Insolvency

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Insolvency: USA

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Insolvency law, policy and procedure

Statutory framework and substantive law

Although individual states in the United States have laws that govern the relationship between debtors and their creditors, insolvency law in the United States is primarily dictated by federal law because Article 1, Section 8 of the United States Constitution grants Congress the power to enact 'uniform Laws on the subject of Bankruptcies'.[1] While over time several different bankruptcy statutes have been passed by Congress, the US bankruptcy regime is currently set forth in Title 11 of the United States Code (Bankruptcy Code),[2] which codified the Bankruptcy Reform Act of 1978[3] and subsequent amendments. The most recent significant amendment to the Bankruptcy Code was the 2005 Bankruptcy Abuse and Consumer Protection Act.[4]

The Bankruptcy Code is composed of nine chapters. Chapters 1, 3 and 5 provide the structural components that generally apply to all bankruptcy cases. Chapters 7, 9, 11, 12, 13 and 15 lay out general procedures specific to certain types of bankruptcies. Generally speaking, these specific types of bankruptcies are as follows:

a. trustee-administered liquidation (Chapter 7);
b. municipality bankruptcy (Chapter 9);
c. debtor-in-possession (DIP) managed reorganisation or liquidation (Chapter 11);
d. family farmer and fisherman bankruptcies (Chapter 12);
e. individual bankruptcies (Chapter 13);[5] and
f. cross-border cases (Chapter 15).

Generally speaking, with respect to plenary corporate bankruptcies, US insolvency law provides for two distinct regimes: a trustee-controlled liquidation under Chapter 7 and a DIP-controlled reorganisation or structured liquidation under Chapter 11.[6] This chapter focuses on Chapter 11 proceedings. Below are certain key provisions of US insolvency law.

The automatic stay

One of the most important provisions of the US insolvency regime is the automatic stay, which is codified in Section 362 of the Bankruptcy Code. The automatic stay is a statutory injunction that applies immediately upon the commencement of a bankruptcy proceeding. Generally, the automatic stay operates to enjoin most creditors from pursuing actions or exercising remedies to recover against a debtor's property. There are limited exceptions to the automatic stay and it can be modified by a court upon a showing of cause. The automatic stay provides the breathing room necessary for the debtor or trustee to assess and assemble all of the property of the estate without creditors seeking remedies to protect their own self-interests. Accordingly, the automatic stay allows for the preservation of the debtor's assets and the maximisation of their value and for an equitable distribution of those assets to creditors.

Safe harbours

One important exception to the automatic stay is that it generally does not apply to contracts that are colloquially referred to as financial contracts. Specifically, the automatic stay does not apply to certain delineated counterparties' ability to offset, net, liquidate, terminate or accelerate securities contracts,[7] commodities contracts,[8] forward contracts,[9] repurchase agreements,[10] swap agreements[11] or master netting agreements[12] with a debtor, provided that the counterparty may be required to exercise its remedies promptly.[13] In addition, a debtor may not avoid as a fraudulent transfer a transfer to such a counterparty under one of these contracts unless the transfer is intentionally fraudulent.

The absolute priority rule

Another key tenet of US insolvency law is the absolute priority rule. The absolute priority rule provides that, absent class consent, creditors with higher priority must be paid in full before creditors of lower priority or equity holders receive any distribution from the bankruptcy estate, and thereby ensures a fair and equitable distribution of the debtor's property consistent with the priorities under applicable non-bankruptcy law. As a result, in the absence of consent of the requisite majority of their class, secured claims must be paid in full before general unsecured creditors receive any recovery from the secured creditor's collateral. Similarly, because equity holders have the lowest priority, in the absence of consent, they cannot receive any distribution until all creditors have received distributions with a value equal to their allowed claims. Consent to the payment of a junior class can be obtained through a vote of the senior class on a plan of reorganisation.[14]

Avoidance actions

The Bankruptcy Code also provides a number of procedures that allow the debtor or trustee to avoid a pre-bankruptcy transfer of property from the bankruptcy estate. This allows the debtor to maximise the value of the bankruptcy estate and prevent a depletion of the estate prior to the commencement of the bankruptcy proceeding that may favour certain creditors over others. These protections are found in Chapter 5 of the Bankruptcy Code. The most commonly used of these actions are as follows:

a. avoidance of preferential transfers, which enables an insolvent debtor, subject to certain defences, to avoid and recover payments based on antecedent debt made to creditors within the 90 days prior to the debtor's filing for bankruptcy – up to one year for payments made to insiders of the debtor;[15]
b. avoidance of fraudulent transfers, which enables the debtor to avoid and recover transfers of property that were actually fraudulent or were made while the debtor was insolvent and for less than reasonably equivalent value;[16] and
c. avoidance of unperfected security interests, which enables a debtor to avoid liens on property if such liens were not perfected under applicable non-bankruptcy law prior to the commencement of the bankruptcy case.[17]

Policy

The goal of US insolvency law is to provide maximum return to creditors (and, if possible, equity holders) of the debtor and, in that context, to reorganise rather than liquidate business debtors to preserve employment and to realise the going concern surplus of reorganisation value over liquidation value. This is accomplished by reorganising a debtor corporation under the provisions of Chapter 11 of the Bankruptcy Code. However, if a reorganisation is not possible – or if it would not result in a maximisation of value for creditors – the debtor company can be liquidated either under Chapter 11 or Chapter 7 of the Bankruptcy Code. Chapter 7 transfers the control of the liquidation process from the debtor's management, who are likely to have greater familiarity with the assets and their value, to a trustee appointed by the United States Trustee[18] or elected by the debtor's creditors. Chapter 7 liquidations usually result in lower recoveries for creditors. Therefore, companies are more likely to be liquidated under Chapter 7 if there are not sufficient funds in the estate or available to the estate to run a Chapter 11 process.

Insolvency procedures

As discussed above, the Bankruptcy Code provides for two main types of insolvency proceedings available to businesses with assets in the United States: Chapter 7 and Chapter 11.

Chapter 7

Chapter 7 is a trustee-controlled liquidation. The goal of Chapter 7 is to ensure the most efficient, expeditious and orderly liquidation of the debtor's assets to be distributed to the creditors and equity holders. Companies cannot reorganise under Chapter 7. The Chapter 7 liquidation procedure is administered by a Chapter 7 trustee either selected by the United States Trustee or by an election conducted by certain creditors. The Chapter 7 trustee is responsible for realising upon all of the property of the estate and coordinating the distribution of such property or proceeds of sales of such property.

Chapter 11

Chapter 11 provides for a proceeding in which the directors and management of the financially distressed debtor company remain in control (the DIP) unless a trustee is appointed for cause. Chapter 11 proceedings allow for the reorganisation of the debtor's operations and capital structure in the hope that the company will emerge from the bankruptcy process as a healthier, reorganised company. Chapter 11 gives the debtor the exclusive right to propose a plan of reorganisation for the first 120 days after commencement of the bankruptcy proceedings, and this date may be extended until 18 months after the order for relief (the petition date of a voluntary case) in the case if the debtor is making progress on a plan of reorganisation and can show cause why the court should extend the exclusivity period.[19] The plan of reorganisation provides for how the debtor's assets will be distributed among the classes of creditors and equity holders. It is also possible for a debtor to liquidate its assets through Chapter 11, which is typically a more structured liquidation than one under Chapter 7.

The culmination of a Chapter 11 proceeding is the confirmation of the plan of reorganisation. The Chapter 11 plan provides how creditors' claims will be treated upon emergence of the debtor from Chapter 11. Under the Chapter 11 plan creditors and shareholders are divided into classes of holders sharing substantially similar claims or equity interests. Chapter 11 plans must meet certain standards to be confirmed. Even if a plan is accepted by the requisite vote of all impaired classes, it must be found by the court to be in 'the best interests of creditors' (providing each dissenting class member with at least what would have been recovered in a liquidation). As to a class that rejects the plan, the plan must satisfy the Bankruptcy Code's fair and equitable requirement (also known as the absolute priority rule, described above).

The plan of reorganisation is filed together with a disclosure statement and submitted to a vote of the various creditor and shareholder classes. If at least one class that stands to receive less than their asserted claim (an 'impaired' class) votes in support of confirmation of the plan, excluding insider yes votes, the plan can be confirmed over even if rejected by another impaired class. Dissenting classes can thus be crammed down so long as the plan is fair and equitable with respect to such class (that is, satisfies the absolute priority rule with respect to such class) and does not discriminate unfairly among similarly situated creditors. Once the plan is approved by the necessary stakeholders, a court can confirm a plan so long as certain other prerequisites of Section 1129 of the Bankruptcy Code are satisfied.

Chapter 15

Chapter 15 is the Bankruptcy Code's codification of the United Nations Commission on International Trade Law (UNCITRAL) Model Law and allows a foreign debtor, through its foreign representative, to commence an ancillary proceeding in the United States to support its foreign insolvency proceeding.

Starting proceedings

As set forth above, the US Bankruptcy Code provides for different types of bankruptcy proceedings. Not all of these proceedings are available for all types of companies. Specifically, insurance companies and banking institutions cannot file for Chapter 7 or Chapter 11 bankruptcy;, a railroad can be a debtor under Chapter 11 but not Chapter 7, and stockbrokers and commodity brokers can file for bankruptcy under Chapter 7 but not Chapter 11. Regardless of the type of bankruptcy case, under Section 301(a) of the Bankruptcy Code, a debtor voluntarily commences a plenary insolvency proceeding by filing a petition with the bankruptcy court.

A bankruptcy proceeding can also be commenced against a debtor company, which is known as an involuntary bankruptcy case. An involuntary case is commenced upon the filing of a petition with the bankruptcy court by three or more holders[20] of non-contingent, undisputed claims, and such claims aggregate at least US$18,600 more than the value of any lien on property of the debtor securing such claims.[21] A bankruptcy court will order relief against the debtor in an involuntary case only if the debtor is generally not paying its debts as they become due, unless such debts are the subject of a bona fide dispute as to liability or amount, or if a custodian as described in Section 303(h)(2) of the Bankruptcy Code has been appointed.

A Chapter 15 case is commenced when the foreign representative of the debtor company files a petition for recognition of the foreign proceeding with the US bankruptcy court.[22]

Control of insolvency proceedings

Under Chapter 7, the insolvency proceeding is controlled by a trustee who is appointed by the United States Trustee or elected by the debtor's creditors to administer the debtor's assets. The Chapter 7 trustee is responsible for, among other things, 'collect[ing] and reduc[ing] to money the property of the estate for which such trustee serves, and closes such estate as expeditiously as is compatible with the best interests of parties in interest'.[23] Although the Chapter 7 trustee can continue business operations for a short period if value is maximised by doing so, generally, once a Chapter 7 trustee has been appointed, the debtor company is expeditiously liquidated.

Chapter 11 proceedings allow for the debtor's existing management and directors to stay in place and operate the business during the bankruptcy case. For this reason, a debtor in a Chapter 11 proceeding is referred to as the debtor-in-possession (or DIP). The board of directors' primary duties in connection with an insolvency proceeding are the same as they are outside bankruptcy[24] – to maximise the value of the company.[25] The key distinction is that when a company is insolvent, the creditors, not the shareholders, are the residual beneficiaries of the board's fiduciary duties to the corporation and are, thus, able to bring actions for breach of fiduciary duty.[26] If the court determines there is cause (for example, fraud or gross mismanagement) or that it is in the best interests of the estate and its creditors, a trustee may be appointed to replace the DIP and administer a Chapter 11 case.[27]

During a Chapter 7 or Chapter 11 case, the DIP or trustee may take actions that are in the ordinary course of the debtor's business without approval of the bankruptcy court. Actions after entry of the order for relief outside the ordinary course of business are subject to bankruptcy court approval.

In the United States, bankruptcy courts are courts of limited jurisdiction. This is because, unlike federal district and circuit courts, bankruptcy courts were not created under Article III of the United States Constitution. Instead, Congress created the bankruptcy courts because they were 'necessary and proper' to effectuate Congress's enumerated powers to enact bankruptcy law. For this reason, bankruptcy courts may only oversee matters that are core to the bankruptcy case unless the parties knowingly and voluntarily consent to adjudication of a non-core matter by the bankruptcy court. Without consent, matters that are not core to the insolvency proceeding must be decided by a federal district court. Appeals of bankruptcy court decisions are generally heard, in the first instance, by the federal district court sitting in the same jurisdiction as the applicable bankruptcy court.[28] Bankruptcy court jurisdiction is the subject of much debate under a line of recent Supreme Court cases.[29]

Among other things, the bankruptcy court manages filing deadlines, hears evidence on contested issues and issues orders regarding requests for relief by the parties. Nevertheless, and despite the involvement of the court, many aspects of the bankruptcy process are negotiated by the parties outside the courtroom and the DIP or trustee is free to enter into settlement agreements, which are then subject to the approval of the bankruptcy court.[30]

Special regimes

Securities broker-dealers are not eligible for relief under Chapter 11[31] but are more likely to be resolved in a proceeding under the Securities Investor Protection Act of 1970 (SIPA).[32] SIPA proceedings are liquidation proceedings, and upon commencement of the SIPA proceedings, the broker-dealer will cease to conduct business as a broker-dealer, subject to certain limited exceptions. In SIPA proceedings, a trustee (SIPA trustee) will take control of all property, premises, bank accounts, records, systems and other assets of the broker-dealer and displace management. The SIPA trustee's primary duties will be to marshal assets, recover and return customer property (including through effectuating bulk account transfers to a solvent broker-dealer) and liquidate the broker-dealer.

In SIPA proceedings, the provisions of Chapters 1, 3 and 5 and Subchapters I and II of Chapter 7 of the Bankruptcy Code will also apply, to the extent consistent with SIPA, and the SIPA trustee will generally be subject to the same duties as a trustee under Chapter 7 of the Bankruptcy Code with certain limited exceptions regarding securities that are property of the customers of the broker-dealer. If the broker-dealer is a registered futures commission merchant under the Commodity Exchange Act of 1936,[33] the SIPA trustee will have additional obligations under the Part 190 regulations[34] promulgated by the Commodity Futures Trading Commission, with respect to any commodity customer accounts that have not been transferred to another futures commission merchant prior to the filing date.

Although bank holding companies can file for Chapter 11 relief, their subsidiary depository institutions are not eligible for relief under the Bankruptcy Code, and are typically resolved by the Federal Deposit Insurance Corporation (FDIC) under the Federal Deposit Insurance Act.[35] The FDIC has the authority to market a failed depository institution for sale to another depository institution, or the FDIC can insert itself as a receiver, close the bank and liquidate its assets to pay off creditors. The powers of the FDIC as receiver are very similar to those of a trustee in bankruptcy.[36]

Additionally, the Dodd–Frank Wall Street Reform and Consumer Protection Act[37] established the Orderly Liquidation Authority (OLA), which provides that the FDIC may be appointed as receiver for a top-tier holding company of a failing financial institution that poses a systemic risk to financial stability in the United States. OLA sets forth the procedures that the federal government can take to cause the wind down of financial institutions that were once considered too big to fail. Pursuant to OLA, the FDIC can exercise many of the same powers it has as a bank receiver to liquidate systemically risky financial institutions. Moreover, under the Dodd–Frank Act, institutions that may be subject to OLA must provide the FDIC with resolution plans (commonly known as 'living wills'), to serve as road maps in the event the financial institution requires resolution. However, despite the enactment of OLA, these resolution plans must demonstrate how the financial institution would be resolved under the Bankruptcy Code.

State law governs all regulation of insurance companies, including the resolution of insolvent insurance companies.[38]

The Bankruptcy Code has mechanisms for dealing with bankruptcy proceedings involving corporate groups and there is no special regime to address these types of filings. If multiple affiliated companies in the same corporate group seek relief under the US Bankruptcy Code, they will file separate bankruptcy petitions but will often seek joint administration of the various bankruptcy proceedings, meaning that the bankruptcy cases of each member of the group will be overseen by the same judge, which provides for greater efficiency in the administration of the cases. Importantly, joint administration does not mean that the assets and liabilities of the group will be combined. Rather, corporate separateness will be observed despite the joint administration of the cases, unless there is cause to breach corporate separateness and 'substantively consolidate' the assets and liabilities of the debtor.

Cross-border issues

As part of the 2005 Bankruptcy Abuse and Consumer Protection Act, the United States enacted Chapter 15 of the Bankruptcy Code, which is based on the UNCITRAL Model Law on Cross-Border Insolvency (Model Law).[39] Chapter 15 governs how a US court should treat a foreign insolvency proceeding when no plenary proceedings have been commenced in the United States and provides a mechanism for cooperation between the US court and the foreign court overseeing a debtor's plenary insolvency proceeding. Generally, Chapter 15 allows for the commencement of an ancillary proceeding upon recognition of the debtor's foreign proceeding. Once the foreign proceeding is recognised by the US bankruptcy court, the automatic stay applies to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States,[40] and the debtor's foreign representative enjoys certain powers and privileges under the Bankruptcy Code, such as the right to intervene in any court proceeding in the United States in which the foreign debtor is a party, the right to sue and be sued in the United States on the foreign debtor's behalf, the authority to operate the debtor's business and the authority to initiate avoidance actions in a case pending under another chapter of the Bankruptcy Code.

The bar for accessing plenary proceedings in the US bankruptcy courts is relatively low. A company can be eligible to commence a Chapter 11 proceeding in a US bankruptcy court so long as it is incorporated or has any property or operations in the United States. Because of the perceived debtor-friendliness of US bankruptcy courts and the courts' vast experience in restructuring large multinational companies, many multinational companies file for Chapter 11, even if their principal place of business, or centre of main interest, is located outside the United States. This trend is illustrated by companies in the shipping industry. For example, the Taiwan-based TMT Group opened an office in Houston only a few days before filing for Chapter 11 protection in the United States Bankruptcy Court for the Southern District of Texas.[41]

Insolvency metrics

The US economy has largely maintained stability in 2023 and thus far in 2024. The labour market is slowing, but appears to be doing so in an orderly manner alongside economic expansion.[42] Real GDP increased 2.5 per cent in 2023 from 2022, compared to an increase of 1.9 per cent in 2022.[43] The unemployment rate remained relatively stable from 3.4 per cent in January 2023 to 4.3 per cent in July 2024, and in any event has been back to normal levels from the covid-19 pandemic high of 14.8 per cent in April 2020.[44]

US equities generated strong returns in the first quarter of 2024, with the S&P 500 experiencing its sharpest rally in momentum since 2000.[45] Strength in the equity markets continued in the second quarter of 2024, with the overall market (as measured by the US Market Index) returning 3.48 per cent.[46] Bonds issuances were up in 2024 as well. From January to July 2024 alone, US$1.23 trillion in bonds were issued, compared to US$1.38 trillion in the full year of 2023.[47]

In 2023, the 10-year Treasury rate gradually rose from 3.79 per cent in January to 4.98 per cent in October.[48] In 2024, the 10-year Treasury rate increased from 3.95 per cent in January to 4.70 per cent in April, as the US Federal Reserve continues to combat high levels of inflation, and then subsided to 3.73 per cent in September as the Federal Reserve signaled rate cuts to come in the autumn.[49]

The US equity market boom that followed the covid-19 pandemic slowed significantly in 2022, with only US$71 billion in stock issued, as compared to the US$419 billion issued in 2021. This trend continued through 2023, with only US$64 billion in stock issued.[50] US initial public offerings (IPOs) were also down in 2023. In the fourth quarter of 2023, there were just 26 IPOs launched by US companies, up from 20 launched in the same quarter of 2022, but significantly lower than the 232 launched in the fourth quarter of 2021.[51] Securities sold through IPOs in 2023 totaled US$15.76 billion, down from US$20.91 billion in 2022 and well below the $286.86 billion sold in 2021.[52]

Statistics showed increased financial stress in the market in the last year or so. In 2023, the United States had the highest number of corporate defaults in the world of 96, more than twice the 37 US corporate defaults in 2022.[53] S&P Global predicted in December 2023 that the leveraged loan default rate could climb to 3 per cent by September 2024, up from 1.9 per cent in October 2023, amid more difficult credit situations.[54]

High interest rates, high inflation, and the collapse of 'zombie' companies that survived the covid-era government support produced a significant increase in the volume of business bankruptcy filings in 2023.[55] Commercial bankruptcy filings increased by 19 per cent to 25,627 in 2023 from the 21,476 registered in 2022.[56] Commercial Chapter 11 filings increased 72 per cent in 2023 from 3,819 in 2022 to 6,569 in 2023 – but still short of the 7,128 commercial Chapter 11 filings during the covid-19 pandemic in 2020.[57]

The number of foreign bankruptcy proceedings in the United States under Chapter 15 nearly doubled from 89 in 2022 to 164 in 2023.
[58]

Plenary insolvency proceedings

In last year's edition, we discussed the *Boy Scouts of America*, *Gulf Coast*, *Ascena Retail*, and *Purdue Pharma* cases, which brought to the forefront discussion regarding the permissibility of releases of claims held by non-debtors against non-debtors, also known as non-consensual third-party releases, in plans of reorganisation. This year's edition provides an update in that sphere by summarising the recent US Supreme Court opinion in *Purdue Pharma,* which held categorically that such releases are not authorised by the US Bankruptcy Code. Additionally, we discuss the latest developments in the *Johnson & Johnson* 'Texas two-step', the growing popularity of including equitisation features in debtor-in-possession financing, and novel issues presented by cryptocurrency bankruptcy cases.

US Supreme Court ruling in *Purdue Pharma* on non-consensual third-party releases

As discussed in detail in last year's edition, non-consensual third-party releases have been the lynchpin in many US restructurings, where private equity sponsors and other non-debtor affiliates have been able to obtain releases from civil liabilities from claimants in exchange for making significant capital and other contributions to the bankruptcy estate. Circuit courts were split on whether the Bankruptcy Code authorised these arrangements outside a specified statutory scheme for asbestos-related cases.

In June 2024, in a ruling binding on all lower courts, the US Supreme Court ruled five-to-four in the *Purdue Pharma* case that non-consensual third-party releases are categorically impermissible under the Bankruptcy Code.[59] Purdue Pharma's proposed Chapter 11 plan contained a US$5.5 billion to US$6 billion settlement payment from the Sackler family (i.e., the equity holders, officers and directors of Purdue Pharma) in exchange for a release of, and injunction against, all current and future opioid-related claims against them. The Supreme Court held that this type of release and injunction was incompatible with the Bankruptcy Code because the catch-all provision in section

1123(b)(6) of the Bankruptcy Code, which allows a Chapter 11 plan to incorporate 'any other provision not inconsistent with the applicable provisions of [the Bankruptcy Code]' cannot be read to 'endow a bankruptcy court with 'radically different' power to discharge the debts of a non-debtor without the consent of affected non-debtor claimants'.[60]

Importantly, the Supreme Court decision in *Purdue Pharma* recognised the continued permissibility of *consensual* third-party releases obtained under a reorganisation plan.[61] 'Opt-in' plan releases – universally permitted – only effectuate the release of a non-debtor third party from liability to claimants that affirmatively elect to grant the release. 'Opt-out' plan releases shift the burden by providing that third parties are released unless they affirmatively opt out of the release. Prior to the Purdue decision, the majority of courts have confirmed Chapter 11 plans featuring opt-out releases, finding them permissible when appropriate.[62]

Although the extent to which third-party opt-out releases are accepted is a question that will likely continue to be addressed in the United States in the coming years, other countries take less of an issue with the use of third-party releases. Generally, countries other than the United States have permitted the use of non-consensual third-party releases as part of their insolvency regimes, including the United Kingdom and Canada.[63] Furthermore, US courts have generally granted recognition to such rulings through Chapter 15 proceedings.[64] It remains to be seen whether the Supreme Court's prohibition on non-consensual third-party releases in *Purdue* leads to a shift in recognising such rulings, but there is good reason to believe that prior practice should be unchanged.[65]

Johnson & Johnson's Texas two-step transaction

In 2021, Johnson & Johnson's (J&J) deployed the Texas divisional merger statute, more colloquially known as the 'Texas two-step', to cabin its talc-related liabilities into a newly formed bankruptcy-bound subsidiary, LTL Management LLC (LTL). Commentators were split over whether this reflected misuse of the bankruptcy system[66] or an appropriate use of bankruptcy tools to resolve mass torts.[67]

As last discussed in the 2022 edition, the New Jersey Bankruptcy Court declined to dismiss LTL's bankruptcy case, and upon appeal in January 2023, the Third Circuit Court of Appeals reversed that decision. The Third Circuit found that LTL Management did not satisfy the good faith requirement for bankruptcy filing, whereby '[f]inancial distress must not only be apparent, but it must be immediate enough to justify a filing'. Based on the funding agreements in place that provided the debtor LTL with access to US$61.5 billion of funding to address talc claims, the Third Circuit found that, at the time of filing, LTL was 'highly solvent with access to cash to meet comfortably its liabilities... for the foreseeable future'.

Later on the same day that the Third Circuit's decision was issued, LTL refiled for bankruptcy protection in the New Jersey Bankruptcy Court with a new set of funding and support agreements with its parent, designed to address the Third Circuit's ruling by providing the debtor LTL with access to a significantly reduced amount of approximately US$30 billion.[68] The new agreements obligated HoldCo (formerly known as Old JJCI) to fund LTL's operations and liabilities at all times, but only obligated J&J to fund the talc liabilities while LTL was in bankruptcy.[69] Nevertheless, the New Jersey Bankruptcy Court dismissed the bankruptcy filing on bad faith grounds, finding that the revised funding agreements still sufficiently precluded LTL's argument that it was in financial distress.

LTL appealed its second dismissal, and in July 2024, the Third Circuit affirmed the dismissal. Writing for the Court, Judge Ambro did not totally foreclose the potential that 'solvent companies, confronted by mass-tort litigation, can encounter significant financial distress that warrants bankruptcy'.[70] He observed that a viable bankruptcy case could exist when future insolvency is a realistic possibility based on meaningful evidence', rather than speculation.[71] However, LTL did not meet that standard because even 'in the worst-case scenario, LTL's assets exceed its liabilities'.[72] The Third Circuit opinion was not precedential, however, meaning that district courts and bankruptcy courts in the Third Circuit are not bound by the decision.

J&J is now pursuing its third Chapter 11 filing, this time a prepackaged bankruptcy case in Texas, using a new subsidiary, LLT Management LLC (the result of reincorporating LTL in Texas and renaming it). Reincorporating in Texas ensured that LTL (now LLT) would secure a bankruptcy venue in the Fifth—rather than the Third—Circuit Court of Appeals. Following a three-month out-of-court solicitation period, the prepackaged plan garnered accepting votes from more than 75 per cent of the approximately 100,000 ovarian cancer claims.[73] The planned prepackaged bankruptcy contemplates payment of approximately US$8 billion over 25 years to current and future talc powder users via a personal injury settlement trust and would resolve virtually all talc claims.[74] Given that the proposed plan reached the required consent threshold, it is anticipated that, as announced, LLT will form Red River Talc LLC to be the successor entity responsible for J&J's talc claims and Red River Talc LLC will file for bankruptcy.[75] No further information is available at the time of writing.

Companies deploying the Texas two-step are typically seeking to cordon off mass tort liabilities into a discrete subsidiary for the purpose of keeping the remainder of the enterprise, which can be quite profitable, out of the bankruptcy. Courts have been sympathetic to the goal of efficiently addressing mass torts claims,[76] but the dismissal decisions in *LTL* suggest that if the enterprise as a whole is solvent, any funding arrangement from the solvent part of the enterprise to the entity inheriting liabilities could effectively preclude the debtor from staying in bankruptcy. Now that the United States Court of Appeals for the Third Circuit has twice affirmed the dismissal of LTL's bankruptcy filings, other companies with mass torts liabilities may be deterred from pursuing the Texas two-step to address mass torts liabilities. Even as the Third Circuit has clearly foreclosed J&J's Texas two-step efforts, J&J's continued pursuit of its objective suggest that tactics for using bankruptcy to address these types of mass tort challenges will continue to evolve.

Debtor-in-possession financing with equitisation features

Debtor-in-possession (DIP) financing is routinely used in Chapter 11 cases to support the debtors' ongoing operations and pay for administrative expenses in bankruptcy. This type of post-bankruptcy loan typically gets the benefit of senior liens and superpriority claim status that provides lenders a measure of security and can create attractive risk adjusted returns. Traditionally, DIP facilities are repaid in cash upon emergence from bankruptcy. In recent years, however, equity conversion features have become increasingly common, where DIP loans may be converted into equity of the reorganised company, often at a discount to plan value.

During the covid-19 pandemic, in large part because debtors' financial projections and access to the financial markets at emergence were more difficult to predict, equitising DIPs provided cash-strapped debtors and lenders who were interested in the underlying value of a business a quick way to exit bankruptcy without having to raise substantial exit financing. The largest Chapter 11 cases of Latin American airlines filed in the Southern District of New York during the pandemic, LATAM Airlines, Aeroméxico and Avianca, all involved equitising DIPs, although with somewhat different features and outcomes. The approved DIP facility in Avianca had a senior US$1.3 billion Tranche A facility and a junior US$722 million Tranche B facility, where the debtors would elect to pay the entire Tranche B with reorganised equity upon emergence.[77] In Aeroméxico, the equity conversion was at the lenders' option, where lenders could elect to receive reorganised equity as repayment of their DIP loans.[78] The DIP facility that was ultimately approved in Aeroméxico allowed majority and minority DIP lenders to each make their own elections of receiving repayment in equity or cash without any drag-along feature.[79]

LATAM's proposed revised DIP facility provided that one of the three tranches of the DIP facility, Tranche C, would be provided by the existing shareholders and, at the debtors' option, could be converted into equity at a 20 per cent discount of plan value upon emergence.[80] Multiple creditor constituencies raised objections, and Judge Garrity ultimately struck down the proposed DIP facility as an improper sub rosa plan – an attempt to circumvent the Chapter 11 requirements for confirmation of a plan at the DIP financing approval stage – with respect to the 20 per cent discount element, because the debtors were asking the court to approve a DIP financing that implicates plan terms when a plan was yet to be filed and 'there is no way of knowing now whether that discount is appropriate'.[81] The Court found, however, that the proposed DIP facility met the new value exception to the absolute priority rule, as Tranche C 'represents new, substantial money that is necessary for a successful reorganisation and reasonably equivalent to the value of that which the Tranche C Lenders will be receiving' and the debtors' post-petition DIP marketing process was extensive and appropriate.[82]

This trend has persisted outside the airline context. Most recently, in the *Enviva* matter in May 2024, the Bankruptcy Court for the Eastern District of Virginia approved a multi-tranche US$500 million junior DIP facility, of which US$100 million of the convertible tranche was allocated to the shareholders to subscribe.[83] This DIP facility appeared to be designed to address concerns from the *LATAM* ruling, by not specifying the terms of any equity rights offering in a future plan; only providing an election feature to this tranche. As a result, plan value and any discount in a future offering all remained subject to the Court's subsequent review and approval at confirmation of a plan.[84] The unsecured creditors' committee still objected, arguing that the DIP facility constituted an impermissible sub rosa plan and violated the absolute priority rule, because the company allocated portion of that tranche was exclusively offered to shareholders (and not to unsecured creditors) when unsecured creditors were likely impaired.[85] Judge Kenney overruled the committee's objections and approved the proposed DIP facility, reasoning that any value received by shareholders was on account of their providing new money DIP loans as opposed to on account of their existing equity interests, since only those shareholders that subscribed to the DIP facility would receive the option to convert their DIP obligations into reorganised equity.[86] The committee appealed the decision to the District Court of Eastern Virginia, and the appeal remains pending at the time of writing.[87]

Cryptocurrency bankruptcies

In 2022, global markets saw the sudden and unexpected downfall of the cryptocurrency companies into a 'crypto winter'. With the decline of cyptocurrency prices, many cryptocurrency-related companies commenced Chapter 11 cases, including one of the leading cryptocurrency exchanges, FTX, whose co-founder Samuel Bankman-Fried was sentenced to 25 years in prison for fraud.[88] Other companies in the cryptocurrency ecosystem that also collapsed include cryptocurrency hedge fund Three Arrows Capital, cryptocurrency brokerage firm Voyager Digital, cryptocurrency-based finance platform Celsius Network, cryptocurrency lender BlockFi, cryptocurrency custodian Prime Trust, and cryptocurrency intermediary Genesis Global.

These bankruptcy cases presented a number of new legal issues driven, in part, by the novel nature of cryptocurrency assets and related custodial relationships. One key issue in many cryptocurrency bankruptcy cases is whether crypto assets deposited prepetition by customers onto the debtors' platform are property of the debtors' estate or the customers. If the crypto assets are determined to be property of the debtors' estates, then customers cannot access those assets during the pendency of the bankruptcy and those assets must be distributed pursuant to a Chapter 11 plan, where the customers would have unsecured claims against the debtors and most likely receive pennies on the dollar based on the Bankruptcy Code's priority waterfall. The debtors would also be able to sell such assets pursuant to section 363 of the Bankruptcy Code and use them to administer the Chapter 11 cases and satisfy other claims. Conversely, if the crypto assets are determined to be property of the customers, such assets must be returned to the customers, who would benefit from any appreciation in value of the asset during the Chapter 11 proceeding (rather than the estate).

Although cryptocurrencies are relatively novel products, in determining ownership, courts overseeing the *Celsius* and *BlockFi* cases both applied traditional contract principles to analyse the applicable terms of use that customers entered into with cryptocurrency platforms at the time of transacting. If such terms of use were unambiguous, then the plain language of the terms of use governed the title and ownership of the deposited digital assets.

Celsius had an 'earn' programme that allowed account holders to transfer digital assets to Celsius in exchange for interest payments. In September 2022, Celsius requested court authority to sell US$18 million worth of stablecoins held in the earn accounts to fund the bankruptcy cases. Before reaching the question of authority to sell such assets, the court had to determine whether the relevant assets were property of the estate. Judge Glenn of the Southern District of New York found that the terms of use formed a valid, enforceable contract between Celsius and earn account holders, and that the terms of use 'unambiguously transfer[red] title and ownership of Earn Assets deposited into Earn Accounts from Accounts Holders to the Debtors' in exchange for the ability 'to earn a financing fee from Celsius'.[89] As a result, the deposited crypto was identified as estate property and the earn account holders were deemed unsecured creditors.[90]

In contrast, BlockFi operated a 'wallet' programme that was not interest bearing, and crypto assets deposited by customers in the wallet accounts were held through custodians for the benefit of customers. In December 2022, BlockFi filed a motion seeking to return US$297 million in the wallet programme to customers.[91] Judge Kaplan of the New Jersey Bankruptcy Court granted the motion, finding that assets held in the BlockFi wallets were not property of the bankruptcy estate.[92] Similar to the *Celsius* case, the court looked to the terms and conditions that users agreed to when creating an account and determined that the agreement stated unambiguously that title to the crypto assets in those non-interest-bearing wallets would remain at all times with the customer and was not conveyed to BlockFi.

Cryptocurrency bankruptcy cases also raise interesting and complex issues with respect to whether plan distributions should be made in-kind or in cash, the appropriate estimation methodology, the appropriate date for purposes of valuation, and whether customers or equity holders can benefit from the appreciation in cryptocurrency during the Chapter 11 proceeding. The resolution of these issues is still developing and courts in different jurisdictions have taken different approaches. As the FTX bankruptcy case marches toward plan confirmation this fall, there is still plenty to watch in the cryptocurrency bankruptcy space.

Ancillary insolvency proceedings

US courts have taken conflicting positions on whether eligibility for Chapter 15 recognition requires that the debtor have a domicile, a place of business or property in the United States. The issue arises because Bankruptcy Code section 109(a) includes those requirements for an entity to be a debtor under the Code and Bankruptcy Code section 103(a) provides that Chapter 1 applies in a case under Chapter 15.

The Second Circuit Court of Appeals – whose decisions control New York Bankruptcy Courts – applied a plain reading of these two statutes in *In re Barnet* to conclude that the debtor eligibility requirements in section 109(a) apply to Chapter 15 proceedings because section 109(a) is encompassed in Chapter 1 of the Bankruptcy Code.[93]

Several bankruptcy courts outside of the Second Circuit have disagreed with *Barnet*. For example, in *In re Bemarmara Consulting A.S.*, the Delaware Bankruptcy Court held that section 109(a)'s debtor eligibility requirements do not apply to Chapter 15 recognition because that recognition is requested by the foreign representative, and not the debtor in the foreign proceeding.[94] The *Bemarmara* court also noted that Bankruptcy Code section 1502 includes its own definition of a 'debtor' as simply 'an entity that is subject to a foreign proceeding', without referencing any requirement that a debtor have a US-based domicile, principal place of business or property.[95]

In April 2024, the Eleventh Circuit Court of Appeals joined the Delaware and other Bankruptcy Courts opposing the Second Circuit's *Barnet* requirements, holding that a Chapter 15 debtor needs only to be properly subject to a non-US proceeding under applicable non-US law, and needs not have a US-based domicile, principal place of business or property.[96] The Eleventh Circuit recognised that a plain reading of section 103(a) indicates that section 109(a) does apply to Chapter 15 cases.[97] However, the Court then found that it is bound by its prior precedent, *In re Goerg*, 844 F.2d 1562 (11th Cir. 1988), which analysed the same issue under the predecessor of Chapter 15, the former section 304, titled 'cases ancillary to foreign proceedings'.

In *Goerg*, the Eleventh Circuit addressed the tension between the definitions of 'debtor' and 'foreign proceeding' in the predecessor to the current Bankruptcy Code.[98] 'Debtor' was defined, at the time, in the same way that it is defined today in section 101, 'a person or municipality concerning which *a case under this title* has been commenced'. The definition of 'foreign proceeding', however, noted specifically that it could be a 'proceeding, *whether or not under bankruptcy law*, in a foreign country where the debtor's domicile, principal business or assets are located'.[99] In that case, the Eleventh Circuit interpreted the term 'debtor' as used in the definition of 'foreign proceeding' to refer to the definition of 'debtor' in the forum where the foreign proceeding is pending rather than the internal Bankruptcy Code definition, recognising that this approach makes US recognition proceedings more accessible to foreign proceedings and facilitates carrying out the purpose of the former section 304 to achieve 'efficiency of insolvency proceedings involving worldwide assets'.[100] The Eleventh Circuit in *Al Zawawi* found that the former section 304 and Chapter 15 are sufficiently similar in their purposes and that the definitions of 'debtor' and 'foreign proceeding' in the current Bankruptcy Code are either the same or sufficiently similar to their equivalents at the time of *Goerg*, such that *Goerg* is a controlling precedent.[101]

The *Al Zawawi* decision establishes the Eleventh Circuit as a jurisdiction that may provide a marginal advantage to foreign debtors that seek to use Chapter 15 to compel discovery in furtherance of a potential cause of action or simply have foreign court decisions recognised by a US court. But the practical effect may not be as significant as the ruling suggests, because foreign debtors can relatively easily satisfy the Second Circuit's requirements under section 109(a) with relatively de minimis US property, for example, a retainer held by their US counsel. The conflicting statutory interpretation between the Second Circuit and the Eleventh Circuit, however, presents an opportunity for a statutory amendment for clarification or for the US Supreme Court to weigh in.

Outlook and conclusions

The sections below highlight recent trends and offer some detail on recent decisions and other developments that may be relevant in US bankruptcy practice in the coming years. This year's theme is focused on the rise of liability management transactions in recent years and the surrounding litigation.

Introduction to liability management transactions

The past few years have seen a sharp rise of companies in distressed situations using increasingly complex liability management transactions. These refinancings and debt buy-backs can allow a borrower to increase liquidity, reduce leverage, reduce cash burn or extend maturities, utilising provisions (or the lack thereof) in loan documents or indentures to allow a reshuffling of debt priorities or collateral waterfall. As a result, these transactions often create winners and losers among lenders within a particular facility based on whether those lenders had the opportunity (or the terms of their opportunity) to participate. A relatively high proportion of these transactions have been followed by bankruptcy, often focused on litigation among lenders and borrowers over the prebankruptcy transactions.

The two paradigmatic structures are drop-down financings and uptier of existing loans. In a drop-down financing, the company utilises investment baskets in the credit documents to transfer valuable assets to unrestricted subsidiaries or non-guarantor restricted subsidiaries, which then are pledged as collateral to newly issued debt. The financing raised has structural seniority with respect to the dropped-down collateral, and the liens on such collateral automatically get released from the collateral package for existing debt. Creditors participating in the drop-down financing would exchange some or all of their existing debt for the newly issued debt secured by the transferred assets.

In contrast to drop-down transactions where lenders providing new financing have structural seniority with respect to the transferred assets, uptiering transactions are built upon the concept of lien seniority. In uptiering transactions, the company issues superpriority new debt to participating lenders, which is senior to all existing debt. The company may also offer to the new money lenders an opportunity to uptier their existing debt, subordinating the existing debt held by non-participating lenders. Uptiering transactions typically involve a majority of lenders to direct the agent to enter into an intercreditor agreement effectuating lien subordination. In either drop-down or uptiering transactions, a majority of lenders could effectuate amendments to the credit documents that strip covenants for the non-participating lenders, making the existing debt held by them with significantly fewer protections.

As credit documents have evolved alongside the development of liability management transactions, new structures have emerged to achieve similar goals, most notably the 'double dip' and 'pari plus' structures. A double dip involves creating two claims against the same loan parties, each representing an independent source of potential recovery, whereas a pari plus creates a pari claim against the existing loan parties with a guarantee claim against assets outside of the existing credit group.

Litigation surrounding liability management transactions

Minority creditors aggrieved by non *pro rata* transactions often challenge these transactions with argument that:

a. the transaction lacked the requisite consent threshold or otherwise failed to comply with the credit documents; and
b. that these transactions violated express or implied covenants of good faith and fair dealing.

Opportunity to participate

Many liability management transactions are only open to participation by a majority of lenders, rather than all lenders. Not affording all lenders to participate has weighed heavily on some judges, but other judges have different views. In the *NYDJ* case, where a new, first-out tranche was created through majority consent, priming the existing loans, the court expressed scepticism with respect to the fairness of cutting certain lenders out of the picture, calling it a 'conspiracy'.[102] Similarly, in *Serta* and *Boardriders*, the plaintiffs' claims for breach of the implied covenant of good faith and fair dealing were allowed to proceed on the basis that the allegations were sufficient to show that the defendants 'colluded with a bare majority of lenders'[103] and 'worked in concert and in secret to deprive plaintiffs of the benefit of their bargain'.[104] Notably, however, the *Serta* Bankruptcy Court overruled an objection predicated on the same argument, finding the fact that the minority lenders were not invited to participate to be irrelevant and observing that '[a]bsent a contractual or legal duty to do so, the failure of the [minority lenders] to receive an invitation is just a fact of commercial life'.[105]

Lien subordination versus lien release

In challenging uptiering transactions, minority creditors have argued that a subordination of their debt to new superpriority debt effectively amounts to a release of their collateral, because the transaction renders their debt severely undersecured or effectively unsecured. A lien release, the argument goes, requires the consent from all lenders, which was not obtained. Courts have regularly rejected this argument and held that subordination is not lien release.

In *Murray Energy*, the Court noted that unlike a lien release, subordination merely 'reorders' the priority of liens, while still keeping the non-participating lenders' liens on the collateral.[106] The Court accepted the company's argument that the consent of all lenders was not necessary to consummate the transaction, as the transaction merely involved lien subordination rather than lien release.[107] Similarly, in *Serta,* the majority lenders prevailed on their argument that, had the sophisticated parties with counsel intended for lien subordination to require unanimous consent, the credit agreement would have provided that explicitly.[108] They argued that if a court were to superimpose such a protection into the contract, it would unravel the parties' bargained-for expectations.[109] Similarly, the Bankruptcy Court in *TPC* reasoned that the two-thirds threshold required for collateral release implied that subordination, as a less drastic action, would only require a lower consent threshold.[110]

No-action provisions

No-action provisions are often included in amended credit agreements put into effect by the majority, participating lenders, without consent by the minority, non-participating lenders, to eliminate standing for any individual creditor to sue the borrower, except through the administrative agent and with a required lender vote. Courts have taken a sceptical view of these provisions in the liability management context, as they severely limit ability of the aggrieved non-participating lenders to challenge the transaction.

For example, in the *TriMark* uptiering transaction, the amended credit agreement included a no-action provision, limiting non-participating lenders' standing to sue the borrower and the majority lenders in connection with the transaction.[111] Specifically, the non-participating lenders would need to direct the administrative agent and post a significant cash indemnity to initiate any lawsuit challenging the transaction. The New York Superior Court observed that no-action clauses are typically 'not unenforceable as violative of public policy... because they reflect an ex ante agreement to sacrifice certain individual rights for the "salutary purpose" of benefiting the venture as a whole'.[112] However, the Court found that the no-action clause here was not typical because it was imposed by the majority lenders and the borrower without notice or consent to the non-participating lenders, was 'purpose-built to prevent *these Plaintiffs* from suing *these Defendants* in connection with this transaction', and was 'part of a larger scheme to breach and then exit the agreement'.[113] The Court cast doubt on the requirement for non-participating lenders to post a cash indemnity bond equal to the fees and costs of litigation (including, notably, any counterclaims brought by the majority lenders that received an uptier of their loans) and characterised this provision as a 'preemptive self-pardon, of sorts'.[114]

A similar decision was reached in the Chapter 11 cases of *TPC Group*, where the Delaware Bankruptcy Court held under New York law that the no-action clause in question did not bar the objecting noteholders' challenge of the transaction.[115] Citing several cases, the Court reasoned that 'sacred rights' granted to individual bondholders (no matter how large or small their holdings are) would be rendered meaningless if any action to enforce such right would be subject to the no-action clause that requires 25 per cent of the holders to demand the trustee to initiate a lawsuit, which even then could be defeated if the majority holders so instructed the trustee.[116]

Implied covenant of good faith and fair dealing

When challenging non-*pro rata* liability management transactions, minority lenders often use a fall-back argument that, even if the transaction does not violate the express contractual provisions of the credit agreement or indenture, it violated the implied covenant of good faith and fair dealing that is implicit in all contracts. Courts have generally construed the implied covenant of good faith dealing narrowly and dismissed such claims because they are duplicative of breach of contract claims and seek identical damages for the alleged breach.

For example, the *Trimark* Court commented that 'the implied covenant cannot be used to impose obligations or restrictions going beyond what is set forth in the contract'.[117] Similarly, the *Serta* Bankruptcy Court dismissed the breach of good faith and fair dealing and reasoned that conduct 'that is expressly permitted under an agreement does not violate the implied covenant'.[118] The Court noted that the parties could have drafted the contract differently, but they can only get the benefit of the bargain as reflected in the contract.[119]

However, a few courts have more recently declined to dismiss claims for good faith and fair dealing. For example, in *Boardriders,* the Court declined to dismiss the implied covenant claim at the summary judgment stage.[120] The Court reasoned that even 'an explicitly discretionary contract right cannot be exercised in such bad faith as to deprive the other party of the benefit of the bargain', i.e., *pro rata* participation.[121] The Court found multiple features of the transaction that in combination painted a picture of bad faith on the part of the majority lenders and the company, including that:

a. negotiations were carried out in secret;
b. non-participating lenders' offer to provide additional capital were rebuffed by the company;
c. no-action provisions were amended to hinder plaintiffs' ability to sue; and
d. every affirmative and negative covenant was eliminated.[122]

Boardriders suggests especially egregious behaviour by the company and majority lenders may be viewed as bad faith even if the transaction fits into the four corners of the credit documents.

Remedies

In addition to monetary damages, plaintiffs frequently seek equitable relief to unwind the transaction and return the parties to the status quo ex ante. Typical relief requested includes the avoidance of liens or incurrences of new debt obligations, as well as the unwinding of any transfers of collateral to unrestricted subsidiaries. Such equitable remedy has rarely been granted, and multiple bankruptcy courts have declined to grant such remedy based on a lack of standing by the plaintiffs to bring claims belonging to the estates.

The *Revlon* Bankruptcy Court held that the non-participating lenders lacked standing to pursue any equitable remedies (including under state law) to unwind the transaction, because such claims are derivative of claims that belong to the estate and had been settled between the unsecured creditors' committee and the debtors.[123] Similarly, the *Incora* Bankruptcy Court held that plaintiffs' claims for an equitable lien and equitable subordination were disguised avoidance actions and therefore belonged to the estate, and dismissed such claims on the basis of lack of standing.[124] However, Judge Isgur did find that the amendments were not effective as to the minority lenders whose liens were stripped, resulting in those lenders receiving a restoration of their liens.[125]

Courts have reached different conclusions with respect to various aspects of liability management transactions, some focusing more on the textual interpretations of the credit documents, while others focusing more on the overall spirit and essence of the transactions. The confines of permissible manoeuvres are still being defined by developing case law, such as recent decisions in *Incora* and *Robertshaw*, and remain an area to watch. There is speculation that 'lender-on-lender-violence' in non-*pro rata* transactions will become less popular as creditors become more sensitive to the litigation risks, as well as the strains on commercial relationships with other repeat players in the distressed lending market.

Footnotes

1. ^ US Constitution, Article I, § 8.
2. ^ 11 U.S.C. §§ 101–1532 (2012).
3. ^ Pub. L. No. 95-598 (1978).
4. ^ Pub. L. No. 109-8 (2005).
5. ^ Individuals can also seek relief under Chapters 7 and 11 of the Bankruptcy Code.
6. ^ A trustee can be appointed in Chapter 11 for cause. 11 U.S.C. § 1104(a)(1).
7. ^ 11 U.S.C. § 555.
8. ^ 11 U.S.C. § 556.
9. ^ id.
10. ^ 11 U.S.C. § 559.
11. ^ 11 U.S.C. § 560.
12. ^ 11 U.S.C. § 561.
13. ^ See *In re Lehman Brothers Holdings Inc*, Case No. 08-13555 (JMP) (Bankr. S.D.N.Y. 15 September 2009).
14. ^ A plan of reorganisation is approved by a class when it is accepted by a majority in number of the class members who vote and the class members who accepted the plan hold at least two-thirds of the total value of the claims of voting creditors in that class. 11 U.S.C. § 1126.
15. ^ 11 U.S.C. § 547.
16. ^ 11 U.S.C. 11 544(b), 548. Under Section 548, the trustee can avoid a fraudulent transfer of an interest of the debtor in property that took place within two years before the date of the filing of the petition. Under Section 544(b), a trustee can avoid a transfer of an interest of the debtor in property under applicable state law, which can extend the look-back period beyond two years. However, a debtor might not be able to avoid and recover subsequent transfers of property received abroad by a foreign transferee from a foreign transferor. See *Securities Investor Protection Corp v. Bernard L Madoff Inv Sec LLC*, Case No. 12-00115 (S.D.N.Y. 7 July 2014).
17. ^ 11 U.S.C. § 552(a).
18. ^ The United States Trustee Programme is a component of the Department of Justice that seeks to promote the efficiency and protect the integrity of the federal bankruptcy system. The Programme monitors the conduct of parties in interest in bankruptcy cases, oversees related administrative functions and acts to ensure compliance with applicable laws and procedures. It also identifies and helps investigate bankruptcy fraud and abuse in coordination with various law enforcement agencies. The United States trustee is distinct from the trustee appointed to administer Chapter 7 and certain Chapter 11 cases. See U.S. Dep't of Just. US Trustee Programme, https://www.justice.gov/ust.
19. ^ 11 U.S.C. §§ 1121(b), (d)(2)(A).
20. ^ Only a single holder is necessary to commence an involuntary case if there are fewer than 12 overall holders of claims against the debtor.
21. ^ 11 U.S.C. §§ 303(b)(1), (2).
22. ^ 11 U.S.C. § 303(h)(1).
23. ^ 11 U.S.C. §§ 1504, 1515.
24. ^ 11 U.S.C. §704(a)(1).
25. ^ The Supreme Court has observed that 'the willingness of courts to leave debtors in possession' is premised upon an assurance that the officers and managing employees can be depended upon to carry out the fiduciary responsibilities of a trustee'. *Commodity Futures Trading Comm'n v. Weintraub*, 471 US 343, 355 (1985),

citing *Wolf v. Weinstein*, 372 US 633, 651 (1963). Officers and directors may therefore owe fiduciary duties to the estate even if their fiduciary duties to the company were limited under state law prior to the bankruptcy. *In re Houston Regional Sports Network, LP*, Case No. 13-35998 (Bankr. S.D. Tex. 12 February 2014).

26. ^ 'Even when [a] company is insolvent the board may pursue, in good faith, strategies to maximise the value of the firm.' *Trenwick America Litig Trust v. Ernst & Young*, 906 A.2d 168, 175 (Del. Ch. 2006), aff'd, 931 A.2d 438 (Del. 2007).
27. ^ Marshall S Huebner and Darren S Klein, 'The Fiduciary Duties of Directors of Troubled Companies', *American Bankruptcy Institute Journal*, Vol. XXXIV, No. 2 (February 2015); See *N Am Cath Educ Programming Found, Inc v. Gheewalla*, 930 A.2d 92, 101 (Del. 2007).
28. ^ 11 U.S.C. § 1104.
29. ^ The 1st, 6th, 8th, 9th and 10th circuits have established bankruptcy appellate panels (BAPs), which are panels composed of three bankruptcy judges that are authorised to hear appeals of bankruptcy court decisions. These panels are units of the federal courts of appeals. BAP judges continue to serve as active bankruptcy judges in addition to fulfilling their BAP duties. If a BAP has been established in a given circuit, the BAP will hear an appeal of a bankruptcy court decision unless a party to the appeal elects to have it heard by the district court. Decisions of the BAP may be appealed to the appropriate circuit court of appeals. See United States Courts, www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/CourtofAppeals/BankruptcyAppellatePanels.aspx.
30. ^ See *Stern v. Marshall*, 546 U.S. 462 (2011) (holding that the bankruptcy court lacked constitutional authority to enter a final judgment on a debtor's tortious interference counterclaim even though the counterclaim was a 'core proceeding' under 28 U.S.C. § 157(b)(2)), *Exec Benefits Ins Agency v. Arkison*, 134S. Ct. 2165 (2014) (providing that, when a 'Stern claim' is encountered, the bankruptcy court may issue proposed findings of facts and conclusions of law to be reviewed de novo by the district court), *Wellness Int'l Network, Ltd v. Sharif*, 135 S. Ct. 1932 (2015) (holding that bankruptcy judges may enter final judgment on claims that seek only to add to the bankruptcy estate and would exist outside of bankruptcy proceedings if the parties knowingly and voluntarily consent).
31. ^ Fed R Bankr P 9019.
32. ^ 11 U.S.C. §§ 741–753.
33. ^ Pub. L. No. 91-598 (1970), codified at 15 U.S.C. §§ 78aaa et seq.
34. ^ Pub. L. No. 74-675 (1936), codified at 7 U.S.C § 1 et seq.
35. ^ 17 C.F.R. Part 190.
36. ^ Pub. L. No. 81-797 (1950).
37. ^ See Federal Deposit Insurance Corporation, Receivership Management Programme, https://www.fdic.gov/about/strategic-plans/strategic/receivership.html.
38. ^ Pub. L. 111-203 (2010).
39. ^ 11 U.S.C. § 1011.
40. ^ See United Nations Commission on International Trade Law (UNCITRAL): A Guide to UNCITRAL, January 2013, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/12-57491-guide-to-uncitral-e.pdf.
41. ^ 11 U.S.C. § 1520.
42. ^ Reuters, US economy displays resilience with low layoffs, solid second-quarter growth August 30, 2024), available at https://www.reuters.com/markets/us/us-weekly-jobless-claims-fall-slightly-2024-08-29/.
43. ^ U.S. Bureau of Economic Analysis, Gross Domestic Product, Fourth Quarter and Year 2023 (Second Estimate), available at https://www.bea.gov/news/2024/gross-domestic-product-fourth-quarter-and-year-2023-second-estimate#:~:text=Current%2Ddollar%20GDP%20increased%206.3,(tables%201%20and%203).
44. ^ U.S. Bureau of Labor Statistics, United States Department of Labor, Graphics for Economic News Releases, Civilian Unemployment Rate, available at https://www.bls.gov/charts/employment-situation/civilian-unemployment-rate.htm.
45. ^ Hamilton Capital, Capital Markets Review, Q1 2024, https://hamiltoncapital.com/wp-content/uploads/2024/04/CMR-Q1-2024-Final.pdf.
46. ^ Morningstar, How the Largest US Stock Funds Did in Q2 2024, available at https://www.morningstar.com/funds/how-largest-us-stock-funds-did-q4-2024.
47. ^ Id.
48. ^ United States Department of Treasury, Daily Treasury Yield Curve Rates, 2023, available at https://home.treasury.gov/resource-center/data-chart-center/interest-rates/TextView?type=daily_treasury_yield_curve&field_tdr_date_value=2023.
49. ^ United States Department of Treasury, Daily Treasury Yield Curve Rates, 2024, available at https://home.treasury.gov/resource-center/data-chart-center/interest-rates/TextView?type=daily_treasury_yield_curve&field_tdr_date_value=2024.
50. ^ Federal Reserve Board, New Securities Issues, US Corporations (Table 1.46) (August 2024), available at https://www.federalreserve.gov/data/corpsecure/current.htm.
51. ^ S&P Global Worldwide IPO activity marks slow end to 2023 (17 January 2024) https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/worldwide-ipo-activity-marks-slow-end-to-2023-80055467.
52. ^ Id.
53. ^ S&P Global, Default, Transition, and Recovery: Corporate Defaults Jumped 80% In 2023 To 153, (16 January 2024), available at https://www.spglobal.com/ratings/en/research/articles/240116-default-transition-and-recovery-corporate-defaults-jumped-80-in-2023-to-153-12968832.
54. ^ S&P Global, Default, Transition, and Recovery: The U.S. Leveraged Loan Default Rate Could Climb To 3% By September 2024 As Economic Growth Slows (19 December, 2023), available at https://www.spglobal.com/ratings/en/research/articles/231219-default-transition-and-recovery-the-u-s-leveraged-loan-default-rate-could-climb-to-3-by-september-2024-as-12949225.
55. ^ The Year in Bankruptcy: 2023 (January 2024), available at https://www.jonesday.com/en/insights/2024/01/the-year-in-bankruptcy-2023#:~:text=According%20to%20data%20provided%20by,of%20the%20pandemic%20in%202020.
56. ^ Id.
57. ^ Id.
58. ^ Id.
59. ^ Harrington v. Purdue Pharma L.P., 144 S. Ct., 2071 (2024).
60. ^ Id. at 2083.
61. ^ Id. at 2087-88.
62. ^ See, e.g., In re Avianca Holdings S.A., 632 B.R. 124, 136 (Bankr. S.D.N.Y. 2021) (MG) (noting that ‘numerous cases in this district and elsewhere have approved the use of an opt-out procedure’).
63. ^ See, e.g., Luc Morin and Arad Mojtahedi, Catch Me If You Can: Third-Party Releases Under the Companies’ Creditors Arrangement Act, 19 Annual Review of Insolvency Law, 2021 CanLIIDocs 13544, https://canlii.ca/t/tt2n, retrieved on 30 August 2024 (‘Third-party releases are now a key component of most restructuring

processes conducted under the CCAA'); In re Avanti Commc'ns Grp. PLC, 582 B.R. 603, 606 (Bankr. S.D.N.Y. 2018) (a UK scheme of arrangement included the releases of non-debtor affiliate-guarantors).

64. ^ In re Avanti 582 B.R. at 606–07 (holding that where a foreign jurisdiction's insolvency law accepts third-party releases, such a scheme should be generally enforced by US courts based on principles of comity).
65. ^ See Ho, G (2024) After Purdue Pharma: The future of nonconsensual third-party releases in Chapter 15 proceedings, Columbia Business Law Review. Available at: https://journals.library.columbia.edu/index.php/CBLR/announcement/view/684#_ftn17 (Accessed: 30 August 2024) ('The Fifth and Second Circuit have both stated that bankruptcy courts could still grant enforcement of such releases as a permissible form of "additional assistance" not otherwise available under the Bankruptcy Code or U.S. law'.)
66. ^ The United States Senate Committee on the Judiciary further held a subcommittee hearing entitled, 'Abusing Chapter 11: Corporate Efforts to Side-Step Accountability Through Bankruptcy', (8 February 2022), which may be accessed at https://www.judiciary.senate.gov/committee-activity/hearings/abusing-chapter-11-corporate-efforts-to-side-step-accountability-through-bankruptcy.
67. ^ See A. Case & J. Macey, A Qualified Defense of Divisional Mergers, Harv. Bankr. Roundtable (28 June 2022), https://bankruptcyroundtable.law.harvard.edu/2022/06/28/texas-two-step-and-the-future-of-mass-tort-bankruptcy-series-a-qualified-defense-of-divisional-mergers/. See generally, Debtor's Objection to Motions to Dismiss Chapter 11 Case, In re LTL Mgmt. LLC, No. 20-30589 (MBK) (LTL I) (Bankr. D.N.J. 22 December 2021), [ECF No. 965].
68. ^ Debtor's Statement Regarding Refiling of Chapter 11 Case, In re LTL Mgmt. LLC, 23-12825-MBK (Bankr. DNJ 4 April 2023) [ECF No. 3]; In re LTL Mgmt., LLC, 652 B.R. 433, 448 (Bankr. D.N.J. 2023).
69. ^ See Declaration of John K. Kim in Support of First Day Pleadings paragraphs 80–82, In re LTL Mgmt., LLC, Case No. 23-12825 (Bankr. D.N.J. 4 April 2023), [ECF No. 4].
70. ^ In re LTL Mgmt. LLC, No. 23-2971, 2024 WL 3540467 at *4 (3d Cir, 25 July 2024).
71. ^ Id.
72. ^ Id.
73. ^ J&J to File Third Texas 2-Step If At Least 75% of Ovarian Cancer Claimants Accept LLT Management Prepack, https://app.reorg.com/v3#/items/intel/6185?item_id=261525 (1 May 2024).
74. ^ See Disclosure Statement, In re Red River Talc LLC, https://document.epiq11.com/document/getdocumentbycode/?docId=4339529&projectCode=RRI.
75. ^ Id.
76. ^ See, e.g., In re LTL, 652 B.R. at 449–50 ('There have been no developments since LTL 1.0 that have abated the Court's concerns or resolved the problems of the extensive tort-claim backlog, or the incontrovertible fact that many plaintiffs are denied any recovery in the tort system altogether'.).
77. ^ Final Order (I) Authorising the Debtors to (A) Obtain Postpetition Financing, and (B) Grant Liens and Superpriority Administrative Expense Claims, (II) Modifying the Automatic Stay, and (III) Granting Related Relief, In re Avianca Holdings SA, Case No. 20-11133 (MG) (Bankr. S.D.N.Y. 2020) [ECF No. 1031].
78. ^ Final Order Granting Debtors' Motion to (I) Authorise Certain Debtors in Possession to Obtain Post-Petition Financing; (II) Grant Liens and Superpriority Administrative Expense Claims to DIP Lenders; (III) Modify Automatic Stay; and (IV) Grant Related Relief, In re Grupo Aeroméxico, SAB de CV, No. 20-11563 (SCC) (Bankr. S.D.N.Y. 2020) [ECF No. 527].
79. ^ Notice of Filing of Revised Debtor in Possession Loan Agreement Schedule, In re Grupo Aeroméxico, SAB de CV, Case No. 20-11563 (SCC) (Bankr. S.D.N.Y. 2020), [ECF No. 525].
80. ^ In re LATAM Airlines Grp. S.A., 620 B.R. 722, 758 (Bankr. S.D.N.Y. 2020).
81. ^ Id. at 819.
82. ^ Id. at 812.
83. ^ Motion of Debtors for Entry of Interim and Final Orders (I) Authorising the Debtors to (A) Obtain Postpetition Financing and (B) Use Cash Collateral, (II) Granting Liens and Providing Superpriority Administrative Expense Claims, (III) Granting Adequate Protection to Prepetition Secured Parties, (IV) Modifying the Automatic Stay, and (V) Granting Related Relief [ECF No. 24], In re Enviva Inc., 24-10453-BFK (Bankr. E.D. Va. 13 March 2024).
84. ^ Id. at paragraph 64.
85. ^ See, e.g., Preliminary Objection of the Official Committee of Unsecured Creditors to Debtors' Proposed DIP Financing [ECF No. 375] at paragraphs 4, 38-49.
86. ^ Hr'g Tr., 1 May 2024, 165:15-24 [ECF No. 446].
87. ^ Notice of Appeal, In re Enviva Inc., 24-10453-BFK (Bankr. E.D .Va.) [ECF No. 564].
88. ^ United States Attorney's Office, Southern District of New York, Press Release, Samuel Bankman-Fried Sentenced to 25 Years for His Orchestration of Multiple Fraudulent Schemes, available at https://www.justice.gov/usao-sdny/pr/samuel-bankman-fried-sentenced-25-years-prison.
89. ^ Memorandum Opinion and Order Regarding Ownership of Earn Account Assets [ECF No. 1822] at 30, 33, Case No. 22-10964 (MG) (Bankr. S.D.N.Y. 4 January 2023).
90. ^ Id. at 6.
91. ^ Notice of Hearing of Debtors' Motion for Entry of an Order (I) Authorising the Debtors to (A) Honor Withdrawals from Wallet Accounts, (B) Update the User Interface to Properly Reflect Transactions and Assets as of the Platform Pause, and (C) Conduct Ordinary Course Reconciliation of Accounts, and (II) Granting Related Relief [ECF No. 121], Case No. 22-19361 (MBK) (Bankr. D.N.J. 19 December 2022).
92. ^ Order (I) Authorising the Debtors to (A) Honor Withdrawals from Wallet Accounts, (B) Update the User Interface to Properly Reflect Transactions and Assets as of the Platform Pause, and (C) Conduct Ordinary Course Reconciliation of Accounts, and (II) Granting Related Relief [ECF No. 923], Case No. 22-19361 (MBK) (Bankr. D.N.J. 17 May 2023).
93. ^ Drawbridge Special Opportunities Fund LP v. Barnet, 737 F.3d 238 (2d Cir. 2013); 11 U.S.C. § 103(a) ('this chapter . . . apply in a case under chapter 15').
94. ^ In re Bemarmara Consulting A.S., No. 13-13037(KG) (Bankr. D Del. 17 December 2013).
95. ^ Hr'g Tr. at 9, 10, 11–18, In re Bemarmara Consulting A.S., No. 13-13037(KG) (Bankr. D. Del. 17 December 2013), [ECF No. 39]; 11 U.S.C. § 1502. See also, e.g., In re MMX Sudeste Mineração S.A., No. 17-16113-RAM (Bankr. S.D. Fla. 2017), Order Granting Recognition, [ECF No. 9], 12 June, 2017; Hr'g Tr. Denying Motion to Dismiss Ch 15 Case at 5–6 [ECF No. 51] (1 November 2017).
96. ^ In re Al Zawawi, 97 F.4th 1244, 1248 (11th Cir. 2024).
97. ^ Id. at 1251.
98. ^ In re Goerg, 844 F.2d at 1566-67.
99. ^ Id.

100. ^ Id. at 1568.
101. ^ In re Al Zawawi, 97 F.4th at 1255.
102. ^ Octagon Credit Invs, LLC v. NYDJ Apparel, LLC, No. 656677/2017 (N.Y. Sup. Ct. 1 November 2018) [ECF No. 91] Tr 27:20-21.
103. ^ LCM XII Ltd v. Serta Simmons Bedding, LLC, No. 21 Civ 3987 (KPF), 2022 WL 953109, at *15 (S.D.N.Y. 29 March 2022).
104. ^ ICG Global Loan Fund 1 DAC v. Boardriders, Inc, 2022 WL 10085886, at *9 (N.Y. Sup. Ct. 17 October 2022).
105. ^ Serta Simmons Bedding LLC v. AG Ctr. St. P'ship (In re Serta Simmons Bedding, LLC), No. 23-90020, 2023 WL 3855820, at *11 (Bankr. S.D. Tex. 6 June 2023).
106. ^ Black Diamond Com. Fin LLC v. Murray Energy Corp. (In re Murray Energy Holdings Co.), 616 BR 89 (Bankr. S.D. Ohio 2020).
107. ^ Id. at 99.
108. ^ Lessons from the Loan Market from Recent Liability Management Transactions, Davis Polk (August 2020), https://www.davispolk.com/sites/default/files/davis_polk_reprint-davis_polk.pdf.
109. ^ See id. at 3.
110. ^ Bayside Cap Inc. v. TPC Grp. Inc. (In re TPC Grp. Inc.), No. 22-50372 (CTG) (Bankr. D. Del. 6 July 2022) [ECF No. 72].
111. ^ Audax Credit Opportunities Offshore Ltd et al. v. TMK Hawk Parent, Corp (Trimark), 2021 WL 3671541, at *13 (N.Y. Sup. Ct. 2021).
112. ^ Id. at *8.
113. ^ Id. at *7.
114. ^ Id.
115. ^ Bayside Cap, Inc v. TPC Grp. (In re TPC Grp.), No. 22-10493 (CTG), Memorandum Opinion, at 18-20 (Bankr. D. Del. 6 July 2022) [ECF No. 72] (internal citation omitted).
116. ^ Id.
117. ^ TriMark, 2021 WL 3671541 at *13.
118. ^ In re Serta, No. 23-90020, Memorandum Opinion at 16 (Bankr. S.D. Tex. 6 June 2023).
119. ^ Id. at 17.
120. ^ ICG Global Loan Fund 1 DAC v. Boardriders, Inc., No. 655175/2020, 2022 WL 10085886 (N.Y. Sup. Ct. 17 October 2022).
121. ^ Id. at 23.
122. ^ Id. at 24.
123. ^ In re Revlon, Inc. (22-10760) (DSJ), Amended Decision & Order, at 6 (Bankr. S.D.N.Y. 24 February 2023), [ECF No. 128] (internal quotations and citation omitted).
124. ^ In re Wesco, No. 23-90611, Memorandum Opinion, at 14-16 (Bankr. S.D. Tex. 1 January 2024), [ECF No. 508].
125. ^ Court Finds Wesco/Incora Uptier Exchange Breached Indenture, Restores Liens Securing All 2026 Wesco/Incora Notes (10 July 2024) https://reorg.com/articles/wesco-incora-uptier-exchange-breached-indenture/#:~:text=Judge%20Isgur%20clarified%20that%20his%20ruling%20restores%20the,not%20affect%20Silver%20Point%20and%20Pimco%E2%80%99s%20DIP