



# Successorship, Bankruptcy and Mine Act Enforcement: When the Automatic Stay is not Automatic

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# Outline of Presentation

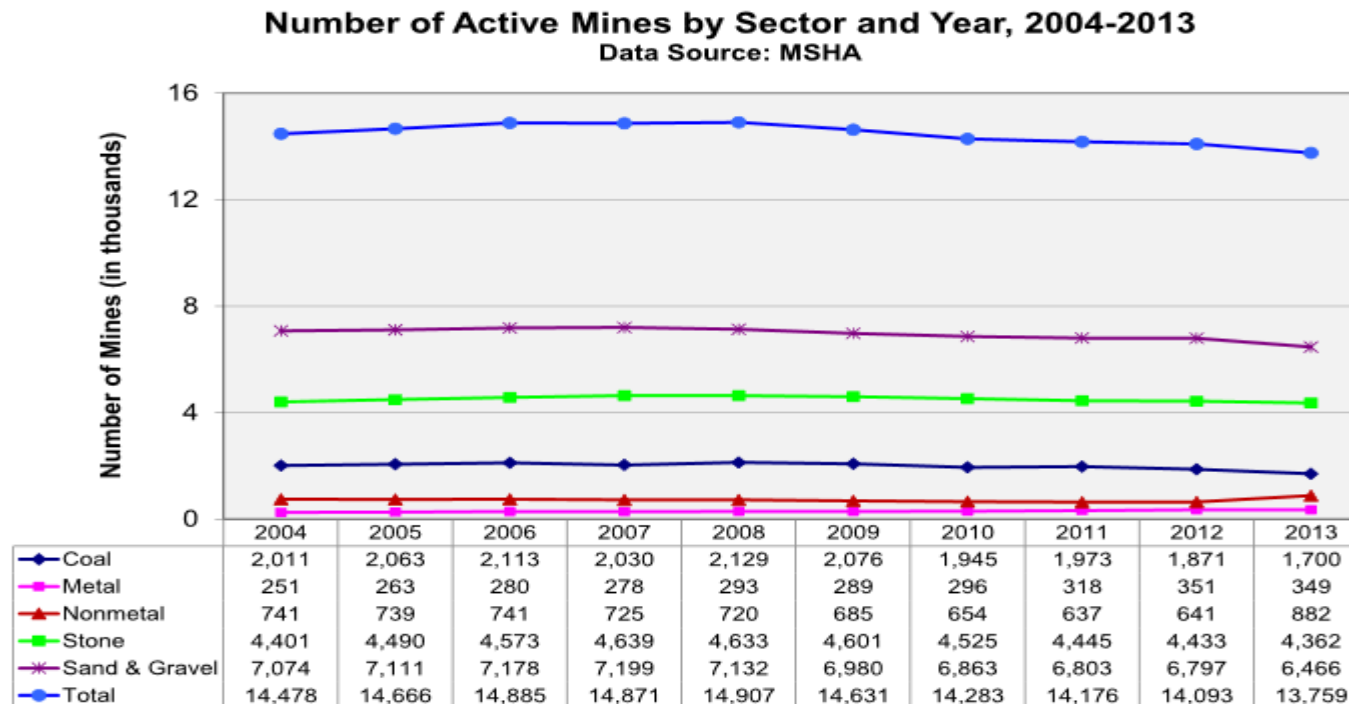
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1. Why are We Talking about This?
2. The United States Bankruptcy Code and its Purpose and Processes
3. The Automatic Stay (and Exceptions)
4. Successorship
5. ESH Considerations

### **Economics 101 - Supply and Demand – Shifting U.S., State and Local Policy Priorities**

- Slowdown in demand growth for commodities.
- Generally, however, supply remains robust.
- Supply surpluses are forecasted.
- As a result, commodity prices are being depressed.
- Majority of analysts are forecasting moderate at-best recovery in underlying metals prices over the next few years.
- Policy shifts not favorable to coal industry

# U.S. Mining Statistics, Then and Now



Note: Active mines are those mines that reported any employee hours during the year.

<http://www.cdc.gov/niosh/mining/UserFiles/statistics/13g04aaa.svg> (last visited Sept. 12, 2016).

# Energy and Mining Bankruptcy Statistics

## “2015 Bankruptcy Recap: 46% Increase Fueled by Oil & Gas/Mining Industry Analysts Predict Further Uptick”

[http://bankruptcydata.com/public/assets/uploads/pdf/PR\\_011216.pdf](http://bankruptcydata.com/public/assets/uploads/pdf/PR_011216.pdf)

“A gauge of contracts on the London Metal Exchange has slid 26 percent this year, the most since 2008, to near the lowest in six years. About 15 percent of copper production and a quarter of zinc output are unprofitable, while 60 percent of aluminum and 70 percent of nickel are supplied at a loss, according to Standard Chartered Plc.”

<http://www.bloomberg.com/news/articles/2015-12-03/why-bankruptcy-might-be-the-mining-industry-s-last-best-hope>

	2009	2010	2011	2012	2013	2014	2015
Number of Coal Mines	2,076	1,944	1,973	1,871	1,701	1,632	1,460
Coal Miners	134,089	135,500	143,437	137,650	123,259	116,010	102,804

<https://www.msha.gov/data-reports/statistics/mine-safety-and-health-glance>

# The U.S. Bankruptcy Code

- The Congress shall have power to “establish ... uniform laws on the subject of bankruptcies throughout the United States . . . .” U.S. Const. art. I, § 8.
- Each judicial district has at one bankruptcy court – 90 total nationwide.
- United States bankruptcy judges are judicial officers of the United States district court. Bankruptcy judge decides related matters, including a debtor’s bankruptcy eligibility and whether the debtor may discharge its debts.

- Congress enacted the "Bankruptcy Code" in 1978, codified as 11 U.S.C. §§ 101, et seq.
  - Uniform federal law that governs all bankruptcy cases.
  - Congress intended to give debtors "fresh start" and relief from burdensome debts.
  - U.S. Supreme Court: “[I]t gives to the honest but unfortunate debtor...a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.” *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934).
  - This goal is accomplished through the bankruptcy discharge, which releases debtors from personal liability from specific debts and prohibits creditors from ever taking any action against the debtor to collect those debts.

# The US Bankruptcy Code - Chapters

- Chapter 1 – Definitions and general provisions
- Chapters 3 and 5 – Concepts applicable to most chapters
- **Chapter 7 – Liquidation**
- Chapter 9 – Municipal
- **Chapter 11 – Reorganization**
- Chapter 13 – Wage earner
- **Chapter 15 – Ancillary cross border proceedings**



# Chapter 11 of Bankruptcy Code

- What is *Chapter 11* bankruptcy? Who are the Players?
- The Debtor
  - Filing for Chapter 11 bankruptcy creates an "estate"
  - Debtor in possession/fiduciary
  - Duties
    - File schedules and various reports
    - Operate the business in the ordinary course
    - Maximize value of estate and assets
    - File a plan of reorganization
  - "Fresh start" goal
  - Public policy behind maintaining existing debtor as debtor-in-possession

# Players in a Chapter 11 Case

- **Secured Creditor**

- Secured to the extent of the value of the collateral
  - Different treatment of secured and deficiency claims
- Must be adequately protected
- May be granted additional rights and protections if debtor in possession financing is provided
- Secured claims must be treated in specified manner in a plan of reorganization
- Secured creditors have more "control" than most other creditors in the Chapter 11 process

- **Unsecured Creditor**

- **Everyone Else**

# Chapter 15 of the Bankruptcy Code

- The United Nations Commission on International Trade Law (UNCITRAL) adopted the Model Law on Cross-Border Insolvency to harmonize procedures for cross border insolvencies. In 2005, Chapter 15 of the U.S. Bankruptcy Code was enacted to adopt the UNCITRAL Model Law.
- Chapter 15 is a mechanism for a foreign company in an insolvency proceeding abroad to protect its assets in the U.S. for the benefit of all its creditors, not just local creditors.

- The purposes of Chapter 15 are the following:
    - Provide effective mechanisms for dealing with cross-border insolvency.
    - Enhance cooperation between U.S. courts and foreign courts.
    - Provide greater legal certainty for trade and investment.
    - Provide fair and efficient administration that protects all creditors and interested parties, including the debtor.
    - Facilitate the rescue of financially troubled businesses to protect investment and preserve employment.
- See 11 U.S.C. § 1501(a).

## Eligibility Under Chapter 15

- The foreign proceeding must be a collective or administrative proceeding for liquidation or reorganization, including an interim proceeding, but not a receivership for the benefit of one party.
- The foreign proceeding must be governed by a law relating to insolvency or adjustment of debt.
- The foreign proceeding must be under the control or supervision of a foreign court. See 11 U.S.C. § 101(23).
- The debtor's eligibility requirements of section 109(a) of the U.S. Bankruptcy Code apply in cases under chapter 15, so the foreign debtor must reside or have a domicile, a place of business or property in the United States. *Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet)*, Case No. 13-612 (2d Cir. Dec. 11, 2013).

# The Automatic Stay: 11 U.S.C. § 362

- Most important bankruptcy protection
- Effect of automatic stay
- Exceptions for certain financial transactions and governmental police power
- Grounds for creditor to lift stay
  - 11 U.S.C. § 362(d)(1) – For cause, including lack of "adequate protection"
  - 11 U.S.C. § 362(d)(2) – Debtor has no equity in property, and it is not necessary for reorganization
  - 11 U.S.C. § 362(d)(3) – Special provisions for single asset real estate cases

# The Automatic Stay

- Pursuant to 11 U.S.C. 362(a), filing a petition with the Bankruptcy Court under the Bankruptcy Code stays the “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 . . . .”
- The filing of a bankruptcy petition, however, does not operate as a stay for certain types of actions listed under 11 U.S.C. § 362(b).
- The stay provides the debtor an opportunity to catch its breath, allowing negotiations to occur so as to resolve the debtor’s financial problems.

# MSHA Enforcement in this Context

- **General Rule: Automatic Stay Inapplicable in MSHA Enforcement Context.**
- Police-Powers Exception— may bring claims if ...acts within a governmental unit or agency's police or regulatory powers. (Bankruptcy Code, 11 U.S.C. § 362(b)(4))
- \*\*\* *“effectuate and enforce mandatory safety standards that implement the Mine Act,” see 11 U.S.C. 362(b)(4); thus, the automatic stay provision of the Bankruptcy Code does not operate to limit the Commission’s authority to order the requested relief. Hidden Splendor Resources, Inc., 35 FMSHRC 1548, 1550, 2013 WL 3759789 (June 6, 2013); see also Jim Walter Resources, 12 FMSHRC 1521 (August 20, 1990).*
- MSHA generally has authority under the police-powers exception to bring enforcement and whistleblower proceedings irrespective of a collateral bankruptcy proceeding.



# MSHA Enforcement in this Context

- Generally, Inspections, Investigations, Enforcement; Document Production Requests May Proceed.
- However, this does not necessarily apply in a collection action.
- Collections of unpaid penalties, however, will generally place the U.S. Department of Treasury as a General Unsecured Creditor, requiring the government to “Get In Line”
- What does this mean?

## ■ Bankruptcy

### ■ Asset sale agreement –

- typically purports to allow the purchaser of mining assets (not liabilities) from a bankruptcy estate to take control of substantially all mining assets from the estate “free and clear of . . . all claims as defined in section 101(5) of the Bankruptcy Code (11 U.S.C. § 101(5)), including all rights or causes of action . . . , obligations, demands, restrictions, indemnification claims or liabilities relating to any act or omission of the debtors prior to the Closing.”

- **SALES ARE TYPICALLY FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES AND INTERESTS.**

- Bankruptcy cont.

- Liability Provisions

- Bankruptcy Court Orders approving asset sales from a Bankruptcy estate (e.g., Ch. 11 and 15) frequently contain explicit language allowing the purchaser to take control of substantially all mining assets from the bankruptcy estate “**free and clear of...all claims** as defined in section 101(5) of the Bankruptcy Code (11 U.S.C. § 101(5)), including all rights or causes of action..., obligations, demands, restrictions, indemnification claims or liabilities relating to any act or omission of the debtor prior to the Closing.”
      - **Yet courts have found that “successor liability” can exist in certain situations.**

- Beyond Bankruptcy

# Nine-Factor Successor Test

- Courts and FMSHRC use a **nine-factor test** to determine whether an entity is a successor in interest to a mining operation or simply a new owner of the formerly owned mining assets in a court proceeding:
  - (1) whether the successor company had notice of the charge,
  - (2) the ability of the predecessor to provide relief,
  - (3) whether there has been a substantial continuity of business operations,
  - (4) whether the new employer uses the same plant,
  - (5) whether he uses the same or substantially the same work force,

# Nine-Factor Successor Test

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- (6) whether he uses the same or substantially the same supervisory personnel,
  - (7) whether the same jobs exist under substantially the same working conditions,
  - (8) whether he uses the same machinery, equipment and methods of production, and
  - (9) whether he produces the same product.
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- See *Sec'y of Labor on behalf of Zambonino v. Colonial Mining Materials*, 36 FMSHRC 1239 (May 2014) (ALJ) (citing *Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463, 3465-66 (Dec. 1980), *aff'd* in relevant part sub nom., *Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir. 1983.)

- As to a Distressed Company Pre-petition:
  - ESH compliance is mission critical.
    - As we know, MSHA can issue withdrawal and closure orders for actual or perceived violations with little process, ceasing or hindering operations and thus cash flow with potentially devastating effects for distressed companies.
  - Ensure all permits are in order.
    - Align permit holder information with organization, so that if permits/authorizations are held in different parties (because transfers were not correctly done or company organization has changed and permits have not been updated) and eliminating guarantors, if possible.

- Distressed Company Pre-petition cont:
- Conserve cash flow but not by scrimping on ESH Processes and Compliance.
  - Catastrophes such as explosions, fires and other serious accidents that can cripple operations, generally also cause irreparable harm to employees and/or the public, company assets and cash flow, often resulting in debtor company defaulting on obligations.

- Post-petition

- Automatic stay is generally inapplicable.
- In most cases ESH agencies have authority under the law enforcement exception to the automatic stay to pursue these matters as enforcement actions notwithstanding any bankruptcy proceeding.
- Whistleblower actions are also costly and can be disruptive to debtor's ongoing operations.



- Successors (Bankruptcy and Beyond)

- Effects of NO automatic stay
- Incurring predecessor liabilities
- The D-Chain and POV
- MSHA's perceptions and inspections

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Peter Gould, managing partner of Squire Patton Boggs' Denver office, works closely with federal and state regulatory agencies, the private sector and nongovernmental organizations to assist clients with matters involving administrative law, government investigations, litigation and dispute resolution and public policy.

Peter advises clients in a variety of areas, including energy, natural resources, environmental and industrial health and safety, where he frequently represents employers in enforcement and whistleblower actions. He also provides crisis management counsel and helps devise regulatory and legislative strategies for clients.

He advises entities doing business worldwide and provides representation nationally in litigation before federal and state courts and agencies, as well as in domestic and international arbitrations.

As counsel to a variety of nongovernmental organizations on issues of governance, compliance, liability and dispute resolution, Peter also assists clients in establishing their international presence.

During law school, Peter worked as a law clerk at the U.S. Environmental Protection Agency and the U.S. Attorney's Office for the District of Maine.

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Matthew Cooper utilizes his unique prior experience as a federal government trial attorney and boutique employment firm litigator to provide pointed advice to employers dealing with environmental, safety and health (ESH) issues and general employment matters.

Matt's ESH practice consists of helping employers navigate regulatory inspections, investigations, accidents, and other crises management, as well as litigating a wide array of government enforcement actions, including both MSHA and OSHA.

As an employment attorney, he also litigates and counsels employers on a comprehensive range of workplace matters, including wage and hour compliance, agency audits and investigations, employment agreements, policy drafting and implementation, and discrimination, retaliation, and whistleblower claims.