3rd Annual Connecticut Bankruptcy Conference Series: 
Alternatives for Winding Down a Business 

October 16, 2020 
3:00 p.m. – 5:00 p.m. 

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Webinar 

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No representation or warranty is made as to the accuracy of these materials. Readers should check primary sources where appropriate and use the traditional legal research techniques to make sure that the information has not been affected or changed by recent developments.
As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Principles of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Civility and courtesy are the hallmarks of professionalism and should not be equated with weakness;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not knowingly make statements of fact or of law that are untrue;

I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will refrain from causing unreasonable delays;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and if appropriate, the court (or other tribunal) as early as possible;

Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

I will refrain from utilizing litigation or any other course of conduct to harass the opposing party;

I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging I acts of rudeness or disrespect;

I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party’s opportunity to respond;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client’s interests as well as to the proper functioning of our system of justice;

While I must consider my client’s decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will withdraw voluntarily claims or defense when it becomes apparent that they do not have merit or are superfluous;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be punctual in attending court hearings, conferences, meetings and depositions;

I will at all times be candid with the court and its personnel;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will endeavor to keep myself current in the areas in which I practice and when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

I will be mindful of the fact that, as a member of a self-regulating profession, it is incumbent on me to report violations by fellow lawyers as required by the Rules of Professional Conduct;

I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

It is understood that nothing in these Principles shall be deemed to supersede, supplement or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which lawyer conduct might be judged or become a basis for the imposition of civil liability of any kind.

--Adopted by the Connecticut Bar Association House of Delegates on June 6, 1994
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PATRICK M. BIRNEY

Patrick Birney co-chairs the firm’s Bankruptcy + Reorganizations Group and is a member of the Business Litigation Group.

Bankruptcy and Creditors’ Rights

Since 1998, Patrick has focused his practice on complex transactional, litigation, and advisory work related to the debtor/creditor relationship, including restructurings, Chapter 11 bankruptcy cases, workouts and ‘prepackaged’ Chapter 11 matters, and commercial finance. He has extensive experience representing secured and unsecured creditors, trustees, debtors, official and ad hoc creditors’ committees, and other parties in Chapter 11 restructurings, adversary proceedings, state court receiverships, and out-of-court workouts.

Patrick recently represented a global fuel oil supplier in its Chapter 11 case, including negotiation and confirmation of its plans, which included providing for a substantial distribution to creditors. He represented the senior secured lender in the successful Chapter 11 restructuring of an international toy manufacturer. He also represented the bondholders in the successful Chapter 11 restructuring of an assisted senior living facility and geriatric hospital.

Business Litigation

Patrick has a broad range of experience handling commercial litigation matters in state and federal courts, routinely representing businesses involved in contract disputes, fraudulent transfer, fraud, civil theft, and intercompany claims. He has represented businesses in the insurance, manufacturing, health care, distribution, logistics, shipping, energy, retail, and construction industries.

Patrick recently obtained summary judgment in the United States District Court for the Southern District of Texas on behalf of an international manufacturer regarding claims of breach of contract.
Pro Bono and Community Involvement

Patrick is committed to doing pro bono work and being actively involved in the community. He has participated in the firm’s Domestic Violence Restraining Order Program, which assists victims with obtaining restraining orders. He is on the Board of Directors for G.R.O.W.E.R.S., Inc., which provides employment and educational opportunities for intellectually disabled clients, and he serves as president of the N.E.W. 34th Charitable Corp., an organization which helps fund civic and charitable causes in the New Haven, Connecticut area.

Patrick has also been a member of the Connecticut Lottery Corporation’s Board of Directors, serving as the board’s vice chairperson since 2014 and chairperson of the board’s Finance Committee since 2013. He has also served as vice chairperson of the Wallingford Public Utilities Commission since March 2015, and prior to that served on the Wallingford Planning and Zoning Commission and Zoning Board of Appeals.

Patrick is a frequent lecturer and participant on educational panels related to bankruptcy, insolvency, commercial law, and creditors' rights. In addition, he is a frequent author and contributor to several national bankruptcy publications. To date, his articles have been cited by several judicial opinions, including *In re Reichgott*, 2013 WL 5492532 (Bankr. N.D.Ohio, 2013), and *In re Kebe*, 444 B.R. 871, 880 (Bankr. S.D.Ohio, 2011).

Patrick has been listed in *The Best Lawyers in America®* in the area of Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law since 2017.

Professional Associations

+ American Bankruptcy Institute
+ Connecticut Bar Association
  o Commercial Law and Bankruptcy Section
+ Turnaround Management Association
+ Connecticut Bar Foundation
Fellow
- American Bankruptcy Institute Journal
  - Coordinating Editor
- Journal of Bankruptcy Law and Practice
  - Editorial Advisory Board
- United States Law Firm Group
  - Chair, Bankruptcy and Creditors Rights Committee (2018)
- Hartford County Bar Association
  - Board of Directors (2013 - 2017)

Community Involvement
- Town of Wallingford
  - Public Utilities Commission, Vice Chairman
  - Planning and Zoning Commission, Vice Chairman
- Connecticut Lottery Corporation
  - Board of Directors, Chairman (Acting since 11/2018)
  - Board of Directors; the corporation, a 501(c)(3), provides employment and educational opportunities for intellectually disabled clients
- The N.E.W. 34th Charitable Corp.
  - President; the corporation, a 501(c)(3), provides funding for civic and charitable causes within New Haven County

Awards
- St. John's University, CALI Excellence for the Future Award for Complex Bankruptcy Litigation
- Connecticut Coalition Against Domestic Violence, "First 100," 2013
+ Selected to the Connecticut Super Lawyers list from 2013 to 2019.

+ Selected by his peers for inclusion in The Best Lawyers in America© in the area of Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law since 2017.

Joanna M. Kornafel, Green & Sklarz LLC

Joanna M. Kornafel represents individuals and clients with complex financial and litigation needs in a wide array of industries such as healthcare, construction, horticulture, retail, and hospitality. Her practice focuses on civil litigation and commercial litigation matters, unfair trade practices (CUTPA), business torts, breach of contracts, debtor/creditor litigation, workouts, bankruptcy litigation, and other commercial litigation matters. Joanna has extensive experience handling all aspects of bankruptcies and workouts, representing secured and unsecured creditors, debtors, bankruptcy trustees, and acquirers of businesses in Chapter 11 bankruptcies.

Joanna is actively involved in the Connecticut Bar Association (CBA). She currently serves as the Legislative Liaison for the Commercial Law & Bankruptcy Section and Senior Advisor for the Young Lawyers Section. Joanna sits on the boards of the International Women’s Insolvency and Restructuring Confederation (IWIRC) and the New England Bar Association (NEBA). Joanna was the American Bar Association Young Lawyers Division’s District Representative for Connecticut and Rhode Island (2015 – 2017). She is also a member of the American Bankruptcy Institute.

Joanna received her B.A. with Honors from McGill University in Montreal, Quebec, Canada, and her J.D. from Boston College Law School. While in law school, Joanna was selected for the London Study Abroad Program, where she interned in the General Counsel Division at the Financial Services Authority and attended classes at King’s College London.

Prior to attending law school, Joanna worked for several years for the global management consulting firm McKinsey & Company.
Kevin J. McEleney
Shareholder, Updike Kelly Spellacy, Hartford

Kevin J. McEleney is a Shareholder in UKS’ Hartford office, practicing in the areas of creditor’s rights, bankruptcy and commercial litigation. Mr. McEleney couples his depth of technical knowledge in commercial law and bankruptcy with a passion for trial litigation. Combining these skillsets, Mr. McEleney endeavors to provide practical, business oriented advice to his clients in a cost effective manner.

Mr. McEleney regularly represents secured and unsecured creditors in United States Bankruptcy Courts. He has litigated a wide variety of contested bankruptcy matters to judgment, including confirmation of a creditor’s plan, approval of complex § 363 sales, determination of creditors’ debts, adversary proceedings and motions for relief from stay. Mr. McEleney also represents creditors in bankruptcy appeals.

Outside of bankruptcy, Mr. McEleney assists creditors liquidating collateral using state law remedies such as foreclosure, replevin and secured party sales under the Uniform Commercial Code. Sometimes, a negotiated workout will provide a better and more efficient recovery for a client. Mr. McEleney will creatively restructure deals utilizing forbearance agreements, amendments, additional collateral, stipulated judgments, and other appropriate tools designed to maximize recovery and avoid protracted litigation.

Mr. McEleney has experience working on complex litigation involving business disputes in a variety of fields and industries. He frequently represents and advises commercial landlords on leasing issues, evictions and collections. Mr. McEleney works with shareholders and privately held companies to resolve shareholder and partnership disputes. Mr. McEleney represents businesses and individuals in United States District Courts and various state courts litigating contract claims, business torts, real estate disputes and business insurance claims. Mr. McEleney has tried numerous civil cases through verdict and appeal.

Mr. McEleney is the Treasurer of the Hartford County Bar Association, the Secretary/Treasurer of the Connecticut Bar Association’s Commercial Law and Bankruptcy Section and is a co-chair of the Creditor’s Rights Litigation Subcommittee of the American Bar Association. He is a contributor to the pre-eminent treatise of Connecticut foreclosure law, Connecticut Foreclosures, by Denis R. Caron and Geoffrey K. Milne, Fifth and Sixth Editions, contributing to the chapter on bankruptcy law. Mr. McEleney was recognized as a Super Lawyers Rising Star in Connecticut, 2011-2020.
3RD ANNUAL CONNECTICUT BANKRUPTCY CONFERENCE:
ALTENRATIVES FOR WINDING DOWN A BUSINESS

Friday, October 16, 2020
3:00 p.m. – 5:00 p.m.

Panelists

Patrick M. Birney, Robinson & Cole, Hartford
Joanna M. Kornafel, Green & Sklarz LLC, New Haven
Kevin J. McEleney, Updike, Kelly & Spellacy, P.C., Hartford

1. Creditor liquidation of a business outside of bankruptcy
2. Voluntary dissolution of a business under state law
3. Receiverships, assignments for the benefit of creditors and statutory trusts
4. Questions & Answers
CREDITOR LIQUIDATION OF A BUSINESS OUTSIDE BANKRUPTCY

Secured Creditor Considerations for Alternative Liquidations

There are many reasons a secured creditor might consider liquidating a borrower’s business outside of bankruptcy utilizing Article 9 of the Uniform Commercial Code and other state law remedies. First, state law generally allows creditors to initiate proceeding unilaterally without the affirmative cooperation of borrowers. In bankruptcy, borrowers typically initiate voluntary bankruptcy proceedings themselves. If a creditor wishes to start an involuntary bankruptcy proceeding against a borrower, it must join with at least two other creditors holding undisputed claims in order to file an involuntary petition (unless the debtor has less than 12 creditors). 11 U.S.C. § 303. Very rarely can a single secured creditor initiate a bankruptcy by itself.

Once in bankruptcy, a secured creditor’s options are limited without the debtor’s cooperation. Many bankruptcy liquidations utilize 11 U.S.C. § 363 to sell the debtor’s assets free and clear of liens. Only a debtor, however, or chapter 7 trustee, may request the Court to authorize a § 363 sale. While a secured creditor may eventually propose a creditor’s plan of reorganization in a chapter 11 bankruptcy, only the debtor may file a plan for the first 120 days (which period may be reduced or extended up the 18 months by order of the court). 11 U.S.C. § 1121. Although secured creditors may effectively utilize bankruptcy proceedings to liquidate business collateral, this process is often time consuming and difficult absent the debtor’s cooperation.
Even if the borrower seeks to cooperate, bankruptcy proceedings by design notify all potentially interested stakeholders and invite their scrutiny of business liquidations. Under Article 9, a secured creditor must notify all obligors and lienholders, but it is not required to solicit the participation of other potentially interested parties such as general unsecured creditors. Conn. Gen. Stat. § 42a-9-611 (only the debtor, secondary obligors and other secured creditors must be notified of an Article 9 liquidation).

Second, bankruptcy proceedings are often expensive. A chapter 11 debtor must pay significant quarterly fees to the United States trustee depending on the monetary amount of disbursements made by the debtor. 28 U.S.C. § 1930. If the debtor or secured creditor wish to liquidate the debtor’s assets through a plan of liquidation or reorganization, the plan will need to provide for payment of all administrative claims. 11 U.S.C. § 1129(a)(9)(B). These expenses may include considerable fees incurred by a committee of unsecured creditors that may scrutinize any proposed liquidation or attempt to extract concessions for unsecured creditors. 11 U.S.C. §§ 503 and 1102.

Third, an Article 9 liquidation may be effectuated must faster than the typical bankruptcy proceeding. A secured creditor may effectuate an Article 9 sale within a “reasonable” time of providing notice to interested parties, but Article 9-612 provides that 10 days’ notice is a safe harbor for a reasonable time for commercial transactions. Conn. Gen. Stat. § 42a-9-612. If the borrower consents to the surrender of collateral, a secured creditor can dispose of collateral almost
instantly if there are no other lienholders that must receive notice. Conn. Gen. Stat. §§ 42a-9-620 (notification before disposition of collateral), 42a-9-620 (acceptance of collateral in full or partial satisfaction of obligation).

Despite the many advantages of state law remedies, bankruptcy proceedings will always offer powerful tools unique to the bankruptcy code. It may be easier to manage an ongoing business as a going concern while in bankruptcy. The automatic stay can prevent competing creditors from interfering with a lender's collateral until a liquidation can be effectuated. A bankruptcy proceeding can help simultaneously liquidate a borrower’s collateral located across many states, instead of dealing with a patchwork of different state law proceedings. For businesses that operate with multiple leases or executory contracts, the power to assign assume and assign those contacts under 11 U.S.C. § 365 may be critical to the sale of a business as a going concern. A buyer may take comfort in purchasing assets free and clear of all potential claims under § 363 resulting in an increased sale price over an Article 9 sale.

Creditors must consider all these factors before electing whether to pursue state law rights or attempting to steer a borrower towards a (voluntary or involuntary) bankruptcy. Just a few of these considerations may include:

- The type and size of the borrower’s business;
- The location(s) of borrower’s assets;
- The expected monetary value of the business;
- The significance and activities of other creditors;
• The cooperation of the borrower;
• The anticipated preferences of potential buyers;
• Whether the business will be sold as a going concern; and
• The ability of the borrower (or lender) to fund a Chapter 11.

Liquidating Real Estate Assets Along With Personal Property

Foreclosure is the traditional means for a secured creditor to liquidate real estate outside of bankruptcy. Certain states will also allow for a receiver to sell real estate together with other business assets. If the debtor is willing to cooperate with the creditor, the debtor may alternatively sell the business privately (perhaps in a short sale with creditor’s consent) or grant the creditor a deed in lieu of foreclosure and title to the personal property. If the parties are considering a voluntary transfer outside of bankruptcy or foreclosure, they should weigh the cost of paying off junior liens and the real estate conveyance tax that is applicable with a transfer of real estate through private sale or deed in lieu of foreclosure.

If a creditor initiates a foreclosure action to take title to real estate, it should consider whether or not to add a separate claim to foreclose the Debtor’s personal property collateral within the state court foreclosure. Pursuant to UCC § 9-604, if a security agreement covers both real and personal property, the creditor may proceed to foreclose the personal property separately under the UCC or may foreclose the personal property together with the real estate in the state court foreclosure action. If the creditor combines both real estate and personal property

If real estate presents the bulk of the value of the secured creditor’s collateral, it may be efficient to concurrently foreclose on the real and personal property together in state court. A creditor may be hesitant to seize, store and sell personal property separate from the personal property when the highest value may be achieved by selling it together with the real estate. Also, a Court judgment will eliminate questions over whether the secured creditor complied with UCC rules for a reasonable sale. A creditor seeking to foreclose is state court should still take care to conduct a UCC search and name all subsequent lienors of the personal property in the foreclosure action. The creditor should also obtain a separate appraisal of the personal property collateral (or an allocation of value within an appraisal that values both real and personal property together) so that the Court may properly enter judgment on the personal property foreclosure.

The downside of foreclosing personal property together with real estate is that a state court foreclosure typically takes much longer than a UCC disposition. If the personal property value is not significantly enhanced by selling it together with the real estate, and if the value of the personal property justifies the separate replevin, potential storage and sale costs of a separate UCC sale, a creditor may elect to conduct an immediate UCC sale outside of Court and proceed to judgment on the real estate in due course. Foreclosing both real and personal property in the same action may also not be feasible if the borrowers constitute separate “op-co” and
“prop-co” entities because, even if related, the separate borrowers may not be party to the same security agreement.

**Leased Property**

If the debtor does not own its own real estate, a creditor may want to utilize a debtor’s leased premises to store its collateral through a sale. Unless a lender has a mortgage on the property as well and retakes possession of the real estate in a related action, the lender will need to consider whether it has the right to utilize the debtor’s leased property. Savvy creditors will have provided for this eventuality in the loan documents by obtaining an assignment of the debtor’s lease rights and an agreement with the landlord that the lender be allowed reasonable time to liquidate the collateral in place. If a creditor has these rights, it should consider seizing possession of the leased property in conjunction with executing a court ordered replevin.

If the creditor does not enjoy these rights through the loan documents, it may have to negotiate both with the debtor and the landlord for the right to utilize the leasehold space. If arrangements cannot be made through the loan documents or consent, the creditor may be forced to move all its collateral to a safe location for storage, staging and sale.

**Obtaining Possession of Personal Property Collateral**

A secured party is permitted to take possession of its personal property collateral upon a default. Conn. Gen. Stat. § 42a-9-609. The creditor may seize property pursuant to judicial process or without judicial process, “if it proceeds

When self-help is not prudent or feasible, the creditor should utilize a replevin action to retake the collateral by Court order. Conn. Gen. Stat. § 52-515 *et seq.* A plaintiff may not combine a replevin lawsuit with any other claims (except for conversion of goods sought to be replevied), so a creditor must institute its replevin suit separately from any foreclosure or suit for monetary damages. Conn. Gen. Stat. § 52-522. Creditors will often employ a replevin as a prejudgment remedy, either upon notice and hearing or utilizing a commercial waiver in the loan documents. Conn. Gen. Stat. § 52-516 (an action for replevin may include a prejudgment remedy to long as it complies with PJR requirements); Conn. Gen. Stat. § 52-278f
(authorizing a PJR in a commercial transaction when defendant waived notice and hearing).

Creditors should be aware that they are required to post a bond in a sum at least double the sworn value of the property before issuing a writ of replevin. Conn. Gen. Stat. § 52-518. The creditor will have to develop a good faith basis to complete an affidavit swearing to the value of the property. *Id.* Depending on the type of property at issue, the creditor may consider developing a value based upon a recognized marketplace (*e.g.* Blue Book value of a motor vehicle) or a professional appraisal of the collateral. A creditor may also consider relying upon the debtor's own valuation of the property contained in personal property tax declarations filed with the town or in financial statements submitted to the creditor. Creditor's attorney should take note of the specific form the bond must take and the requirement that the surety must swear before “the authority signing the writ.” Conn. Gen. Stat. § 52-518. Practically, this means that the insurance company shouldn’t simply transmit the bond to creditor’s attorney, but must sign a form specified by statute notarized personally by the creditor's attorney. Conn. Gen. Stat. §§ 52-518, 52-519. Often a surety will issue a bond on its own form, but the creditor’s attorney should attach that to the Connecticut statutory form bond and ensure that he or she personally notarizes the statutory form.

**Intellectual Property, Online Accounts and Computer Data**

Prudent creditors should take particular care when considering the liquidation of assets such as intellectual property, online accounts and electronic
records. Article 9 does not apply to perfecting a security interest if a federal law preempts state law. Conn. Gen. Stat. § 42a-9-311. While the Patent Act 25 U.S.C. § 261 requires parties to record an “assignment, grant or conveyance” of a patent with the United States Patent and Trademark Office, it does not specifically address security interests. As a result, Courts have ruled that a patent may be foreclosed under Article 9 and does not need to be recorded in the PTO Office (although a creditor will want to file notice with the PTO Office after title to a patent has been conveyed through an Article 9 foreclosure). See In re Cybernetic Services, Inc., 252 F.3d 1039 (9th Cir. 2001).


The Copyright Act, however, requires creditors to record their security interest in a copyright in the Copyright Office, not under the UCC. In re Peregrine Entm’t Ltd., 116 B.R. 194, 205 (C.D. Cal. 1990) (federal authority preempts UCC for Copyright perfection). Counsel should carefully review the particular laws regarding intellectual property before foreclosing on these assets.

Internet accounts and electronic data are not governed by federal statute, but these assets may be even more practically difficult to liquidate without cooperation. A creditor can and take a security interest in the debtor’s electronic records under the UCC. Conn. Gen. Stat. § 42a-9-102(70). Similarly, a creditor can also secure and
foreclose out a debtor’s interest in a website or social media account as “general
intangibles” as defined in Article 9-102. Foreclosing these electronic assets will do a
creditor little practical good without access to usernames and passwords. If the
debtor does not cooperate, a creditor should seek specific language in a replevin or
other court order to require the debtor’s cooperation in turning over this
information. A creditor may also consider hiring a debtor’s former IT professional or
bookkeeper as a consultant to assist with the liquidation of this collateral.

**Hot Goods**

The federal “hot goods” statute makes it unlawful for any person
transporting, shipping, delivering or selling in commerce any good produced in
violation of federal minimum wage laws or overtime rules. 29 U.S.C. § 215. The
United States Supreme Court has confirmed that this statute applies to secured
secured creditor should *not* take possession of any goods if there is a suspicion that
they debtor failed to pay the workers who produced them without providing
compensation to those workers.

**Will The Business Continue Operating Through a Sale?**

Sometimes, the parties desire the business to continue operations through a
sale to maximize its value as a going concern. This is obviously much easier if a
creditor and debtor cooperate. A creditor must be extremely cautious of taking
direct control of a business prior to a sale. An unwary lender may find itself liable
for unpaid withholding taxes under IRC § 6672. Further if a lender pays wages
directly to a debtor’s employees, it may also find itself liable for unpaid taxes under IRC § 3505. For these tax reasons and a host of other lender liability issues, most lenders prefer not to exercise direct control over a business during windup.

Absent the powers of a bankruptcy or receivership to govern the business during the windup, a lender may enter into an agreement with the debtor that allows the debtor to utilize the lender’s cash collateral to facilitate an orderly windup. The creditor may also consider allowing the debtor to continue to utilize a revolving line of credit under strict conditions for this purpose. If a lender sets parameters for the debtor’s use of cash but stops short of exercising direct control of the business, it may maintain the viability of the business while reducing potential lender liability exposure. Just as in a bankruptcy or receivership, prudent creditors will insist on frequent financial reporting and closely monitor a debtor’s budget throughout this process. The bank may also consider conditioning its forbearance or continued lending on the debtor’s employment of a Chief Restructuring Officer or other professional to assist with an orderly windup.

The UCC Sale

Creditors must proceed to dispose of personal property in accordance with the requirements of the UCC. Every aspect of a disposition of collateral must be commercially reasonable. Conn. Gen. Stat. § 42a-9-610(b). Creditors often dispose of collateral through a public or private sale, but the UCC also allows creditors to lease or license the collateral. Conn. Gen. Stat. § 42a-9-610(a). While the UCC does not define what constitutes “commercially reasonable” conduct, Article 9-101
specifically mentions that the “method, manner, time, place and other terms” must all be commercially reasonable.

If the collateral at issue is routinely sold within a recognized price range, such as a motor vehicle or other regularly traded equipment, it may be easy to reasonably sell the collateral through a private sale. When the reasonable value of collateral is unknown, a creditor may wish to conduct a public sale to test the marketplace. To ensure that a sale is commercially reasonable, the creditor will typically wish to engage an auctioneer or other professional with solid experience selling the type of collateral at issue. Any public sale should be sufficiently advertised. While the ultimate sale price will not by itself determine whether a sale was commercially reasonable, a low price suggests that a court should carefully scrutinize all aspects of the disposition for commercial reasonableness. Conn. Gen. Stat. § 42a-9-610 (comment 10).

Depending on the collateral at issue, practitioners should carefully consider how the COVID-19 pandemic may impact the commercial reasonableness of any sale. Crowded auctions may not currently be viable in many areas. Article 9-610 permits both public and private dispositions to be conducted over the internet, but the specific sale procedures must be commercially reasonable. Many online markets are currently achieving strong sales results, but the decision on how to dispose of collateral may be under more scrutiny during this pandemic than ever before.
The secured creditor itself may purchase the collateral at a sale, but may only purchase its collateral in a private sale if the property “is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations.” Conn. Gen. Stat. § 42a-9-610(c).

Instead of selling the collateral, a creditor may under certain circumstances accept the collateral in full or partial satisfaction of the outstanding debt. Conn. Gen. Stat. § 42a-9-620. This option is not available for consumer transactions. Conn. Gen. Stat. § 42a-9-620(g). Before taking the collateral in full or partial satisfaction of its debt, the secured party must obtain the debtor’s consent in writing after the default (this can not be “pre-approved” in the loan documents) and no other secured creditors, obligors or persons with interest in the collateral object after receiving written notice of the proposed disposition. If the creditor wishes to propose a surrender of collateral in full satisfaction of the debt, the debtor’s consent may be obtained not only by an affirmative signed writing but also if the debtor fails to timely object to the creditor’s written proposal. Conn. Gen. Stat. § 42a-9-620(c).

While accepting collateral in partial or full satisfaction of debt will generally not work in contentious situations, it may be a more expeditious matter of cleaning up junior liens if lender and debtor consent (and so long as other creditors do not actively oppose the transaction).
Tax Concerns

Those participating in liquidations outside of bankruptcy should always carefully consider tax ramifications. While a confirmed Chapter 11 plan may eliminate certain tax obligations associated with liquidation of collateral, the tax consequences may be slightly different outside of bankruptcy. In particular, equity owners of pass-through entities (limited liability companies and S Corporations) should carefully consider the potential tax consequences of any business liquidation.
Voluntary Dissolution of a Business Under Connecticut State Law
When a Business May Not Want to File for Bankruptcy

- Can’t get full support to survive a Chapter 11
- Owner can negotiate more in liquidating company than a bankruptcy trustee can
- Chapter 11 bankruptcy is administratively costly
- Personal guarantees of principal

If a company files for bankruptcy, its principal may remain on the hook for substantial liabilities

- Insiders' transactions
  - Loans or gifts
- Fraudulent transfers
- Liquidating a business by filing for bankruptcy might leave creditors with no option but to go after a guarantor's personal assets if the business doesn't have sufficient assets to cover liabilities

- Payments to officers and owners can be attacked
- No discharge of debts

When a business may not want to file for bankruptcy
Voluntary Dissolution of Limited Liability Company in Connecticut - C.G.S. § 32-267, et seq. (the “LLC Act”)

- The first step is to look to the company’s formation documents for any rules on how to approve dissolution.
  - Articles of organization and operating agreement occasionally will contain a section with rules for how to dissolve the LLC, e.g., requiring a vote of members with a certain percentage.
  - For either approach, make sure to record the decision to approve dissolution.

  - Affirmative vote, approval, or consent of a majority in interest of the LLC members.
  - Alternative method to voluntarily dissolve an LLC – C.G.S. § 34-243, et al.:
    - Unless the formation documents say otherwise, the LLC Act allows for an affirmative vote, approval, or consent of at least a majority in interest of the LLC members voting in favor of resolution requiring a vote of members, with requirement that certain percentage of members vote in favor of resolution.

The first step is to look to the company’s formation documents for any rules on how to dissolve the company.
Winding up an LLC – C.G.S. § 32-267a

The LLC Act provides certain winding up tasks:

- Distributing to the members any remaining LLC assets
- Discharging the LLC's liabilities; and
- Marshaling, disposing of and transferring the LLC's property
- Settling disputes by mediation or arbitration
- Settling and closing the LLC's business
- Administrative
- Prosecuting and defending lawsuits, whether civil, criminal, or administrative
Providing Notice of Known Claims Ag. the LLC

C.G.S. § 32-267c provides the procedural requirements for giving notice of known claims. A dissolved LLC may notify its known claimants of the dissolution.

The LLC can also publish the notice in newspapers, but this would give claimants 3 years to bring a claim. The notice to claimants must:

- Notify the claimant that the claim is barred if not received by the deadline.
- Provide the deadline by which the LLC must receive a claim, “which may not be less than [120] days after the date the notice is received by the claimant,” and [120] days after the date the notice is received by the claimant; and
- State that a claim must be (a) in writing; and (b) provide a mailing address to which the claim is to be sent;
- Describe the information that must be included in a claim;
- The LLC can also publish the notice in newspapers, but this would give claimants 3 years to bring a claim.

C.G.S. § 32-267c provides the procedural requirements for giving notice of known claims. A dissolved LLC may notify its known claimants of the dissolution.
When Are Claims Against an LLC Barred?

A claim is barred if the requirements above are not met, and:

1. The claimant commences an action against the LLC to enforce the claim not later than 90 days after the claimant receives the notice, and the claim is not rejected by the LLC, even if timely received.
2. If the claimant does not commence the action within 90 days after receiving the notice that its claims have been barred.

Note: this section doesn’t apply to a claim based on an event that occurs after the effective date of dissolution or a liability that is contingent on that date.
assets in liquidation and the claim can't be enforced against a member or transferee that received pursuant to this section, then the LLC's obligations to the claimant are satisfied, and the LLC can file an application for a determination of the amount and form of security to be provided. If a dissolved LLC provides security in amount and form as ordered by the court, including expert witness fees, and the LLC must pay the GAL's reasonable fees and expenses, A court may appoint a Guardian ad Litem to represent any claimants who are unknown, and the LLC must provide notice of the proceeding to the claimant. The LLC then has 10 days to provide notice of the proceeding to the claimant. Security isn't required for any claims that are reasonably anticipated to be barred. If a dissolved LLC provides security in amount and form as ordered by the court, pursuant to this section, then the LLC's obligations to the claimant are satisfied, and the claim can't be enforced against a member or transferee that received pursuant to this section, then the LLC's obligations to the claimant are satisfied, and the LLC can file an application for a determination of the amount and form of security to be provided. If a dissolved LLC provides security in amount and form as ordered by the court, including expert witness fees, and the LLC must pay the GAL's reasonable fees and expenses, A court may appoint a Guardian ad Litem to represent any claimants who are unknown, and the LLC must provide notice of the proceeding to the claimant. The LLC then has 10 days to provide notice of the proceeding to the claimant. Security isn't required for any claims that are reasonably anticipated to be barred. 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C.G.S. § 34-267e Court Proceedings for Contingent Claims –
Priority of Disposition of Assets – C.G.S. § 32-267f

1. Creditors, or make adequate provisions to pay them. This includes LLC members who are creditors (to the extent permitted by law) in proportion in which the members share in interim distributions.

2. All outstanding taxes

3. Unless otherwise provided in the operating agreement, any required interim distributions owed to current and former members, as well as any distributions due to disassociated members.

4. Unless otherwise provided in the operating agreement, any remaining distributions due to disassociated members.

For the return of their contributions to the LLC:

b) In proportion in which the members share in interim distributions.

a) For the return of their contributions to the LLC:

assets are distributed to members and former members:
After dissolution, articles of dissolution must be filed with the Commercial Recording Division of the Secretary of State. The articles include information about the dissolved LLC, including:

- Name of the LLC
- Reason for filing the articles of dissolution, e.g., majority vote of all members,
- Effective date of dissolution if other than the filing date, and
- After dissolution, articles of dissolution must be filed with the
Voluntary Dissolution of a Corporation – C.G.S. § 33-880, et seq. ("Corporations Act")

Similarly to CT's Limited Liability Act, CT's Business Corporation Act provides for voluntary dissolution of a corporation.

There are streamlined procedures for dissolving corporations that have not yet issued stock or yet started doing business.

See C.G.S. § 33-880 for specific notice provisions.
Dissolution by Board of Directors and Shareholder – C.G.S. § 33-881

Requirements:

- Board submits proposal to dissolve to the shareholders with 10 days advance notice of the proposed meeting to consider dissolution
- To each shareholder, whether or not entitled to vote notice of the proposed meeting to consider dissolution
- Board submits proposal to dissolve to the shareholders with 10 days advance notice

Must then provide notice of consent that states the corporation is dissolved

- Same as for LLC: make sure to record both the board’s proposal and the shareholders’ votes

Number of votes required to approve proposal depends on when corporation was formed, unless certificate of incorporation expressly provides otherwise:

- Jan. 1, 1997 or later: a majority of all votes entitled to be cast
- Prior to Jan. 1, 1997: 2/3's majority of all votes entitled to be cast

Page 35 of 59
Can avoid a formal shareholder vote at a meeting if shareholders entitled to vote on dissolution provide their written consent, in one of two ways:

1. If all shareholders entitled to vote provide their consent.
2. If permitted by certificate of incorporation, by the consent of only that majority of shares otherwise required under the Corporation Act when shareholders vote at a shareholder meeting:
   a. If simple majority for corporations formed in or after 1997, 2/3s majority for a corporation formed prior to 1997.

Dissolution by Board of Directors and Shareholders (cont.) – C.G.S. § 33-639(b)
Certificate of Dissolution

Certificate of dissolution should be filed with Commercial Recording Division of the Secretary of the State.

Not required by Corporations Act, but it’s a good idea to file the certificate to limit liability and terminate various filing requirements.

Need to provide:

- Name of corporation,
- Date dissolution was authorized, and
- Statement that the proposal to dissolve was properly approved by the shareholders in the manner required by the Corporations Act and certificate of incorporation.

Certificate of Dissolution of [Corporation Name]

Date of Dissolution: [Date]

Authorized by: [Authorized by]

Filed with: Commercial Recording Division of the Secretary of the State

Certificate of Dissolution
Winding Up a Corporation – C.G.S. § 33-384(a)

The Corporations Act provides that a dissolved corporation may not
carry on any business except the following tasks necessary to wind up
its affairs:

• Doing every other act necessary to wind up and liquidate its business and
  affairs

• Collecting its assets

• Disposing of properties that won't be distributed in kind to shareholders

• Discharging or making provision for discharging corporate liabilities

• Distributing remaining corporate property to its shareholders according to
  their interests

• Collecting its assets

and liquidate assets:

The Corporations Act provides that a dissolved corporation may not
Winding Up a Corporation (Cont.) – C.G.S. § 33-385

The first priority is to discharge liabilities, which includes paying business taxes and creditors.

Unlike other states, CT’s Corporations Act states that “No final liquidating distribution of assets shall be made to shareholders by a dissolved corporation before the corporation has obtained a statement or statements from the DRS and the administrator of the unemployment compensation law, indicating one of three things:

• Corporation has paid all taxes and contributions;
• Corporation wasn’t liable for any taxes or contributions; or
• Corporation has made adequate provisions for the future payment of any unpaid taxes and unpaid contributions as of the date of the agencies’ respective statements.
Notice to Creditors & Other Claimants –

While giving notice isn’t required by the Corporations Act, doing so will limit liability and allow corporation to make final distributions to shareholders.

C.G.S. § 33-886
Notice to Creditors & Other Claimants –

Notice to unknown, potential claimants can be published in a newspaper.

4. State that the claim will be barred if not received by the deadlines.
3. State the deadline, which may not be fewer than 120 days from the effective date of the written notice, by which the dissolved corp. must receive the claim; and
2. Provide a mailing address where a claim may be sent;
1. Describe the information that must in the claim;

Notice provisions are similar to the LLC Act:
When Will a Claim Be Barred?
C.G.S. § 33-886(c)

• A claim against a corporation is barred if:
  1. Claimant who was given written notice under C.G.S. § 33-885(b) doesn’t deliver the claim to the dissolved corporation by the deadline; or
  2. A claimant whose claim was rejected by the dissolved corporation doesn’t commence a proceeding to enforce the claim within 90 days from the effective date of the rejection date

• Just as for dissolved LLCs, this section doesn’t apply to a claim based on an event that occurs after the effective date of dissolution or a liability that is contingent on that date
If a dissolved corporation provides security in amount and form as ordered by the court, and the claim can’t be enforced against a member or transferee that received assets in liquidation, the claimant’s obligations to the claimant are satisfied.

The corporation then has 10 days to provide notice of the proceeding to the claimant.

Security isn’t required for any claims that are reasonably anticipated to be barred.

The corporation must pay the GAL’s reasonable fees and expenses, including expert fees.

A court may appoint a Guardian ad Litem to represent any claimants who are unknown.

If a dissolved corporation provides security in amount and form as ordered by the court, then the corporation is released from its obligations to the claimant, and the claim can’t be enforced against a member or transferee that received assets in liquidation.

This is a virtually identical process as for dissolved LLCs. If a notice was published in the newspaper, a dissolved corporation can file an application with Superior Court for a determination of the amount and form of security to be provided for contingent claims, claims that haven’t been made known to the corporation, or are based on an event that occurred after the effective date of dissolution.

Contingent claims, claims that have been made known to the corporation, or are based on an event that occurred before the effective date of dissolution, can be enforced against a dissolved corporation.

C.G.S. § 33-887a

Court Proceedings for Contingent Claims –
What Remains Unchanged by Dissolution –
C.G.S. § 33-384(b)

Dissolution of a Corporation

Does NOT:

- Transfer title to property of the corporation to the shareholders
- Render shareholders liable for corporation’s liabilities or obligations
- Terminate the authority of corporation’s registered agent
- Suspend a legal proceeding pending on the date of dissolution
- Prevent commencement of a legal proceeding by or ag. the corporation
- Prevent commencement of a legal proceeding pending on the date of dissolution
- Provide a different standard of conduct for directors or officers from those prior to dissolution
- Close the corporation’s share transfer records
- Prevent transfer of corporate shares (although the authorization to dissolve may provide for transfer of corporate property to shareholders)
- Transfer title to the business’s property

C.G.S. § 33-384(b)

Does NOT:
Practical Considerations for Dissolving a Business

Conflicts of interest may arise for an attorney representing a company. Individual principals, directors, shareholders, etc., could have breached their fiduciary duties to the business. Therefore could be fraudulent transfers.

What is the company's obligation in recovering those transfers or their value?

What is the attorney's role in advising the company when there are breaches of fiduciary duty, fraudulent transfers, or other matters with potential conflicts of interest?

When are the conflicts so substantive that you as the attorney representing the business need to take further action?
Practical Considerations for Dissolving a Business (Cont.)

• To whom does the business owe fiduciary duties?
  - The answer: it depends.

• A business does not have a duty to creditors even in the "zone of insolvency" if it is not insolvent.

• When a business is insolvent, the duties and responsibilities include:
  - Directors/members need to monitor when a business becomes insolvent.
  - All residual stakeholders — claimants, including creditors
  - When a business is insolvent, the duties and responsibilities include corporation's directors.
  - Insolvency

  • The answer: it depends.

  • A business does not owe fiduciary duties.

  • The answer: it depends.

  • To whom does the business owe fiduciary duties?

  • Insolvency

  • The answer: it depends.

  • A business does not owe fiduciary duties.
Practical Considerations for Dissolving a Business (Cont.)

Liquidating assets
- Bring in a third party to liquidate assets and obtain highest value

Distributing proceeds
- Once you liquidate the assets of a business, what do you do with the proceeds?
- Get a disbursing agent to handle final payments

Taxes
- Get an escrow agent to pay any taxes owed – Federal, state, employment, IRS

Terminating Retirement Plan

Requirements
- IRS Business Closing Checklist has required forms and links to additional


Alternatives for Winding Down Business: Receivership Proceedings

I. Introduction

Black’s Law Dictionary defines “receivership” as the state or condition of being in control of a receiver. In turn, a “receiver” refers to a third-party who is authorized to administer assets that are the subject of a dispute or a claim, including claims secured by liens or the subject of regulatory oversight. Receivers may be appointed by a court order, regulatory department action, or private agreement, and their powers vary as a custodian of the company's property, including its funds. Conventional wisdom holds that a receiver should only be appointed and a receivership proceeding commenced when the entity is insolvent and there is a concern that the assets are likely to be misappropriated or wasted; however, insolvency is not the exclusive basis for a receivership proceeding to be commenced.

Receivers are often appointed to wind down the affairs of the business entity, including liquidating the entity; however, the commencement of a receivership proceeding does not automatically trigger a dissolution of the business entity. In some instances, a receiver may be appointed to continue the business as a going concern.

II. State Court Receivership Proceedings in Connecticut

The typical commercial receivership proceeding is commenced by a creditor in federal or state court and authorized through a specific statute, contractual provision or, in certain circumstances, pursuant to a court’s equitable powers. In Connecticut, Attorneys Wesley W. Horton, Kimberly A. Knox and Dana M. Hrelic provide insightful analysis of Connecticut

2 Non-Bankruptcy Alternatives to Chapter 11 Restructurings and Asset Sales, Practical Law Practice Note Overview
3 Id.
4 Compare Conn. Prac. Bk. § 21-6 (providing that insolvent estates must be with liquidated) with Conn. Prac. Bk. § 21-11 (permitting the continuance of a business at four month increments)
5 Id.; see also Big Shoulders Capital LLC v. San Luis & Rio Grande Railroad, Inc. et al, 1:19-cv-06029 (D.N. Ill 2019).
receiverships under the Connecticut Rules of Practice (the Practice Book), the Connecticut General Statutes and receivership-related decisional law in Chapter 21 of the Connecticut Practice Series, portions of which will be recited herein with citation.

For avoidance of doubt, in Connecticut Superior Court, an application for a receiver in a civil action is considered under the court’s equitable authority, absent express statutory authority. By way of examples of express statutory authority, section 19a–543(3) of the Connecticut General Statutes permits a court to appoint a receiver for a nursing home that poses a threat to the welfare of its patients as a result of serious financial loss. Section 52-505 permits the selectmen of any town to “bring an application, in the name of the town, to the superior court for the judicial district in which the town is situated, for the appointment of a receiver of the property of the association, community or corporation and for other equitable relief [if] in the opinion of the selectmen… there is danger that the property will be lost or expended in any manner so that some of the members may become an expense to the town.” Sections 16-262f and 12-163a provide a different role of receivers in utility and municipal tax debt cases, in which the purpose of a receiver is not to protect the property, but to facilitate collection of the debt.

Without direct statutory authority, it has been long held that the power to appoint a receiver in state court is discretionary and should only be exercised when necessary.

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8 The authors, here, suggest review of the chapter as a great resource reference for statutory and common law direction related to receivership proceedings.
9 Id.
exercising its power of appointment, the state court is charged with inquiring as to “whether, considering all the circumstances, the affairs of the [business entity] should continue to be managed and wound up by those in control of it or, instead, it appears that those in control are so using their power that the property of the corporation should be taken over and administered under the discretion of the court.”12 The state court is also charged with determining “[t]he availability and adequacy of another remedy.”13 “If it appears that some expedient action or remedy, less stringent in effect than a receivership, will meet the situation, that course should be taken.”14

Receiverships generally are not intended to provide parties with an ultimate remedy, but rather a tool to effectuate “the administration and enforcement of a recognized equitable right.”15 The usual purpose of a receivership is to preserve and protect property pending the outcome of litigation.16 Once the state court determines that it has common law or statutory authority to appoint a receiver, the Connecticut General Statutes and the Practice Book provide general procedures that the court, court clerk, receiver and other parties in interest, including creditors, can utilize regarding the administration of the case, with some additional decisional law that provides guidance. In the end, however, a lot of procedure regarding the management and administration of a state court receivership is left to the imagination of lawyers and judges.

III. Federal Court Receivership Proceedings in Connecticut

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13 See Chatfield, 150 A. at 512.
14 Id.
16 Id.
Rule 66 of the Federal Rules of Civil Procedure and 28 U.S.C. § 3103 et seq., provide a procedural and statutory mechanism for a receivership to proceed in U.S. district court. It is important to note that the federal court would require diversity or federal question jurisdiction to preside over a federal receivership. The reach of a federal receivership proceeding is perceived as much broader than a state court proceeding because federal courts can empower receivers to act across state borders, wherever assets are located.\textsuperscript{17} As a result, if the debtor owns properties, including real estate, in jurisdictions outside of Connecticut, the U.S. district court is empowered to appoint a receiver to manage and/or preside over the disposition of property located in those jurisdictions.

The U.S. district courts also possess the power to sell assets to third parties through private or public sales, which obviate the creditor from taking possession of the secured collateral, as it might have to do through a traditional foreclosure procedure.

Finally, major creditors often have substantial input in the appointment of a federal receiver, who is, as in a state court action, viewed as an arm of the court.\textsuperscript{18}

\section*{Alternatives for Winding Down Business: Assignment for the Benefit of Creditors}

\subsection*{Introduction}

As an initial matter, it is important to note that Connecticut is one of eight states without a specific statute related to the Assignment for the Benefit of Creditors (ABC); however, because of its prevalence outside of the jurisdiction, the fact that many Connecticut practitioners practice

\textsuperscript{17}See 28 U.S.C. § 3103(b); 28 U.S.C. § 754.

\textsuperscript{18}See \textit{S.E.C. v. Hardy}, 803 F.2d 1034 (9th Cir. 1986); see also See 28 U.S.C. § 3103(a) (“a court may appoint a receiver for property in which the debtor has a substantial nonexempt interest if the United States shows reasonable cause to believe that there is a substantial danger that the property will be removed from the jurisdiction of the court, lost, concealed, materially injured or damaged, or mismanaged.”).
in multiple jurisdictions and because an ABC derives from the common law, the authors believe it prudent to provide information about the process here.

II. Nuts and Bolts of an ABC

An ABC is a common law or statutory alternative to a formal Chapter 7 bankruptcy proceeding. Through an ABC, a debtor's assets are marshaled and liquidated in an orderly fashion for the benefit of creditors of the debtor. As noted, supra, most states have adopted statutory provisions governing ABCs, which either provide for a court-supervised ABC or are conducted outside the court process. In many instances, an ABC can be an advantageous and efficient wind-down mechanism for a troubled business. As noted by one commentator, ABCs are particularly appealing in matters in which the goals are: “(1) to transfer the assets of the troubled business to an acquiring entity free of the unsecured debt incurred by the transferor and (2) to wind down the company in a manner designed to minimize negative publicity and potential liability for directors and management.”

Generally, an ABC is initiated by the troubled business (the Assignor) entering into a written agreement (the Assignment Agreement) with a third party (the Assignee), who will be charged with responsibility for orchestrating the liquidation and/or going concern sale, and ultimate winddown the Assignor. The Assignee assumes a fiduciary role for the benefit of the Assignor’s creditors. The Assignment Agreement, and the statutory provisions concerning same, require the Assignor to convey all of the Assignor’s right, title, interest in, and custody and

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20 See Kupetz, note __.
control of its property to the Assignee to hold in “trust.”21 In turn, the Assignee liquidates the conveyed property and makes distribution of the sale proceeds to the Assignor’s creditors.

In order to commence the ABC process, the Assignee generally will need both board of director authorization and shareholder approval, although the particular transfer stricture will be governed by applicable state law.22

III. Key Advantages of an ABC

An ABC may involve less administrative expense and likely will be a faster and more flexible liquidation process than a liquidation proceeding under the Bankruptcy Code. Moreover, unlike a Chapter 7 liquidation, in an ABC the Assignor selects an assignee with appropriate experience and expertise to conduct the liquidation and winddown of its Assignor’s business and assets. Indeed, the Assignee usually is involved in the ABC prior to the Assignment Agreement actually becoming effective, while in a Chapter 7 liquidation, the Chapter 7 trustee parachutes in after the Chapter 7 petition is filed. Further, in jurisdictions in which a court proceeding is not mandatory to effectuate the ABC, court procedures, requirements, and oversight are not involved. In comparison, in bankruptcy cases the judicial process is invoked and brings with it additional uncertainty and complications, including active participation by multiple constituents and stakeholders, who often are required to rely on the Bankruptcy Code and Bankruptcy Rules to implement their objectives.

From a buyer’s perspective, buying a going concern or specified assets from an Assignee should allow the purchaser to avoid being targeted as a transferee under a fraudulent transfer theory or subject to the Assignor’s unsecured debt. Rather, the Assignor’s creditors receive

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21 See Kupetz, note __.
22 See Kupetz, note __.
notice of the ABC and are required to file proofs of claim to the Assignee and receive
distributions, if any, from the proceeds of the ABC estate.23

From the perspective of a secured creditor, an ABC can eliminate the need for an Article
9 foreclosure proceeding and actually permit the secured creditor a say on who the Assignee may
be.

IV. **Key Disadvantages of an ABC**

Unlike a formal federal bankruptcy case, a sale of assets—even if authorized through a
court-supervised ABC—will not have the strength of a bankruptcy sale order entered under
section 363 of the Bankruptcy Code, free and clear of liens, claims and interests. Additionally,
executory contracts and leases cannot be assigned in an ABC without the consent of the
contract/lease counter party, even in the context of a court-supervised ABC. Accordingly, where
a deal is dependent on the assignment of key contracts and/or leases, and those contracts and
leases require consent as a condition precedent to assignment, an ABC transaction might not be
the best approach. Further, *ipso facto* default provisions (allowing for termination, forfeiture, or
modification of contract rights) based on insolvency or the commencement of the ABC are not
unenforceable as they are in a federal bankruptcy case.

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23 See Kupetz, note 19.
Alternatives for Winding Down Business: Delaware Statutory Trust.

I. Introduction

While Delaware is nationally known as the preferred jurisdiction for many business entities, it is equally well known as a leader in the area of statutory trusts. The State of Delaware adopted the original version of the Delaware Statutory Trust Act (the DST Act) in 1988, adopting its current name and form in 2002. A Delaware statutory trust can be used for the primary purpose of liquidating assets transferred to the trust for distribution to trust beneficiaries. Liquidating trusts can be effective tools to wind down any business enterprise, including entities that wish to wind down their business affairs outside of bankruptcy.

II. Summary of the Delaware Statutory Trust

The DST Act, similar to the Delaware LLC law, relies on the legal principle of freedom of contract, effectively granting the power to determine the rights and responsibilities of the various parties to the drafters of the governing instrument (the Trust Agreement). The Trust Agreement is a private, governing document of the trust entity (the Delaware Trust), is a contract enforceable under Delaware law, and will be enforced by its terms by the Delaware Court of Chancery.

The Trust Agreement may create various classes or groups of trustees and/or beneficial owners, and it determines the nature of distributions of the trust's assets for the benefit of the beneficial owners. Not surprisingly, the Trust Agreement may vest the Delaware Trust’s trustee (the Trustee) with powers ranging from very limited to very broad, and the Trustee may delegate its duties.

The DST Act provides that the Delaware Trust is a separate legal entity and no creditor of a beneficial owner has any right to obtain possession of any of the property belonging to the
trust. The DST Act also states that a beneficial owner has no specific interest in the property of the Delaware Trust, and the beneficial owner may not terminate the Delaware Trust except in accordance with the Trust Agreement. Thus, other beneficial owners of the Delaware Trust are protected against any beneficial owner filing for bankruptcy or divorce, or undergoing any major life change.

The DST Act also provides that beneficial owners may have the same limitations on personal liability for the entity as shareholders of a Delaware corporation. In other words, beneficial owners may participate in management, or effectively control the Delaware Trust by directing the trustees, without taking on any personal liability. Not unlike claims trading in cases filed under the Bankruptcy Code, the DST Act permits beneficial owners the right to transfer their interests to others, unless prohibited or limited by the Trust Agreement and, thus, transferability will be permitted by the courts unless specifically limited in the Trust Agreement.

III. Using the Delaware Statutory Trust as an Alternative to Bankruptcy

Business organizations that are dissolving may wish to use the Delaware Trust as an alternative to bankruptcy, an ABC, or a receivership for its winding-up process.
Joanna M. Kornafel is an associate at Green & Sklarz LLC in New Haven, CT. She represents individuals and clients with complex financial and litigation needs in a wide array of industries, such as healthcare, construction, horticulture, retail, and hospitality. Her practice focuses on civil litigation and commercial litigation matters, unfair trade practices, business torts, breach of contracts, debtor/creditor litigation, workouts, and bankruptcy litigation. Joanna has extensive experience handling all aspects of bankruptcies and workouts, representing secured and unsecured creditors, unsecured creditors’ committees, debtors, Chapter 7 bankruptcy trustees, and acquirers of businesses in Chapter 11 bankruptcies.

Joanna is actively involved in the Connecticut Bar Association. She serves as the Legislative Liaison for the Commercial Law & Bankruptcy Section and, until 2020, was a Senior Advisor for the Young Lawyers Section. She was recently selected as an ABA Business Law Fellow for the 2020-2022 term. Joanna sits on the boards of the International Women’s Insolvency and Restructuring Confederation (IWIRC) and the New England Bar Association (NEBA). She is also a member of the American Bankruptcy Institute.

Joanna received her B.A. with Honors from McGill University in Montreal, Quebec, Canada, and her J.D. from Boston College Law School. While in law school, Joanna was chosen for the London Study Abroad Program, where she interned in the General Counsel Division at the Financial Services Authority and attended classes at King’s College London.

Prior to attending law school, Joanna worked for several years for the global management consulting firm McKinsey & Company.
Kevin J. McEleny is a Shareholder in UKS’ Hartford office, practicing in the areas of creditor’s rights, bankruptcy and commercial litigation. Mr. McEleny couples his depth of technical knowledge in commercial law and bankruptcy with a passion for trial litigation. Combining these skillsets, Mr. McEleny endeavors to provide practical, business oriented advice to his clients in a cost effective manner.

Mr. McEleny regularly represents secured and unsecured creditors in United States Bankruptcy Courts. He has litigated a wide variety of contested bankruptcy matters to judgment, including confirmation of a creditor’s plan, approval of complex § 363 sales, determination of creditors’ debts, adversary proceedings and motions for relief from stay. Mr. McEleny also represents creditors in bankruptcy appeals.

Outside of bankruptcy, Mr. McEleny assists creditors liquidating collateral using state law remedies such as foreclosure, replevin and secured party sales under the Uniform Commercial Code. Sometimes, a negotiated workout will provide a better and more efficient recovery for a client. Mr. McEleny will creatively restructure deals utilizing forbearance agreements, amendments, additional collateral, stipulated judgments, and other appropriate tools designed to maximize recovery and avoid protracted litigation.

Mr. McEleny has experience working on complex litigation involving business disputes in a variety of fields and industries. He frequently represents and advises commercial landlords on leasing issues, evictions and collections. Mr. McEleny works with shareholders and privately held companies to resolve shareholder and partnership disputes. Mr. McEleny represents businesses and individuals in United States District Courts and various state courts litigating contract claims, business torts, real estate disputes and business insurance claims. Mr. McEleny has tried numerous civil cases through verdict and appeal.

Mr. McEleny is the Treasurer of the Hartford County Bar Association, the Secretary/Treasurer of the Connecticut Bar Association’s Commercial Law and Bankruptcy Section and is a co-chair of the Creditor’s Rights Litigation Subcommittee of the American Bar Association. He is a contributor to the preeminent treatise of Connecticut foreclosure law, Connecticut Foreclosures, by Denis R. Caron and Geoffrey K. Milne, Fifth and Sixth Editions, contributing to the chapter on bankruptcy law. Mr. McEleny was recognized as a Super Lawyers Rising Star in Connecticut, 2011-2020.
PATRICK M. BIRNEY

Patrick Birney co-chairs Robinson & Cole’s Bankruptcy + Reorganizations Group and is a member of the Business Litigation Group.

Corporate Restructuring & Creditors’ Rights

Since 1998, Patrick has focused his practice on complex transactional, litigation, and advisory work related to the debtor/creditor relationship, including restructurings, Chapter 11 bankruptcy cases, workouts and ‘pre-packaged’ Chapter 11 matters, and commercial finance. He has extensive experience representing secured and unsecured creditors, trustees, debtors, official and ad hoc creditors’ committees, and other parties in Chapter 11 restructurings, adversary proceedings, state court receiverships, and out-of-court workouts.

Patrick recently represented a global fuel oil supplier in its Chapter 11 case, including negotiation and confirmation of its plans, which included providing for a substantial distribution to creditors. He represented the senior secured lender in the successful Chapter 11 restructuring of an international toy manufacturer. He also represented the bondholders in the successful Chapter 11 restructuring of an assisted senior living facility and geriatric hospital.

Business Litigation

Patrick has a broad range of experience handling commercial litigation matters in state and federal courts, routinely representing businesses involved in contract disputes, fraudulent transfer, fraud, civil theft, and intercompany claims. He has represented businesses in the insurance, manufacturing, health care, distribution, logistics, shipping, energy, retail, and construction industries.

Patrick recently obtained summary judgment in the United States District Court for the Southern District of Texas on behalf of an international manufacturer regarding claims of breach of contract.

Pro Bono and Community Involvement

Patrick is committed to doing pro bono work and being actively involved in the community. He has participated in the firm’s Domestic Violence Restraining Order Program, which assists victims with obtaining restraining orders. He is on the Board of Directors for G.R.O.W.E.R.S., Inc., which provides
employment and educational opportunities for intellectually disabled clients, has previously served as president of the N.E.W. 34th Charitable Corp., an organization that helps fund civic and charitable causes in the New Haven, Connecticut area, and is a member of Compass Lodge No. 9, A.F. & A.M., receiving his 10-year pin in 2019.

Patrick has also been a member of the Connecticut Lottery Corporation’s Board of Directors, serving as the board’s vice chairperson and chairperson of the board’s Finance Committee. He has served as vice chairperson of the Wallingford Public Utilities Commission since March 2015, and prior to that served on the Wallingford Planning and Zoning Commission and Zoning Board of Appeals.

Patrick is a frequent lecturer and participant on educational panels related to bankruptcy, insolvency, commercial law, and creditors' rights. In addition, he is a frequent author and contributor to several national bankruptcy publications. To date, his articles have been cited by several judicial opinions, including In re Reichgott, 2013 WL 5492532 (Bankr. N.D.Ohio, 2013), and In re Kebe, 444 B.R. 871, 880 (Bankr. S.D.Ohio, 2011).

Patrick has been listed in The Best Lawyers in America® in the area of Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law since 2017.