BANKRUPTCY 101

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A. Introduction

"The principal purpose of the Bankruptcy Code is to grant a fresh start to the honest but unfortunate debtor."2

When a contract bond surety’s principal files or is forced into bankruptcy, the surety must operate under the influence of the bankruptcy court—a forum with its own peculiar rules and procedures. Within the bankruptcy sphere, many of the surety’s typical and ordinary actions or reactions to construction project concerns or indemnity events must be tempered or altered by the rules of this specialized forum.

This chapter is intended for use by surety claims representatives and their legal and consultant professionals, as an introduction to the bankruptcy courts and processes. This chapter will review, from a surety’s perspective, the basics of the Bankruptcy Code, its format, impact, and goals. Thereafter, it will follow the path of a typical construction contractor bankruptcy case through the bankruptcy process in order to introduce specific bankruptcy terminology and events, along with a general discussion of their effects on the rights of the surety. As we review the concepts and actions that a surety should anticipate, we will provide a foundation for the later chapters of this book, which will address these concepts in greater depth.

The surety’s primary goals in bankruptcy are not terribly different from those in any contractor-in-crisis situation. The surety needs to determine the status of ongoing projects and contracts, to protect contract balances as well as material and equipment specific to project completion, and to protect the surety’s indemnity rights in order to enhance salvage, mitigate loss, limit exposure, and maximize recoveries.

1. The author wishes to thank Patricia A. Wager, R. Beau Leonard, and associate Jason A. Lange, of Torre, Lentz, Gamell, Gary & Rittmaster, LLP for their assistance in the preparation of this chapter.
But the forum and strategies utilized to accomplish these goals in the bankruptcy environment are different from those to which the surety may be accustomed. Procedurally speaking, the bankruptcy forum is structured differently from the ordinary business environment, and yet this structure can sometimes provide more fertile ground for negotiated resolutions of disputes than the business world outside the bankruptcy court. In this chapter we hope to lay the foundation for understanding how this forum can best be utilized to the surety's benefit and best advantage.

B. The Bankruptcy Code—Form and Purpose

"The determination of the status of the honest and unfortunate debtor by his liberation from encumbrance on future exertion is matter of public concern, and Congress has power to accomplish it throughout the United States by proceedings at the debtor's domicile."

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The Bankruptcy Code occupies Title 11 of the United States Code. The Code leads off with three (3) chapters of general application to be used in every bankruptcy proceeding, and the general rules of administration that will apply through the balance of the Code. These include Chapter 1, which contains extensive definitions applicable to the remaining chapters; Chapter 3, which contains administration rules; and Chapter 5, which addresses various aspects of the concept of "property of the estate" as used throughout the balance of the Code.

Thereafter, the Code consists of six (6) chapters which provide debt relief to particular categories of debtor (i.e., Chapter 7 applies to individuals and businesses seeking liquidation. Chapter 9 applies to municipalities. Chapter 12 applies strictly for the family farmer or family fisherman. Chapter 13 is for individuals with a regular income). The even numbered chapters were originally omitted to allow room for expansion of the Code, as is the case with Chapter 12, which became effective in 1986 and permanent in 2005.

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While the Code provides for the rights and procedures for a bankruptcy case, generally speaking, the proceedings within a

bankruptcy case are governed by the Federal Rules of Bankruptcy Procedure.\textsuperscript{5}

The interaction of the Code and Rules is demonstrated, for instance, by the proof of claim. Code Sections 501 and 502 require that a creditor file a Proof of Claim in order to recover, while Rule 3002 provides the deadline by which such must be filed.\textsuperscript{6}

A debtor construction contractor that has become insolvent\textsuperscript{7} has only two filing options, the selection of which is generally based on its financial circumstances and its long-term goals. A debtor that intends to liquidate what assets remain and cease to function, will file a petition for relief under Chapter 7 of the Bankruptcy Code, while a debtor contractor intending to re-organize and continue its business will file a Chapter 11, or re-organization, petition. The latter choice, Chapter 11, will be the primary topic of our discussion here, as Chapter 11 proceedings present a greater number of strategy options, choices and, sometimes, dilemmas for the surety. In a liquidation, a trustee is usually appointed to collect and sell the debtor’s assets. Only in a successful Chapter 11 bankruptcy can a non-individual (corporate) debtor obtain the “discharge” of its prepetition debts.

Construction contractors have been described as an optimistic lot, making the Chapter 11 proceeding an overwhelmingly popular option. As our industry’s literature has often observed, however, the overwhelming number of contractor reorganizations are not successful, \textsuperscript{8} and for many reasons, a construction contractor may not be a particularly

\textsuperscript{5} Fed. R. Bankr. 101.
\textsuperscript{6} Collier on Bankruptcy (15th ed. rev. 2009) Vol. 1, ¶1.01[3][b], 1-7.
\textsuperscript{7} 11 U.S.C. §101 (32) The term “insolvent” means—
(A) with reference to an entity other than a partnership and a municipality, financial condition such that the sum of such entity’s debts is greater than all of such entity’s property, at a fair valuation, exclusive of—property transferred, concealed or removed with intent to hinder, delay, or defraud such entity’s creditor’s; and
(ii) property that may be exempted from property of the estate under section 522 of this title; ... 
\textsuperscript{8} T. Scott Leo and J. Blake Wilcox, Bankruptcy Considerations and Bond Defaults in The Bond Default Manual, p. 315 (Duncan L. Clore, Richard E. Towle, and Michael J. Sugar, Jr., editors, 3d ed. 2005). “Lack of planning on the part of putative debtors and the time allowances of the Code are the elements that doom most, if not virtually all, reorganization efforts by contractors.”
good candidate for Chapter 11. Yet, as Chapter 11 is the tool most often utilized by construction contractors, it is the option on which much of our discussion centers.

C. Overarching Bankruptcy Principles

Generally speaking, there are three overarching principles of bankruptcy that underlie the entire process. Bankruptcy is intended to give debtors time to collect themselves and reevaluate their business and financial situations by halting the actions of their creditors; bankruptcy is intended to lead to a ratable sharing of assets among creditors of similar classes; and finally to provide a mechanism for the discharge of the debtor’s pre-petition debts and a “fresh start” for the worthy debtor.

1. Breathing Space/Time

A bankruptcy filing is intended to provide time and space for a creditor to reevaluate its position and financial condition by halting the actions of its creditors. Immediately upon a bankruptcy petition being filed, an “automatic stay” is imposed, which prevents creditors from taking any action to collect from the debtor or to seize the debtor’s property even if the creditor has a security or other interest in that property. The automatic stay is discussed at length below, with particular discussion of actions which a surety may or may not take while the stay is in place.

2. Sharing of Assets—Ratable Distribution Among Creditors

The second goal of bankruptcy is to achieve an orderly and equitable sharing of existing assets of a debtor—termed “ratable distribution to creditors”—according to a formula and process outlined in the Code. This process of assembly and distribution includes both assets held at the time of the filing, as well as certain assets divested from the debtor’s


estate or “transferred” within 90 days prior to the date of the bankruptcy filing, or within one year for certain transactions with “insiders.” On these “reachback” theories, certain transactions in which one creditor was unfairly preferred over another as bankruptcy loomed can be reversed, and the recaptured assets made part of the estate which will then be equitably distributed to all creditors similarly situated, with the goal of preventing unfair gains for one creditor to the detriment of others. This “reachback” period, termed a Preference Period, and the “avoiding power” which permits the reversal of the transaction and recapture of the transferred assets, is also intended to discourage creditors from pressing a weak debtor on the eve of bankruptcy, which actions often have the effect of hastening the debtor’s demise.

3. The Discharge of Debt

Finally, the Code contemplates that once an estate has been assembled, and ratably distributed among creditors, a debtor will be granted a clean slate or “fresh start.” After a Chapter 11 debtor’s plan of reorganization is confirmed, and the plan fully performed, the balance of a debtor’s pre-petition obligations will be discharged. A discharge is not absolute. This discharge of debt will not be granted where such debt is for a tax or customs duty. Where the debtor has acted wrongfully—such as through fraud or deceit, the creditor can seek to have the debt declared non-dischargeable. In the case of a construction contractor principal, such “bad acts” might consist of trust fund diversion, masking of assets, or inaccurate financial disclosures. Where, however, a debt is merely a result of unfortunate circumstance or bad judgment, a debt will be discharged, subject to the creditor receiving his ratable share of the debtor’s assets.

A discharge also will not apply if the plan is merely for liquidation rather than a reorganization that continues it in business. Additionally, as to any creditor not named on the debtor’s creditor lists and properly noticed of the bankruptcy filing (or who lacked constructive or actual notice), the associated debt will not be discharged.

12. 11 U.S.C. §101(31) defines “insider” to be one with a particularly close relationship to the debtor as contained within this section.
D. Procedural Framework of a Contractor Bankruptcy

1. Filing—Procedure and Implications

A bankruptcy filing may be voluntary, meaning initiated and filed by the debtor, or involuntary, meaning initiated and filed by the debtor’s creditors.

A bankruptcy commences by the filing of a bankruptcy petition which in a voluntary bankruptcy case consists of the filling out and filing of a short standard form by the debtor himself, or in an involuntary case by the debtor’s creditors. An involuntary petition may be filed against a debtor by one creditor where the debtor has fewer than 12 creditors in total. Where a debtor has more than 12 creditors, an involuntary filing will require the signatures of at least three creditors. In both cases, the creditors must hold non-disputed and at least partially non-contingent (or liquidated) claims which have a combined total of unsecured, non-contingent debt of at least $13,475.

The filing of a petition for relief, whether voluntary or involuntary, immediately creates a bankruptcy “estate” pursuant to Bankruptcy Code Section 541, which estate is made up of all of the debtor’s interests in property, or the proceeds, products, rents or earnings of such property interests, “wherever located and by whomever held.”

The petition date, which is the date on which the petition is filed, is critical throughout every part of the bankruptcy proceeding, because debt incurred by the debtor before the filing date is treated very differently from debt incurred after the filing. Debt incurred after the petition date will not be discharged, and further, may be granted particularly favorable treatment intended to incentivize business partners and lenders to deal with bankrupt entities.

17. 11 U.S.C. §301.
19. See, 11 U.S.C. §303(b)(1) which establishes:
   b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title—
      (1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount, or an indenture trustee representing such a holder, if such noncontingent, undisputed claims aggregate at least $13,475 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims. (Footnote omitted).
After a bankruptcy filing, the petition is served on all “creditors” of the debtor. A creditor is defined by the code as, an:

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;
(B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(i) of this title; or
(C) entity that has a community claim.22

Under Chapter 11 reorganization, a debtor that has not chosen or been compelled to appoint a trustee is known as a “debtor in possession” or “DIP.”23 A debtor in possession retains control of its assets and its business after the filing of the petition, and as set forth in Section 1107 the rights, powers and duties of the debtor in possession are nearly identical to those of a trustee serving in a Chapter 11.24 Section 1106(a) sets forth the duties of a trustee in a Chapter 11 proceeding, which, among other things, includes filing statements and conducting investigations.25

2. The Automatic Stay

“The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.”26

Immediately upon the filing of a bankruptcy petition, 11 U.S.C. §362(a) of the Bankruptcy Code imposes an “automatic stay,” which, subject to certain exceptions and caveats, forbids creditors from taking

21. The commencement of a bankruptcy case is governed by 11 U.S.C. §§301, 302, and 303. Specifically, Section 301 applies to those actions voluntarily commenced by the debtor; Section 302 applies to joint cases, which typically apply in spousal situations; and Section 303 applies to involuntary actions, which apply only to Chapter 7 and 11 filings, by entities other than the debtor.
23. 11 U.S.C. §1101(1) establishes that a “‘debtor in possession’ means debtor except when a person that has qualified under section 322 of this title is serving as trustee in the case.”
any act or action to collect money from the debtor, or to obtain or exercise control over, or to create or enforce any lien or judgment against, property of the estate. The stay would apply to lawsuits or enforcement actions that a surety has already commenced against the debtor, halting them in place, as well as prohibiting those actions the surety had not yet taken. Within a surety context, the automatic stay dramatically changes the typical and ordinary steps that a claims representative or attorney would take upon learning of a principal’s payment or performance difficulties.

The automatic stay generally forbids action against the debtor or against “property of the estate.” Property of the estate is defined very broadly in the Code, and generally means “property in which the debtor had an interest at the date of the filing of the petition.” Accordingly, the question of whether certain assets (such as bonded contract balances) are, or are not, “property of the estate,” is frequently litigated.

Section 362(a) provides a list of actions that are barred by the automatic stay:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—
(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
(4) any act to create, perfect, or enforce any lien against property of the estate;
(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a corporate debtor’s tax liability for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.28

By design, the automatic stay serves to protect both the debtor and any property in which the debtor possesses an interest from the reach of creditors so as to theoretically afford the debtor time to consolidate and improve its financial situation. The automatic stay becomes “effective automatically and immediately” upon the debtor’s bankruptcy filing.29 Section 362 applies regardless of whether the bankruptcy case is voluntarily or involuntarily commenced, and whether the debtor seeks liquidation or reorganization.

The broad protections afforded the debtor, as well as the limitations confronting the creditor arising from the automatic stay, have far-reaching implications for the surety contending with its principal’s bankruptcy filing. Taken together, the bankruptcy filing and automatic stay restrict the surety from proceeding as it normally would upon learning of its principal’s financial difficulties. Ordinarily, at the first sign of its principal’s financial distress, the surety might reach out to the obligee requesting that payments not be made to the principal or it may make demand upon its principal and other indemnitors for cash collateral, for financial information or disclosure, and it may file a UCC-1 financing statement to perfect any security interests it was granted in any applicable indemnity agreements. However, upon its principal’s bankruptcy filing, these early-stage claims activities might be prohibited by the automatic stay. Thus, regardless of whether the surety is seeking to secure the contract balances to ensure continued project performance and payments to subcontractors or suppliers, or to protect its indemnity rights, the surety must proceed with an abundance of caution so as to not violate the broad injunction of the automatic stay.

28. 11 U.S.C. §362(a). Conversely, Section 362(b) establishes which actions are not barred by the automatic stay.
3. **Termination of Contracts**

Section 362(a) establishes that if a contract is not terminated prior to the contractor’s bankruptcy filing, the debtor’s rights in the contract become part of the contractor’s bankruptcy estate. The Code then affords the bankrupt contractor’s estate the opportunity to decide whether the contract should be assumed or rejected.\(^{30}\) This creates a problem for the surety that had bonded that contract, as well as for the bond obligee and any subcontractors or suppliers to the bankrupt contractor. The stay prevents the obligee from unilaterally terminating its contract with the now bankrupt contractor.\(^{31}\) Consequently, where the bond or applicable law require the principal’s rights to perform the contract to be terminated prior to the surety’s obligation arising or becoming enforceable, the automatic stay also delays the obligee from making demand upon the surety to takeover and complete the project. During this delay period, work on the project may cease, affecting subcontractors and suppliers, and costs may rise (including liquidated damages should the contract so provide). Accordingly, the delay to ongoing construction projects that may be caused by the automatic stay is problematic for the surety, as delay usually increases risks and costs.

Of course, as a bankruptcy filing is rarely a surprise, some delay may be avoided if the parties are alert to signs that the bankruptcy filing is on the horizon. For example, assuming that the contract was in default prior to a bankruptcy filing, the obligee may wish to terminate the contract. However, if the contract affords the contractor a notice of intent to default and a period in which to cure the default, a bankruptcy filing during the contractual cure period will “stop the music,” the termination will not be effective prior to the injunction of the automatic stay, and the debtor’s rights in the contract may be considered property of the bankruptcy estate.\(^{32}\) With respect to determining whether to accept or reject a contract, courts recognize that a “bankruptcy court ha[s] the authority to preserve the status quo until the debtor [makes] its

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31. See *In re Computer Communications, Inc.*, 824 F.2d 725, 728 (9th Cir. 1987).

32. See, e.g., *Moody v. Amoco Oil Co.*, 734 F.2d 1200 (7th Cir. 1984).
decision." Accordingly, where bankruptcy appears imminent and delay to an ongoing project would be unacceptable, the surety and the obligee may attempt to negotiate with the contractor prior to the filing of the petition to eliminate the cure period from the contract, or to secure the voluntary default and termination of the contractor prior to the bankruptcy filing.

Conversely, when the bankruptcy filing occurs prior to the termination of the contract, the automatic stay typically stops the termination process and prevents the termination from becoming effective. The surety may then need to take steps to protect its interests in the remaining contract funds as "cash collateral," meaning property of the estate in which the surety also has an interest. The surety should be careful, with respect to such contracts, not to act in contravention of the automatic stay, or in contravention of any orders of the bankruptcy court, as such acts may not only provide grounds for sanctions but may also be found to be "invalid, void and of no force or effect."

4. Surety’s Contact with Project Owners

Where the principal has filed for bankruptcy, as in any other significant default scenario, one of the surety’s first goals is to restrict the uses of the remaining contract balances to funding the remainder of the project and paying project claims. In a non-bankruptcy environment, the surety would typically send a letter to the obligee asserting the surety’s rights to the contract balances and placing the obligee on notice not to disperse contract funds to the principal. However, in a bankruptcy context, when the contract at issue is arguably still property of the estate (i.e., has not been terminated at the time of filing), such a communication with the obligee may be problematic due to the automatic stay, which enjoins any acts that adversely affect the property of the estate.

With well crafted language, a surety can convey information to the obligee that does not violate the protections of the automatic stay. Generally, courts recognize that "mildly worded correspondence which

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33. Matter of Whitcomb and Keller Mortg. Co., Inc., 715 F.2d 375, 378 (7th Cir. 1983) (finding that the debtor’s contract remained in effect until such time as the debtor assumed or rejected the contract).

34. 11 U.S.C. §363(a) defines “cash collateral” as “cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest . . . whether existing before or after the commencement of a case under this title.”

does not adversely impact on the estate does not constitute an actionable violation of the automatic stay.” Moreover, the same court recognized that the automatic stay will not be violated if the letter “was a non-repetitive single mailing that was predominately informational.” Nevertheless, in some instances courts have held that such a contact may constitute a stay violation.

5. **Lifting the Automatic Stay**

The Bankruptcy Code provides a context for a surety or other creditor to pursue its rights, even during the period of the stay, by special permission of the bankruptcy court. Once the automatic stay goes into effect, a surety may move pursuant to code Section 362(3) to have the automatic stay lifted with respect to particular estate property, such as construction contract rights or balances, or to permit particular acts. Section 362(d) permits a party in interest to make a motion before the bankruptcy court to have the automatic stay lifted. Thus, the surety may move to lift the stay to recover or place controls upon remaining contract funds in which the surety can demonstrate it also has an interest, either under its indemnity agreement or by way of equitable subrogation. When moving to lift the automatic stay, the surety may seek adequate

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36. *In re* Hughes-Bechtol, 117 B.R. 890, 906 (Bankr. S.D. Ohio 1990). See, also, *In re* Messick, 2010 WL 419992 (E.D. Tenn. 2010), which is a non-surety case that recognizes that creditors may send letters to debtors advising of certain policies with respect to accounts that have caused a loss.

37. *Id.*


39. 11 U.S.C. §362(d) provides in relevant part:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

protection to ensure that the bankrupt contractor does not otherwise diminish the surety’s interest in the property. This is of utmost importance to the surety as it possesses an “equitable interest in the remaining contract consideration and must look to the remaining contract consideration as security for performance and payment of contract obligations should the debtor fail to perform.”

6. Payment Bond Claims

Ordinarily, the payment bond surety would like nothing more than to see the remaining contract funds go to the bankrupt principal’s subcontractors and suppliers. Typically, the automatic stay only protects the bankrupt contractor, and not its surety.

7. Indemnity Rights

The automatic stay has an immediate, undesirable effect on the surety seeking to preserve its indemnity rights. The automatic stay typically:

1. impacts the surety’s right to demand or seize information, including the books, records, and accounts of the principal/debtor,
2. affects the surety’s collection of the contract funds, including progress payments and retainage,
3. limits the surety’s rights to the debtor’s property, including the surety’s rights under the assignment or trust provisions of the Indemnity Agreement,
4. affects the surety’s ability to enforce its rights against the principal/debtor with respect to equipment claims and subcontracts under the assignment provision of the Indemnity Agreement,
5. prohibits the surety’s demands for exoneration, reserve deposits, or the posting of collateral to resist or litigate claims, and
6. limits the surety’s ability to exercise its takeover rights under the Indemnity Agreement and its rights to terminate the underlying bonded contracts.

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41. 11 U.S.C. §361 sets forth when adequate protection may be provided.
8. **Post-Petition Financing and Extension of Credit**

If the debtor contractor desires to complete its contract, such as where it believes that it has a profit in the job, the debtor may request that its surety provide project funding for job completion. Section 364 permits the debtor to obtain unsecured credit post-petition and incur unsecured debt.\(^4\) If the trustee’s request to obtain credit and incur debt is granted, Section 364(c)(2) permits the lender to obtain priority over other administrative expenses, provided that it is secured by a lien or junior lien on the property of the estate.\(^5\) The debtor’s request may be met with resistance from other creditors. This is in part because the surety would be granted a super-priority which has the effect of “prim[ing] all other administrative claims and secured interests in the property in which a lien is granted.”\(^6\)

E. **Surety’s Options for Gaining Information**

1. **Debtor’s Schedules and Mandatory Disclosures**

Within 45 days after the filing of the petition (subject to further extension by court order), the debtor must file disclosures and schedules outlining the state of the debtor’s financial affairs, including assets, liabilities, obligations, contracts in place, and financing.\(^7\) This information is intended to allow creditors to make decisions within the


\(^{5}\) 11 U.S.C. §364(c) reads: (c) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt— (1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title; (2) secured by a lien on property of the estate that is not otherwise subject to a lien; or (3) secured by a junior lien on property of the estate that is subject to a lien.

\(^{6}\) T. Scott Leo and J. Blake Wilcox, *Bankruptcy Considerations and Bond Defaults in The Bond Default Manual*, p. 352 (Duncan L. Clore, Richard E. Towle and Michael J. Sugar, Jr., editors, 3d ed. 2005). Here, the authors indicate that while financing may be “one of the most foolish actions a surety can pursue, the circumstances sometimes compel action would, under ordinary circumstances, be regarded as foolish.” at 355.

ongoing bankruptcy, as well as to eventually assess a reorganization plan. This material, usually prepared jointly by the debtor, its accountant, and its bankruptcy counsel, will usually give the surety a glimpse into the overall status of its bankrupt principal, and may even contain job-specific information regarding jobs in progress. Since the filing of these disclosures is public, the information is easily accessible by the surety even if the surety has not “appeared” in the bankruptcy through counsel.

2. 341 Meeting

A “341 Meeting” (or “Creditors Meeting”) is held in every bankruptcy case, under Section 341 of the Code, typically about 30 to 60 days after the bankruptcy petition is filed. The bankruptcy judge does not preside over the 341 Meeting, and is actually prohibited from attending it.48 Instead, the 341 Meeting is presided over by the trustee, or, in most Chapter 11 cases, by the U.S. Trustee. Since the bankruptcy judge is not present, the 341 Meeting is usually held in the offices of the U.S. Trustee instead of the courtroom. Thus, in many districts the 341 Meeting may not even be held at the courthouse.

The debtor is required to attend the 341 Meeting. Creditors may elect to attend if they wish, but are not required to attend. Even if creditors do attend, the extent of their participation is usually limited to a few questions, since most of the examination of the creditor is done by the trustee or the U.S. Trustee.

The purpose of the 341 Meeting is purely organizational and informational. No formal substantive rulings or decisions are made at the 341 Meeting. In most instances the meeting begins with the debtor being placed under oath to swear to a series of basic, standardized questions about the schedules of assets and liabilities. The trustee (or the U.S. Trustee) might also ask questions about such matters as ongoing insurance coverage, the location of any financial records, the identity of the debtor’s accountant and business associates, and the extent of any payments made to anyone during the 90 days immediately preceding the filing of the bankruptcy petition, and the profitability of the debtor’s continuing operations.

After the trustee or U.S. Trustee has concluded the initial round of questioning, the creditors in attendance are invited to ask questions—but not too many—typically limited to inquiries about the existence and/or value of assets or liabilities not mentioned in the schedules, or in Chapter 11 cases about the profitability of any continuing operations. One topic

the trustee or U.S. Trustee will always be interested in would be the possibility that the debtor might have committed a bankruptcy fraud which might affect the debtor’s entitlement to a bankruptcy discharge of its debts—such as by having concealed or destroyed assets or documentation. Another topic which a trustee or U.S. Trustee might permit a creditor to pursue extensively would be cross-examination of a debtor on the location or disposition of assets that had been listed on an earlier financial statement which the debtor had provided to the creditor, especially where it seems to vary from the schedules of assets and liabilities filed in the bankruptcy case.

As a practical matter, there is one further topic that is often raised, unofficially and informally, at the 341 Meeting, that is, the formation of a creditors committee. Section 1102 of the Bankruptcy Code provides that “as soon as practicable” the U.S. Trustee “shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or of equity security holders as the United States trustee deems appropriate.” In a given case, the creditors committee may or may not have been formulated prior to the 341 Meeting, and, in either event, a creditor might want to attend the 341 Meeting to express an interest in being appointed to the creditors committee if one has not yet been formed, or to gather information about the creditors committee members if the U.S. Trustee has already selected them (and/or about the committee’s counsel or agenda).

In typical personal bankruptcy cases, the 341 Meeting may last only a few minutes, and indeed, it might be a mass-production, assembly-line event in which a dozen or so unrelated debtors might simultaneously appear. Even in Chapter 11 cases, the 341 Meeting may last only 20 to 30 minutes. However, in complex bankruptcy cases, including most Chapter 11 filings, it is typical for the 341 Meeting to be “continued”—not concluded—at the end of the questioning. Typically, the 341 Meeting will then be carried on the court’s calendar, but repeatedly adjourned every 60 days or so, until the final approval of a Chapter 11 plan or other disposition of the case as a whole.

3. Rule 2004 Examination

Creditors who wish to examine the debtor more extensively than might be allowed at a 341 Meeting may move for a court order directing the debtor to appear for a Rule 2004 examination. A Rule 2004 examination can also be sought in order to examine non-debtors who

49. See 11 U.S.C. §727 for a list of the grounds for denying a discharge.
might have information or documents concerning the bankruptcy—such as a debtor’s spouse, or business partner, or bank, or even another creditor. In effect, a Rule 2004 examination is simply a deposition in a bankruptcy setting, conducted by order of the bankruptcy judge.

A Rule 2004 examination “may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor’s estate, or to the debtor’s right to a discharge.”50 Nevertheless, the scope of the rule is “exceptionally broad.”51 Some courts have even said Bankruptcy Rule 2004 permits a “fishing expedition.”52 If a party seeking to conduct a Rule 2004 examination comes forward with evidence that good cause exists for taking the requested discovery, “the burden shifts back to the party objecting to the examination, who then bears the ultimate burden of persuasion that the examination would be improper.”53 The mere fact that there is already litigation pending against a person sought to be examined under Rule 2004 is not a sufficient reason for denying the request for an examination.54

F. Controlling Debtor’s Use of Cash Collateral

Among other things, Section 363 defines cash collateral to include cash, cash equivalents, negotiable instruments, securities, and any of the proceeds, fees, profits, etc. arising out of those things.55 Section 363 permits the debtor to use property of the estate in the ordinary course of business, but requires permission of the court in order for the debtor to engage in activity outside of the ordinary course.56 Similarly, the debtor in possession may not use “cash collateral,” as defined in Section 363, without the consent of the secured party or other party with an interest in the cash collateral, and authorization by the court will only be granted after a determination of whether the secured party can be “adequately

55. 11 U.S.C. §363(a) defines “cash collateral” as “cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest . . . whether existing before or after the commencement of a case under this title.”
protected" for the potential loss or diminution of its interest in the cash collateral as a result of debtor’s use. 57 A party with an interest in cash collateral which a debtor is proposing to use, or is actually using, may request that the court prevent the debtor from using the cash collateral, or place limitations or conditions on its use, as necessary, to “adequately protect” the creditor. 58 Although cash collateral concepts typically apply to financing secured creditors such as financing banks, cash collateral concepts also apply to the surety. “The surety’s interest in the contract funds could be adequately protected by giving the surety a lien or priority in property to cover the value of the contract funds used by the debtor in the event of default or rejection.” 59 Of course, the surety may also be subrogated to the rights of the obligee, especially the obligee’s contract and setoff rights, in certain circumstances. 60

As a matter of course, and in particular for sureties, debtors often simply go about using the surety’s cash collateral—the contract balances—unless and until the surety does something about it. A court order could be procured, for example, requiring that a debtor- contractor must use project progress payments first to pay all claims under the contract, and only use any remainder thereafter for the debtor’s operating expenses. 61

Alternatively, if the debtor needs to use receivables in which the surety has an interest as operating capital—the debtor may be able to offer the lender a court-approved “super-priority” over other unsecured

58. See COLLIER ON BANKRUPTCY (15th ed. rev. 2009) Vol. 3, ¶361.02, 361-3. “An entity is entitled to adequate protection as a matter of right, not merely as a matter of discretion, when the entity is stayed from enforcing its interest, when the estate proposes to use, sell or lease property in which the entity has an interest, and when property on which the entity has a lien is to be used as collateral for a loan.” (internal citation omitted.)
61. In re Ram Constr. Co., Inc., 32 B.R. 758 (Bankr. Pa. 1983). The court here found that the contractor was in default of its bond with its surety and subcontractors, and thus, the owner, subcontractors and surety superior to the right of a bank with the first lien security interest was not superior to the because the contractor could not continue on the project.
creditors, or in the alternative, permit a new lien on particular property of the estate.62

G. Assumption or Rejection of Contracts

A primary feature of business bankruptcies is the debtor’s ability to “accept” or “reject” its existing “executory contracts” under Section 365 of the Bankruptcy Code, based on the debtor’s own business judgment as to what would best serve the debtor’s own interests (and, at least in theory, the best interests of the debtor’s general unsecured creditors as a whole). This ability to accept or reject contracts is one of the most powerful, and most complex, tools available to debtors in possession who have filed a business bankruptcy.63 Nevertheless, a debtor’s right to accept or reject a contract is not absolute. In many instances a surety will be able to prevent the right from being exercised, provided the surety files a timely objection.

The Bankruptcy Code does not define the term “executory contract.” The House and Senate Reports indicate that the term is generally intended to include “contracts on which performance remains due to some extent on both sides.”64 The House and Senate Reports further suggest that where the only performance which remains due is payment, by one party to the other, “performance on one side of the contract would have been completed and the contract is no longer executory.”65

In practice, the definition of “executory contracts,” and the application of any such definition, can be far more complex, especially in a surety setting. To begin with, most courts initially adopted the so-called “Countryman” definition, to the effect that a contract is executory if the obligations of both the debtor and the other party to the contract are “so far unperformed that the failure of either to complete the performance would constitute a material breach excusing the performance of the other.”66 Nevertheless, some courts have ruled that the term “executory

63. In re Drexel Burnham Lambert Group, Inc., 138 B.R. 687, 690 (Bankr. S.D.N.Y. 1992) (“in no area of bankruptcy has the law become more psychedelic than in the one titled ‘executory contracts’” (quoting Westbrook, A Functional Analysis of Executory Contracts, 74 MINN. L. REV. 227, 228 (1989))).
65. Id.
contract” is intended to apply only in those instances in which substantial performance is left on the part of the debtor (or its estate), or, to put it differently, some courts have ruled that Section 365 is designed only to help debtors, not to diminish their estates.\textsuperscript{67}

Also important is that Section 362(a) of the Bankruptcy Code generally prohibits the unilateral termination or modification of executory contracts by the non-debtor party to the contract, without first getting the bankruptcy court to lift the automatic stay.\textsuperscript{68} A corollary to this rule is that pending a decision by the debtor to either accept or reject an executory contract, the other party to the contract is required to continue to perform the terms and conditions of the contract with the debtor, even though the debtor may not be performing its own obligations.\textsuperscript{69}

\begin{itemize}
  \item S. Wireless Data, Inc., 547 F.3d 484, 488 (2d Cir. 2008); \textit{In re Murexco Petroleum, Inc.}, 15 F.3d 60 (5th Cir. 1994); \textit{In re Texscan Corp.}, 976 F.2d 1269 (9th Cir. 1992); United States v. Floyd, 882 F.2d 233, 235 (7th Cir. 1989); Sharon Steel Corp. v. National Fuel Gas Distrib. Corp., 872 F.2d 36, 39 (3d Cir. 1989); \textit{In re Speck}, 798 F.2d 279, 279-80 (8th Cir. 1986); Gloria Mfg. Corp. v. International Ladies Garment Workers’ Union, 734 F.2d 1020, 1021 (4th Cir. 1984); Countryman, \textit{Executory Contracts in Bankruptcy, Part II, 58 MINN.L.REV. 479 (1974).}
  \item See, e.g., Computer Commc’n, Inc. v. Codex Corp. (\textit{In re Computer Commc’n, Inc.}), 824 F.2d 725, 730-31 (9th Cir. 1987) (termination of an executory contract violates the automatic stay); \textit{In re Wegner Farms Co.}, 49 B.R. 440, 444-45 (Bankr. N.D. Iowa 1985) (termination of an executory contract postpetition violates the automatic stay); \textit{In re Bd. of Dirs. of Compañía General De Combustibles, S.A.}, 269 B.R. 104, 113 (Bankr. S.D.N.Y. 2001) (an executory contract may not be terminated without seeking relief from the automatic stay); \textit{In re Redpath Computer Servs., Inc.}, 181 B.R. 975, 981 (Bankr. D. Ariz. 1995) (non-debtor party violated the automatic stay by attempting to terminate an executory contract postpetition); \textit{In re Tudor Motor Lodge Assocs., Ltd. P’ship}, 102 B.R. 936, 951 (Bankr. D.N.J. 1989) (postpetition efforts to terminate executory contract that had not been properly terminated prepetition were subject to the automatic stay).
  \item NLRB v. Bildisco & Bildisco, 465 U.S. 513, 532 (1984). See also, e.g., United States Postal Serv. v. Dewey Freight Sys., Inc., 31 F.3d 620, 624 (8th Cir. 1994) (“After a debtor commences a Chapter 11 proceeding, but before executory contracts are assumed or rejected under § 365(a), those contracts remain in existence, enforceable by the debtor but not against the debtor.”); \textit{In re Nat’l Steel Corp.}, 316 B.R. 287, 305 (Bankr. N.D. Ill. 2004) (“The non-debtor party must continue to perform under the
Somewhat less clear is what happens if the contract is determined not to be “executory.” It might be argued that a determination that a contract is not “executory” will imply not only that the contract cannot be accepted by the debtor (even if the debtor wanted to accept it, for some valid business reason), but also that such a contract is deemed rejected as of the petition date, hence leading to the conclusion that the other party to the contract does not have any obligation to continue to perform it. Thus, the question of whether a contract is still “executory” as of the date of the bankruptcy filing can be as important as it is complex.

Executory contracts may be assumed in order for the debtor to continue to perform the contract itself, or they may be assumed for the sole purpose of selling them, or “assigning” them, to another entity, whereupon that purchaser would perform the contract instead of the debtor. In the latter instance, there may be a significant question as to whether the performance bond, issued on behalf of the original contractor which is now in bankruptcy, will also remain in full force and effect, once the sale has occurred. Issues may also arise as to whether a sale or assignment of a contract may be free and clear of “defenses” (such as “recoupment,” as distinguished from “setoff”).

70. Generally speaking, a surety bond is considered to be a financial accommodation which is deemed rejected and terminated as of the date of the bankruptcy petition, and which cannot simply be assumed and enforced by the debtor, nor assigned to another party, without the surety's consent. See 11 U.S.C. § 365(c)(2); In re United Airlines, Inc., 368 F.3d 720, 723 (7th Cir. 2004); In re Thomas B. Hamilton Co. Inc., 969 F.2d 1013, 1020 (11th Cir. 1992) (dicta); Wechsler v. Hunt Health Sys., Ltd., 330 F.Supp.2d 383, 430 (S.D.N.Y. 2004); In re Edwards Mobile Home Sales, Inc., 119 B.R. 857, 859 (Bankr. M.D.Fla. 1990); In re Wegner Farms Co., 49 B.R. 440, 444 (Bankr. N.D.Iowa 1985).

H. The Surety’s Proof of Claim

As discussed above, Sections 501 and 502 of the Code provide that any creditor holding a claim against the debtor may file a proof of claim, to both notify all interested parties of its claim and to reserve its right to ultimately share in any distribution of assets. The proof of claim must be filed on or before the “bar date” (set by Rule 3002(c) as 90 days after the first date set for the Section 341(a) meeting of creditors, except for certain very limited types of claims).\(^{72}\)

Under the Bankruptcy Code, the term “claim” is “quite expansive,” extending to any right to payment, whether or not reduced to judgment, liquidated, unliquidated, fixed, contingent matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.\(^{73}\) Thus, even if the surety has yet to sustain a loss relating to its principal’s bankruptcy, it may hold a claim against the principal, and even the surety with no loss is a “creditor” of the estate.\(^{74}\)

Typically, a surety will file a proof of claim with the bankruptcy court as a way to establish that its claim is valid and allowable. While the bankruptcy court standard forms contain a proof of claim form, the surety will likely need to file an attachment in addition to the form, which explains the basis for its claim and the amount of its claim dividing that amount into the various categories of claim outlined by the bankruptcy court.

I. Categories of Claims

There exist four different types of claims that are defined within Section 101 of the Code. A claim may be (1) “secured”; (2) “priority” unsecured; (3) “unsecured”; and/or (4) “unmatured and contingent.”\(^{75}\)

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72. 11 U.S.C. FRBP Rule 3002. The exceptions are found within Rule 3002(c)(1) through (c)(5).


1. **Secured Claim**

A claim will be secured if the creditor possesses a lien on the debtor’s property in connection with the claim.\(^{76}\) According to Section 101 of the Code, there are three kinds of liens: liens secured by the debtor’s consent in an agreement providing for creditor with a security interest in the debtor’s property,\(^{77}\) liens secured by a judgment, judicial levy, or legal or equitable proceeding,\(^{78}\) and liens arising by force of statute.\(^{79}\)

A surety will typically have a secured claim if it obtained “collateral from the principal or filing the Indemnity Agreement as a Uniform Commercial Code Financing Statement (UCC-1). . . [as well as] resulting from the Indemnity Agreement’s trust fund or assignment provisions.”\(^{80}\)

2. **Priority Unsecured**

Section 507 sets forth examples of those unsecured claims that have priority over other unsecured claims. For example, priority unsecured claims include bankruptcy estate administrative costs, unpaid wages, and taxes.\(^{81}\) Frequently, a surety may be called upon by a priority unsecured creditor, such as a union, to make payment to it for unpaid wages. While the surety may be obligated to make such payment, and may become subrogated to the union’s claim against the estate, the Code will not allow the surety to enforce the priority that originally attached to the creditor’s claim. Section 507(d) makes clear that a surety “that is subrogated to the rights of a holder of a claim of a kind specified in subsection (a)(1), (a)(4), (a)(5), (a)(6), (a)(7), (a)(8), or (a)(9) of this section is not subrogated to the right of the holder of such claim to priority under such subsection.”

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76. 11 U.S.C. §506.
77. 11 U.S.C. §101(51).
80. Chad L. Sehenssay, Steven H. Rittmaster, and T. Scott Leo, *The Indemnity Agreement in Bankruptcy in Surety’s Indemnity Agreement—Law & Practice*, p. 484 (Marilyn Klinger, George J. Bachrach and Tracey Haley, editors, 2d ed. 2008). A surety will have an unsecured claim if, or to the extent, it does not possess a lien on the debtor’s property, or the debtor’s property on which it has a lien is insufficient to cover its claim.
3. Unsecured Claim

These types of claims make up the majority of the debtor’s estate.\textsuperscript{82} Generally, a surety will have an unsecured claim if it does not possess a lien on the debtor’s property.\textsuperscript{83}

4. Contingent Claims

The contingent claim is of particular relevance for the surety. An example of a contingent claim is one “not yet due as of the filing” that arises from a liability or “claim of a creditor against a debtor-guarantor if the principal debt is current.”\textsuperscript{84} Section 502(e)(1)(B) disallows claims that remain contingent at the time of “allowance or disallowance,” which occurs during the later segments of a Chapter 11 proceeding.\textsuperscript{85} While bankruptcy courts have disallowed portions of a surety’s claim that are contingent,\textsuperscript{86} the surety’s claim is allowed as a “prepetition claim at the time it becomes fixed after the commencement of the case, \textit{i.e.}, when the

\begin{itemize}
\item[83.] Chad L. Schexnayder, Steven H. Rittmaster, and T. Scott Leo, \textit{The Indemnity Agreement in Bankruptcy in Surety’s Indemnity Agreement—Law & Practice}, p. 484. (Marilyn Klinger, George J. Bachrach and Tracey Haley, editors, 2d ed. 2008).
\item[84.] \textbf{COLLIER ON BANKRUPTCY} (15th ed. rev. 2009) Vol. 1, ¶1.03[2][a], 1-12.
\item[85.] 11 U.S.C. §502(e)(1) reads: Notwithstanding subsections (a), (b), and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that—(A) such creditor's claim against the estate is disallowed; (B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution; or (C) such entity asserts a right of subrogation to the rights of such creditor under section 509 of this title.
\item[86.] \textit{In re} Microwave Products of America, Inc., 118 B.R. 566, 573 (Bankr. W.D. Tenn. 1990) ("surety has no right to share in the distribution of the debtor's assets until such time as the creditor's claim has been paid in full. Until payment is made, the surety's claim is contingent. Accordingly, section 502(e)(1)(B) disallows a contingent claim of the surety for reimbursement or contribution.")
\end{itemize}
creditor’s claim against the debtor is paid by the surety or co-debtor.”87 Any additional payments made by the surety will make that portion of its claim no longer contingent, transforming the contingent claim to a liquidated claim that will either be secured or unsecured (and, depending upon the obligation that is paid, potentially administrative in nature and therefore entitled to priority).

A surety may insert language into its indemnity agreement intended to negate the contingent nature of its unliquidated claim. For example, sureties may employ language that equates the surety’s creation of a reserve to cover any bond claim or loss arising from its issuance of a bond to a “present enforceable monetary obligation to pay to the surety the amount of the reserve.”88 Thus, the liquidated debt becomes the amount of the reserve, regardless of whether payments to claimants have yet been made, and the surety has a powerful argument that its loss is not contingent.89

As a bankruptcy progresses, a surety must be aware that if a claim is still contingent at the time of allowance and disallowance, it can be estimated except for sureties, whose unliquidated claims cannot be estimated, and that is why this is uniquely a problem for sureties.

Bankruptcy Rule 3005 expressly permits a surety to file a proof of claim within 30 days after the filing deadline (the “bar date”), if a creditor entitled to make claim on the surety’s bond has failed to file such a proof of claim. Thus, a surety who might otherwise have only a contingent claim might be able to effectively extend the time within which certain claims can be filed, by utilizing this rule.

J. Plan Confirmation and Final Decree

Generally speaking, a Chapter 11 plan may either be one for “reorganization” or for “liquidation.” Traditionally Chapter 11 was designed for business reorganizations, but liquidation plans have become popular in recent years in cases in which substantially all of the productive and/or profitable assets are sold to a new entity, with the proceeds being distributed to secured creditors and then to general unsecured creditors.

87. Id.
89. Id. at 487.
Section 1121 of the Bankruptcy Code provides for an initial 120-day "exclusivity period" during which the debtor in possession has the exclusive right to propose a plan of reorganization or liquidation. This period is routinely extended for up to 180 days, but sometimes it is actually shortened, by order of the court. If the debtor in possession is replaced by a trustee, the exclusivity period automatically ends, and any creditor can propose a plan—as can the debtor itself.90 A creditor is not permitted to file its own plan, unless a trustee is appointed, or unless the debtor's plan is not timely filed, or not timely accepted.91

Along with the plan the debtor must also file a disclosure statement—thereby creating a two-step process by which the court must first approve the disclosure statement, and then must later approve the plan. Thus, although the disclosure statement to a large extent is simply repetitive of the terms of the plan, creditors first have an opportunity to effectively object to the plan by filing an objection to the disclosure statement, which may lead to a revision of both the disclosure statement and the plan in order to cure the objection.

After the disclosure statement is approved by the court, the creditors are permitted to vote on the plan—which must be approved by each category of the creditors, except those creditors whose claims are not actually "impaired" by the plan itself (such as creditors whose claims are to be paid in full, or creditors whose claims are fully secured).92 In general, a class of claimants has accepted the plan if it is approved by holders of "at least two-thirds in amount and more than one-half in number of the allowed claims in such class."93

Creditors are given an additional opportunity to object to the plan, in advance of the confirmation hearing. Sections 1123 and 1129 of the Bankruptcy Code set forth a variety of substantive and procedural requirements for a plan’s approval. Items of particular interest to sureties would include the disposition of (i) contract balances, materials, equipment, tools, and other assets relating to bonded construction projects (or other appurtenances to bonded obligations); (ii) liens in which the surety might have an actual or contingent interest; and (iii) claims by or against third parties, such as bond obligees and other potential bond claimants, and also including officers and directors of the debtor entity. Most importantly, the surety should determine whether the plan includes any releases which may be granted, under the plan, not

90. 11 U.S.C. § 1121(c).
91. 11 U.S.C. § 1121(c).
only to the debtor entity itself but also to the debtor’s officers, directors, shareholders, employees, affiliates and other related persons and parties, who might also be indemnitors of the surety, or who might otherwise have liability to the surety.\footnote{The instances in which such non-debtor releases are permitted are severely limited, under rules which may vary from circuit to circuit. See, e.g., Airadigm Communications, Inc. v. Federal Communications Comm’n. (\textit{In re} Airadigm Communications, Inc.), 519 F.3d 640 (7th Cir. 2008); Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc. (\textit{In re} Metromedia Fiber Network, Inc.), 416 F.3d 136 (2d Cir. 2005); Class Five Nevada Claimants v. Dow Corning Corp. (\textit{In re} Dow Corning), 280 F.3d 648, 658 (6th Cir. 2002); Resorts International, Inc., v. Lowenschuss (\textit{In re} Lowenschuss), 67 F.3d 1394 (9th Cir. 1995); Landsing Diversified Properties-II v. First Nat’l Bank and Trust Co. (\textit{In re} Western Real Estate Fund), 922 F.2d 592 (10th Cir. 1991).}

**K. Conclusion**

The key point for a surety claims representative or surety attorney or consultant to take away from this introduction, is that while bankruptcy is a functioning, usable, and interactive forum, it is very different from an ordinary business environment. To effectively protect a surety’s rights within the forum, both a surety claims representative and its counsel must utilize to best advantage the alternative rules and processes which the bankruptcy code and rules put in place and the benefits which they bestow, while respecting the limitations they impose. The foundation provided by this chapter is greatly expanded upon by the later chapters in this book, and will broaden your understanding and ability to utilize the specific rules applicable to many of the issues we have introduced herein.