**Weathering the Storm:**
**Critical Considerations for Dealing with**
**Financially Distressed Commercial Real Estate**

**Presentation to the Kansas City Regional Association of Realtors**

**April 22, 2011**

1. ***Overview--Options Available for Distressed Real Estate***[i]
    a. Common Features of Distressed Commercial Real Estate
    b. Pre-Negotiation Considerations
    c. Lender's Leverage Points
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    k. Receiverships
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2. ***Common Features of Distressed Commercial Real Estate ("CRE")***
    a. Most CRE is owned by a "special purpose" or "bankruptcy remote" entity (i.e., a company's directors must unanimously approve a bankruptcy filing and the operating agreement or by-laws require that at least one director be independent and/or appointed by the lender).
    b. Many CRE estate loans are nonrecourse
    c. Some CRE loans have a non-recourse springing guaranty—guarantor's obligations are only triggered if certain events occur (e.g., bankruptcy filing; receivership; fraud; foreclosure by a junior lender; etc.)
    d. Property may be subject to one or more mezzanine loans (loans made to the parent or holding company of the real property with the mezzanine lender taking a security interest in the LLC's interests).
        i. Example:
            1. Real Estate—Mortgage—Primary Lender
            2. First LLC (owner of real estate)—First LLC's interests are pledged to mezzanine lender to secure loan
            3. Second LLC (owner of First LLC)— Second LLC's interests are pledged to mezzanine lender to secure loan
        ii. Depending on the situation (i.e., being "in the money"), a mezzanine lender may have an incentive to foreclose its security interest to obtain ownership of the property, inject new capital to pay off the secured loan, and then become the owner
    e. Mortgage may be securitized
        i. Financial institution holds the mortgages in trust pursuant to an indenture trust agreement
            1. Loan may also be held in a real estate mortgage investment conduit

ii. Different classes of securities in the trust are purchased by investors
iii. Master servicer collects and distributes monthly loan payments (monies distributed according to certain prioritization)
1. Master servicer likely lacks any authority to negotiate a loan restructuring
iv. Special servicer works with troubled borrowers
1. Loan sent to special servicer upon an "Event of Default"
2. Earns fees by continuing to service the troubled loan

f. Relatively short loan maturity (i.e., 2-5 years)
i. Shorter terms mean lender can obtain more fees for agreeing to extension.
ii. Shorter terms allow lenders to consider whether certain conditions are being met (e.g., loan to value ratio; debt service coverage ratio (net cash flow compared to debt service that is due); etc.)
iii. Lender may only be willing to grant extension if certain conditions are met (i.e., no pass through of funds to lower lenders or equity).

g. Floating rate (based on LIBOR)
i. Rate may be based on an interest rate swap agreement

h. Credit default swap may exist

i. Current low interest rates means building may be cash flow positive despite increased vacancy rates

j. Debt service coverage ratio may still look good

k. Loan to value ("LTV") ratio has deteriorated since initial term of loan

***3. Pre-Negotiation Considerations***

a. Amount owed and loan terms (including loan covenants)

b. Has an "event of default" occurred? If so, impact?

c. Value of property

d. Is the lender properly perfected?

e. If so, in what collateral does the lender have a security interest?

f. Are there subordinate lienholders in the collateral?
i. Does an intercreditor agreement exist?
ii. Are there any mezzanine lenders with an interest in the owner's stock?

g. Does the Debtor have any potential lender liability claims?

h. Nature of the loan (recourse, non-recourse)

i. What guarantees exist?
i. Personal guaranty?
ii. Non-recourse springing guaranty?
iii. Financial status of guarantors?

j. Analyze the opposing party's current condition and leverage points
i. Debtor's cash flow
ii. Ability of the noteholder to make compromises

***4. Lender's Leverage Points***

a. Personal guaranty of one or more owners of the property

b. An "out of the money" junior lender may challenge a senior lender's foreclosure efforts and thereby get a carve out of some sort.

c. Exposure to lender liability claims

d. May obtain significant waiver of claims through agreeing to a forebearance agreement

e. Under an assignment of rents, lender becomes entitled to collect and recover rents only after it seeks to take possession of property.

f. May seek the appointment of a receiver

5. ***Borrower/Owner's Leverage Points***
    a. Seek a temporary restraining order ("TRO") to halt a foreclosure. To obtain TRO there must be a showing of irreparable harm (e.g., foreclosure is occurring and it was wrongfully done and therefore owner will be irreparably damaged if foreclosure occurs).
    b. May demand that lender produce note
    c. May have a lender liability claim
    d. Right of redemption
        i. Equitable redemption (applicable where foreclosure sale is voidable, borrower does not delay, borrower offers to make lender whole)
        ii. Statutory redemption Mo. Rev. Stat. § 443.410 and 443.420 (applicable where notice of intent to redeem is given before sale, purchaser at sale is debt holder, bond is filed and approved by court within 20 days of sale, all debts, charges and fees must be paid in one year).
        iii. Kansas gives the owner a three month opportunity to redeem the property following foreclosure followed by up to an additional nine months thereafter for any other creditor to redeem the property. K.S.A. § 60-2414.
    e. May file for bankruptcy and seek to restructure debt obligation
6. ***Forbearance Agreements***
    a. Can the lender impose "milestone" marker obligations on the borrower (e.g., by this date you will do X).
    b. Release of claims (e.g., is borrower giving up significant lender liability claims in exchange for just 6 or 12 months of forebearance)?
7. ***Discounted Loan Payoffs (Short Sales)***
    a. Recourse liability?
    b. Will the borrower pursue guarantors?
8. ***Loan Restructurings***
    a. Everything is fair game for restructuring (rate; amortization schedule; loan covenants; security deposits; etc.)
    b. Lender will likely require waiver of claims to restructure loan
9. ***Deed in lieu of foreclosure***
    a. Inexpensive way to obtain title to property
    b. Does not eliminate any additional encumbrances on property
    c. May be construed as an equitable mortgage if mortgagor remains in possession
    d. May subject lender to a constructively fraudulent transfer claim if mortgagor later files for bankruptcy
10. ***Foreclosure***
    a. Missouri—non-judicial foreclosure
        i. Process is much faster than judicial foreclosure
        ii. Specified notice requirements (advertising of sale, notice to owner, etc.)
    b. Kansas—Judicial foreclosure
        i. Lawsuit must be filed to foreclose mortgage
        ii. Filing of lawsuit creates a forum for borrower to file counterclaim asserting lender liability claims
        iii. An uncontested foreclosure can easily take (3) months
        iv. Loss of rents may be more significant due to extended nature of foreclosure proceeding
        v. Appointment of receiver should be strongly considered
11. ***UCC Foreclosure***

a. Mezzanine lender may foreclose interest in holding company through a foreclosure under the Uniform Commercial Code
b. Traits of a UCC foreclosure
    i. Uniform law in every estate
    ii. Non-judicial foreclosure
    iii. Only requirement is notice and a public auction
    iv. Mezzanine lender may credit bid
    v. Mezzanine lender has more flexibility in setting terms of the sale
c. UCC foreclosure may be much quicker than judicial foreclosure

***12. Receiverships***

a. Lender may seek Court authority to appoint a receiver if it is concerned about loss of rents or protection of collateral.
b. Appointment of a receiver is much quicker than a foreclosure (either judicial or non-judicial) and maximizes potential of preserving asset value
c. Receiver must post a bond and be approved by the Court

***13. Commercial Landlord Tenant Issues***

a.
b.
c.

***Bankruptcy***

**14. The Automatic Stay**

***a. What does the Automatic Stay Stop?***

i. The automatic stay immediately becomes effective upon the filing of a bankruptcy petition (whether voluntary or involuntary).
ii. The automatic stay prohibits <u>all</u> efforts to collect pre-petition debts outside of the bankruptcy process. This includes, but is not limited to, commencement or continuation of legal proceedings (such as foreclosure actions)
iii. The automatic stay prevents a party from perfecting a lien (subject to certain exceptions noted below).
iv. The automatic stay prohibits set-off of debts.
v. The automatic stay prevents companies from taking steps to terminate a pre-petition contract (e.g., sending notices required for termination).

***b. What does the Automatic Stay NOT Stop?***

i. Criminal actions against the Debtor
ii. The automatic stay <u>does not</u> stop the hands of time (i.e., the automatic stay does not stop the termination of a contract which is set to expire by its own terms on a certain date with no further action by the non-Debtor).
iii. Any act to perfect or maintain perfection in property to the extent that the Trustee's rights are subject to such perfection under 11 U.S.C. § 546(b).
    1. The most common example of this is the perfection of a mechanic's lien post-petition or the continuation of the perfection of a mechanic's lien post-petition provided that there is compliance with applicable state law.
    2. Another example is the timely perfection of a purchase money security interest under the Uniform Commercial Code.
iv. The exercise of contractual rights under a forward contract, commodities contract, repo agreement, swap agreement, etc.

***c. Automatic Stay Violations***

i. Actions that violate the automatic stay are void.

ii. *Violations of the automatic stay will subject the creditor to potential liability for actual and possibly punitive damages as well as attorneys' fees and costs*.
iii. There is "grace" for innocent and/or inadvertent actions which violate the automatic stay.

***d. Relief from the Automatic Stay***

i. The Bankruptcy Court can grant relief from the automatic stay to enable a creditor to pursue its state law remedies with respect to collateral.
ii. The automatic stay may also be lifted to allow a creditor to liquidate and adjudicate its claims (i.e., pursue litigation to a judgment).
iii. Stay relief will be granted for the following reasons:
    1. "Cause" (including lack of adequate protection for an interest in property) or
    2. Where the Debtor does not have equity in the property and the property is not necessary for an effective reorganization.
iv. Relief from the automatic stay will only be granted upon a motion with the Court.

**15. Single Asset Real Estate ("SARE") Cases**

a. A SARE bankruptcy occurs where the Debtor's principal asset consists of real property which is either nonresidential real estate or residential real property with 4 or more units which generates substantially all of the Debtor's income.
b. Lender may obtain automatic stay relief in a SARE case unless
    i. Debtor files within 90 days a proposed plan of reorganization that has a reasonable likelihood of being confirmed or
    ii. The Debtor has commenced making monthly payments (which may come from property rents) at the non-default rate which are equal to the creditor's interest in the property.
c. SARE cases are subject to being challenged as a bad faith filing—particularly where the SARE was filed on the eve of a foreclosure and the Debtor has no viable prospect of restructuring the debt

**16. Adequate Protection**

a. To the extent a creditor has a lien in any cash collateral or any collateral that can be easily transformed into cash (e.g., inventory, accounts receivable, rents), the creditor should immediately file a notice of non-consent to use of cash collateral.
    i. Filing of the notice prohibits the Debtor from using such cash collateral absent an order of the Bankruptcy Court.
b. Secured creditors are entitled to receive adequate protection payments to protect against the diminution in value of their collateral during the pendency of the bankruptcy proceeding.
c. A secured creditor is <u>not</u> entitled to adequate protection payments so long as there is sufficient equity in the property to protect against any diminution in value during the pendency of the bankruptcy proceedings.
d. Secured creditors are <u>not</u> entitled to continued payment of their secured debt during the bankruptcy process. Rather, they are only entitled to adequate protection (although Debtors frequently will continue making debt payments as a way to engender good will with the lender).
e. An oversecured creditor is entitled to interest on the secured debt as well as attorneys' fees and costs up to the value of the collateral.
f. An undersecured creditor is <u>not</u> entitled to interest on the secured debt or attorneys' fees and costs.

g. Adequate protection payments generally are only awarded from the date that a motion for such payments is filed with the Court.

**17. Funding Operations in Bankruptcy**

***a. Use of Existing Cash Collateral***

i. "Cash collateral" includes both cash and the proceeds or rents of property.

ii. The Debtor cannot use "cash collateral" unless either (a) the party with a security interest in such cash collateral consents or (b) after notice and a hearing the Court authorizes use of the cash collateral

***b. Post-Petition Financing***

i. A Debtor may obtain unsecured credit in the ordinary course of business. Such post-petition unsecured debt is allowable as an unsecured claim.

ii. Following the bankruptcy filing, any debt incurred outside the ordinary course of business must be approved by the Bankruptcy Court.

iii. If post-petition credit cannot be obtained on an unsecured basis, the Debtor must first look to pledging unencumbered collateral or the equity in encumbered collateral to secure the post-petition lien.

iv. The Bankruptcy Court may provide a post-petition lender with a priming lien which takes priority over existing lienholders provided that there is adequate protection to such lienholders (i.e., they are provided with an equivalent lien in other property of the Debtor which assures that the value of their liens is not lost).

v. It is very common for Debtors to provide post-petition lenders with a lien in post-petition accounts receivable, inventory, etc. as well as avoidance actions (i.e., preferential and fraudulent transfer actions).

vi. Sophisticated lenders will seek entry of an order approving post-petition financing which creates a rollover (i.e., pre-petition debt is paid down and with all post-petition advances being secured by the Debtor's post-petition property).

**18. Assumption/Rejection of Executory Contracts and Unexpired Leases**

***a. General points***

i. Debtors have authority to assume, assume/assign, or reject executory contracts and unexpired leases.

ii. A contract is executory if both parties still have material unperformed obligations.

iii. If a Debtor is slow and/or unresponsive, a creditor can seek Court authority compelling the Debtor to assume or reject the executory contract.

iv. While assumption or rejection is generally done via a specific motion, Debtors will seek to assume or reject contracts in plans of reorganization. Thus it is important that proposed plans be reviewed to determine the impact on the policy.

***b. Assumption***

i. The Debtor can assume a contract (i.e., where it intends to reorganize), or it can assume and assign a contract (i.e., assign it to the entity which is acquiring substantially all its assets through a § 363 sale).

ii. To assume a contract, the Debtor must cure all pre-petition defaults under the agreement or provide adequate assurances that outstanding defaults will be cured.

iii. Assumption operates as a bar to any future preferential transfer avoidance action.

***c. Rejection***

i. The Debtor must seek court approval to reject executory contracts.

ii. Rejection of an executory contract does not terminate the contract. Rather, rejection is deemed to be a breach of the contract as of the petition date.

iii. The creditor is entitled to file a pre-petition claim for all damages arising from the rejection of the executory contract.
iv. Often, the rejection claim must be filed within 30 days of the date the Court approves the rejection.

**19. Landlord Tenant Issues in Bankruptcy**

a. Section 365(d)(3)—Continued Performance of Lease Obligations Following the Bankruptcy Filing
   i. Section 365(d)(3) requires the Debtor to perform all lease obligations for non-residential real property as they arise post-petition.
      1. Rent must be paid at full contract rate
      2. Property taxes must be paid
      3. Insurance must be maintained
      4. These obligations apply even if the lease agreement is a month-to-month tenancy
   ii. Disagreement among courts regarding application of § 365(d)(3)
      1. Some courts take a strict constructionist view and hold that all obligations must be paid if they arise post-petition and prior to assumption or rejection of the lease.
         a. Under this approach, the debt must be paid if it is billed post-petition in the ordinary course
         b. For example, a pre-petition tax obligation which comes due post-petition must be paid in full.
      2. Other courts take a more equitable view and adopt a pro-rata or "accrual" rule.
         a. Under this approach, only the pro-rata portion of expenses that are incurred post-petition must be paid.
         b. No pre-petition obligations which are billed post-petition will be paid.
   iii. Section 365(d)(3) expenses are administrative and need to be requested pursuant to 11 U.S.C. § 503(b) in order to be allowed.
      1. Remember, however, that § 365(d)(3) only applies to leases of non-residential real estate. Lease related expenses for residential real estate must be allowed under § 503(b).
   iv. If a debtor does not comply with its § 365(d)(3) obligations, the creditor should file a motion to compel both performance and to require the debtor to determine whether it will assume or reject the lease.
b. Assumption of an Unexpired Lease
   i. Determine whether the lease has been rejected
      1. A leasehold interest that terminated pre-petition or during the bankruptcy proceedings cannot be assumed or rejected.
      2. Termination of a lease agreement is dependant upon state law.
   ii. Deadlines for assumption or rejection of an unexpired lease
      1. Chapter 7
         a. Lease is deemed rejected if not assumed within 60 days or if the Bankruptcy Court does not extend the deadline for assuming or rejecting the lease agreement
      2. Chapter 11—non-commercial real estate leases

a. Lease can be assumed or rejected anytime prior to plan confirmation
b. Lessor can file a motion seeking to set a deadline by which debtor must decide whether it will assume or reject the lease

3. Chapter 11—unexpired lease of commercial real property
   a. Debtor initially has 120 days.
   b. If a motion is filed and allowed prior to the expiration of the 120 days, then the Bankruptcy Court can extend that deadline by an additional 90 days.
   c. Any additional extensions require the consent of the landlord

iii. Requirements for assumption of a lease agreement
1. Debtor must cure pre-existing defaults or provide adequate assurance that they will be cured.
2. Debtor must compensate (or provide adequate assurance) the other party to the lease agreement for any damages sustained as a result of the default
3. Debtor must provide adequate assurance of future performance
4. Note:
   a. Pre-petition non-monetary defaults need not be cured
   b. The entire contract must be assumed—the debtor cannot pick and choose the provisions that it wants to assume or reject
   c. As a general rule, cross-default provisions need not be cured. However, they will be enforced where multiple contracts are viewed as a single, integrated economic transaction (e.g., a franchise agreement coupled with a lease)
5. Rejection of an Unexpired Lease
   a. Rejection of a lease is only a <u>breach</u> of the lease.
   b. Rejection of a lease <u>does not</u> terminate the lease.
   c. A rejected lease must still be terminated in accordance with state law
   d. While it is more of an exceptional event, the debtor can retroactively reject a lease agreement

c. Statutory Cap on Damages
i. 11 U.S.C. § 502(b)(6) sets forth a statutory cap for damages (greater of one year rent or 15% percent not to exceed three years)
ii. Statutory cap does not apply to other non-rent damages (e.g., restoration, pre-petition defaults)
iii. Warning: some courts will apply a draw on a letter of credit against the § 502(b)(6) cap

**20. Section 363 Sales (Sales of some or all of the Debtor's Assets)**

***a. General Points***

i. Debtor can sell items in the ordinary course of its business without Bankruptcy Court approval.
ii. The Debtor can freely sell collateral if the lienholder consents (e.g., typically lienholder will consent to the sale and will receive an agreed upon amount of the sales proceeds).
iii. Debtor can sell collateral without lienholder consent if the sales price exceeds the value of the lien
iv. A lienholder can be barred from "credit bidding" at a bankruptcy sale.

***b. Sale of Substantially all of Debtor's Assets***

i. It is very common for substantially all of Debtor's valuable assets to be sold to a buyer through a § 363 sale.
ii. As a practical matter, § 363 sales are a cheaper and effective alternative to confirming a plan of reorganization.
iii. A typical sales process is as follows:
    1. Debtor executes a sales agreement with a stalking horse buyer for the purchase of its assets.
    2. Debtor gives notice to creditors and prospective buyers of the agreement.
    3. An auction is held to obtain the highest bid for Debtor's assets.
    4. The Bankruptcy Court must approve the sale.
    5. Upon Court approval and the closing of the sale, the purchased assets are transferred "free and clear" to the new buyer.
        a. *Note:* There are a handful of cases (particularly dealing with products liability) that hold that a § 363 sale does not cut-off successor liability).
    6. Following the sale of substantially all its assets, Debtor will either (a) confirm a liquidating Chapter 11 plan or (b) simply convert the bankruptcy proceeding to Chapter 7 and allow the Chapter 7 Trustee to complete the liquidation of existing assets.

**21. Chapter 11 Reorganization**

***a. Disclosure Statement***

i. Before soliciting votes in favor of a plan, a creditor must have a Disclosure Statement approved by the Court.
ii. The Disclosure Statement generally discusses the Debtor's condition and explains how the plan will work.
iii. A copy of the proposed plan accompanies the Disclosure Statement.
iv. The Disclosure Statement must provide adequate information that a "hypothetical investor" would desire to know.

***b. General Points Regarding Plan Confirmation***

i. A plan of reorganization will divide creditors into various classes depending on the type of claim that they have.
ii. For a Chapter 11 plan of reorganization to be confirmed, either (a) all of the different classes must be unimpaired (i.e., get 100% of their claim (including curing any defaults) or leaves the claim unaltered) or (b) at least one impaired class of claims must vote in favor of the plan.
iii. A Chapter 11 plan cannot be confirmed if the "best interests" rule is not met (i.e., the plan must provide that claimants will get as much or more in the Chapter 11 reorganization as compared to what they would receive in a hypothetical Chapter 7 liquidation).

***c. Cramdown***

i. Cramdown under a plan of reorganization occurs where the confirmed plan "rewrites the contract" to provide payments to the secured creditor over time (e.g., the creditor is paid the present value of the collateral--not the full debt--over time).
    1. Cramdown occurs where the contract with the lender is rewritten to provide for a new rate, new loan term and/or new or altered loan provisions.

2. Typically, the claim of an undersecured creditor will be bifurcated into a secured and unsecured portion with each portion receiving differing treatment under the plan.

ii. To "cramdown" a plan, (a) at least one impaired class of creditors must vote in favor of the plan and (b) the Bankruptcy Court must approve the plan.

iii. A class "accepts" a claim where a majority of the voting creditors and 2/3 of the claim amounts votes in favor of the plan.

iv. Debtors cannot improperly gerrymander classes to get an impaired class which accepts a vote.

v. Each secured creditor will often be classified in its own separate class.

***d. Cramdown Rate of Interest***

i. To determine the appropriate interest rate in a Chapter 11 proceeding, the Court first looks to see if there is an "efficient market" rate (i.e., competitive market rate for the type of loan in question). If not, it will then use the "formula approach" of prime plus 1-3%.

1. Chapter 13 reorganizations will simply use the "formula approach" of prime plus 1-3%.

***e. Absolute Priority Rule***

i. Unless a higher priority class consents, a Bankruptcy Court cannot approve a plan where a lower priority class will receive a distribution if a higher priority class has not been paid in full.

1. *Note:* As a practical matter, this means that equity can only retain its interest in the company if unsecured creditors are paid in full.

***f. 1111(b) Election***

i. If a secured creditor makes a § 1111(b) election, the creditor's entire claim (both the secured and unsecured portion which relates to the collateral is deemed secured).

ii. The secured creditor is not entitled to receive interest on its claim during the life of the plan

iii. The secured creditor's claim, however, must be paid in full over the life of the plan.

***g. Taxes***

i. Payment of pre-petition tax claims can be repaid over a five-year period of time which begins on the bankruptcy petition date.

ii. The Debtor must stay current on all tax obligations post-petition.

**22. Preferential Transfers**

***a. Definition of a preferential transfer***

i. A preferential transfer occurs where the Debtor makes a payment to or for the benefit of a creditor within 90 days of bankruptcy on account of antecedent debt which enables the creditor to receive more than it otherwise would receive in a Chapter 7 proceeding.

1. *In plain English, this means that all payments received within 90 days of the petition date are subject to being recovered by the bankruptcy trustee.*

ii. *Warning:* All payments made to an "insider" within one-year of the bankruptcy filing are subject to avoidance as a preferential transfer.

iii. The term "insider" is broadly defined and includes family members (of an individual debtor) as well as officers, directors and persons in control of a corporate debtor.

1. *As a simple rule of thumb, if a creditor can be viewed as having some form of significant influence, control or dominion over the debtor, then that creditor runs the risk of being deemed an insider for preference purposes.*

iv. Examples of preferential transfers
1. Payments made to creditors on outstanding invoices
2. Garnishments
3. Payment of a secured debt guaranteed by an insider (payment of the debt relieves the insider of his guarantee obligations and is thus an indirect transfer to him/her).

***b. Attacking the elements of a preferential transfer.***

i. A pre-payment is <u>not</u> preferential transfer because there is no antecedent debt.
ii. Payment of an employee benefit may not be a debt that the Debtor owes.
iii. Where an executory contract or unexpired lease has been assumed, the Debtor cannot later pursue the creditor for recovery of a preferential transfer.
iv. Payments on account of secured debt will not constitute a preferential transfer

***c. Two main defenses to preferential transfers***

**i. Ordinary Course of Business**

1. This is a fact intensive inquiry which requires that the parties dealings be ordinary from either a subjective or objective approach.
2. The subjective approach asks whether the payments received during the preference period were subjectively similar to the payments made by the Debtor during the pre-preference period.
    a. Typically this means comparing the average days to pay during the pre-preference period with the average days to pay during the preference period.
3. The objective approach asks whether the payments were objectively ordinary for the industry as a whole.

**ii. New value**

1. Goods or services provided *after* a preferential transfer is received can be used to off-set any preference liability.
2. Post-petition new value cannot be used to off-set pre-petition preference liability.

**23. Fraudulent Transfers**

***a. General Points***

i. Under the Bankruptcy Code, there is a two-year look back period (from the date of the bankruptcy petition) for avoidance of actual and constructively fraudulent transfers.
ii. Under most applicable state laws (including both Kansas and Missouri) there is a four-year look back period for avoidance of actual and constructively fraudulent transfers.

***b. Actually Fraudulent Transfers***

i. Transfers made with actual intent to hinder, delay or defraud creditors are voidable as actually fraudulent transfers.
ii. A party rarely reveals its true intent and thus actually fraudulent transfers are proven through circumstantial evidence (e.g., badges of fraud).

***c. Constructively Fraudulent Transfers***

i. A constructively fraudulent transfer occurs where the Debtor is (a) insolvent and (b) transfers property (or an interest in property) for less than reasonably equivalent value.
ii. The Debtor's solvency is based on its balance sheet at the time of the transfer.
iii. "Less than reasonably equivalent value" is a general standard which will compare (a) the value of the property interest that the Debtor transferred with (b) the value the Debtor received in exchange for the transfer.
iv. "Satisfaction of antecedent debt" occurs where a debt is extinguished by a transfer.
    1. For example, payment of an outstanding invoice for $10,000 is not a constructively fraudulent transfer because the payment resulted in a dollar-for-dollar "satisfaction of antecedent debt."

**24. Retention as a Professional for the Bankruptcy Estate**

a. For a professional (e.g., attorney, accountant, broker) to be compensated by the bankruptcy estate, the professional's employment must be approved by the Bankruptcy Court.
b. To be employed, the Debtor will file a motion with the Bankruptcy Court seeking authorization to employ a professional. The application will generally identify the following points:
    i. Work to be done.
    ii. Compensation to be provided.
    iii. An affidavit demonstrating that the professional is "disinterested."
c. A professional must be "disinterested" to be approved for employment.
    i. A "disinterested" professional is one that does not have a claim against the estate.
    ii. A person that is an officer, director or employee of the Debtor is not disinterested.
    iii. A person that has a material adverse interest against Debtor is not disinterested.
d. Substantial Contribution
    i. The Bankruptcy Code does allow payments to an entity that provides a substantial contribution to the bankruptcy estate.

[i] The following materials were relied upon in preparing this document: Stephen B. Meister, *Commercial Real Estate Restructuring Revolution*, John Wiley & Sons, Inc., 2011; Stephen Max Todd, *Missouri Foreclosure Manual*, Thompson Reuters, 2009; W. Wade Berryhill, *et al*., *Structuring Commercial Real Estate Workouts: Alternatives to Bankruptcy and Foreclosure*, Wolters Kluwer, 2011