

Bankruptcy Essentials For The Energy Lawyer And Commodity Trading Professional

Trading Law Primer Series

Houston, Texas
January 28, 2026

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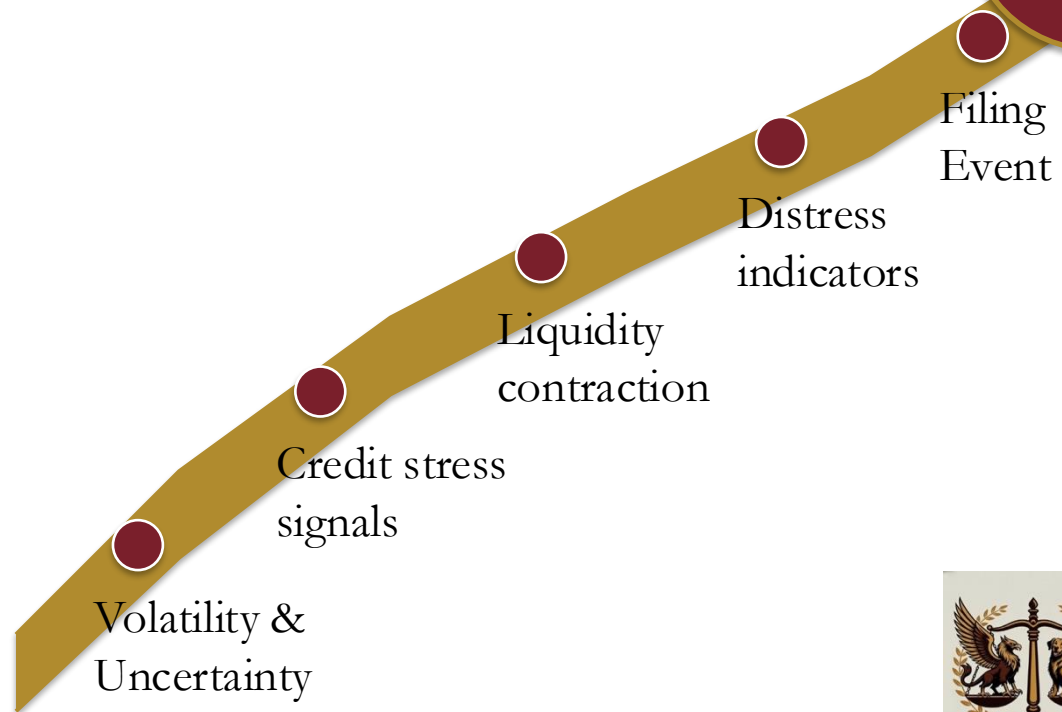
Topics for Today

- The Industry in 2026: Where are we and how did we get here?
- Counterparty Warning Signs
- Bankruptcy Primer
- Safe-Harbor Contracts
- Counterparty Credit Concerns
- My counterparty just filed! Now what?
- Key Issues and Pitfalls
- Back to the Future



WHERE WE ARE AND HOW WE GOT HERE

CHAPTER 11



Pressure builds. Options narrow. Decisions accelerate.

THE INDUSTRY IN 2026



Counterparty Deterioration — The Three Pillars

A high percentage of the largest U.S. bankruptcies have been energy companies — the same forces that compress the curve on Slide 1 drive failures across the sector.

Market Conditions

- Imminent warnings
- Energy-transition uncertainty
- Price volatility
- Counterparty credit exposure is central to risk management
- Energy contracts behave differently than executory contracts

Debt Stress

- RBL reserve valuation pressure
- Upcoming principal/interest payments
- Facility or bond maturity approaching
- Default risk increasing
- Covenant breach/default
- Forbearance negotiations
- Late or restated financials

Third-Party Actions

- RBL
- Credit rating downgrades
- Loss of credit insurance
- Loss of put markets
- Delisting notices
- Distressed-debt purchasers active

DEBT ISSUES

- RBL reserve valuations restrict availability
- Upcoming principal or interest payment on bond debt
- Upcoming maturity of bond debt
- Imminent expiration of loan facility
- Risk of upcoming bond default
- Covenant breach/default on loan facility
- Entry into forbearance agreement
- Late/restated financials

THIRD PARTY ACTIONS

- Downgraded agency credit ratings
- Loss of credit insurance
- Loss of market for puts
- Delisting notice from stock exchange
- Distressed debt purchasers on the prowl



Warning Signs Of Imminent Bankruptcy

- Sudden change of leadership (CFO or CEO)
- Sudden change in members of board of directors and adding independent directors
- Retention of chief restructuring officer/crisis manager
- Formation of ad hoc bondholder committee
- Retention of insolvency professionals, including new financial advisors
- Reports of negotiations with prospective chapter 11 lenders
- Bond default
- WARN Act



- Purpose of bankruptcy filing: Give the debtor “breathing room,” allow restructuring of debts and assets
- Automatic stay
 - Generally, actions against debtor (judicial and non-judicial) to collect debts, modify or terminate contracts, discontinue contracted-for services, pursue lawsuits, etc., are stayed automatically
- First-day motions
- Claims
 - Waterfall of distributions
 - Secured, unsecured, administrative expense, reclamation, 503(b)(9)



- Assumption and rejection
 - Executory contracts and unexpired leases
- Avoidance actions
 - Preferences: include potential to claw back legitimate payments to creditors
 - Fraudulent conveyances: provided by both bankruptcy law, and state law
- Safe-harbor exceptions
- Plan of reorganization and confirmation of plan (and timing)
- Claims trading



What Is A Chapter 11?

- Reorganization or rehabilitation of business
- Liquidating chapter 11
- Debtor's management generally continues absent serious malfeasance
- Creates debtor's bankruptcy estate:
 - All legal, equitable interests of debtor in property when case commenced; other property



- Bankruptcy filing stays virtually all creditor actions
 - Collect claims
 - Terminate agreements
 - Foreclose on collateral
 - Setoff
 - Commencing or continuing lawsuit
 - Enforcing judgment
 - Creditor can't stop doing business if otherwise bound by contract
 - Cannot demand payment of prior debts to continue performance



- Consequences of stay violation
 - Contempt of court/sanctions
- Generally, does not apply to actions against non-debtors
 - Drawing on a Letter of Credit
 - Making claim under guaranty



Numerous motions facilitate administration of Chapter 11 case:

- Administrative and procedural orders
- Payment of pre-petition payroll and employee benefits
- Financing: Debtor-in-Possession ("DIP") financing and/or use of cash collateral
- Special treatment for key pre-petition vendors
- Prohibiting utilities from altering, refusing, or discontinuing service (discussed later)



Critical Vendor Programs – goods/services

- Court approval authorizing debtor's early payment of claims of creditors deemed critical or "essential" to debtor's ongoing business/successful reorganization
- Quid pro quo: creditors receiving such payments must agree to extend post-petition credit and other terms – "no less favorable than pre-petition"

Post-petition delivery of goods/services for pre-petition contracts

- Administrative expense claim treatment
- Approved payment as ordinary course expense



- Administrative claim for the value of goods debtor received within 20 days of bankruptcy filing
- 20 day goods must be sold to the debtor in the ordinary course of debtor's business
 - No written reclamation demand required
 - No secured inventory lender defense
 - No "goods on hand" requirement
 - No solvency defense
- Safety net for trade creditors that supply goods, not services!
- Generally displaces reclamation claim remedy
- Often filed as proof of claim; sometimes by motion



Safe-Harbor Contracts



The "safe harbor" provisions for covered contracts are exceptions to the automatic stay (Code §§ 365(e), 541(c)(1)): upon bankruptcy default, non-Debtor counterparty can enforce contractual rights to

- Terminate, Liquidate or Accelerate
 - Code § 556 – Commodities or Forward Contracts
 - Code § 559 – Repurchase Agreements
 - Code § 560 – Swap Agreements
 - Code § 561 – Master Netting Agreements
- Off-set or net termination values/payment amounts, for covered contracts, MNAs



Non-Debtor counterparty also can enforce contractual rights to:

- Foreclose on collateral: Realization on pledged collateral securing swap agreements is permitted and exempted from stay, assuming the non-Debtor party has properly perfected its security interests
 - Code §§ 362(b)(6)&(7), 362(d)
- Defenses to avoidance: protection from preference/fraudulent transfer claims - Code §§ 546(e), (f), (g) & (j)
- Protections for Margin, Settlement Payments, transfers related to Swap Agreements and Master Netting Agreements
- BUT no protection from avoidance based on actual fraud



Safe-harbor Termination Rights



- The stay does ***not*** act as a bar to the following:
 - "the exercise by a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency of any contractual right (as defined in section [555](#) or [556](#)) under any security agreement or arrangement or other credit enhancement forming a part of or related to any **commodity contract, forward contract or securities contract**, or of any contractual right (as defined in section 555 or 556) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such contracts, including any master agreement for such contracts...." 11 U.S.C. § 362 (b) (6)
- Equivalent protections of collateral, security agreements, etc. for other safe-harbor contracts



- A “forward contract” means:
 - a contract (other than a commodity contract) for the purchase, sale, or transfer of a commodity, as defined in section 761(8) of this title, or any similar good, article, service, right, or interest which is
 - (A) presently or in the future
 - (i) the subject of dealing in the forward contract trade, or
 - (ii) the subject of recurring dealings in the forward contract trade,
 - (B) with a maturity date more than two days after the date the contract is entered into
- Bankruptcy courts have sometimes struggled with what qualifies as a forward contract.



- **What is a commodity contract? Potentially very broad**
 - Defined by contract category – at least 10 categories of examples of contracts, options, agreements, or transactions.
11 U.S.C. § 761
 - Such contracts qualify as commodity contract based on the status of the counterparty of the contract
 - For an FCM, an exchange-traded futures contract; for a leverage transaction merchant, a leverage transaction, etc.
 - E.g., a contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade
 - Also, foreign futures, leverage transactions, and commodity options

AND

- Any other contract, option, agreement, or transaction that is similar to a contract, option, agreement, or transaction referred to in this paragraph



But wait, there's more...

- Any option to enter into an agreement or transaction referred to in this paragraph
- A master agreement that provides for an agreement or transaction referred to in the definition
- Any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this paragraph (including guarantees or reimbursement obligations), but only up to an amount not exceeding the damages in connection with the related agreement or transaction
- If it walks like a duck, quacks like a duck, or perhaps once dated a duck in college, it may be a commodity contract with the underlying qualifying as a commodity



- Protect markets from systemic risk and effects of a bankruptcy of major financial institution
- Prevent "domino" effect in forwards and futures markets
- Prevent debtor party from "playing the market" by assuming or rejecting a swap based on market moves post-filing
- Prevent "cherry picking" of favorable swaps
- Need to exercise contractual rights fairly promptly
"Contractual rights" broadly defined in Code, but safe harbors do not provide independent rights



- Section 553 of the Code allows counterparties of the debtor to exercise existing setoff rights if certain conditions are met:
 - Mutual, Bilateral Obligations
 - Pre vs. Pre and Post vs Post
- What makes it mutual?
 - Agreement by multiple parties? No
 - Is it mutual as long it involves the same two parties? Not necessarily
 - The claim and debt must be held in the same right
- Do safe-harbor protections trump?
 - No. Despite broad language in Code, strict mutuality still required, and cross-affiliate setoff not allowed





Our termination calculation was safe-harbored —
about as safe as the tea during the Boston Tea Party.

Not Bankrupt Yet

- Once a supplier or customer files for bankruptcy, things get chaotic and some options are foreclosed
- Before the filing, you can still influence a number of issues that become more locked-in/static after debtor files
- To do so,
 - Keep your ear to the ground
 - Monitor credit exposure and collateral closely
 - Monitor payments made and payment due dates
 - Collect payments due! But be careful about making unusual demands
 - Gather executory contracts, transaction data, related documents
 - Evaluate whether to seek adequate assurances
 - Monitor potential contractual breaches prior to the bankruptcy
 - Generally advantageous to be out of the money to your counterparty, upon their bankruptcy



My Counterparty Filed! Now What??

- Information gathering (including documents, if not already done)
- Evaluate deliveries, payments, collateral demands, collateral, guaranties, and status of letters of credit
- Obtain valuation reports for positions
- Assess types of contracts – safe-harbored? – and contractual rights; evaluate potential courses of action
- Analyze impact of "first-day motions"
- Assess termination and valuation issues and methodologies
- Either file notice of appearance or set up alerts to obtain real time filings, because cases move fast and you can get railroaded



To determine your options, need to consider:

- Are the contracts at issue safe-harbor contracts?
 - Forward contracts (commodity), swap agreements, repos, securities agreements, futures, master netting agreements
- Are physical deliveries *en route*?
- Do I have product stored at debtor's facility?
- What is the contractual exposure – AR, AP, collateral and forward exposure? Setoff rights?
- Has a breach occurred and can I or should I terminate?
- Do I want to continue to do business with the debtor during bankruptcy?
- Are my choices limited by one of the first-day motions?



If decision is made to terminate:

- Analyze the contractual valuation methodology carefully
 - Sometimes, various contracts will contain different methodologies (e.g., 1992 ISDA vs. 2002 ISDA vs. NAESB), or fall under an MNA
 - Follow the contractual methodologies (whether you have a claim or owe an early termination payment)
- Document and retain support for the methodology used and steps followed; it may be important in negotiations with debtors
- Don't wait too long before terminating; if you do, it could be too late
- Follow contractual notice provisions strictly!



Questions?



Pivotal moments require strategic legal judgment, delivered when it matters.

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