



Bankruptcy Chapter 11 Nuts and Bolts
Tuesday, October 20, 2026
DSBA
Agenda

8:30 a.m. – 9:00 a.m. – Registration and Check In

9:00 am – 10:00 am: Introduction to Bankruptcy

This session will provide an overview of chapter 11 bankruptcy, including a brief history of United States bankruptcy law, an overview of the current statute (the Bankruptcy Code), and the role of various parties in a bankruptcy case and the bankruptcy estate.

Speakers:

S. Alexander Faris, Esq. | Young Conaway Stargatt & Taylor, LLP
Laurel D. Roglen, Esq. | Ballard Spahr LLP

10:00 am – 10:10 am: Break

10:10 am – 11:10 am: The Bankruptcy Case

This session will discuss filing a bankruptcy case, first day relief, operating and financing the business in bankruptcy, retention of professionals, chapter 5 causes of action, assumption and rejection of contracts and leases, and restructuring options, such as a section 363 sale of the entire business and plan of reorganization.

Speakers:

Sophie Rogers Churchill, Esq. | Morris, Nichols, Arsht & Tunnell LLP
Stacy L. Newman, Esq. | Cole Schotz P.C.

11:10 am – 11:20 am: Break

QR Code for Materials is on the Back Page



11:20 am – 12:20 pm: Current Issues in Bankruptcy

This session will discuss current issues and hot topics in chapter 11 bankruptcy cases.

Speakers:

Gregory J. Flasser, Esq. | Potter Anderson & Corroon LLP

Bruce Grohsgal, Esq. | Widener University Delaware Law School

This seminar offers 3.0 credits to Delaware and Pennsylvania Attorneys; 3.6 credits to New Jersey Attorneys.



Materials

Bankruptcy Chapter 11 Nuts and Bolts
Tuesday, October 20, 2026 - 9:00 AM

Laurel Roglen is a partner in the Wilmington, Delaware office of Ballard Spahr LLP. Laurel focuses her practice on corporate bankruptcy and restructuring, commercial bankruptcy, and workout and restructuring matters. She represents debtors in Chapter 11, Chapter 9, and Chapter 15 bankruptcy proceedings, as well as commercial retail landlords, trade vendors, purchasers of assets through section 363 sales, and commercial parties in bankruptcy-related litigation. Laurel is ranked individually for her Bankruptcy/Restructuring Practice in Delaware by *Chambers USA*, for Bankruptcy Litigation and Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization by *The Best Lawyers in America*, as a Next Gen. Partner for Municipal Restructuring by *Legal 500*, and was an American Bankruptcy Institute's "40 Under 40" List honoree for 2025.

Alex Faris is an insolvency and restructuring attorney at Young Conaway Stargatt & Taylor. He advises debtors, creditors, investors, purchasers, and other stakeholders in distressed transactions, chapter 11 proceedings, and other insolvency-related matters. Alex's practice includes asset sales, restructuring transactions, bankruptcy litigation, and other issues that financially distressed entities may face.

Stacy Newman is a partner in the bankruptcy and corporate restructuring group of Cole Schotz with extensive experience representing a wide range of stakeholders, including corporate debtors, official and unofficial committees, liquidating trustees and acquirers of distressed assets in chapter 7 and chapter 11 proceedings. Stacy serves as a mentor to law school students attending Wilmington University School of Law and a guardian ad litem for children in foster care. Stacy is currently the Chair of the DSBA Bankruptcy Law Section. Stacy is included on IFLR1000's list of prominent Delaware restructuring and insolvency attorneys where she is featured as a Notable Practitioner and has been recognized as an Up-and-Coming individual for her bankruptcy/restructuring practice by *Chambers USA*.

Sophie Rogers Churchill is an Associate in the Bankruptcy & Restructuring group of Morris, Nichols, Arsht & Tunnell LLP. Sophie's practice focuses primarily on representing debtors in complex chapter 11 proceedings. She works closely with fiduciaries and other advisors throughout all stages of a restructuring, from prepetition planning and first-day relief through asset sales, plan confirmation, appeals, and post-effective date administration. She has represented chapter 11 debtors in a range of industries, including most recently FlexShopper, LLC (consumer retail financing), Spirit Airlines (commercial aviation), Mosaic Companies, LLC (materials sourcing and distribution), Fisker, Inc. (automotive), Big Lots (retail) and Boys Scouts of America (non-profit, mass tort).

Bruce Grohsgal is the Helen S. Balick Professor in Business Bankruptcy Law at Delaware Law School, Widener University, where he teaches bankruptcy and other commercial law courses and is the Director of the Delaware Institute of Corporate and Business Law. At Delaware Law School he was awarded Douglas Ray Faculty Scholarship Awards in 2018 and 2022 and the Outstanding Faculty Award in 2017 and 2025. Professor Grohsgal joined the Delaware Law School faculty from Pachulski Stang Ziehl & Jones in Wilmington, Delaware, where he practiced business bankruptcy law, representing Chapter 11 debtors, trustees, and creditors' committees. His recent

articles are *Working to Make Bankruptcy Work: The First Hundred Years of the National Conference of Bankruptcy Judges – Part I*, 100 Am. J. Bankr. L. 1 (2026); *Working to Make Bankruptcy Work: The First Hundred Years of the National Conference of Bankruptcy Judges – Part II*, 100 Am. J. Bankr. L. 189 (2026), and *A Brief History of Third Party Releases under the Bankruptcy Code*, 36 W. Legal Hist. 215 (2026).

Gregory Flasser is an associate in the General Litigation Group of Potter Anderson & Corroon LLP. He focuses his practice on representing corporate debtors, secured and unsecured creditors, trustees, official committees, asset purchasers, and other significant parties in various bankruptcy court proceedings. While in law school, Greg served as a judicial extern to the Honorable Kent A. Jordan of the United States Court of Appeals for the Third Circuit.



Delaware State Bar Association

Bankruptcy Section

**Bankruptcy Nuts and Bolts:
A Primer for Bankruptcy Cross-Training
October 20, 2026**

**Part 1 – Introduction to Chapter 11 Bankruptcy
Laurel D. Roglen, Ballard Spahr
Alexander Faris, Young Conaway Stargatt & Taylor**

9:00 – 10:00 a.m.

Why Bankruptcy?

Credit fuels developed economies

- But what happens when a company or an individual cannot (or simply refuses) to pay?
- What should the law do with respect to these debts, the debtor (the person who owes the debt), and the creditors (the persons to whom the debts are owed)?
- Bankruptcy addresses these questions
- Bankruptcy is the law of economic failure and revival

What You Will Learn in This CLE Program

- How a Chapter 11 bankruptcy case is commenced
 - By a debtor filing a voluntary petition, or by the filing of an involuntary petition by creditors against a debtor
- How the debtor and its property are protected
 - By the automatic stay pending the resolution of the bankruptcy case
 - The automatic stay stops actions against estate property and actions in non-bankruptcy courts to collect pre-bankruptcy (“prepetition”) claims

What You Will Learn in This CLE Program

- How bankruptcy law alters state law and non-bankruptcy law during the debtor's bankruptcy case, thus enabling the debtor's reorganization and “fresh start”
- The fundamental elements of Court supervision of the debtor or trustee – When a Court order is required and when it is not

What You Will Learn in This CLE Program

- The law by which the debtor can restructure its debts and obligations, including by selling its operating business or confirming a Court-approved Chapter 11 plan, assuming and assigning or rejecting unexpired leases and executory contracts
- The pleadings and objections that are key to the restructuring and the resolution of the debtor's bankruptcy case

What You Will Learn in This CLE Program

- The requirements for a sale of the debtor's business or other property of the estate and the effect of the sale
- The elements of a Chapter 11 reorganization plan
- Professional responsibility in a bankruptcy case

What You Will Learn in This CLE Program

- Sessions 1 and 2 of this program will focus on the fundamentals of Chapter 11 and bankruptcy generally
- Session 3 of this program will focus on current “hot topics” in business bankruptcy law, both Chapter 11 and Chapter 15, which is the chapter of the Bankruptcy Code that governs international business bankruptcy cases

Why Bankruptcy?

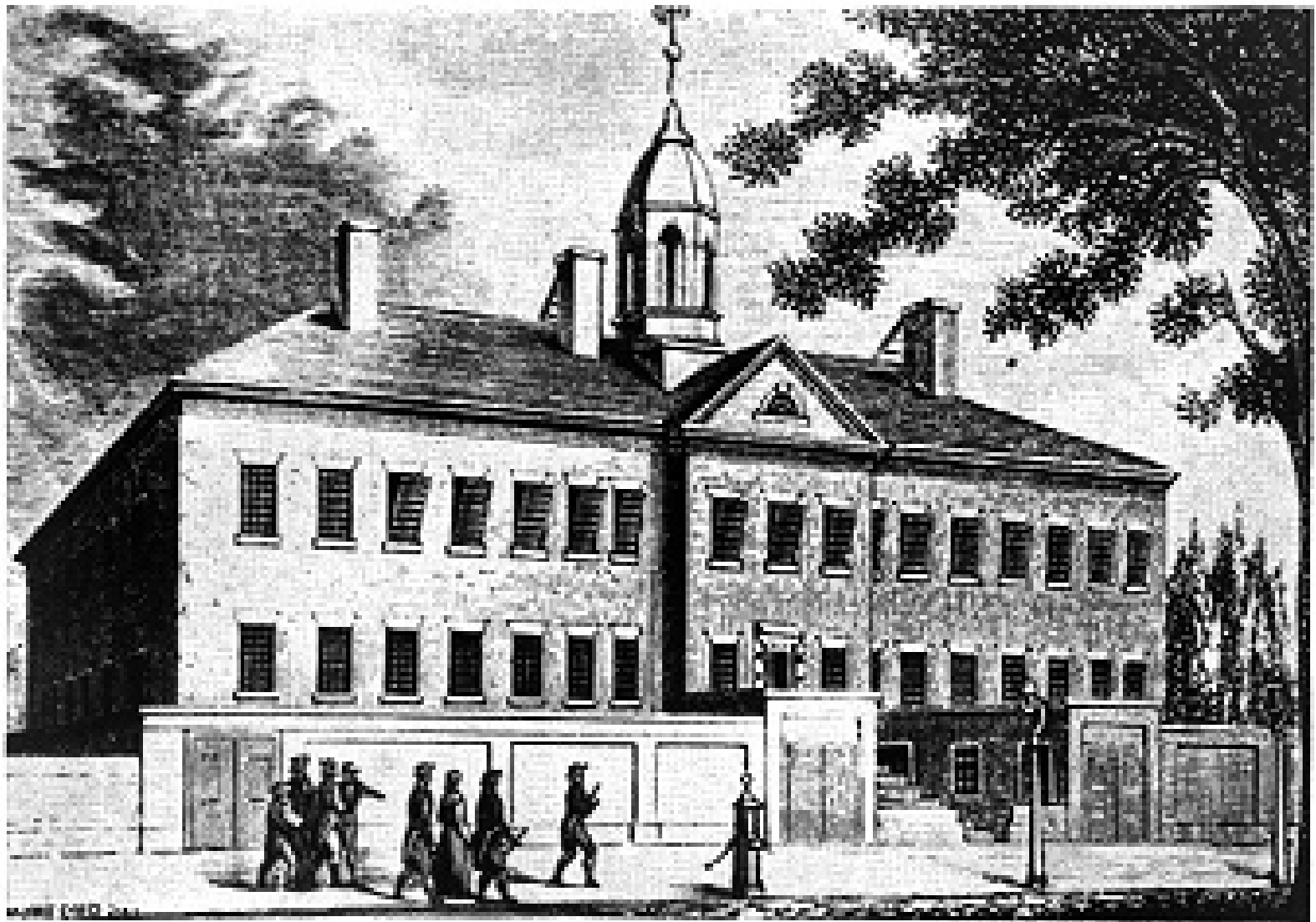
- Bankruptcy cases are generally the largest part of the federal civil court docket
- Bankruptcy case filings (592,000 for year ending March 31, 2026) exceed the sum of all non-bankruptcy federal case filings, civil and criminal combined (443,000 for same period), and significantly exceed federal civil case filings
- Include both *Lehman Brothers* and *Washington Mutual* – corporate assets of nearly \$700B and \$300+B, respectively (though most are no asset consumer cases)
- USBJs (approx. 345 authorized)
- USDJs (approx. 670 authorized)

U.S. Bankruptcy Law

- United States Constitution (ratified 1789) – Article 1, Section 8, Clause 4 – Congress has the power (but is not required) to establish uniform laws on the subject of bankruptcies throughout the United States
- Congress rarely exercised its power to enact bankruptcy laws until 1898

Early U.S. Bankruptcy Law

- State insolvency and bankruptcy laws prevailed during the 1800s
- For much of that period, a debtor that did not pay his or her debts could be confined indefinitely in a debtors' prisons (i.e., images which follow, of Prune St., part of Walnut St. in Phila., and Accomac, Va.) until the debt was repaid or the creditor relented



Walnut Street Jail, southeast corner, Sixth and Walnut Sts.

Debtor's Prison (1824-1849)

Accomac, Virginia



U.S. Founders Jailed for Debt 1790s

James Wilson (Drafter U.S. Const./S. Ct. Justice) and Robert Morris (“Financier of the Revolution”)



Early U.S. Bankruptcy Law

- State bankruptcy laws that discharge a debtor from debt often run afoul of the Contracts Clause of the United States Constitution
- A state statute that affects debts or contracts in effect when the statute became effective is “a law impairing the obligation of contracts” and thus violates the Contracts Clause. *Ogden v. Saunders*, 25 U.S. 213, 273 (1827) (citing *Sturges v. Crowninshield*, 17 U.S. 122 (1819))
See U.S. Const. Art. I, Sec. 10, Clause 1

Early U.S. Bankruptcy Law

- In 1898, the Bankruptcy Act, enacted following the financial panic of 1893, became law, hastened by the “closing of the frontier” and the end of “Gone to Texas” (“GTT”)
- A federal bankruptcy statute has been in effect since that time
- Key aspect of a bankruptcy proceeding for an individual debtor was and is the “fresh start” arising from the discharge from most debt
- U.S. bankruptcy law did not provide for business reorganizations

Reorganizations

- 1930s legislation recognized new social economic concept of reorganization and rehabilitation (under the authority of a Court-appointed trustee) of the debtor and its business as a going concern, instead of ending the business and liquidating, with consequent loss to creditors, employees, and public
- 1930s legislation also enacted enabled municipal bankruptcies and Chapter XIII for consumer wage earner plans (today's Chapter 13)

Reorganizations

- 1978 Bankruptcy Code Chapter 11 replaced the trustee with the debtor-in-possession, meaning directors and officers remain in charge. The theory is that existing management is best-equipped to operate, maximize value, restructure, and reorganize.
- Ended requirement that debtor be insolvent
- 1978 Bankruptcy Code also facilitated the assumption and assignment of executory contracts and, in Chapter 11, the “cramdown” and restructuring of secured debt

Bankruptcy Policy

Congress and the Supreme Court have long recognized that the purposes of bankruptcy law include

1. Maximizing value and distributions to creditors
2. Preserving enterprises as going concerns
3. Ordered distributions to creditors
4. Providing a debtor with a “fresh start” by a discharge from most debt

Chapter 11

1. Commencing the Voluntary Case
2. The Automatic Stay
3. Debtor in Possession (DIP) – What Requires Court Approval and What Does Not
4. Property of the Estate
5. The Absolute Priority Rule

Chapter 11

6. The Structure of the Bankruptcy Code and the Bankruptcy Court's Jurisdiction and Authority
7. First Day Orders, Cash Collateral, DIP Financing, and the Early Days of the Case
8. Restructuring the Debtor
 - a. Executory Contracts
 - b. Sale of the Business
 - c. Avoiding Unperfected Liens and Other Avoidance Actions
9. Claims and Distributions
10. Chapter 11 Plan Confirmation

Commencing the Voluntary Bankruptcy Case

- The “voluntary petition” is a form document that is completed and signed by the debtor (and, often, its counsel)
- Petitions typically are filed electronically
- The forms of voluntary petition are available at <https://www.uscourts.gov/forms/>
- In the voluntary petition that the debtor files to commence its case, the debtor can select the kind of bankruptcy case it is filing (i.e., Chapter 7, 9, 11, 12, 13 or 15) provided the debtor is eligible to be a debtor under that chapter of the Bankruptcy Code (see Diagram 1-1 and § 109)

Commencing the Voluntary Bankruptcy Case

- Most persons and entities other than banks and insurance companies are eligible to be a debtor in a Chapter 11 case (§ 109)
- The decision whether to file for bankruptcy is made by the corporation's board of directors or the LLC's members (or an individual for an individual filing)
- The debtor is not required to be insolvent to be eligible to file a voluntary bankruptcy petition or be in bankruptcy under U.S. law

Venue – Where Can the Debtor File?

- A bankruptcy case is filed in a U.S. bankruptcy court
- There are 94 U.S. bankruptcy courts in the United States (one for each U.S. district court)
- Most of these courts (including Delaware) have more than one judge
- Venue is proper in a district (1) in the state of formation, (2) in which the company has its principal place of business, (3) in which the company has its principal assets, or (4) in which an affiliate's case is pending (28 § U.S.C. 1408)

Change (Transfer) of Venue

28 U.S.C. § 1412 – Change of venue

A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties.

What Happens on the Filing of the Voluntary Petition?

- Prepetition debts generally cannot be paid without Court approval
- Bankruptcy Court Supervision – A Court order is required for certain actions (i.e., sales and borrowings out of the ordinary course of business, retention and payment of counsel), though a Chapter 11 debtor can continue to operate in the ordinary course of business without Court approval
- Bankruptcy estate is automatically created, consisting of nearly all of the debtor's property (no assignment or transfer is required)
- Automatic stay goes into effect automatically (no Court order is required)

Voluntary and Involuntary Petitions

- Most bankruptcy cases are commenced by the debtor's filing a voluntary petition
- A bankruptcy case can also be commenced by creditors filing an involuntary petition against the debtor
- Very few involuntary cases are filed

Why Few Involuntary Petitions?

- A debtor can “controvert” (i.e. object), and if the debtor succeeds (including because the debtor is generally paying its debts as they become due), the petitioning creditors are liable for actual and punitive damages
- Until the Court determines a debtor’s objection, the automatic stay is in effect, yet in most cases, the debtor can continue to act without Court supervision

Involuntary Bankruptcy Filing – Debtor Heaven



Automatic Stay – § 362(a)

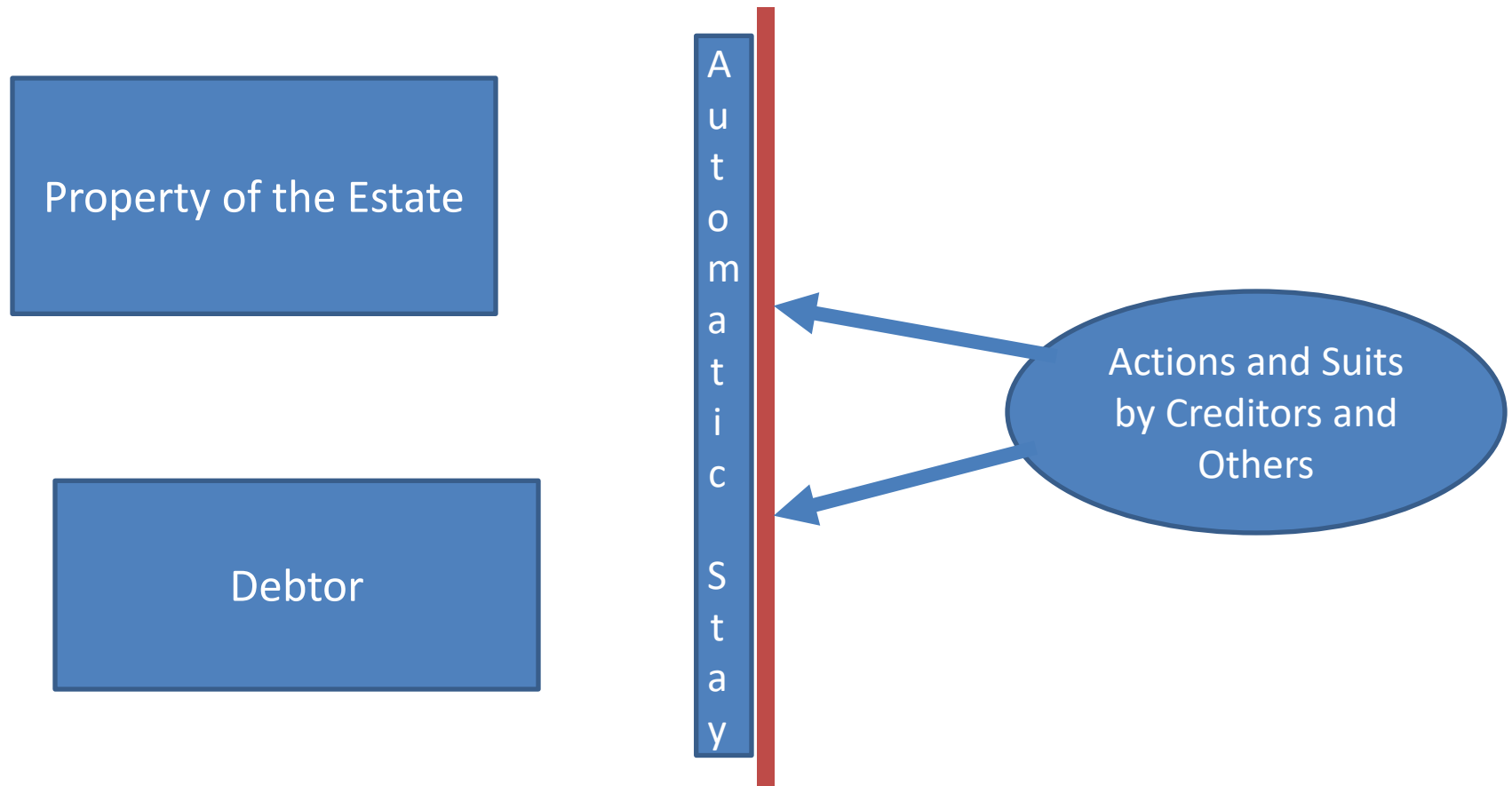
Automatic stay is key to orderly distribution under U.S. law. The filing of a petition stays any action to collect on a prepetition claim, or against property of the estate.

(1) the commencement or continuation of a proceeding against the debtor that was or could have been commenced pre-bankruptcy, or to recover a claim against the debtor that arose pre-bankruptcy

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained pre-bankruptcy

(3) any act to obtain possession of property of or from the estate or to exercise control over property of the estate

Back to Basics – Property of the Estate, the Debtor, and the Automatic Stay



Automatic Stay – § 362(a)

Why is there an automatic stay in bankruptcy?

- Gives DIP/trustee/estate a breathing spell
- Preserves estate for orderly distribution and, in Chapter 11 reorganization, by protecting estate property from actions of individual creditors

Automatic Stay – § 362(a)

- Exceptions to the automatic stay – Primarily police powers, such as governmental enforcement actions for ongoing violations (§ 362(b))
- Special rule for single asset real estate cases (§§ 101(51B), 362(d)(3))

Stay relief granted unless debtor:

Has filed a plan (1) within 90 days or 30 days after Court's determination that it is a single asset real estate debtor, whichever is later, that (2) has a reasonable possibility of being confirmed within a reasonable time; and

Has commenced making interest payments on the mortgage (i.e., the secured claim securing the property)

Violation of the Stay – § 362(k) (formerly § 362(h))

(k) (1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages

(2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages

Violation of the Stay – § 362(k)

- “Although Section 362(h) [now 362(k)] refers to an individual, the section has uniformly been held to be applicable to a corporate debtor.” *In re Atlantic Business and Community Corp.*, 901 F.2d 325 (3d Cir. 1990)
- Courts that have more strictly construed § 362(k) to preclude application to a corporate debtor still have penalized the person who willfully violated the stay by use of Court’s inherent or other sanction powers

Violation of the Stay – § 362(k)

In re Atlantic Business and Community Corp., 901 F.2d 325 (3d Cir. 1990)

- “A ‘willful violation’ does not require a specific intent to violate the automatic stay. Rather, the statute provides for damages upon a finding that the defendant knew of the automatic stay and that the defendant’s actions which violated the stay were intentional.”

Automatic Stay – Creditor's Rights

Does a creditor have rights regarding its claim?

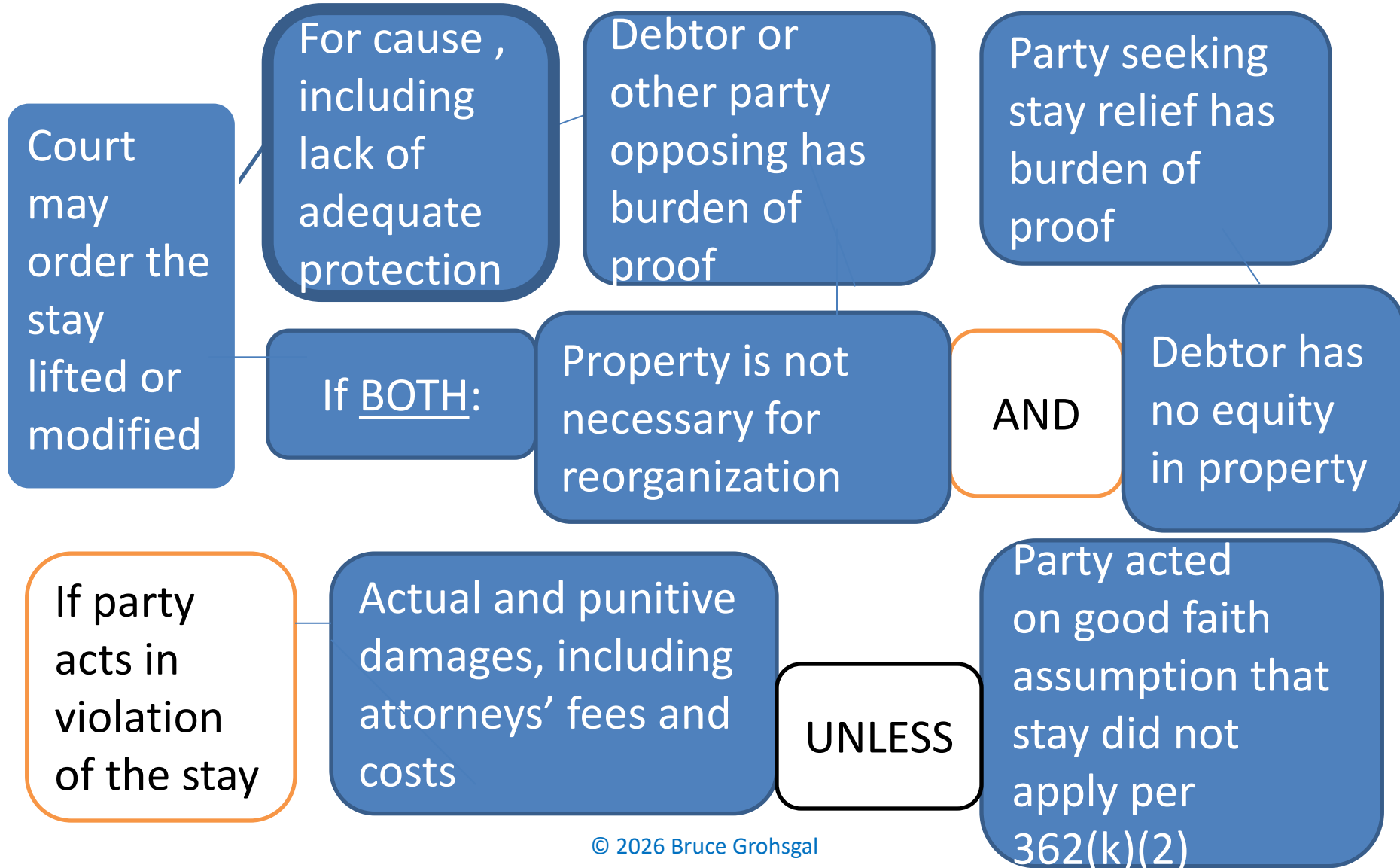
- A creditor is entitled to the allowance of its rightful claim, and to value on account of that claim to the extent that there are funds in the estate with which to pay it based on distributional priorities, specifically:
- “Adequate protection” against postpetition diminution in value of the collateral (unless equity cushion)
- Payment or value at the end of the case, up to the value of its collateral
- If unsecured, payment or value at the end of the case, in the same amount as the holders of other creditors who hold claims of the same priority

Creditor's Rights – Motion for Stay Relief

A lienholder also may obtain stay relief on motion to the Court (and, if granted, may proceed against its collateral under state law) on two grounds provided in § 362(d):

- (1) for cause, including the lack of adequate protection of an interest in property of such party in interest [i.e., value of collateral is diminishing] or
- (2) with respect to a stay of an act against property under subsection (a) of this section, if—
 - (A) the debtor does not have an equity in such property; and
 - (B) such property is not necessary to an effective reorganization

If Motion for Stay Relief (§ 362(d)) or for Damages for Stay Violation (§ 362(k)) Is Filed



Actions Against Non-Debtors Are Not Automatically Stayed

- Actions against non-debtors (i.e., officers and directors of DIP) and their property are not stayed – The automatic stay applies only to debtors and estate property
- Courts nonetheless will enter a stay, on the authority of § 105, on the filing of an adversary proceeding and motion against actions against non-debtors and their property if certain facts are proven. *See e.g., In re Uni-Marts, LLC*, 399 B.R. 400 (Bankr. D. Del. 2009; *In re Am. Film Techs.*, 175 B.R. 847 (Bankr. D. Del. 1994).

Adequate Protection

What is adequate protection (§ 361)?

- Secured creditor is entitled to adequate protection against any postpetition diminution in the value of its collateral that the debtor uses or sells postpetition

Adequate Protection

- Debtor can provide adequate protection by:
 - Cash payments
 - New liens or replacement liens
 - Other relief that gives the creditor the “indubitable equivalent” of the value of its interest in the property (i.e., an equity cushion)
 - Lien against proceeds of sale of collateral
- Absent adequate protection, lienholder is entitled to stay relief under § 362(d)(1)

Adequate Protection by Equity Cushion

- If a secured creditor is oversecured (i.e., the value of its collateral is more than the amount of its claim), then it has an “equity cushion”
- If the equity cushion is large enough, then is the secured lender’s interest in the collateral and the collateral adequately protected by the equity cushion?

Yes, because the secured creditor will still be paid its claim in full from any sale of the collateral, even if the value of the collateral decreases

Authority of DIP – What Requires Court Approval and What Does Not

Once a Chapter 11 case is filed, who has authority to act for the bankruptcy estate?

- In a Chapter 11 reorganization, the debtor in possession (“DIP”) controls and administers the estate, though the Court for cause can appoint a Chapter 11 trustee to replace the DIP, and if so, the Chapter 11 trustee is in charge
- “Debtor in possession” means debtor except when a Chapter 11 trustee has been appointed (i.e. the directors and officers) (§ 1101(1))

DIP Has Authority to Act for Estate and Operate in Chapter 11

- Authorization to operate business in Chapter 11 (§ 1108) – Unless the Court, on request of a party in interest and after notice and a hearing, orders otherwise, the trustee [i.e., the Chapter 11 DIP] may operate the debtor's business
- Compare a Chapter 7 liquidation case, in which a Chapter 7 trustee is appointed with authority over the estate at the beginning of the case and needs Court approval to operate the business

Authority of DIP or Trustee and Court Supervision

- Without a Court order, DIP remains in possession under Chapters 9, 11, 12 and 13 and can operate its business
- Although DIP or trustee in Chapter 7 has authority over the estate, Court approval is required for:
- Paying (most) prepetition claims, sale, use or lease of property out of the ordinary course of business (§ 363(b)); use of cash in which another party has a lien or interest (“cash collateral”) (§ 363(c)(2)); obtaining financing (other than unsecured trade credit) (§ 364); assuming or rejecting executory contracts (§ 365); retaining and paying counsel and other professionals (§§ 327-330); and certain other acts

Conversion from Chapter 11 to Chapter 7

- In some Chapter 11 cases, the United States Trustee (UST), which is a division of the USDOJ, dissatisfied and/or confrontational creditors, or another party in interest may move for conversion from Chapter 11 to Chapter 7 under § 1112(b)
- Motion is often made in conjunction with requests, in the alternative, for appointment of a Chapter 11 trustee to replace the DIP or for dismissal of the bankruptcy case
- Court will grant such motion for cause (i.e., gross mismanagement, continuing diminution in value of estate, no prospect of rehabilitation) if in the best interest of creditors

DIP Does Not Need Court Approval to Act in Ordinary Course of Business

11 U.S.C. § 363 - Use, sale, or lease of property

(c) (1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee [or DIP] may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing

Note statutory construction issue: Nearly every reference to “trustee” in Chapter 11 means the “DIP” unless a Chapter 11 trustee has been appointed to replace the DIP

Court Approval Required for Actions Out of the Ordinary Course of Business

11 U.S.C. § 363 - Use, sale, or lease of property

(b) (1) The trustee [or DIP], after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting [special rules regarding sale or lease of personally identifiable information]

Ordinary Course of Business

What is the ordinary course of a debtor's business?

The term is not defined in the Bankruptcy Code

Most courts apply two tests

- (1) Horizontal/objective test – industry-wide perspective
- (2) Vertical/subjective test – reasonable expectations of counterparties based on debtor's historic practices

See e.g., In re Cook and Sons Mining, Inc., 2005 WL 2386238 (E.D. Ky. Sept. 28, 2005)

Property of the Estate

- A fundamental premise of bankruptcy law is that the value of the debtor's property will be distributed to creditors in the order prescribed by the statute until the value runs out
- Filing a voluntary petition creates an estate consisting of the debtor's property to be used for this purpose
- Property of the estate is expansive (§ 541)
 - Exclusions are primarily compensation payable to individual Chapter 7 debtor for postpetition services and certain retirement assets

Property of the Estate

Property of the Estate

- § 541 broadly defines “property of the estate” to include “all legal or equitable interests of the debtor in property as of the commencement of the case” “wherever located and by whomever held”
- State law generally applies to the determination of whether a debtor has a legal or equitable interest in property

Property of the Estate

Butner v. U.S., 99 S.Ct. 914 (1979), accord *Nobelman v. American Sav. Bank*, 113 S. Ct. 2106 (1993)

- Property interests, including liens, are generally created and defined by state law (i.e., non-bankruptcy law)
- Bankruptcy law can and often does alter those state law rights

U.S. v. Whiting Pools, 103 S. Ct. 2309 (1983)

- Debtor's property that is subject to a lien is "property of the estate" even if the debtor has no equity in the property (i.e., the lien secures a debt that is in excess of the value of the property)
- Debtor still owns the property, subject to the lien

Turnover of Estate Property

§§ 542 and 543 require an entity (including a custodian such a receiver) in possession, custody, or control of estate property to deliver it or its value to the DIP, and account for it, unless such property is of inconsequential value or benefit to the estate

Abandonment of Estate Property

§ 554 – Abandonment of property of the estate

(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate

Example: Property in which the debtor has no equity (because claim secured by lien exceeds value of collateral) and which debtor does not need to reorganize

Case-law limitation on the abandonment power: If imminent and identifiable danger to the public. See *Midlantic Nat'l Bank v. NJDEP*, 474 U.S. 494 (1986); *In re Unidigital, Inc.*, 262 B.R. 283 (Bankr. D. Del. 2001)

Orderly Distribution Under the Code – The Absolute Priority Rule

First, a secured creditor is entitled to receive the value its collateral, up to the amount of its claim that is secured by that property.

- If the secured creditor is undersecured (i.e., the value of the collateral is less than the amount of the claim that it secures), then the amount of the creditor's claim in excess of the value of its collateral (i.e., the “deficiency claim”) becomes a general unsecured claim pursuant to § 506(b).

Orderly Distribution under the Code – The Absolute Priority Rule

Second, if value remains in the estate, in the form of either unencumbered cash or assets or the debtor's equity in property remaining after payment of liens against that property, then priority unsecured claims are paid in the order of priorities specified in § 507(a) – In most cases these will be costs of administering the case, then employee claims, then certain tax claims

- The holders of claims in each tranche of priority unsecured claims listed in § 507(a) are entitled to being paid in full (i.e., absolute priority) prior to any payment on claims in the next junior tranche of claims

Orderly Distribution under the Code – The Absolute Priority Rule

Third, if value still remains after priority unsecured claims have been paid in full, then non-priority general unsecured claims are paid.

- Non-priority unsecured claims (often referred to as “general unsecured claims” or “GUCs”) are junior to § 507(a) priority unsecured claims and are not entitled to any payment until all priority unsecured claims are paid in full
- If funds are not sufficient to pay the general unsecured claims in full (which is almost always the case), then those claims are paid *pari passu*

Orderly Distribution under the Code – The Absolute Priority Rule

Finally, if there funds or property remaining after all creditors referred to in the prior paragraphs have been paid in full (which is hardly ever the case), then the funds are distributed to the debtor, or in a corporate bankruptcy case, the shareholders or other equity holders receive the remaining value (which in such a case may mean simply that they retain ownership of the company).

Structure of the Bankruptcy Code

- Chapter 1 – Definitions, general powers of bankruptcy court, debtor eligibility
- Chapter 3 – Case administration, including compensation of trustees and professionals
- Chapter 5 – Claims, distribution, turnover, avoidance actions (preferences and fraudulent transfers), safe harbors (i.e., for qualified financial contracts)
- Chapters 7, 9, 11, 12, 13 and 15 (each Chapter for a different kind of bankruptcy case)

Structure of Bankruptcy Code

- Chapter 7 – Individual or business, liquidation and discharge
- Chapter 9 – Municipality, discharge on effective date of plan
- Chapter 11 – Business or individual, reorganization and discharge on effective date of plan (if liquidating plan, no discharge)
- Chapter 12 – Family farmer/fisherman, 3-5 year repayment plan (all “disposable income”), discharge at end
- Chapter 13 – Individual only, 3-5 year repayment plan (all “disposable income”), discharge at end
- Chapter 15 – Cross-border insolvencies

The Bankruptcy Case and the Bankruptcy Court's Authority

- Numerous proceedings are typically brought within a single bankruptcy case, both contested matters (i.e., motions under FRBP 9014) and adversary proceedings (i.e., suits brought by complaint under FRBP 7001) for determination of the matters necessary to resolve the debtor's affairs
- The Bankruptcy Court has authority over most of those proceedings (especially “core” proceedings), but some are so tangential that the Court lacks jurisdiction unless the parties consent
- Bankruptcy jurisdiction is *in rem* – Based on the Court's jurisdiction over the debtor's property (i.e., the bankruptcy estate)

Jurisdiction, Authority and Venue

Recall that United States Constitution gives Congress authority to enact uniform laws on the subject of bankruptcies throughout the United States

- Congress, in enacting the Bankruptcy Code, conferred federal question jurisdiction on the federal courts hearing bankruptcy cases over:
- All bankruptcy cases (i.e., the bankruptcy case itself) – Bankruptcy court has exclusive jurisdiction
- All proceedings arising under, arising in, or related to the bankruptcy case – Bankruptcy court has concurrent jurisdiction with other courts having jurisdiction

Jurisdiction, Authority and Venue

- Under 1978 statute, bankruptcy judges do not have lifetime tenure, which is required for judges appointed under Article III, but rather have 14-year terms (and are Article I judges)
- Thus, federal bankruptcy jurisdiction lies with the district courts, each of which refers all bankruptcy cases to its bankruptcy court pursuant to a standing order

Jurisdiction, Authority and Venue

- 28 U.S.C. § 157 provides that the bankruptcy court can enter final orders on “core” matters (i.e., case administration, claims allowance, use or sale of estate property, obtaining new credit, plan confirmation, objections to discharge)
- In *Stern v. Marshall*, the Supreme Court held that some matters that are “core” under the statute are not “constitutionally” core because they are not sufficiently related to the bankruptcy case for a bankruptcy judge, who is not an Article III judge, to enter final judgment

Are the Bankruptcy Code's Jurisdictional Provisions Constitutional?

J. Howard Marshall and Anna Nicole Smith



Statutory Jurisdiction and Authority

- A few years after *Stern*, the Court held that a bankruptcy judge can enter final judgment on non-core matters if the parties consent
- Absent such consent, bankruptcy judges hearing a “non-core” matter must submit proposed findings of fact and conclusions of law to the district court
- District judge then enters final judgment after considering the proposed findings and conclusions and reviewing *de novo* those matters (of fact and law) to which any party has timely and specifically objected

First Day Motions, Cash Collateral, DIP Financing, and the Early Days of the Case

What leads to a voluntary bankruptcy filing?

- Existing lender's refusal to lend further, or suppliers' refusal to extend trade credit
- Company's inability to pay debts or perform other obligations
- Creditor's taking judicial or self-help action against the company and/or its assets



Delaware State Bar Association

Bankruptcy Section

Bankruptcy Nuts and Bolts: A Primer for Bankruptcy Cross-Training

Part 2 – Introduction to Chapter 11 Bankruptcy

**Stacy L. Newman, Cole Schotz
Sophie Rogers Churchill, Morris Nichols Arsht & Tunnell**

10:00 – 11:00 a.m.

Running the Business in Chapter 11 – Why First Day Motions?

The debtor needs an order from the bankruptcy court to pay prepetition claims, use cash against which its lender has a lien (“cash collateral”), and borrow money postpetition.

Upon filing for bankruptcy, the debtors has a number of concerns:

- ❖ Paying prepetition wages included in next payroll
- ❖ Paying prepetition claims of critical vendors and suppliers
- ❖ Using cash collateral and, if necessary, borrowing money postpetition

Examples of First Day Motions

The following First Day Motions are often filed with the Voluntary Petitions in a Chapter 11 case:

- ❖ Motion for Joint Administration (if affiliates filed)
- ❖ Application to Employ Claims Agent (28 U.S.C. § 156)
- ❖ Motion to Pay Prepetition Wages and Benefits
- ❖ Cash Management Motion (UST Requirements)
- ❖ Motion to Pay Prepetition Taxes
- ❖ Motion to Pay Critical Vendors (i.e., sole source suppliers)
- ❖ Motion to Continue Customer Programs
- ❖ Motion to Use Cash Collateral and Obtain Postpetition DIP Financing
- ❖ Declaration in Support of First Day Relief

Legal Basis for First Day Relief – Doctrine of Necessity and § 105(a)

The “necessity of payment” doctrine permits “immediate payment of claims of creditors where those creditors will not supply services or material essential to the conduct of the business until their pre-reorganization claims shall have been paid.” *Matter of the Lehigh and New England Railway Company*, 657 F.2d 570 (3d Cir. 1981) (citing *In re Penn Central Transportation Co.*, 467 F.2d 100 (3d Cir. 1972)).

§ 105 (a) – “The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.”

First Day Motions

Del. Bankr. L.R. 9013-1(m) – Applicable to any motion filed by a debtor on less than 7 days notice (for a hearing or order within 21 days after the petition)

“(ii) Requests for relief must be confined to matters of a genuinely emergent nature required to preserve the estate’s assets and to maintain ongoing business operations and such other matters as the Court may determine appropriate. No motion seeking authority to pay prepetition obligations will be considered unless the motion and proposed order include the maximum amount sought to satisfy the prepetition obligations.”

FRBP 6003 – Unless relief is needed to avoid immediate and irreparable harm, the court must not, within 21 days after the petition is filed, grant an application or motion to use, sell, lease, or incur an obligation regarding property of the estate, including a motion to pay all or part of a prepetition claim

Motion for Use of Cash Collateral (§ 363(c))

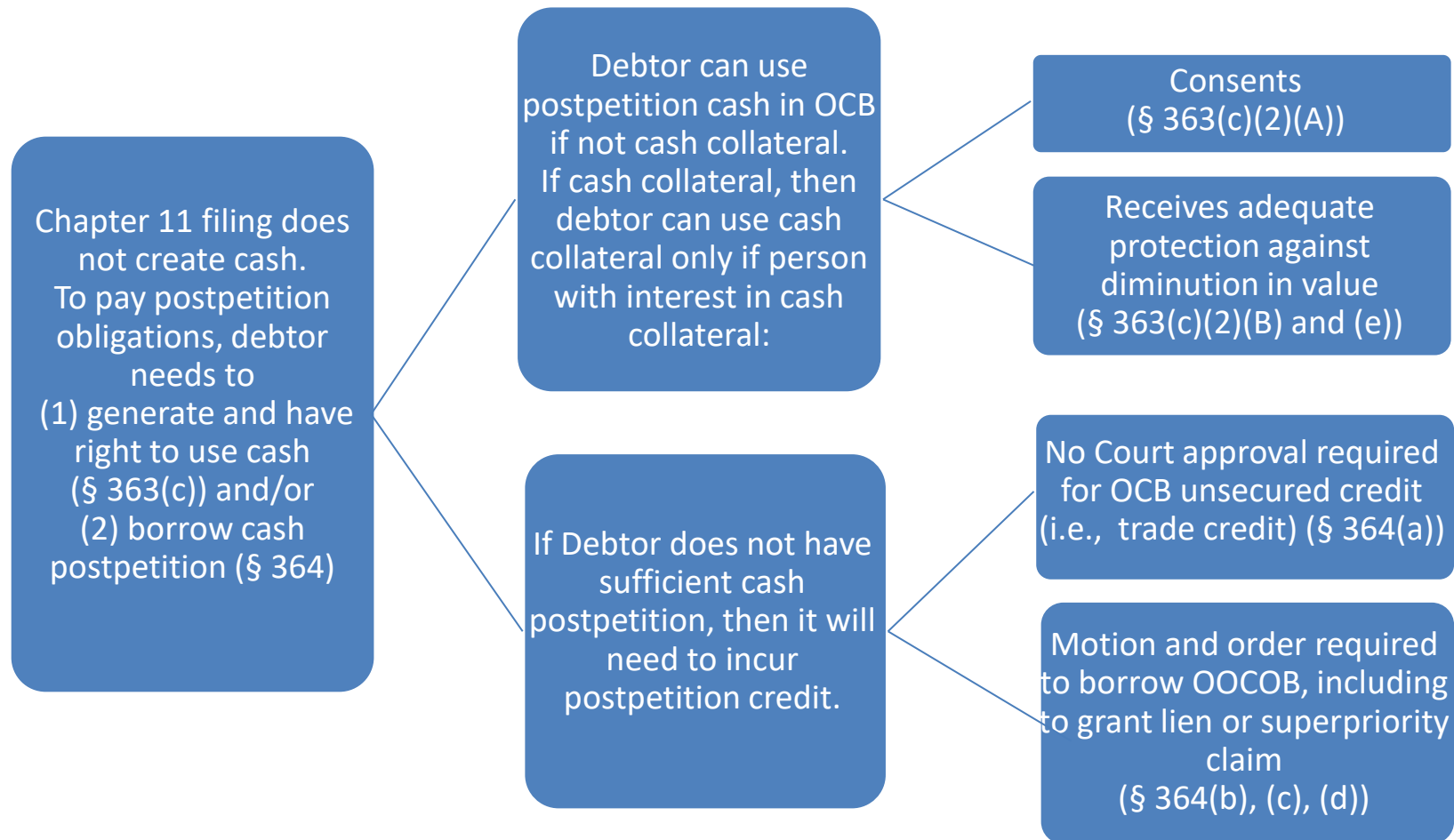
Cash is “cash collateral” if a lien extends to the Debtor’s cash (i.e., lien is against debtor’s bank accounts or proceeds of collateral)

- ❖ **§ 363(c)(2)** – Debtor may only use cash collateral if:
 - (A) entity with interest in the cash consents, or
 - (B) the court, after notice and a hearing, so authorizes.
- ❖ Typically, authority is obtained by consent order.
- ❖ Lender with interest in cash collateral is entitled to adequate protection against diminution in value.
- ❖ **FRBP 4001(b)** – Hearing on less than 14 days notice permissible to extent necessary to avoid immediate and irreparable harm, followed by final hearing at least 14 days later.

Motion for Approval of DIP Financing (§ 364)

If debtor is not generating sufficient cash to sustain its operations during the bankruptcy case, it will need to borrow postpetition, and the postpetition DIP lender may require superpriority administrative claim, new collateral, replacement liens, and/or priming liens.

- ❖ Debtor needs Court approval to borrow on those terms.
- ❖ Financing must be necessary and terms must be reasonable compared with those of other potential lenders (if any).
- ❖ Interim approval available at First Day Hearing under FRBP 4001(c) to avoid immediate and irreparable harm, followed by final hearing at least 14 days later.
- ❖ Any lender being primed is entitled to adequate protection.



The Official Committee of Unsecured Creditors ("Committee" or "UCC")

- ❖ Chapter 11 requires the United States Trustee ("U.S. Trustee" or "UST") to appoint a committee to represent the interests of unsecured creditors in the case if they are willing to serve (except in small business cases) (§ 1102(a)).
- ❖ Ordinarily, the Committee consists of 3-7 of the largest unsecured creditors (§ 1102(b)).
- ❖ U.S. Trustee or bankruptcy court may order the appointment of other official committees (i.e., equity committee, retiree committee).
- ❖ An official committee may retain counsel and other professionals, with Court approval, whose fees and expenses are paid by the debtor after Court approval (§§ 330, 1103).

Rules of Professional Responsibility Apply to Solicitation of Committee and Its Possible Members

Rule 7.3. Solicitation of Clients

- ❖ (a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:
 - (1) is a lawyer; or
 - (2) has a family, close personal, or prior professional relationship with the lawyer.

In re Universal Bldg. Prods., 486 B.R. 650 (Bankr. D. Del. 2010) (firms disqualified and their fees not paid for improper solicitation of potential members of Committee).

Official Committees – Duties and Standing

- ❖ An official committee is a fiduciary for its constituency and § 1103 sets forth its duties.
- ❖ An official committee has standing on issues affecting its constituency (§ 1109).
- ❖ The Committee can be granted derivative standing to bring colorable claims on behalf of the debtor and estate when (a) the debtor unjustifiably refuses a demand to pursue an action, or such demand would be futile; (b) the Committee has a colorable claim or cause of action; and (c) the Committee seeks and obtains leave from the bankruptcy court to prosecute the action for and in the name of the debtor. *See, e.g., Official Committee of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548 (3d Cir. 2003).
- ❖ Claims must be colorable – the Committee must demonstrate that there is a possibility of success. Low threshold similar to motion to dismiss standard.

Retention and Payment of Estate Professionals

The Court must approve, on motion or application, both

(a) the retention, and

(b) the payment of fees and expenses

of the lawyers, financial advisors, investment bankers and other professionals (collectively called “estate professionals”) of the Debtor and UCC (and any other official committee).

Different Requirements for Retention of Debtor and Other Professionals

Debtor's Counsel and Other Professionals:

- ❖ §§ 327, 328 – Must be “disinterested” and not have or represent an adverse interest, except that under § 327(e), certain OCB professionals (i.e., tax counsel or labor counsel) retained postpetition need only have no adverse interest. If professional has prepetition claim against debtor, it is not disinterested.
- ❖ Committee Professionals (§ 1103) – Not required to be disinterested, but must not have or represent an adverse interest.

Disclosures by Estate Professionals Proposed to be Retained

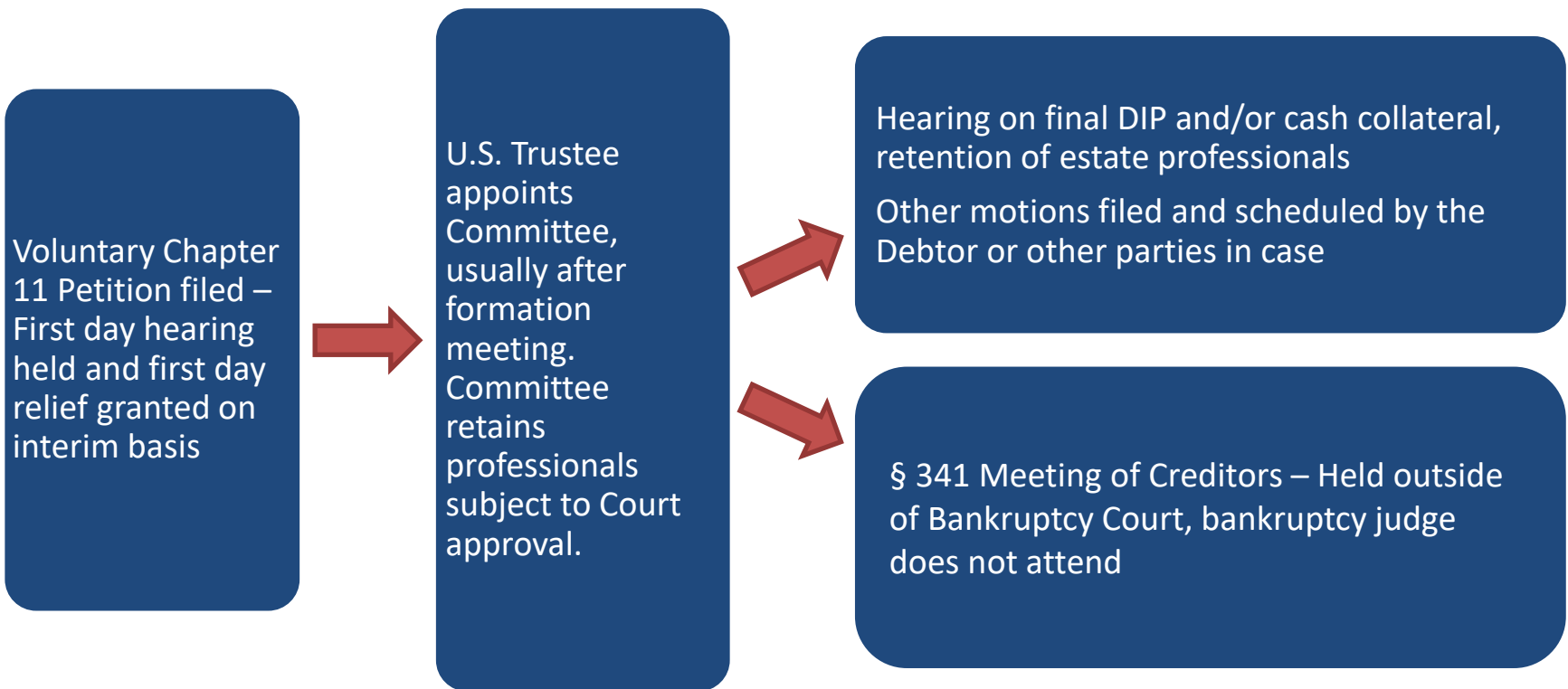
FRBP 2014 – Employing Professionals

(a)(2) Application for Employment . . . The application must state specific facts showing: . . . (F) to the best of the applicant's knowledge, all the person's connections with: the debtor; creditors; any other party in interest; their respective attorneys and accountants; the United States trustee; and any person employed in the United States trustee's office.

(a)(3) Verified Statement of the Person to Be Employed. The application must be accompanied by a verified statement of the person to be employed, setting forth that person's connections with any entity listed in (2)(F).

§ 341 Meeting of Creditors

- ❖ § 341 requires the Chapter 11 debtor to meet with and be examined by its creditors, unless votes for plan were solicited prepetition (i.e., a prepack).
- ❖ The U.S. Trustee presides over § 341 meeting. The Bankruptcy Court does not preside or attend.
- ❖ The debtor will have prepared and filed its schedules of assets and liabilities and statement of financial affairs (SOFAs) listing in detail its assets, the amounts and types of claims against it, its executory contracts, etc. as required by FRBP 1007.
- ❖ In practice, in a Chapter 11 case, the U.S. Trustee normally examines the debtor (accompanied by bankruptcy counsel) on the record, and with creditors present, about the reasons for filing for bankruptcy, the information in the petition, the schedules and statements, and the pleadings filed to date, and the debtor's plans for the future (i.e., the possible sale of the debtor's business, operational and debt restructuring, negotiation and filing of the plan). Creditors may then question the debtor.



Second Day Hearing

By the time of the second day hearing in the Chapter 11 case, the Committee has been formed and has engaged counsel, subject to Court approval.

Motions and other matters considered at the second day hearing typically include final approval of first day motions, final approval of authority to use cash collateral and DIP financing, retention of estate professionals, interim compensation motion, bidding procedures for the sale of estate assets.

Restructuring the Debtor – Executory Contracts and Unexpired Leases

- ❖ The Bankruptcy Code materially alters contract law in a bankruptcy case with respect to contracts that are executory on the petition date.
- ❖ An “executory contract” is not defined in the Bankruptcy Code.
- ❖ *Countryman* definition – A contract under which material performance obligations remain for both parties (i.e., the debtor and the counterparty). The term comes from Harvard Law Professor Vern Countryman and is widely accepted by federal courts.

Executory Contracts and Unexpired Leases

Bankruptcy law's override of ordinary contract law is significant in § 365, and includes that:

- ❖ With Court order, debtor can assume or reject most executory contracts and unexpired leases
- ❖ *Ipsa facto* clause (i.e., a clause in a contract or lease that provides for the termination or modification of the contract or lease, or permits the counterparty to terminate or modify it, based on the filing of the bankruptcy case) is not enforceable in bankruptcy
- ❖ Anti-assignment clauses are not enforceable

Executory Contracts and Unexpired Leases

Debtor can decide, in its business judgment, and subject to bankruptcy court approval under § 365(a), whether:

- ❖ to assume an executory contract or lease; or
- ❖ to reject the executory contract or lease.

If debtor assumes the executory contract or lease, then in many (but not all) instances it can also assign (i.e., sell) it with Court approval.

After assignment, the debtor and its estate have no future obligations (§ 365(f), (c), (k)).

Executory Contracts and Unexpired Leases

- ❖ **If debtor assumes** – It assumes all obligations, both those not performed prepetition and those that arose and will arise postpetition unless and until a Court-approved assignment cuts off postpetition obligations. All of those obligations become 100% obligations and administrative expenses of the estate.
- ❖ **If debtor rejects** – (1) unperformed prepetition obligations are non-priority, general unsecured claims; (2) most unperformed postpetition obligations are administrative expense claims up to the rejection date; and (3) the counterparty is entitled to rejection damages (payable as a GUC), subject to caps for leases under § 502(b)(6)

Executory Contracts and Unexpired Leases

What does this all mean?

The debtor can –

- ❖ Assume most advantageous, below-market contracts and leases and assign them notwithstanding any prohibition in the contract or lease against assignment (§ 365(f), § 541(c)(1)), and
- ❖ Reject disadvantageous, above-market contracts and leases and pay rejection damages in “bankruptcy” dollars (i.e., GUC) (§ 365(g)(1), § 502(g)(1)), subject to a cap for long-term real estate leases (§ 502(b)(6)).

Executory Contracts and Unexpired Leases

Restrictions on assumption and assignment:

- ❖ If executory contract or lease is in default, then in order to assume, debtor must cure and provide the counterparty with adequate assurance of future performance (§ 365(b)(1)).
- ❖ If debtor proposes to assign the executory contract or lease, then the counterparty is entitled to adequate assurance of future performance by the assignee.
- ❖ Certain contracts cannot be assigned: IP licenses, personal services contracts, loan commitments from non-debtor lender.

Executory Contracts and Unexpired Leases

- ❖ Trustee or debtor (in all chapters) must timely perform (i.e., pay rent) under any unexpired nonresidential lease until the lease is assumed or rejected (subject to 60-day extension for cause) (§ 365(d)(3)).
- ❖ Lease of nonresidential real property (i.e., commercial lease) in all chapters must be assumed or rejected within the earlier of 120 days after the petition date (as the same may be extended by the Court up to an additional 90 days) or plan confirmation, or the lease is deemed rejected (§ 365(d)(4)).
- ❖ In a Chapter 11 case, the debtor may assume or reject executory contract or unexpired lease of residential real property or of personal property at any time before plan confirmation (§ 365(d)(2)).

What if the Debtor is the Landlord or the IP Licensor and Rejects?

- ❖ **§ 365(h)** – If debtor is the landlord under the lease and rejects, the tenant has the right to “squat” in the space for the remaining term notwithstanding debtor-landlord’s rejection of the lease so long as the tenant pays the rent that was payable under the rejected lease reduced by any services the debtor-landlord stopped furnishing.
- ❖ **§ 365(n)** – If debtor is the licensor under a license for use of IP rights re: patents, copyrights and trade secrets (trademarks not mentioned) and rejects the license, then the non-debtor licensee may continue to use the IP after rejection (on certain conditions).

Restructuring the Debtor – Sale of the Business

§ 363 applies to the sale, use, or lease of property of the estate.

- ❖ If in the ordinary course, Court approval is not required.
- ❖ If outside of the ordinary course, then Court approval is required. Court approval is usually granted if the transaction is in the best interest of the debtor's estate and creditors.
- ❖ § 363(b) also permits reorganization through a going concern sale (i.e., the sale of the operating business).

§ 363 Sales

Court typically requires, for approval of sale under § 363(b):

- ❖ A good business reason to sell;
- ❖ That the sale is in the best interest of the debtor's estate and creditors (i.e., that it will maximize eventual distributions to creditors by maximizing sale price and minimizing debtor's liabilities, including administrative expense claims);
- ❖ 3d Circuit requires proof of good faith for approval of sale; and
- ❖ Evidence of extensive marketing and competitive bidding (or justification for private sale) required.

*Even though creditor vote is not required (as would be for plan), objections on these grounds are considered.

Additional § 363(b) Issues

- ❖ Notice and hearing required – Failure to give adequate notice may result in retroactive invalidity of previously approved sale.
- ❖ Standing of a party to object to a § 363(b) sale is the standard applicable to civil actions generally.
- ❖ Statutory mootness if sale or lease in good faith and stay not granted.
- ❖ Sales to insiders are not prohibited, but are subject to greater scrutiny given the insider's ability to control the price, the information about the company, and the competitive bidding process generally.

Sales Free and Clear of Liens and Other Interests (§ 363(f))

- ❖ § 363(f) permits the sale of estate assets free and clear of interests, including liens.
- ❖ Without this authority, many bankruptcy sales, especially in a world of over-leveraged debtors, would not be feasible.
- ❖ A third party who holds a lien or other interest in the property must be given notice of the sale and an opportunity to be heard and is entitled to adequate protection of its interest (i.e., by being given a lien in the same amount and priority in the proceeds of the sale).

The Requirements of § 363(f)(1)-(5)

The debtor must satisfy one of the five disjunctive requirements of § 363(f) for a sale free and clear:

- ❖ (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- ❖ (2) such entity consents;
- ❖ (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- ❖ (4) such interest is in bona fide dispute; or
- ❖ (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

Adequate Protection Under § 363(e)

§ 363(e) provides that on the request of an entity that has an interest in property proposed to be used, sold, or leased, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.

Adequate protection on a sale typically is provided by the sale order's providing that the interest attaches to the sale proceeds (in the same order of priority that it had in the property sold).

The Bidding Process – Stalking Horse and Bidding Procedures

- ❖ The “stalking horse” is the initial purchaser against whom other bidders compete. This encourages initial bidder to establish floor price (though unreasonably high break-up fees and reimbursements and unreasonable bidding procedures can chill bidding).
 - *In re O’Brien Envtl. Energy, Inc.*, 181 F.3d 527 (3d Cir. 1999) – Administrative expense standard. Was the break-up fee necessary?
 - *In re ASARCO, LLC*, 650 F.3d 593 (5th Cir. 2011) – Business judgment standard
- ❖ Break-up fees and expense reimbursements paid to stalking horse bidder in the event that the stalking horse bidder is outbid and the property is sold to a higher and better bidder.
- ❖ Common for a debtor to establish bidding procedures, bid protections (i.e., break-up fees and expense reimbursements) for the stalking horse bidder, and bidding rules (i.e., bidding increments), and seek Court approval prior to the auction, and seek at the later hearing approval of the §363 sale to the highest or otherwise best bidder.

The Bidding Process

- ❖ Under § 363(k), the holder of a lien that secures an allowed claim may credit bid at the sale, except as the Court may “for cause” order otherwise.
- ❖ Highest or otherwise best bid at auction, whether cash bid or credit bid, is usually approved by the Court (maximizes value and reduces liabilities).
- ❖ Collusive bidding prohibited under § 363(n), but joint bid resulting in higher price is permitted.

Effect of Sale of Business

- ❖ Closing on the sale of the debtor's business and substantially all of its assets does not end the Chapter 11 case.
- ❖ Business and assets that were sold are outside of the jurisdiction of the bankruptcy court and are no longer property of the estate.
- ❖ Sale proceeds must be administered, claims must be reconciled and allowed or disallowed, avoidance actions must be brought (unless purchased by the buyer), and distributions must be made, often pursuant to a liquidating plan (or structured dismissal or conversion to Chapter 7).

Restructuring the Debtor – Avoiding Unperfected Liens and Other Avoidance Actions

- ❖ Avoidance of Prepetition Unperfected Liens (Strong-Arm Clause) (§ 544)
- ❖ Avoidance of Prepetition Preferential Transfers (§ 547) – Preference period is 90 days prepetition, or one year prepetition for insiders
- ❖ Avoidance of Prepetition Fraudulent Transfers (§ 548) – Fraudulent transfers may also be avoided pursuant to applicable state law
- ❖ Avoidance of Postpetition Unauthorized Transfers (§ 549)

Avoidance of Liens – The Strong Arm Clause (§ 544)

Debtor can avoid an unperfected lien (i.e., because it was not filed or recorded or otherwise perfected).

- ❖ Result: Formerly secured creditor loses its lien against the collateral and becomes an unsecured creditor
- ❖ Compare: Under state law outside of bankruptcy, the result would be that an unperfected lien is only subordinated to perfected liens

Bankruptcy Avoidance Powers – Preferences (§ 547)

(b) Except as provided in subsections (c) and (i) of this section, the trustee may ... avoid any transfer of an interest of the debtor in property—

- 1) to or for the benefit of a creditor;
- 2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- 3) made while the debtor was insolvent [balance sheet basis];
- 4) made—
 - A. on or within 90 days before the date of the filing of the petition; or
 - B. between 90 days and 1 year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
- 5) that enables such creditor to receive more than such creditor would receive if—
 - A. the case were a case under chapter 7 of this title;
 - B. the transfer had not been made; and
 - C. such creditor received payment of such debt to the extent provided by the provisions of this title.

Defenses to Preference Actions (§ 547(c))

- ❖ Contemporaneous Exchange (§ 547(c)(1))
- ❖ Ordinary Course of Business Transactions (§ 547(c)(2))
- ❖ New Value or “Enabling Loans” (§ 547(c)(3))
- ❖ Subsequent Advances of New Value (§ 547(c)(4))
- ❖ Floating Liens (§ 547(c)(5))
- ❖ Statutory Liens (§ 547(c)(6))
- ❖ Other Defenses (§ 547(c)(7), (8), (9))

Fraudulent Transfers (§ 548)

- ❖ **Actual fraudulent transfers** – Transfers with actual intent to hinder, delay or defraud any creditor of the debtor
- ❖ **Constructive fraudulent transfers** – Transfers made for less than reasonably equivalent value when the debtor is insolvent (balance sheet basis) or undercapitalized

Some transfers are both actual and constructive fraudulent transfers.

Fraudulent Transfers

- ❖ Both types of fraudulent transfers (actual and constructive) exist under bankruptcy law (§ 548) and under state law (i.e., UFTA).
- ❖ Debtor or Committee has standing to bring both
 - § 548 actions; and
 - Pursuant to § 544(b), state law actions
- ❖ Statute of limitations is different for § 548 (2 years) versus state law avoidance actions (vary by state, but typically longer).
- ❖ Safe harbors for qualified financial contracts (repo, derivatives, swaps, etc.)

Postpetition Transfers (§ 549)

- (a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate—
 - (1) that occurs after the commencement of the case; and
 - (2) (A) that is authorized only under section 303(f) or 542(c) of this title; or
(B) that is not authorized under this title or by the court

Claims and Distributions

- ❖ Most essential attributes of bankruptcy proceeding are the estate, claims against the estate, and the distributions made from the estate to those claimants.
- ❖ Claims must be allowed, both in amount and by type.
- ❖ Different types of claims, primarily:
 - Secured claims
 - Priority unsecured claims
 - Non-priority, general unsecured claims (“GUCs”)
 - Interests (i.e., equity)

Relationship Between Scheduled Claims and Filed Claims

Chapter 11:

- ❖ If scheduled, *prima facie* evidence and claimant not required to file POC (FRBP 3003(b)(1), (c)(1))
- ❖ If not scheduled or scheduled CUD, claimant must file POC (FRBP 3003(b)(1), (c)(2))
- ❖ Bar date for POC is fixed by the Court (FRBP 3003(c)(3))
- ❖ Filed claim supersedes scheduled claim (FRBP 3003(c)(5))
- ❖ Claims Agent

Administrative Expense Claims (§ 503)

- ❖ Postpetition claims in a voluntary case (§ 503)
- ❖ Must be the “actual, necessary costs and expenses of preserving the estate”
- ❖ Include:
 - Actual and necessary postpetition expenses (i.e., wages, salary, and other operating costs in a business)
 - Bankruptcy counsel and other estate professionals (subject to Court approval of retention and fee applications)
 - § 503(b)(9) – Value of goods received by the debtor within 20 days prior to the commencement of the case

Secured Claims

A properly perfected secured claim that is “undersecured” (i.e., claim amount exceeds value of collateral) is bifurcated into:

- (1) the portion treated as secured = the value of the collateral, and
- (2) the portion treated as unsecured = the balance of the allowed amount of the claim (§ 506(a))

Example: Bank has \$1,000 claim, and the collateral is determined to have a value of (or sold for) \$700. What part of \$1,000 claim is secured/unsecured?

Answer: \$700 secured and \$300 unsecured

Late-Filed Claims

“Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party’s control.” *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993).

Excusable neglect standard (FRBP 9006(b)(1)) – Equitable determination taking into account all relevant circumstances. Courts consider the prejudice to the debtor, length of delay and impact on proceeding, reason for delay and whether creditor acted in good faith.

Chapter 11 Plans

- ❖ A Chapter 11 plan can:
 - Reorganize the debtor company, or
 - Provide for the liquidation of the debtor's property for distribution to creditors.
- ❖ A debtor often does not know early in the case whether it will be able to confirm a plan of reorganization.
- ❖ A primary goal in Chapter 11 is the proposal by the debtor and/or another party of a plan of reorganization that is confirmed by the Court.
- ❖ The plan process enables the debtor to restructure its debts and compromise the claims against it pursuant to the plan, and on confirmation of the plan, emerge from chapter 11 as a viable concern.
- ❖ A debtor often will sell its business as a going concern early in the case, and then attempt to confirm a liquidating plan for the distribution of the sale proceeds and any remaining assets.

Chapter 11 Plans

Why might a Chapter 11 plan be preferable, whether or not the DIP already has sold the company?

- ❖ Plan often (though not always) provides the greatest return to creditors and a more extensive resolution of claims
- ❖ Plan can provide for debtor and third-party releases for directors and officers and other parties
- ❖ Most likely other alternative to a plan is conversion to Chapter 7
 - Chapter 7 trustee will incur costs, in addition to the Chapter 11 costs already incurred
 - Chapter 7 Trustee can still assert avoidance actions and other claims against various parties in interest

Plan Confirmation – Exclusivity



Only the debtor may propose plan in first 120 days of case unless deadline shortened or extended. When the “exclusivity period” ends, others may propose plan.

Plan Confirmation – Disclosure Statement

Court must approve Disclosure Statement prior to soliciting votes (§ 1125).

- ❖ Disclosure statement must contain “adequate information” (FRBP 2002(b))
- ❖ 28 days notice to object to disclosure statement and for hearing on disclosure statement
- ❖ Court-approved disclosure statement must be sent to those entitled to vote on plan

Plan Confirmation – Class Designation and Voting

Must separately classify types of claims (i.e., secured v. unsecured claims, claims secured with different collateral or lien priorities in same collateral, may not be placed in the same class) (§ 1122(a))

Only impaired classes can vote for or against plan (§ 1126(c))

- ❖ Class of claims or interests is impaired if the plan changes the rights of its members (i.e., reducing amount owed, extending payment terms, lowering interest rates, modifying contractual obligations)
- ❖ Class of claims is unimpaired if plan leaves all legal, equitable and contractual rights intact
- ❖ Acceptance by a class of creditors only if $> 1/2$ in number and $\geq 2/3$ of dollar amount
- ❖ Acceptance by a class of interests only if $> 1/2$ in number

Plan Confirmation – Consensual vs. Cramdown

- ❖ If all impaired classes accept the plan, then plan is a consensual plan and can be confirmed if the requirements of § 1129(a) are met
- ❖ If an impaired class of claims has rejected the plan, then plan is a cramdown plan and can be confirmed if, in addition, (1) at least one impaired class has accepted the plan (§ 1129(a)(10)) and (2) § 1129(b) (the “absolute priority rule”) is satisfied
- ❖ If cramdown plan (i.e., at least one impaired class voted against and at least one impaired class voted to accept the plan), then absolute priority rule requirements of § 1129(b) must be satisfied.
- ❖ Absolute priority rule requires that no junior stakeholder may receive anything on account of its claim or interest unless all those in rejecting senior classes are paid in full (unless reasonably equivalent new value is given to the estate by the junior stakeholder)

Plan Confirmation – Best Interest of Creditors Test



Each holder of a claim or interest who voted against the plan, and who is in an impaired class, must receive at least as much as that holder would in a Chapter 7 liquidation (liquidation analysis).

A single objecting, impaired creditor who votes to reject can block the plan unless that holder will receive under the plan at least as much as it would in a Chapter 7 liquidation (§ 1129(a)(7))

Plan Confirmation – Payment of Claims and UST Fees

Administrative and priority claims must be paid in full (§ 1129(a)(9))

All U.S. Trustee quarterly fees must be paid (§ 1129(a)(12))

Plan Confirmation – Feasibility

Plan must be feasible

“Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.” (§ 1129(a)(11))

Plan Confirmation

If all of the requirements of § 1129 have been met, then Court may confirm the plan.

FRBP 2002(b) requires 28 days notice to object to plan and for hearing on confirmation of plan.

Third-Party Releases

- ❖ *Purdue* tells us that non-consensual third-party releases are not permitted under the Bankruptcy Code.

- ❖ What is a *consensual* third-party release?
- ❖ Split among the Delaware judges – comes down to how the debtor obtains consent
- ❖ Affirmative consent: the creditor affirmatively opts in to giving the release (usually by checking a box that says they consent to giving the release and submitting the form to the debtor)
- ❖ Implied consent: the creditor *fails to opt out* of giving the release (usually by failing to object or failing to return an opt-out form)

The Effect of Confirmation of a Chapter 11

Provisions of a confirmed plan bind:

- ❖ the debtor,
- ❖ any entity issuing securities under the plan,
- ❖ any entity acquiring property under the plan, and
- ❖ any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan (11 U.S.C. § 1141).

Prepackaged Plans (“Pre-Pack”)

- ❖ The typical pre-pack is a case in which institutional creditors, such as secured lenders and bondholders, negotiate and solicit acceptance of a plan that restructures their respective debt prepetition.
- ❖ A pre-pack plan leaves unimpaired the claims of other creditors, such as trade creditors and plaintiffs in litigation against the debtor whose claims have not yet been liquidated (whose consent is not required because they are unimpaired).
- ❖ A pre-pack is a kind of “consensual plan” (i.e., all impaired classes (by a vote of 2/3 in number and more than ½ in dollar amount within the class) have consented).

Winding Down the Case

- ❖ Liquidating any remaining assets
- ❖ Prosecuting avoidance actions and other causes of action
- ❖ Reconciling filed claims
- ❖ Making distributions to allowed claims under the plan
- ❖ Confirmed plan may create a liquidating trust, in which case the liquidating trustee appointed pursuant to the plan often will be authorized to prosecute avoidance actions, resolve claims, and make distributions to creditors

Closing the Case

Del. Bankr. L. R. 3022-1 – Final Decree in Chapter 11 Cases

- ❖ A motion for final decree must include a proposed final decree order that orders the closing of the case....
- ❖ The motion must be served on the parties listed in Local Rule 2002-1(b) at least 21 days before the hearing.
- ❖ The debtor or trustee must file a final report and account at least 14 days before the hearing on the motion.



Delaware State Bar Association

Bankruptcy Section

Bankruptcy Nuts and Bolts: A Primer for Bankruptcy Cross-Training

Part 3 – Hot Issues in Business Bankruptcy
Bruce Grohsgal, Delaware Law School
Gregory Flasser, Potter Anderson & Corroon

11:15 a.m. – 12:15 p.m.

1. Chapter 15

What is Chapter 15?

- Governs cross-border insolvency cases involving a debtor, assets, creditors, or proceedings in more than one country.
- Enacted in 2005 as part of BAPCPA.
- Implements the UNCITRAL Model Law on Cross-Border Insolvency.
- Allows U.S. courts to recognize foreign insolvency proceedings and coordinate with foreign courts.
- Commonly supplements a foreign bankruptcy, liquidation, or restructuring rather than replacing it.

Chapter 15

Objectives and Key Players

- **Objectives — § 1501**
 - Promote cooperation between U.S. and foreign courts.
 - Provide greater legal certainty for international trade and investment.
 - Protect creditors and other interested parties.
 - Preserve and maximize the value of the debtor's assets.
 - Facilitate the rescue of financially troubled businesses.
- **Foreign representative:** The person or entity authorized to administer the foreign proceeding or act on behalf of the foreign estate.
- **Foreign proceeding:** A qualifying collective judicial or administrative insolvency proceeding in another country.
- **U.S. bankruptcy court:** Determines whether recognition is appropriate and what relief is available under U.S. law.
- **Creditors and other stakeholders:** May participate and assert rights, subject to applicable procedural requirements.

Chapter 15

Recognition: Main vs. Non-Main Proceedings

- A foreign representative files a petition under § 1515, supported by evidence of the foreign proceeding and the representative's authority.
- The court determines whether the proceeding qualifies for recognition under § 1517.
- Foreign main proceeding
 - Pending in the country where the debtor has its center of main interests (COMI).
 - COMI is a central factual and legal issue; the debtor's registered office is subject to a rebuttable presumption under § 1516(c).
- Foreign non-main proceeding
 - Pending in a country where the debtor has an establishment—a place of operations involving non-transitory economic activity.
 - Does not qualify as a main proceeding.
- Recognition is subject to statutory requirements, including the public-policy exception in § 1506.
- Practice point: Build the evidentiary record for COMI early. Address headquarters, management, creditors' expectations, assets, and the location of business operations.

Chapter 15

What Happens after Recognition?

Automatic stay — § 1520

- Important distinction from Chapter 11: The automatic stay does not apply to the debtor and its property within the U.S. until the recognition order is entered
- Can be a gap from petition date to date of first day hearing to get recognition order

Preliminary relief — § 1519

- The court may grant appropriate interim relief after filing but before recognition, subject to statutory limits, such as an ex parte stay order to cover that gap

Additional relief — § 1521

- Depending on the circumstances, the court may grant discretionary relief to protect the debtor's assets or creditors' interests.

Access to U.S. courts — §§ 1509, 1524

- A recognized foreign representative may seek further relief and participate in certain U.S. proceedings.

Important distinction

- Recognition of a non-main proceeding does not automatically trigger the same stay under § 1520.
- Relief is not unlimited; statutory conditions and court orders matter.

Chapter 15

Court Cooperation and Cross-Border Coordination

- **Cooperation — §§ 1525–1527**
 - U.S. courts and insolvency representatives are directed to cooperate to the maximum extent possible with foreign courts and representatives.
 - Cooperation can include direct communications, coordination of proceedings, and information sharing.
- **Concurrent proceedings — §§ 1528–1532**
 - Chapter 15 addresses coordination where U.S. and foreign insolvency proceedings overlap.
 - Courts must consider the relationship between proceedings and avoid unnecessary interference with the foreign main proceeding, often recognizing orders from the foreign main proceeding.

Chapter 15

Benefits and Growing Popularity

- As the insolvency laws in foreign jurisdictions have advanced and developed, they have provided appealing options for main proceedings in other countries
 - Canada, UK, Mexico, etc.
- This has led to an uptick in Chapter 15 cases

Chapter 15

Major Issues and Trends: COMI Tourism

- **When, if ever, should recognition of a foreign main proceeding in a chapter 15 case be denied because of “COMI tourism,” *i.e.* establishing a foreign debtor that is an affiliate of a U.S.-based company to obtain jurisdiction in a non-U.S. forum with the intention of having the foreign proceeding recognized in the U.S.?**

Chapter 15

Major Issues and Trends: COMI Tourism

- *In re NFE Global Holdings Limited*, Case No. 26-11268 (MG) (Bankr. S.D.N.Y.)
 - Courts should scrutinize “COMI tourism” closely to confirm the plan was not “used unfairly to favor one group of creditors over others to achieve a result that could not be achieved in a chapter 11 case.”
- *In re Mega Newco Limited*, Case No. 24-12031 (MEW) (Bankr. S.D.N.Y.)
 - Mexican parent formed an English subsidiary with a U.K.-registered office to restructure its NY-law notes, then sought recognition of the English insolvency proceeding as the foreign main proceeding.
 - If this structure is routinely allowed, “the ordinary predicates for Chapter 15 relief could be stripped of meaning.” Any debtor could restructure anywhere it chose simply “by form[ing] a new subsidiary in a jurisdiction of its choice” and causing it to assume the parent obligations, so that “the parent company’s COMI would no longer be relevant.”

Chapter 15

Major Issues and Trends: Nonconsensual Third-Party Releases

- Following *Purdue*, nonconsensual third-party releases are prohibited in chapter 11 plans, but does that render such releases “manifestly contrary to U.S. public policy” to render them impermissible in a bankruptcy court’s enforcement of such releases that have been approved by a foreign court?
- *In re Crédito Real S.A.B. de C.V., SOFOM, E.N.R.*, 677 B.R. 192 (D. Del. 2026)
 - Judge Horan held that Chapter 15’s broad grant of authority permits enforcement of foreign court orders containing nonconsensual third-party releases and that the releases at issue were not manifestly contrary to U.S. public policy.
 - Affirmed on appeal to the District Court

Chapter 15

Major Issues and Trends: Cannabis

- Based on federal law, cannabis businesses cannot seek relief under the U.S. Bankruptcy Code, but does that mean recognition of a foreign cannabis case is manifestly contrary to U.S. public policy?
- *In re The Cannabist Co. Holdings Inc.*, Case No. 26-10426 (BLS)
 - Granting chapter 15 recognition to a foreign cannabis insolvency proceeding for the first time, finding that it was not manifestly contrary to U.S. policy to grant such recognition to a cannabis business.

2. Third Party Releases in Chapter 11 Plans

Chapter 11 discharges only the debtor

Why have courts authorized third party releases of non-debtors in Chapter 11?

- Non-debtor releasees (i.e., owners of debtor) have no obligation to contribute to plan, and often are not willing (or say they are not willing) to do so unless they obtain releases from non-debtors who hold claims against them
- Monetary contribution of non-debtor releasees maximizes value and distributions to creditors, preserves the enterprise as a going concern, and/or makes plan confirmation possible

A subtext, of course, is that the releasees typically are insiders

Third Party Releases after *Purdue Pharma*

- Before *Purdue Pharma*, several circuits authorized non-consensual third party releases

Purdue Pharma: The Bankruptcy Code “does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants.”

“Holdout problem” – After Supreme Court’s decision, without the benefit of non-consensual third party releases, the Sacklers agreed to \$7.4B settlement

Questions Not Decided by Supreme Court in *Purdue* (as stated in Court's Opinion)

- Consensual third party releases not “call[ed] into question.” They “pose different questions and may rest on different legal grounds” (“gifting” plans still okay if releasor consents)
- “What qualifies as a consensual release?”
- Might a plan that fully satisfied the third party non-debtor’s claims have altered the result?

Some Questions Arising Since *Purdue* – What is Required for Consent?

- What is required for consent (i.e., opt-in, opt-out, voting for the plan)?
- Most courts require knowing, meaningful consent
- Tension for plan proponent is that the more “knowing and meaningful,” the lower the likelihood that a consent will be obtained

Some Questions Arising Since *Purdue* – What is Required for Consent?

Many courts pre-*Purdue* held the plan could provide for a “deemed consent” to the release, which took various forms

- Creditor is in a class that will receive a distribution under the plan based on estate value
- Creditor is in a class that voted to accept the plan
- Creditor voted to accept the plan
- Creditor failed to check opt-out box on ballot
- Creditor failed to return opt-out form

Some Questions Arising Since *Purdue* – What is Required for Consent?

An “opt-in” requires the releasor to check a box or other action by which it affirmatively grants the release

Opt-in Required:

- *In re Smallhold* (Bankr. D. Del. 2024) (J. Goldblatt, acknowledging that pre-*Purdue* he authorized opt-outs, but going forward will require opt-ins)
- *In re Tonawanda Coke* (Bankr. W.D.N.Y. 2024) (failure to opt-out is not consent after *Purdue*)

Some Questions Arising Since *Purdue* – What is Required for Consent?

An “opt-out” provides that the releasor can decline, but grants the release if it does not act

Opt-out Permitted:

- *In re The Container Store Group, Inc.* (S.D. Tex. 2026)

Some Questions Arising Since *Purdue* – What is Required for Consent?

Opt-out Permitted (cont'd):

- *In re GOL Linhas Aereas Inteligentes S.A.*, 2025 WL 1591830 and 2025 WL 1466055 (S.D.N.Y. 2025) (applying federal law, following *Roell v. Withrow* (2003), and not state contract law, and affirming bankruptcy court's finding that releases were "knowing and voluntary")

Some Questions Arising Since *Purdue* – What is Required for Consent?

Opt-out Permitted (cont'd):

- *In re Lavie Care Centers* (Bankr. N.D. Ga. 2024) (rejecting *Smallhold* and holding that creditor or interest holder gave release if it (1) did not vote for the plan and failed to file an objection to the release or check the opt-out box on the ballot or opt out form, (2) voted for the Plan, or (3) failed to affirmatively opt out)

Some Questions Arising Since *Purdue* – What is Required for Consent?

Opt-out Permitted (cont'd):

- *In re Spirit Airlines* (Bankr. S.D.N.Y. 2025) (following weight of pre-*Purdue* cases within district, creditors failing to opt-out deemed to have consented)
- *In re The Roman Catholic Diocese of Syracuse, NY* (Bankr. S.D.N.Y. 2024) (same, though court required opt-out box on ballot, not on separate form)

Some Questions Arising Since *Purdue* – What is Required for Consent?

Opt-out Permitted (cont'd):

- *In re Blockfi Inc.* (Bankr. D.N.J. 2025) (only derivative claims (and not direct claims) released; *Purdue* decision therefore has no bearing)
- *Acute, Inc. v. ECI Pharmaceuticals, LLC* (S.D. Fla. 2025) (appellant failed to object to confirmation order)
- *In re Pipeline Health* (Bankr. S.D. Tex. 2024)

Some Questions Arising Since *Purdue* – Non-Consensual TP Releases Enforceable in Chapter 15?

- Chapter 15 enables multi-national reorganizations
- Multi-national company's subsidiaries and/or property are located in several nations, each of which has a different bankruptcy law
- Non-consensual third party releases will be enforceable against non-debtors in a Chapter 15 case if permitted under the law in which the main proceeding outside the United States is pending

3. Chapter 11 Administrative Expense Claims Processes

- “Administrative expense” claims are claims incurred by the debtor after the filing of the case, that are “actual, necessary costs and expenses of preserving the estate” (plus unpaid claims for the value of goods received by the debtor within the 20 days preceding the filing of the case) – 11 U.S.C. § 503(b)
- Typical administrative expense claims are claims for goods and services purchased on credit postpetition, and the fees and expenses of the lawyers, financial advisors, and other professionals retained by the DIP and OCUC

Chapter 11 Administrative Expense Claims Processes

- A requirement for Chapter 11 plan confirmation is that the plan provides for payment in full of administrative expense claims on the effective date of the plan, “[e]xcept to the extent that the holder of a particular claim has agreed to a different treatment of such claim” – Code § 1129(a)(9)

Chapter 11 Administrative Expense Claims Processes

- What can be done if the estate is “administratively insolvent” at the end of the case, meaning that it does not have sufficient funds with which to pay all of the administrative expenses it incurred?
- This has increasingly occurred in recent years, including in *Big Lots*, *Forever 21*, *Party City II*, *Toys ‘R’ Us*, *Steward Health Care*, and *Rite Aid II*

Chapter 11 Administrative Expense Claims Processes

In such cases, the plan proponents may establish a process by which each “holder of a particular [administrative expense] claim ... agreed[s] to a different treatment of such claim” under Code § 1129(a)(9), i.e., agrees to be paid less

- Alternative is Chapter 7 conversion or dismissal
- Instead, a Chapter 11 plan can be confirmed with potentially better recoveries treatment for many parties
- Risks: uncertainty; too few admin. claimants agree; litigation over adequacy of opt-in or opt-consent

Chapter 11 Administrative Expense Claims Processes

Steps:

- Set a bar date for administrative expense claims
- Determine the aggregate amount of such claims and the percentage of that aggregate amount that the estate will be able to pay

Chapter 11 Administrative Expense Claims Processes

- What constitutes “agree[d]” under 1129(a)(9)?
 - Opt-in or opt-out?
 - State law or federal law?
 - Many of the same issues as for “consent” to a third-party release
- What to do with the hold-outs?

4. Assignment for the Benefit of Creditors (ABC) and Subchapter V

- Delaware recently became the 6th state to adopt the Uniform Assignment for the Benefit of Creditors Act (10 *Del. C.* § 7301A)
 - The new law replaces Delaware's prior ABC statute, which dated back to 1875
- The ABC Act provides an alternative insolvency process that allows a distressed company to transfer substantially all of its assets to an independent assignee for liquidation and distribution to creditors

ABC – Assignee's Authority and Duties

- Serves as a fiduciary for creditors and administers the estate for their benefit
- Operates the business during the wind-down process
- Incurs debt and obtains financing
- Retains professionals
- Pursues avoidance and recovery actions
- Sells assets, including through Court-approved sale procedures similar to § 363 sales

ABC – Court Oversight

- Court of Chancery involvement is generally available on an opt-in basis
- The framework seeks to preserve the traditional benefits of ABCs, namely
 - Speed
 - Lower cost
 - Privacy
- At the same time, it provides a forum for judicial oversight and credibility when needed

Benefits and Advantages of ABC vs. Chapter 11

- Lower cost: Fewer procedural requirements and reduced professional fees
- Faster execution: Assets are often liquidated and distributions are made quicker
- Greater privacy: Attracts less publicity than federal bankruptcy filings
- Control over fiduciary selection: Company may participate in selecting the assignee
- Reduced director/officer exposure: Wind down shifts to an independent fiduciary

ABC – Advantages for Creditors

- Independent Fiduciary
 - Creditors receive the benefit of an independent fiduciary whose duties run to the creditor body as a whole
- Transparency
 - Court-supervised disputes occur in a public forum
 - Creditors can monitor liquidation activities and distributions
- Claims Resolution Forum
 - The ABC process provides a mechanism for resolving disputes regarding claims and distributions

ABC – Limitations

- No automatic stay
 - Creditors generally remain free to pursue collection actions unless otherwise restrained
- Liquidation-only process
 - No framework for restructuring or rehabilitating a business
- No contract assumption process
 - No equivalent to § 365
- Involuntarily bankruptcy risk
 - Creditors may still file an involuntary bankruptcy petition against the debtor
- Approval requirements
 - Transfer requires board approval, shareholder approval when corporate law is applicable, cooperation, and consent from secured lenders

Subchapter V of the Bankruptcy Code

Filing for Subchapter V

- The Small Business Reorganization Act of 2019 (SBRA) was enacted on Aug 23, 2019, with an effective date of February 19, 2020.
- Subchapter V had an initial debt limit of \$2,725,625.
 - However, under the CARES Act, the debt limit temporarily increased to \$7,500,000 until June 21, 2024.
- The applicable debt limit is currently the original limit enacted in the SBRA, as adjusted per 11 U.S.C. § 104, or \$3,424,000.

Eligibility Requirements

- Debtor must affirmatively elect Subchapter V treatment in its Chapter 11 petition
- Debtor must be engaged in commercial or business activities
- At least half of the qualifying business must come from commercial or business activities (personal debt does not qualify)

Subchapter V Trustee – Statutory Duties

- The Trustee's principal responsibilities include
 - Facilitating a consensual plan
 - Monitoring case administration
 - Appearing and being heard on major issues, including sales and confirmation
- The Trustee also possesses broad investigative authority, including the ability to investigate
 - The debtor's conduct
 - Assets and liabilities
 - Financial condition
 - Business operations
 - Any matter relevant to the bankruptcy case or plan formulation

Subchapter V Trustee – Dual Roles

1. Trustee as a Facilitator

- Trustee is expected to
 - Facilitate negotiation of a consensual plan
 - Promote communication among stakeholders
 - Assist with case administration

2. Trustee as a Fiduciary

- The Trustee also owes fiduciary duties to the bankruptcy estate
- This dual role creates tension because a Trustee seeking to facilitate consensus may simultaneously be required to investigate or pursue estate claims

Subchapter V – Estate Claims

- Can a Subchapter V Trustee prosecute estate?
 - Cases finding no authority to bring causes of action
 - *In re Ghatanfard*, 666 B.R. 14 (S.D.N.Y. 2024)
 - *In re Turkey Leg Hut & Company, LLC*, 659 B.R. 539 (Bankr. S.D. Tex. 2024)
 - Cases suggesting authority to bring causes of action
 - *In re Roe*, 2024 WL 206678 (Bankr. D. Or. Jan. 18, 2024)
 - *In re Duling Sons, Inc.*, 650 B.R. 578 (Bankr. D.S.D. 2023)
- Creditors should not assume that a Subchapter V Trustee will pursue estate claims
- When appropriate, creditors may need to seek
 - Derivative standing
 - Authority to pursue claims themselves

Subchapter V – Creditor Committees

- Not automatically appointed, but may be appointed “for cause”
- *In re Cinemex Holdings USA*, 672 B.R. 53 (Bankr. S.D. Fla. 2025)
 - Court identified a seven-factor test to determine if committee should be appointed
 - Case size
 - Complexity
 - Number of creditors
 - Size and nature of secured debt
 - Whether the Trustee can adequately perform committee functions
 - Other factors relevant to creditor representation

Subchapter V

- Subchapter V permits equity holders to retain ownership interests without satisfying the traditional absolute priority rule
- At the same time
 - Nonconsensual debtor discharges are typically delayed
 - Plan payments often continue for 3 to 5 years
- Debtors therefore frequently seek temporary protection for principals and guarantors during plan performance

Subchapter V – Injunction

- Courts typically apply the traditional preliminary injunction framework
- Following *Purdue*, courts have often approached the “likelihood of success” factor more flexibly
- Common considerations include:
 - Whether a principal needs a “breathing spell”
 - Whether temporary protection facilitates a successful reorganization
 - Whether the injunction promotes a consensual resolution
- Courts have rejected arguments that such relief constitutes an impermissible third party release when
 - The injunction is temporary
 - Creditors' claims remain preserved

Subchapter V – Revocation

- *In re USA Cricket*, 2026 WL 88217 (Bankr. D. Colo. Jan. 12, 2026)
 - The Court initially declined to revoke the debtor's Subchapter V designation despite objections from the U.S. Trustee
 - Subsequently, the Court
 - Revoked the designation
 - Appointed a Chapter 11 trustee
 - The Court cited
 - Failure to meet plan deadlines
 - Board deadlock
 - Management dysfunction
 - The Court also noted that a \$150 million proof of claim, if allowed, would have rendered the debtor ineligible for Subchapter V

Subchapter V – Dischargeability

Circuit Split: Corporate Debtor Dischargeability

- A significant split exists regarding whether § 523 exceptions apply to corporate Subchapter V debtors through § 1192(2)
- Courts holding that § 523 applies
 - *In re Cleary Packaging, LLC*, 2022 WL 2032296 (4th Cir. June 7, 2022)
 - *In re GFS Industries, LLC*, 99 F.4th 223 (5th Cir. 2024)
 - *In re 2 Monkey Trading, LLC*, 142 F.4th 1323 (11th Cir. 2025)
- Courts holding that § 523 does not apply
 - *In re Off-Spec Solutions, LLC*, 651 B.R. 862 (9th Cir. 2023)
- Basis of the Disagreement
 - The disagreement centers on § 523(a)'s reference to “an individual debtor” and whether that limitation carries through to § 1192(2)

Subchapter V – Takeaways

- Continues to evolve through litigation
- Trustee authority remains unsettled
- Creditors should actively monitor estate claims and eligibility issues
- Courts remain receptive to injunction requests, but continue to scrutinize third party protections
- Governance and dischargeability issues remain significant litigation battlegrounds