



**Morgan Lewis**

# **FINANCE PANEL**

## **BANKRUPTCY AND SECURED LENDERS**

**Current Issues When Advising Secured Lenders  
in Bankruptcy Cases**

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**MODERATOR**

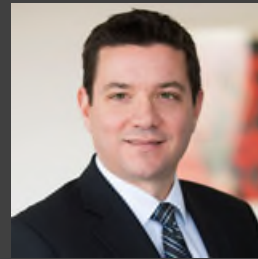


**Marshall C. Stoddard, Jr.**

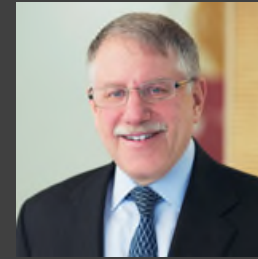
**PANELISTS**



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# Fraudulent Transfer Developments

- Basic Elements of Fraudulent Transfer
  - Intentional
  - Constructive
    - Insolvency
    - Lack of Reasonably Equivalent Value
- Creditor Claim Damages Cap – *Allonhill* decision
- LBO Challenges
- Intentional Fraud Claims
  - Not subject to safe harbor
  - Limited in LBO context – *Samson* decision

# Fraudulent Transfer Developments

- Reasonably Equivalent Value
  - Potential defense created through funds flow
- Insolvency
  - Focus on capital adequacy in LBO
  - Factors courts consider
- Safe Harbor
  - Description of Safe Harbor
    - By, to or for the benefit of a financial institution or a financial participant
    - Margin payment, settlement payment or transfer “in connection with” a securities contract
  - Merit Management decision
  - Tribune decision

## Security Interest Challenges

- Debtor name provided on a financing statement
  - *In re The Financial Oversight and Management Board for Puerto Rico*, 872 F.3d 57 (1st Cir. 2019)
- Collateral indication provided on a financing statement
  - *In re The Financial Oversight and Management Board for Puerto Rico*, 872 F.3d 57 (1st Cir. 2019)
  - *In re I80 Equipment, LLC*, \_\_\_ F.3d\_\_\_ (7<sup>th</sup> Cir. 2019)
- Security interest in assets of a consignee
  - *In re TSAWD Holdings, Inc.*, 2018 WL 6885922 (Bankr. D. Del. 2018)
- Excluded assets
- Foreign situs assets

# Trademarked Collateral

- Bankruptcy of licensor
  - Challenges to licensee retaining rights under license agreement
    - *In re Tempnology, LLC*, \_\_ U.S. \_\_ (2019)
- Bankruptcy of licensee
  - Challenges to licensee's assumption or assignment of license agreement
- Foreclosure sale of trademarked goods by secured party of licensee
  - Status of collateral (finished goods, work in process, raw materials)
- Preventive measures
  - Agreement with licensor to buy back collateral or permit sale of collateral
  - Agreement of licensor to permit transfer of the license
  - Agreement of licensor to grant a new license if the existing license not assumed or assigned

## DIP Financing Trends

- Sectors that continue to dominate
  - Retail
  - Metals/Mining
  - Oil & Gas
  - Healthcare
- Prepetition institutional investors continuing to serve as primary sources for DIP financings
  - enhance/protect recoveries on prepetition debt
  - But unsecured creditors can provide liquidity with better trade terms
- Some third party financings

## DIP Financing Trends – *What Are We Seeing?*

- Interest expenses are increasing
  - Funded term loans are typically more expensive
    - May be mitigated somewhat by a multi-draw mechanism
  - U.S. Trustees fees increased under Bankruptcy Judgeship Act
    - *In re Cranberry Growers Coop.*
- Roll-ups are rolling on
- DIP Financing is no longer just DIP financing, but often a bridge to exit financing
- DIP Orders – Bids and Asks
- Noteworthy Decisions
  - *Mission Product Holdings, Inc. v. Tempnology*
  - *DURA Automotive*



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## Biography



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Jennifer Feldsher recently joined Morgan Lewis as a partner in the Bankruptcy and Restructuring Group and is based in New York. She brings a wealth of experience representing interested parties in bankruptcy proceedings and complex corporate debt restructurings with an emphasis on the representation of lenders, special situations investment funds, ad hoc groups, and acquirers of assets in all aspects of distressed situations.

She also has extensive experience with prepackaged chapter 11 cases, out-of-court workouts, and international restructurings and has provided advisory services on corporate structuring strategies. She has served as counsel in restructurings across a variety of industries, including energy, retail, telecommunications, technology, healthcare, airline, automotive, gaming, and financial services.

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Andrew Gallo is both an accomplished trial lawyer and bankruptcy attorney. Andrew counsels secured and unsecured creditors, equity holders, and investors in complex Chapter 11 cases and out of court restructurings. He also litigates creditors' rights cases in state and federal (including bankruptcy) courts, with specific experience in fraudulent transfer and lender liability cases.

Andrew has also had multiple engagements representing creditors and other parties-in-interest in distressed situations relating to the oil & gas industry. He serves as deputy leader of the firm's bankruptcy and restructuring practice and as co-leader of the firm's energy industry team.

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Ed Smith is a partner in the Bankruptcy and Restructuring Group residing in the firm's New York and Boston offices. He concentrates his practice in creditors' rights, especially for secured creditors.

As a Massachusetts Uniform Law Commissioner, he has been active in the drafting of revisions and amendments to the Uniform Commercial Code, particularly in the area of secured transactions. He has had major creditor representations in Lehman, MF Global, the City of Detroit and PG&E.

Ed is a past president of the American College of Commercial Finance Attorneys, is a past board member of the American College of Bankruptcy, is on the executive board of the National Bankruptcy Conference and is a member of the Permanent Editorial Board for the Uniform Commercial Code.

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