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Benchnotes

By Bradley D. Pack, Aaron M. Kaufman and Christina Sanfelippo[1]

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Fifth Circuit Decries "Lender-on-Lender Violence" and Invalidates Uptier Financing

In syndicated loan transactions, where several different lenders contribute money to fund a loan to the borrower, the principle of "ratable treatment" — under which each participating lender is entitled to receive its *pro rata* share of any payment made by the borrower — has long been thought of as a "sacred right." The recent emergence of "uptier" financing transactions has challenged that notion and given rise to a spate of "lender-on-lender violence," through which most of the participating lenders may secure priority treatment for themselves at the expense of the minority.

In a recent opinion, the Fifth Circuit Court of Appeals intervened to stop some of the bloodshed by invalidating an uptier on the grounds that the transaction did not qualify as an "open market purchase" exempt from ratable sharing under the terms of the syndication agreement.[2] The court also held that equitable mootness did not bar the minority lenders' argument on appeal that an indemnification provision in Serta's chapter 11 plan violated the Bankruptcy Code, and ordered the indemnification to be excised from the plan.

In 2016, Serta obtained a $1.95 billion first-lien loan and a $450 million second-lien loan with a group of syndicated lenders. The syndication agreement provided for ratable sharing among participating lenders of all payments made by the borrower, with two exceptions: Any participating lender could sell its rights under the syndication agreement through two options: (1) a "Dutch auction" open to all participating lenders; or (2) "open-market purchases." Under the Dutch auction option, Serta could buy a portion of the loan from the lender willing to sell it to Serta at the lowest price, subject to auction procedures described in extensive detail in the syndication agreement. In contrast, the syndication agreement did not define or otherwise discuss the phrase "open-market purchase."

Serta entered into an uptier transaction in 2020 with a bare majority of the syndicated lenders (the "prevailing lenders") whereby the prevailing lenders provided $200 million in new financing on a first-out super-priority basis, and swapped $1.2 billion of their existing first- and second-lien loans for $875 million of new debt on a second-out super-priority basis. Serta and the prevailing lenders also amended the syndication agreement to permit the uptier transaction, labeled the uptier an "open-market purchase," and agreed that Serta would indemnify the prevailing lenders for any liabilities arising out of the uptier. The result was to lower Serta's overall debt load and improve the prevailing lenders' priority over the lenders that did not participate in the uptier (the "excluded lenders"), whose loans were effectively subordinated.

Serta filed a chapter 11 petition in January 2023. Serta and the prevailing lenders filed an adversary complaint against the excluded lenders for a declaratory judgment that the uptier did not violate the syndication agreement.[3] The excluded lenders filed counterclaims for breach of contract and breach of the implied covenant of good faith and fair dealing.

The bankruptcy court entered partial summary judgment in favor of the prevailing lenders, finding that the uptier fell within the syndication agreement's "open-market purchase" exception to ratable sharing. The court also confirmed Serta's reorganization plan, which included a provision allowing the claims for indemnification of certain of the prevailing lenders or their successors.

On direct appeal, the Fifth Circuit reversed the rulings in the adversary case and ordered the indemnification provisions excised from the chapter 11 plan. Applying New York law, the court held that the phrase "open market" means "a specific market in which various parties may participate and the prices are set by competition," and not "merely a general context where private parties engage in non-coercive transactions with each other."

In this case, the applicable market was the secondary market for syndicated loans. Since Serta chose "to privately engage individual lenders outside of this market" rather than purchasing its loans on the secondary market or through a Dutch auction, the uptier transaction did not satisfy either exception to ratable treatment under the loan syndication agreement. The Fifth Circuit reversed the bankruptcy court's summary judgment ruling to the contrary and reversed the dismissal of the excluded lenders' breach-of-contract claims. In reaching its holding, the court expressly declined to adopt a more expansive definition of "open-market purchase" given in a guide published by a leading loan-syndication trade group, holding that its definition

1 Mr. Kaufman is special projects leader of ABI's Commercial Fraud Committee. Ms. Sanfelippo is co-chair of ABI's Young and New Members Committee and a 2024 ABI "40 Under 40" honoree.

2 *In re Serta Simmons Bedding LLC*, 125 F.4th 555 (5th Cir. 2025). The opinion — originally issued on Dec. 31, 2024 — was twice revised and superseded.

3 The adversary case did not involve all prevailing lenders and all excluded lenders, but for the sake of simplicity, this article disregards the distinction between those who were parties to the adversary proceeding and those who were not.

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By Diana M. Peterson

Paving the Way: Proposed Changes to Bring Certainty to UCC Article 9 Sales

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Uniform Commercial Code (UCC) Article 9 foreclosures involving sales of membership interests in an entity holding title to real property are rising at a rate not historically seen before. Substantial revisions to Article 9 of the UCC were made in 1998 and adopted in all states. It was further amended in 1999, 2000, 2001 and 2010. Given this recent rise in UCC sales involving the membership interests of real property holding entities, and the fact that Article 9 does not directly allow foreclosures on real property, it might be a good time to consider legislative changes to Article 9.

Why are UCC foreclosure sales involving sales of membership interests in real property holding entities rising at such a rapid rate? One reason could be that during the COVID-19 pandemic, and post-COVID, most commercial real estate borrowers could not get a loan from a traditional lender. During this period, the commercial real estate (CRE) market suffered from high interest rates, tightening credit, and often vacant or mostly vacant buildings with high carry costs and little to no income stream that traditional lenders deemed too high-risk to make a loan. Due to these market constraints, many CRE purchasers were forced to seek financing from hard money, mezzanine and other alternative lenders to obtain the requisite funds to acquire real property needed to conduct or expand their businesses or to develop projects.

This demand for nontraditional CRE lending alternatives was so strong during COVID-19 and post-COVID that a new crop of lenders and funds arose to meet the burgeoning need. Some funds were raised solely to acquire well-located, very saleable real property for pennies on the dollar by making a loan with a UCC pledge to a borrower likely to default. Some funds even made loans to CRE purchasers who lacked the liquidity to tender an earnest money deposit.

In many such situations, the secured lender intended to ultimately foreclose on the membership interests of the borrowing entity holding title to the real property through an Article 9 UCC sale. Reminiscent of the residential subprime lending crisis of 2007-10, many of these COVID- and post-COVID-era CRE borrowers are now defaulting, in addition to those whose traditional lenders played the "extend and pretend" game.

Regardless of a lender's initial intent, an Article 9 UCC foreclosure sale is an appealing remedy when default occurs. It allows the secured creditor to quickly and efficiently seize collateral and is far less costly and much quicker than filing a claim as a creditor in a chapter 11 case or pursuing judicial foreclosure. However, because an Article 9 sale does not require court involvement (vs. a judicial foreclosure or a § 363 sale, which happens under a bankruptcy court's supervision), it affords the secured creditor far less protection than these other methods of repossessing collateral.

A UCC foreclosure on the membership interests in an entity primarily holding title to real property is essentially an Article 9 collateral workaround that many savvy lenders and their attorneys successfully utilize. Typical collateral in Article 9 foreclosure sales includes inventory, equipment, vehicles, accounts receivable, stocks, bonds and negotiable instruments — not real property. While Article 9 does not directly allow foreclosure on real property, lenders can still effectively foreclose on real property by seizing the membership interest in an entity that holds title to the real property, thereby gaining control of it through their ownership of the entity's shares, which is considered personal property governed by Article 9. Such foreclosures are commonly used in mezzanine-financing situations where the collateral is the equity interest in a real property holding entity, allowing for a faster and far less complex foreclosure process than foreclosure on the real property itself.

Legislative Revision: Definition of "Commercial Reasonableness" in Article 9 Sales

The most glaring point of vulnerability for any secured creditor in an Article 9 sale, other than giving the debtor proper notice, is whether a court would find a sale "commercially reasonable" should it ever be challenged. If only one change to Article 9 (regardless of the type of collateral involved) could be recommended, it would be to provide a nationwide definition of "commercial reasonableness." The change would substantially clarify the rights and obligations of secured parties and debtors, which would clearly guide attorneys and auctioneers hired to notice, advertise and conduct Article 9 UCC foreclosure sales.

While Article 9 currently requires secured creditors to sell collateral in a "commercially reasonable" manner, the UCC does not define the term. This often leads to costly litigation where a debtor argues that the sale was not conducted reasonably and the creditor is faced with the very real threat that the debtor could successfully challenge the sale.

Section 9-610(a) of the UCC gives a secured party the right to "sell, lease, license or otherwise dispose of any or all of the collateral." However, § 9-610(b) states that "[e]very aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable." Section 9-627(b) further clarifies that a disposition is commercially reasonable if it is made "(1) in the usual manner on any recognized market; (2) at the price current in any recognized market at the time of the disposition; or (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition."

A secured creditor should typically take steps to protect itself in a UCC Article 9 sale by seeking to sell its collateral on the most recognized market that exists for that particular type of collateral, in the manner that the particular type of collateral is normally sold, taking the necessary steps to maximize the profit on the sale. Under § 9-610(b) of the UCC, the secured creditor may dispose of the collateral through a private or public sale, but under § 9-610(c)(1), the lender has the right at a public sale to purchase the collateral.

From a practical perspective, a secured creditor should only hire a qualified auctioneer to market and conduct the public sale. If an Article 9 sale involves the membership interests in an entity holding title to real property, the auctioneer will successfully market the real property for sale at auction. Moreover, the auctioneer's detailed marketing plan should be well documented in the sale transcript.

A foreclosing secured creditor must also ensure that the sale is marketed for a commercially reasonable amount of time, such that there is adequate notice to potential buyers. Courts generally find a public sale commercially reasonable if the secured creditor provides sufficient notice to the public.

What length of time is recommended for marketing the sale? Many secured creditors would like to hold the sale in 30 days or less, and the notice provisions of Article 9 only require 10 days' notice to the debtor. Since Article 9 does not define a "commercially reasonable" amount of time to market the sale before conducting it, what is recommended depends on the type of collateral owned by the entity whose membership interests are being sold. If the collateral mainly involves real property, at least 60 days of marketing is recommended, which is consistent with what is recommended to any owner of real property selling at an auction being held outside of Article 9. While a sale of the membership interests of an entity holding title to real property can be successfully marketed and conducted in less than 60 days, it arguably is not as defensible in court should the debtor sue the secured creditor for unlawful collection.

While courts have provided some guidance on what constitutes a "commercially reasonable UCC foreclosure sale," the definition is still widely open to individual interpretation. Some examples of "commercially reasonable conduct" include advertising unique collateral well, holding a well-marketed-yet-cost-efficient sale, and utilizing experienced auctioneers who understand how to most effectively and cost-efficiently market the sale to potential buyers. A nationwide definition of "commercial reasonableness" could help clarify the rights and obligations of all parties involved and is a legislative change worth seriously considering. Beyond providing a nationwide definition of what is "commercially reasonable" to better integrate UCC Article 9 sales with real property transactions, the following legislative changes to Article 9 might be considered:

- *More Clearly Defining What a "Fixture" Is in Article 9 UCC Sales:* Article 9 could more clearly define "fixtures" by establishing clear criteria for when an item becomes a fixture, considering factors like adaptation, attachment and intent of the parties.
- *More Clearly Defining What "Related Real Property" Is in Article 9 UCC Sales:* Article 9 could more clearly define what constitutes "related real property," which would help avoid ambiguity in situations where collateral

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Trump Administration Removes Tara Twomey as EOUST Director

The Justice Department removed multiple senior career officials on March 7,[1] including **Tara Twomey**, the head of the Executive Office for U.S. Trustees (EOUST). Jeffrey Ragsdale, the head of the Office of Professional Responsibility, and Liz Oyer, the U.S. pardon attorney, were also among those removed.

Twomey was appointed as director of the EOUST on Feb. 27, 2023, and prior to her appointment, she was the executive director of the National Consumer Bankruptcy Rights Center and Of Counsel to the National Consumer Law Center. She is a former clinical instructor and Fellow at the Legal Services Center of Harvard Law School and has been a Lecturer in Law at Stanford Law School and Boston College Law School.

During Twomey's tenure, the U.S. Trustee Program (USTP) opposed the initial *Purdue Pharma* bankruptcy settlement, which sought to shield the Sackler family from lawsuits, arguing that it would inappropriately protect the family and that the Bankruptcy Code did not allow for such "third-party" releases. The objection went all the way to the U.S. Supreme Court, which later overturned the settlement.[2]

Twomey also worked to expand the use of video § 341 meetings of creditors nationwide for consumer cases in the wake of the COVID-19 pandemic. "The policy is the product of careful and deliberate preparations to ensure that the option for virtual meetings delivers on its promise of added efficiency while preserving the integrity of the bankruptcy system," Twomey said in an *ABI Journal* article last year.[3]

As pointed out in a blog post by Prof. **Robert M. Lawless**,[4] the executive directorship of the USTP is typically seen as a nonpolitical position, and Twomey's predecessor, **Clifford J. White III**, served under both Republican and Democratic administrations.

Sen. Elizabeth Warren (D-Mass.) was critical of the Trump administration's removal of Twomey as EOUST director. "President Trump's decision to fire our nation's bankruptcy watchdog will leave families in financial crisis unprotected from abuse and allow giant companies to cheat the system and skirt accountability," Sen. Warren said.[5] "The American people lost a true public servant with Tara Twomey's firing, one who cared deeply about safeguarding families and served with great integrity."

The removals, like many across the executive branch, could be challenged in court. At press time, a successor to Twomey at the EOUST had not been appointed.

1 Perry Stein, Shayna Jacobs, Carol Leonnig & Ann Marimow, "Several Top Career Officials Ousted at Justice Department," *Washington Post* (March 7, 2025), washingtonpost.com/national-security/2025/03/07/justice-department-trump-firings (subscription required to view article; unless otherwise specified, all links in this article were last visited on March 12, 2025).

2 *Harrington v. Purdue Pharma LP*, 23-124 (June 27, 2024), supremecourt.gov/opinions/23pdf/23-124_8nk0.pdf.

3 Tara Twomey, "Questions and Answers with USTP Director Tara Twomey," XLIII *ABI Journal* 5, 12, 61-62, May 2024, abi.org/abi-journal/questions-and-answers-with-ustp-director-tara-twomey.

4 Bob Lawless, "Making the Bankruptcy System Less Great," *Credit Slips* (March 8, 2025), www.creditslips.org/creditslips/2025/03/making-the-bankruptcy-system-less-great.html.

5 James Nani, "DOJ Bankruptcy Head's Firing Unleashes Politics in Debt World," Bloomberg Law (March 11, 2025), news.bloomberglaw.com/privacy-and-data-security/doj-bankruptcy-heads-firing-unleashes-politics-in-debt-world.

Judiciary Seeks 71 Judgeships to Handle Growing Caseloads

The Judicial Conference of the United States on March 11[6] agreed to recommend to Congress the creation of new district and court of appeals judgeships as the judiciary faces a worsening shortage of Article III judges and caseloads continue to mount. Approved by the federal judiciary's national policy-making body at its biannual meeting in Washington, D.C., the judiciary asked Congress to create two judgeships in the courts of appeals and 69 judgeships in district courts, where the need is greatest. District court filings have grown by 30 percent since 1990, when the last comprehensive judgeship bill was enacted. Since 1991, the overall number of authorized district court judgeships has increased by only 4 percent.

In developing judgeship recommendations, the Conference and its Committee on Judicial Resources use a formal survey process to study and evaluate Article III judgeship needs. Before a judgeship recommendation is transmitted to Congress, it undergoes several levels of careful consideration and review. The surveys are conducted every two years, and the resulting recommendations are based on established criteria, including current workload factors and empirical standards.

Bipartisan Legislation Moves Forward to Clarify Regulatory Oversight of Stablecoins

Sen. Bill Hagerty (R-Tenn.) on Feb. 4 introduced S. 394, the "Guiding and Establishing National Innovation for U.S. Stablecoins (GENIUS) Act of 2025," which would establish a regime to regulate stablecoins. Currently, existing state and federal laws and regulations are applied to aspects of the stablecoin industry based on the nature of activities and individual stablecoin features.

According to Coinbase,[7] stablecoins are a type of cryptocurrency whose value is pegged to another asset, such as a fiat currency or gold, to maintain a stable price. They aim to provide an alternative to the high volatility of popular cryptocurrencies, making them potentially more suitable for common transactions.

6 "Judiciary Seeks 71 Judgeships to Meet Growing Caseloads," U.S. Courts Press Release (March 11, 2025), uscourts.gov/data-news/judiciary-news/2025/03/11/judiciary-seeks-71-judgeships-meet-growing-caseloads.

7 "What Is a Stablecoin?," Coinbase, coinbase.com/learn/crypto-basics/what-is-a-stablecoin.

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By Corinne Ball and Christopher DiPompeo

Rediscovering § 157(b)(5) Transfers in Mass Tort Bankruptcies: Part II

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This two-part series highlights one of the underutilized tools for the resolution of mass torts in the bankruptcy system: 28 U.S.C. § 157(b)(5). Part I, published in the previous issue,[1] discussed what § 157(b)(5) is and does. To recall, § 157(b)(5) is an aggregation tool that allows a district court where a chapter 11 case is pending to order the transfer of all personal-injury cases related to the chapter 11 case to the district court for full adjudication.

A § 157(b)(5) transfer is presumed to be appropriate when requested, and it gives the district court the power to pull cases directly from state court without removal. Section 157(b)(5) has a long history of helping to resolve mass torts, including in some of the earliest mass tort bankruptcies, such as *A.H. Robbins* and *Dow Corning*. Given the U.S. Supreme Court's recent rejection of nonconsensual third-party releases in *Purdue*,[2] it is likely that § 157(b)(5) will be rediscovered.

Part II discusses *how* practitioners can use § 157(b)(5) to assist in the resolution of mass torts through bankruptcy in a world without nonconsensual third-party releases. Courts and practitioners can use § 157(b)(5) to create a sort of "super-MDL" that combines the benefits of multi-district litigation (MDL) and chapter 11 cases to aid in achieving a full resolution of mass tort situations.

Using § 157(B)(5) to Create a "Super-MDL" Within a Bankruptcy Case

As noted in Part I, practitioners have long been searching for a way to resolve mass torts effectively and completely. Of the many strategies employed, two have been most prominent in recent years: the MDL and the chapter 11 case.

Where MDLs are available, they have proven to be very effective. Around 97 percent of MDLs end in a successful settlement, and MDL filings now account for 21 percent of the federal civil docket. Despite their successes, MDLs suffer from at least two limitations that restrict their ability to fully resolve mass torts.

First, because MDLs are exclusively federal, they cannot include nonremovable state cases or state attorneys general actions. This means that MDLs can almost never result in *global* peace, and they foster dueling litigation tracks and a race to the courthouse. Second, because an MDL consolidates cases for strictly pre-trial purposes, MDL judges cannot take cases all the way to trial — even when that would be conducive to achieving a consensual resolution of the mass tort liabilities.

In light of these limitations, chapter 11 cases in recent years have taken center stage. Bankruptcy courts have effectively used procedural mechanisms like preliminary injunctions to halt mass tort litigation pending outside of bankruptcy court. Debtors have then sought to confirm chapter 11 plans containing nonconsensual third-party releases. However, as has been well documented in this publication, the Supreme Court's rejection of nonconsensual third-party releases in *Purdue* has raised questions about how effective bankruptcy courts will continue to be in resolving mass torts. The limitations of MDLs and the question marks surrounding chapter 11 have raised questions about whether either of these mechanisms alone can effectively address mass torts, which is where § 157(b)(5) comes in.

Section 157(b)(5) allows the district court to transfer *all* cases related to a bankruptcy — whether pending in state or federal court — to district court for adjudication in one central forum. This forum will be able to work in coordination with the bankruptcy court, which can use the procedural mechanisms of the Bankruptcy Code and those developed in MDLs to adjudicate overlapping disputes.

Thus, a § 157(b)(5) transfer can be used to create what might be called a "super-MDL" within the bankruptcy case, through which a district court can exercise full jurisdiction to final judgment over all personal-injury cases, working in tandem with the bankruptcy court to achieve a global resolution. By combining some of the procedural innovations of MDLs with the broad bankruptcy jurisdiction created by Congress, § 157(b)(5) creates

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1 Corinne Ball & Christopher DiPompeo, "Resolving the Mass Tort Problem: Part I: Aggregating Cases in a Single Forum Under § 157(b)(5)," XLIV *ABI Journal* 3, 30-31, 55-56, March 2025, abi.org/abi-journal/resolving-the-mass-tort-problem-part-i-aggregating-cases-in-a-single-forum-under-%C2%A7-157b5.

2 ABI held a webinar shortly after the Supreme Court issued its decision in *Purdue*. To listen to the abiLIVE recording, please visit abi.org/newsroom/videos. ABI also published a digital book, *The Purdue Papers*, a compilation of 3,500+ pages of *amicus* briefs, petitions and other related background material. To order your downloadable copy, visit store.abi.org.

By Turner N. Falk

Playing "Gotcha" Games with Class Proofs of Claim

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Outside of a bankruptcy proceeding, groups of persons may sue or be sued as the representative of a class if they meet the criteria of Rule 23(a) of the Federal Rules of Civil Procedure (numerosity, common questions of fact or law, typicality of the claims and defenses of the representative, fair and adequate protection of the interests of the class). If a court certifies a class — making findings that these and other applicable criteria are met under Rule 23(b) — the class representative may act on behalf of the class to bind its members to prosecute and settle the case, subject to certain circumstances that permit members to opt out.

Inside of a bankruptcy proceeding, a class will wish to make its claim on a class basis. The class representatives are more likely to prove a claim against a debtor than a previously disengaged class member acting alone. The class will have the additional negotiating power of a large dollar value claim, giving it room to maneuver to advance liquidation of the class claim.

In return, the class can offer its vote and support in favor of a proposed plan, bind its members to the settlement embodied in that plan, and take the issues of distribution to class members off the debtor's plate. The nonbankruptcy case law authorizing a class to bind nonparticipating class members is more developed than analogous bankruptcy law.

Most class claimants in traditional mass tort bankruptcies — such as asbestos, opioid or talc — fall neatly into the "known present claimant" or "future claimant" buckets. However, other major class actions exist where the class members have already suffered the requisite harm to become current creditors, but might not have any reason to know they have a claim.

For example, take individual customers whose drug prices were allegedly inflated by a price-fixing conspiracy.[1] Allegedly, hundreds of thousands of ordinary people paid the inflated prices and may have a present right to recover. Practically, they will not do so unless a class representative acts for them, since they have no reason to suspect a price-fixing conspiracy or to deeply question the price paid for a generic drug. Permitting a class representative to file a class claim and negotiate a plan-supporting settlement for its members can offer benefits to debtors and class creditors. Unfortunately, the existing case law is deeply unclear on exactly how and when a class claim may be submitted in bankruptcy.

The Simplicity of the Proof of Claim Clashes with the Complexity of Rule 7023

The Bankruptcy Code and Federal Rules of Bankruptcy Procedure make it simple to file a proof of claim. The submission of a form with a minimal amount of supporting information is sufficient.[2] Once submitted, a factually supported claim is deemed allowed until it has been challenged.[3]

Bankruptcy Rule 7023 states that Civil Rule 23 "applies in adversary proceedings." This single sentence has added layers of complexity to the claims-submission process where a class action is involved. Does this rule impact the filing of a claim or the objection to a claim? Does it address pre-petition certified classes? Does a pre-petition certified class need to be recertified during the bankruptcy? Does it permit a bankruptcy court to certify a class within the bankruptcy proceeding to permit it to file a claim?

One court held that Bankruptcy Rule 7023 should be employed as a sword, prohibiting class claims altogether: "The only provision in the Rules [that] deals with class actions is Bankruptcy Rule 7023. Obviously, filing a proof of claim is not an adversary proceeding. Therefore, the reliance on this Rule is misplaced."[4] This position is somewhat at odds with the very existence of Rule 7023: Why should a class of claimants be able to act collectively for most bankruptcy purposes except for filing a claim?

In disallowing class claims, the rationale followed by several early courts was twofold. First, the courts held that "a class representative cannot be considered the authorized agent of all of the creditors in a putative class."[5] Since a claim must be executed "by the creditor or the creditor's authorized agent," a claim filed by a person without proper agency authority is void.[6]

1 *See In re Generic Pharms. Pricing Antitrust Litig.*, 368 F. Supp. 3d 814 (E.D. Pa. 2019).

2 *See* Fed. R. Bankr. P. 3001.
3 *See* 11 U.S.C. § 502(a).
4 *In re Black*, 95 B.R. 819, 823 (Bankr. M.D. Fla. 1989).
5 *In re Standard Metals Corp.*, 817 F.2d 625, 631 (10th Cir. 1987).
6 *Matter of Baldwin-United Corp.*, 52 B.R. 146, 148 (Bankr. S.D. Ohio 1985) (disallowing proof of claim filed by certified class representative because "we do not believe that being a class representative is the equivalent of being an authorized agent for purposes of filing a proof of claim").

Second, these courts felt that a "bankruptcy proceeding is equipped to resolve multiple claims against [an] estate. There is no need for the class to file as a class."[7]

A Split of Authority on Authority

It is now widely acknowledged that class claims and bankruptcy can coexist.[8] These two systems can and should work together to provide recovery for injured class members *pro rata* with the size of their claims while offering a comprehensible negotiating partner that can bind class members for the benefit of debtors.

Unfortunately, a split of authority on how class claims might be filed has complicated this happy picture. There are three general lines of cases on class claims. The largest group of cases requires a pending motion under Bankruptcy Rule 7023 at the time a class claim has been filed. Another line of cases requires that the class succeed upon a Rule 7023 motion before it may validly file a claim. A final line of cases does not require even a pending motion, on a variety of rationales.

Pending Motion Required

Acknowledging the short timeline to file claims in most bankruptcy cases, a plurality of reported opinions hold that a motion to apply Bankruptcy Rule 7023 must be pending either when a class claim is filed or before an objection to that claim is ruled upon.[9] Forward-thinking courts may make it clear that they expect a pending motion.[10] The courts embracing this line of reasoning note the contingent nature of the class representative's status, and that representative's role in acting for other disengaged parties. As the Seventh Circuit explained:

> The representative in a class action is an agent for the missing. Not every effort to represent a class will succeed; the representative is an agent only if the class is certified. Putative agents keep the case alive pending the decision on certification. If the bankruptcy judge denies the request to certify a class, then each creditor must file an individual proof of claim; the putative agent never obtains "authorized agent" status. If the court certifies the class, however, the self-appointed agent has become "authorized," and the original filing is effective for the whole class (the principals).[11]

If application of class principles is not warranted in a case, the bankruptcy court will not apply Civil Rule 23. Cases in this group flexibly address the result of such a denial. Some reopen the claim filing deadline for putative class members who relied on the class claim to safeguard their

7 *Standard Metals*, 817 F.2d at 632.

8 *See, e.g., In re Birting Fisheries*, 92 F.3d 939, 939 (9th Cir. 1996) ("[W]e conclude that the [B]ankruptcy [C]ode should be construed to allow class claims.").

9 *See In re Tarragon Corp.*, 2010 WL 3842409, at *6 (No. 09-10555 DHS) (Bankr. D.N.J. Sept. 24, 2010) (motion must be filed contemporaneously with proof of claim).

10 *See In re W.R. Grace & Co.*, 389 B.R. 373, 376 n.5 (Bankr. D. Del. 2008) ("[T]his court directed that before any class proofs of claim were filed a motion to certify a class had to be filed.").

11 *In re Am. Reserve Corp.*, 840 F.2d 487, 493 (7th Cir. 1988) (citations omitted).

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By Kathleen L. DiSanto and Luis E. Rivera II[1]

Applying § 523 to Corporate Sub V Debtors: A Conscious Policy Decision, or a Drafting Oversight?

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The Small Business Reorganization Act of 2019 (SBRA) took effect a little more than five years ago, creating subchapter V and introducing a series of entirely new Bankruptcy Code sections. The SBRA's enactment was uncontroversial; President Donald Trump signed the bill into law 66 days after it was introduced in the House.[2] It passed with broad bipartisan support, with congressional debate lasting only four minutes.[3]

However, over the past half-decade, bankruptcy courts and practitioners alike have grappled with new issues that have arisen while interpreting subchapter V and the required confirming amendments. Among the challenges has been sorting out the tension between the plain language of new Code sections and the potentially unintended consequences of piecemeal change and conforming amendments. Section 1192 of the Bankruptcy Code is one of those difficult provisions to reconcile.

Section 1192, which covers both individual and corporate subchapter V debtors, but only applies to nonconsensual plans confirmed under § 1191(b), provides that "the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) ... except any debt ... of the kind specified in section 523(a) of this title."[4] This new Code section was coupled with a conforming amendment to § 523, which added § 1192 to the preamble of § 523 so that it read, "A discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title does not...."[5]

There was little discussion regarding adding § 1192 to the preamble of § 523. The addition was not mentioned in the official bill summary compiled by the Congressional Research Service.[6] The SBRA made dozens of similar conforming amendments to the Bankruptcy Code to accommodate the newly minted subchapter V.[7] However, the effect of this conforming amendment was that § 523(a) now provides that "[a] discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title does not discharge *an individual debtor* from" 20 types of nondischargeable debts.[8] How can this apparent inconsistency be reconciled?

Granted, the interplay between §§ 1192 and 523 is awkward and clumsy, given § 523(a)'s preamble, which refers to "an individual debtor."[9] The first bankruptcy courts to address the applicability of § 523 to corporate subchapter V debtors almost uniformly concluded that corporate subchapter V debtors were not subject to § 523 and summarily dismissed creditors' adversary proceedings.[10] While these decisions focused on principles of statutory construction, these early courts' interpretations of §§ 1192 and 523 were later criticized by some as seemingly strained and likely influenced by policy and practical and equitable considerations rather than the plain language of the statutes.

The tides turned when bankruptcy and appellate courts engaged in a deeper analysis of the plain language of the statutes, and a new majority position gradually emerged. The Fourth Circuit was one of the first courts to conclude that § 523's discharge exceptions apply equally to corporate and individual debtors. The Fourth Circuit's holdings were later adopted by the Fifth Circuit in *GFS Industries*.[11] However, the debate rages on in bankruptcy courts across the nation, with one court swimming upstream against the weight of existing authority from the Fourth and Fifth Circuits.[12]

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2 *In re Progressive Solutions Inc.*, 615 B.R. 894, 896 (Bankr. C.D. Cal. 2020).
3 *Id.*; Small Business Reorganization Act of 2019, P.L. 116-54 (Aug. 23, 2019), 133 Stat. 1079.
4 11 U.S.C. § 1192.
5 H.R. 3311, 116th Cong. § 4(a)(5)-(12) (1st Sess. 2019).
6 H.R. 3311, Small Business Reorganization Act of 2019, congress.gov/bill/116th-congress/house-bill/3311 (last visited on Feb. 25, 2025).
7 H.R. 3311, 116th Cong. § 4(a)(5)-(12) (1st Sess. 2019).
8 11 U.S.C. § 523(a) (emphasis supplied).
9 *Matter of GFS Indus. LLC*, 99 F.4th 223, 226, 228 (5th Cir. 2024) ("[T]he question is complicated by a certain textual awkwardness in the Bankruptcy Code.").
10 *Lafferty v. Off-Spec Solutions LLC (In re Off-Spec Solutions LLC)*, 651 B.R. 862 (B.A.P. 9th Cir. 2023); *In re 2 Monkey Trading LLC*, 650 B.R. 521 (Bankr. M.D. Fla. 2023), *motion to certify appeal granted*, No. 6:22-BK-04099-TPG, 2023 WL 3947494 (Bankr. M.D. Fla. June 12, 2023); *In re Hall*, 651 B.R. 62 (Bankr. M.D. Fla. 2023); *In re Lapeer Aviation Inc.*, No. 21-31500-JDA, 2022 WL 1110072 (Bankr. E.D. Mich. April 13, 2022); *In re Rtech Fabrications LLC*, 635 B.R. 559, 568 (Bankr. D. Idaho 2021); *In re Cleary Packaging LLC*, 630 B.R. 466, 468 (Bankr. D. Md. 2021), *rev'd and remanded sub nom.*, *In re Cleary Packaging LLC*, 36 F.4th 509 (4th Cir. 2022); *In re Satellite Rests. Inc. Crabcake Factory USA*, 626 B.R. 871 (Bankr. D. Md. 2021).
11 *Cleary Packaging LLC*, 36 F.4th 509.
12 *Spring v. Davidson (In re Davidson)*, Adv. Proc. No. 23-3005-JCO, 2025 WL 511226 (Bankr. N.D. Fla. Feb. 14, 2025); *Halo Human Res. LLC v. Am. Dental of LaGrange LLC (In re Am. Dental of LaGrange LLC)*, Adv. Proc. No. 24-01004-RMM, 2025 WL 384536, at *8 (Bankr. M.D. Ga. Feb. 3, 2025) (court declined to enter fray as to whether § 523 applies to corporate subchapter V debtors because case was confirmed consensually under § 1191(a); therefore, court did not need to reach issue).

In reconciling the tension between § 523(a)'s specific reference to individual debtors with the silence of § 1192, which applies to both individual and corporate debtors, the Fourth Circuit relied on the statutory interpretation principle of *lex specialis*, meaning that the more specific provision controls over the general.[13] The Fourth Circuit explained that § 1192's reference to the "kind[s] of debt specified in section 523(a)" is "a shorthand to avoid listing all 21 types of debts" enumerated in § 523.[14]

For better or worse, given principles of separation of powers, the judiciary's duty is to interpret the plain meaning of unambiguous statutes — even if that analysis results in unintended consequences. In the case of unambiguous laws, judges do not reach policy considerations or arguments. Perhaps this is the best result, as opinions differ on whether — based on practicality and policy — § 523 should apply to corporate debtors.

On one hand, debtors may argue that the Fourth and Fifth Circuits' interpretations of §§ 523 and 1192 produce unintended — if not absurd — results. One of the SBRA's primary policy objectives was to streamline the reorganization process by relieving small business debtors from the absolute-priority rule and thereby reducing the administrative costs of the case. Debtors argue that subjecting corporate subchapter V debtors to § 523 flies in the face of that goal.[15]

Objections to the dischargeability of debts are costly to litigate and involve fact-intensive factual disputes. Thus, a corporate subchapter V debtor might face an even greater and more expensive burden than the absolute-priority rule if forced to defend dischargeability actions under § 523.

Debtors may also argue that applying § 523 to corporate debtors in a subchapter V case will allow the unreasonable creditor to hijack the entire reorganization to the detriment of other creditors and interested parties. Regardless of the size of its claim or whether it controls the vote of a class of claims under the plan, any creditor could functionally bring the reorganization to a screeching halt by objecting to the dischargeability of its debt.

No matter how hard the debtor tries, the creditor landscape in many subchapter V cases often makes it impossible to avoid this roadblock by arriving at a consensual confirmation. The U.S. Small Business Administration (SBA) and merchant cash advance loans are often creditors in subchapter V cases. Regardless of the treatment of the SBA's claim, however favorable, it is often impossible for a debtor to obtain the SBA's acceptance of the plan. Likewise, merchant cash advance lenders seldom participate in the bankruptcy process, given the dubious and sometimes predatory nature of their dealings with the debtor. In short, applying § 523 to a corporate debtor allows an indignant creditor to capitalize on the inaction of others and entirely thwart the reorganization effort.

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13 *Cleary Packaging LLC*, 36 F.4th 515.
14 *Id.*
15 H.R. Rep. No. 116-171, 1 (2019) (SBRA's purpose is to "streamline the bankruptcy process by which small business debtors reorganize and rehabilitate their financial affairs").

By Midori Yamaguchi

Navigating the Unique Terrain of Out-of-Court Workouts for Corporate Restructurings in Japan

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Japan has long relied on court-supervised restructuring proceedings. However, over the past two decades, Japan has developed several structured out-of-court workout frameworks. These mechanisms require adherence to specific rules, guidelines or statutory provisions depending on the procedure, with independent specialists overseeing the restructuring process.

A defining characteristic of these workouts is the limitation of participating creditors — primarily such financial institutions as banks — whose involvement standardizes the process and facilitates negotiations between distressed debtors and their financial creditors. These workouts effectively serve as preinsolvency proceedings, allowing debtors to maintain cash liquidity by requesting standstills and debt restructuring exclusively from banks while continuing payments to trade creditors. Given the advantages, these regimes have become indispensable tools in Japan's corporate restructuring landscape.

Each type of workout follows a structured framework: (1) multiple creditors' meetings are convened to discuss the restructuring while debtors formulate a restructuring plan; and (2) unanimous creditor approval is sought to finalize the plan. These workouts harness the advantages of out-of-court proceedings while mitigating their typical drawbacks. Although debtors can independently negotiate debt-reschedulings with financial creditors outside of these structured workouts, achieving significant debt restructurings without recognized procedural frameworks is often impractical.

Rule-Based Out-of-Court Workouts

Advantages

Confidentiality and Preservation of Going-Concern Value: Out-of-court workouts primarily involve financial creditors, such as banks, and exclude trade creditors. They are typically conducted privately unless the debtor is a publicly traded company that requires public disclosure. In contrast, judicial insolvency proceedings are public, revealing the debtor's distressed situation, which triggers significant concerns among stakeholders. The announcement of in-court insolvency can precipitate harmful rumors and erode confidence among creditors and customers, potentially leading to the termination of contracts or the imposition of unfavorable terms. By virtue of the privacy afforded by out-of-court workouts, a debtor can maintain its going-concern value and preserve its assets, which ultimately benefits both the debtor and its financial creditors.

Simplicity and Flexibility: Workouts are inherently more streamlined and adaptable, since they rely on unanimous creditor consent, eliminating the need for judicial intervention or trustee appointment. In contrast, court-supervised insolvency proceedings necessitate adherence to procedural formalities, including claim investigations, documentation submissions and creditor notifications. These formalities serve to legitimize the restructuring process, thus ensuring due process and legal enforceability so that claims could be discharged based on a restructuring plan with a majority vote. However, they also add complexity compared to the more flexible nature of workouts.

Transparency and Predictability: The foundation of out-of-court workouts is the unanimity of all interested creditors, as opposed to judicial proceedings, which operate under statutory provisions. Since the court is not overseeing the workout, creditors question the fairness of the process and equal treatment among them, especially on repayment under a restructuring plan. To overcome these drawbacks, the guidelines and rules stipulate the steps to be taken during an out-of-court workout. They were formed by the government, the representatives of financial institutions, experts and academics. Although not legally binding, they should be respected and followed by parties engaging in the workout. Adherence to them fosters fairness and accountability of the process for the parties.

Fairness and Objectivity: The involvement of neutral experts in reviewing the whole proceeding and the restructuring plan enhances objectivity, mitigating concerns that may arise when workouts are solely managed by the debtor and its creditors. This

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By Julie Philippi

The Marital Adjustment: What Is It, and Should It Be Fixed?

Prior to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), a chapter 7 case could be dismissed if the filing was deemed to be a substantial abuse of the process.[1] It was a subjective, fact-intensive determination made by the judge after considering all relevant factors.[2] In chapter 13 cases, the plan payment was determined by a fact-specific review of actual income, and reasonable and necessary expenses.[3]

When BAPCPA was passed, Congress believed that many debtors who obtained chapter 7 relief had an ability to repay at least some of their debt in a chapter 13, and those in chapter 13 could repay more.[4] Therefore, BAPCPA created the "means test" in § 707(b), which purported to be an objective formula for determining whether a consumer debtor should be in chapter 7 or 13, and how much should be paid in a chapter 13 plan to general unsecured creditors.[5]

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The means test starts with a calculation of the debtor's current monthly income (CMI) to determine whether the debtor is above or below the applicable median income. CMI has a detailed definition,[6] which includes not only the debtor's income but also "any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and, in a joint case, the debtor's spouse if not otherwise a dependent)."[7] While awkwardly phrased, this means that a married debtor who has a nonfiling spouse can assert that some of their spouse's income is not paid on a regular basis for the household expenses of the debtor or the debtor's dependents, and this amount can be excluded from the calculation of either CMI or disposable income. This exclusion has become known as the "marital adjustment."[8]

The means test is calculated using Official Forms 122A-19 and 122A-210 in chapter 7, and Official Forms 122C-111 and 122C-212 in chapter 13. In chapter 7, Form 122A-1 instructs the debtor to complete Column B with the nonfiling spouse's income when the spouses are living in the same household and not legally separated.[13] If the CMI is above the applicable median income, the debtor completes Form 122A-2, which in Part 1, Question 3, instructs the debtor to "subtract any part of your spouse's income not used to pay for the household expenses of you or your dependents" (*i.e.*, the marital adjustment). Examples are "income used to pay your spouse's tax debt or to support people other than you or your dependents." Depending on the end calculation on Form 122A-2, the filing could be deemed an abuse of chapter 7.[14]

In chapter 13, on Form 122C-1, the debtor also includes all of the nonfiling spouse's income in Column B, but pursuant to § 1325(b)(4), the marital deduction is taken on Line 13 of Form 122C-1 *before* determining whether the debtor is above or below the applicable median income, which then determines the applicable commitment period (ACP).[15] Unfortunately, § 1325(b)(4) is poorly worded and has led to confusion: "For purposes of this subsection, the ['ACP'] — (A) ... shall be — (i) [three] years; or (ii) not less than [five] years, *if the [CMI] of the debtor and the debtor's spouse combined*, when multiplied by 12, is not less than...."[16] This could be interpreted to require that the entirety of the nondebtor spouse's income be added to the debtor's CMI in determining the ACP. However, the nonfiling spouse's contributions are already included in the debtor's CMI, so adding the spouse's income a second time to determine the ACP makes little sense.[17] One case goes so far as to conclude:

> [T]he more reasonable interpretation of § 1325(b)(4) is that Congress inadvertently

1 *See Morse v. Rudler (In re Rudler)*, 576 F.3d 37, 40 (1st Cir. 2009); *see also In re Hardacre*, 338 B.R. 718, 720 (Bankr. N.D. Tex. 2006).
2 *Hardacre*, 338 B.R. at 720-21.
3 Keith M. Lundin, *Lundin on Chapter 13*, § 92.1 at ¶ 4-5, lundinonchapter13.com (last visited on Feb. 25, 2025).
4 *Hardacre*, 338 B.R. at 720 (citing 151 Cong. Rec. S245, 2469-70 (March 10, 2005)).
5 *Hardacre*, 338 B.R. at 721.
6 11 U.S.C. § 101(10A).
7 11 U.S.C. § 101(10A)(B)(i).
8 The language of § 101(10A)(B)(i) applies to any person or entity other than the debtor, but this article specifically focuses on the marital adjustment and does not address the different issues that might arise in cases involving nonspouses. A nonspouse contribution to household expenses is added on Forms 122A-1 and 122C-1, but it is only the contribution, not their entire income.
9 Chapter 7 Statement of Your Current Monthly Income.
10 Chapter 7 Means Test Calculation.
11 Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period.
12 Chapter 13 Calculation of Your Disposable Income.
13 The marital adjustment does not affect CMI in a chapter 7 case because it is deducted as an expense on Form 122A-2 after CMI has already been calculated on Form 122A-1.
14 11 U.S.C. § 707(b).
15 11 U.S.C. § 1325(b)(4).
16 11 U.S.C. § 1325(b)(4)(A)(ii) (emphasis added).
17 *In re Vollen*, 426 B.R. 359, 367-68 (Bankr. D. Kan. 2010); *In re Dugan*, No. 07-40899-13, 2008 WL 3558217, at *3 (Bankr. D. Kan. Aug. 12, 2008).

failed to include the qualifier that the spouse's [CMI] must only be "combined" with the filing debtor in a joint case by putting those words in parenthesis (or elsewhere) as it did in the definition of [CMI].[18]

In chapter 7, the question of what is properly excluded as a marital deduction is brought before the court in the context of a motion to dismiss under § 707(b)(2)(A) alleging that the filing is an abuse of chapter 7.[19] It does not arise in dismissal motions under § 707(b)(1) or (b)(3) because CMI is only used in § 707(b)(2).[20] The movant has the burden of establishing a *prima facie* case, but then the burden shifts to the debtor to prove what expenses have been properly deducted.[21]

In chapter 13 cases, the question comes before the court in the form of an objection to confirmation, alleging that the debtor is not paying all their projected disposable income for the ACP.[22] The burden is on the plan proponent (which is always the debtor in a chapter 13 case)[23] to prove that the marital adjustment is proper.[24]

Generally, the disputed expenses are children's tuition and extracurricular costs, debt payments on debt solely in the spouse's name, and expenses of the spouse that are typical household expenses. Tuition and other expenses for children are routinely disallowed as marital adjustments.[25]

While § 101(10A) is clear that CMI includes household expenses of the debtor or debtor's dependents,[26] debtors have argued that these deductions should be allowed because the spouse is the only one that signed the contract for the expense,[27] or that the expense is not what would be a normal household expense.[28] These arguments have been unsuccessful; if the child is the debtor's dependent, the deduction will not be allowed.[29]

In *Vollen*, the debtor sought to exclude not only payment of the daughter's college tuition but also a loan payment solely in the spouse's name for a car used by the daughter.[30] Since the daughter was the debtor's dependent, the court held that both the tuition and car loan payment were household expenses that could not be excluded from CMI.[31] For most other expenses sought to be deducted as a marital adjustment, courts tend to fall in one of two camps: whether the expense should be evaluated from a (1) household-centric view, or (2) debtor-centric view.[32]

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18 *Dugan*, 2008 WL 3558217, at *3.
19 11 U.S.C. § 707(b)(1).
20 11 U.S.C. §§ 707(b)(1)-(3); *Kulakowski v. Walton (In re Kulakowski)*, 735 F.3d 1296, 1300 (11th Cir. 2013).
21 *In re Montalto*, 537 B.R. 147, 149-50, 151-54 (Bankr. E.D.N.Y. 2015); *In re Tapply*, 652 B.R. 124, 131 (Bankr. D. Mass. 2023).
22 11 U.S.C. § 1325(b)(1)(B).
23 11 U.S.C. § 1321.
24 *In re Toxvard*, 485 B.R. 423, 432 (Bankr. D. Colo. 2013); *In re Henry*, 616 B.R. 885, 889 (Bankr. D. Kan. 2020).
25 *Tapply*, 652 B.R. at 131-32; *In re Persaud*, 486 B.R. 251, 263 (Bankr. E.D.N.Y. 2013).
26 11 U.S.C. § 101(10A)(B)(i).
27 *Persaud*, 486 B.R. at 263.
28 *Tapply*, 652 B.R. at 131.
29 *See, e.g.*, *Persaud*, 486 B.R. at 263; *Vollen*, 426 B.R. at 373.
30 *Vollen*, 426 B.R. at 373.
31 *Id.*
32 *Toxvard*, 485 B.R. at 436.

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By Andrew E. Arthur

Bio-Hazard! The Sale of Biogenetic Data in a Bankruptcy Proceeding

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Companies in bankruptcy often attempt to sell assets, including customer data. The sale of customer data can raise significant privacy concerns. Bankruptcy courts often navigate the sale of data to ensure compliance with privacy laws and balance the interests of creditors and consumer rights, especially when data includes personally identifiable information (PII). Legal challenges related to selling customer data in bankruptcy occur when consent for data-sharing has not been obtained because the Health Insurance Portability and Accountability Act (HIPAA) only applies within the health care setting — not when a person's health information is held by private genetic-testing companies.[1]

Biogenetic and biotech companies — those that hold DNA data for at least 26 million people[2] — have recently been in the limelight due to financial struggles. With bankruptcies looming for commercial DNA companies, there is a growing concern that one's DNA might fall into the wrong hands and be used for unwanted or unforeseen circumstances. However, with no high-profile bankruptcy case solely centered on genetic data and the sale of one's DNA emerging as an area of concern, this article analyzes what may happen if a high-profile biotech company, such as a 23andMe, were to file for bankruptcy, and the laws that might have to be used to protect consumer-privacy rights.

Concern with the Sale of DNA Data

In October 2023, there was a 23andMe data breach that targeted specific racial and ethnic persons, exposing genetic information and pictures of users and their locations.[3] While the sale of genetic data to a third party might not be as extreme as that of a data breach, there are still other apparent concerns, especially a concern with what insurance companies would do with genetic data, as the data can be central to modeling customer risk. The worry is "that insurance companies will 'seek out people who are genetically pure, creating a ghetto of the uninsured.'"[4]

In addition, "[r]esearchers have investigated the link between an individual's genetics and everything from their financial acumen to their driving ability, perhaps proving of interest to banks considering a loan application or a car insurer considering a new policy."[5] There are still unpredictable or noncommercial concerns, especially as genetic research continues to progress, which makes it important that laws progress with the technology.

Courts Must First Consider the Company's Privacy Policy Statement in a § 363 Sale

In a bankruptcy, a debtor has the ability to sell free and clear of liens and interests, as long as any one of the five criteria listed in § 363(f) is satisfied, and the interest-holder is provided with adequate protection of its interest under § 363(e).[6] Whether § 363(f) will permit the sale of genetic information will depend on the nature of the protection given to that right outside of bankruptcy.[7]

Under § 363(b)(1), PII may be transferred in bankruptcy unless the debtor has a policy prohibiting such transfer.[8] If such a policy was "in effect on the date of the commencement of the case," such data cannot be transferred unless the sale is consistent with the policy, or a "consumer privacy ombudsman" is appointed and the court (1) considers all the facts and circumstances and (2) does not find that sharing violates nonbankruptcy law.[9]

A court will have to ask whether the privacy statement "prohibit[s] the transfer of [PII] about

1 "Legal Expert on How 23andMe's Financial Struggles Could Impact Customer Data," ABC News (Nov. 19, 2024), abcnews.go.com/US/legal-expert-23andmes-financial-struggles-impact-customer-data/story?id=115895688 (unless otherwise specified, all links in this article were last visited on Feb. 24, 2025).

2 Benjamin T. Van Meter, "Note: Demanding Trust in the Private Genetic Data Market," 105 *Cornell L. Rev.* 1527 (July 2020).

3 *In re 23Andme Inc. Customer Data Sec. Breach Litig.*, 2024 U.S. Dist. LEXIS 219622 (N.D. Cal. 2024) ("In October 2023, 23andMe announced that there was a data breach at the company and, as a result, a wide range of sensitive personal information of customers was compromised, 'including but not limited to name, sex, date of birth, genetic information, predicted relationships with genetic matches, ancestry reports, ancestors' birth locations and family names, family tree information, profile pictures, and geographic location.' Cybercriminals had specifically targeted 23andMe customers of Ashkenazi Jewish and Chinese descent, offering their data for sale on the dark web.").

4 Van Meter, *supra* n.2 at *1551.

5 *Id.* at *1551-52.

6 Edward J. Janger, "Genetic Information, Privacy and Insolvency," 33 *J. L. Med. & Ethics* 79, *82-83 (2005).

7 *Id.*

8 *Id.*

9 11 U.S.C. § 363(b).

individuals to persons that are not affiliated with the debtor."[10] One of the most popular genetic data companies, 23andMe is known to have a strong privacy statement in the event that it does sell a person's personal information to a third party, especially in a bankruptcy.[11] As such, 23andMe's privacy statement says that

> data can only be shared with third parties in limited circumstances: "(a) to comply with [the] legal process or professional obligations, (b) to enforce their Terms of Service, (c) to respond to complaints that [the] content violates others' rights, [and] (d) to protect the rights and safety of 23andMe. It will not share data with employers, insurance companies or public databases. It will only share with law enforcement if required by law, and they claim they have never done so. And, if they share with a service provider to help with their business, they contractually require the service provider to keep the data confidential."

While a company can sell genetic data to a third party, if a company has a strong privacy statement (such as the one that 23andMe currently has), then the third party will be bound by the terms of that privacy statement, which will put limits on what can be done with the genetic data.

State Laws and FTC Will Be a Further Line of Defense Against the Unwanted Dissemination of Genetic Data

About 25 states have statutes that provide some form of protection to the privacy of genetic information.[12] States take various approaches in restricting the use of biometric data, which reflects how little consistency there is among the states. At least 12 states prohibit the use of genetic information without consent, regardless of how the information had been obtained.[13] For example, Illinois became the first state to enact a biometric data privacy law in 2008.[14] The Illinois Biometric Information Privacy Act (BIPA) states, "No private entity in possession of a biometric identifier or biometric information may disclose, redisclose, or otherwise disseminate a person's or a customer's biometric identifier or biometric information unless: (1) the subject of the biometric identifier or biometric information or the subject's legally authorized representative consents to the disclosure or redisclosure...."[15] In 2023, several states proposed bills that were closely patterned after the BIPA imposing similar compliance obligations and providing for

10 David Siffert, "If 23andMe Goes Bankrupt, What Happens to All Our Data?," *New York Law Journal* (Jan. 3, 2025), law.com/newyorklawjournal/2025/01/03/if-23andme-goes-bankrupt-what-happens-to-all-our-data (subscription required to view article).

11 *Id.*

12 Janger, *supra* n.6 at *81.

13 *Id.*

14 "Is Biometric Information Protected by Privacy Laws?," Bloomberg Law (June 20, 2024), pro.bloomberglaw.com/insights/privacy/biometric-data-privacy-laws.

15 740 ILCS 14/15(d)(2).

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By Simon Eickmann and Bella V. Jiménez

The Duty to File in Germany: How Much Leeway Do Cross-Border Businesses Actually Have?

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Simon Eickmann, a partner with PLUTA Management GmbH in Munich, is a financial advisor to companies in restructuring and bankruptcy. He studied business administration in Bayreuth, Beijing and Hamburg, focusing on finance, accounting and controlling. Bella Jiménez is a consultant in the same office and specializes in restructuring and distressed M&A.

Under certain circumstances, filing for insolvency in Germany is a duty. Breaking it exposes decision-makers, often managing directors, to great personal and criminal liability. In cross-border businesses, German thresholds are often unknown to international stakeholders, leading to misunderstanding, risk and higher bills. This article sheds light on key pain points and highlights some ways that companies and directors can protect themselves.

The Duty to File

Section 15(a) of the German Insolvency Code requires managing directors to file for insolvency if the company becomes illiquid or overindebted. Both grounds to file are determined by arithmetic calculations well-defined by statute and precedent. In the extraordinary case that the company temporarily has no management ("*Führungslosigkeit*"), members of the supervisory board can also have an obligation to file.[1] In the past, this obligation included shareholders and *de facto* managing directors (*e.g.*, authorized representatives), too.

The deadline to file is three weeks in case of illiquidity and six weeks for overindebtedness. During this time, company leaders can attempt to close the liquidity (or overindebtedness) gap and to eliminate the duty to file. In addition, they must implement the so-called "*Notgeschäftsführung*," a special management mode during which specific rules apply on payments and business continuation. However, if managers do not make it on time or never file, they can be held personally liable for every single payment they made since the obligation arose. Management will have the burden of proving that each payment was done with the "due care of a prudent and conscientious manager." If they fail to do so, according to § 15b, they have to refund the payments out of their own pockets.

Criminal Liability

Not filing for insolvency or filing too late is also punishable as a crime with a jail sentence. Negligence alone carries fines or jail sentences of up to a year if it is determined that it was intentional.[2] Convictions for intent, a feature of German criminal law, can include conditional intent ("*bedingter Vorsatz*"). This is when "the perpetrator considers the occurrence of a result as possible and still accepts the risk," even if the result is not his primary intention.[3] A textbook example would be a director who misses the filing deadline, thinking things will turn around with a big contract or a new investment, aware that if they do not, creditors might lose more money. He/she knows that is a possibility but takes the risk anyway.

In addition, a German managing director is by law required to obtain clear information about the company's current and future financial situation, and must be able to always assess the company's potential obligation to file, especially if signs of crisis appear. Delegating such analysis to an external expert can protect directors from liability, but only if they ensure the collection and disclosure of sufficient and correct data.[4] For international stakeholders, taking such risks does not seem far-fetched, especially if they are based in jurisdictions where filing is a not an obligation and damage claims based on fiduciary duties are not a thing.

Personal liability arises for the obligated persons if the company was insolvent and they did not file before the deadline expires. Both criminal and civil liability can be incurred. These risks should be hedged. Let's discuss what triggers the duty to file, and how to avoid it.

Ground A: Illiquidity

According to § 17 of the German Insolvency Code, a company is illiquid when it is unable to

1 Section 15(a)(3) of the German Insolvency Code (*Insolvenzordnung*), www.gesetze-im-internet.de (available in German and English).

2 Section 15(a)(4) and (5) of the German Insolvency Code.

3 C. Roxin, (2006) Strafrecht. Allgemeiner Teil. I, 4th Edition, C.H. Beck, München, p. 547, § 12. The term is not defined in the German statute; it was developed by doctrine and settled by jurisprudence. Hence, to the authors' knowledge, there is no official translation. In Germany, the presence of the cognitive element (knowledge of the possibility) plus volition (acceptance that such possibility might come true) leads to a type of "intention" called *bedingter Vorsatz* or *dolus eventualis*. Further, criminal offenses —and hence, punishment — are often divided into acts committed with intention vs. negligence, which is the case for the criminal offenses discussed in the article. In common law, the closest equivalent to *dolus eventualis* seems to be recklessness, which is not considered a form of intention. This is the reason that it is discussed in this article.

4 Federal Supreme Court (*Bundesgerichtshof*, BGH) ruling of 27 October 2020 — II ZR 355/18, available only in German at juris.bundesgerichtshof.de.

meet its mature payment obligations. The existence of illiquidity is determined by subtracting all due liabilities from all liquid means available (*e.g.*, cash in the bank accounts, liquid securities and unused credit lines) as of a specific test date. Simple enough. However, it can be an interesting exercise to sit down with a company's management and discuss exactly what due liabilities are comprised of. Some common pitfalls are contingent liabilities, correct assessment of trade balances, intercompany relations, and proof of committed financing.

Contingent Liabilities

Contingent liabilities are liabilities that may or may not arise and may or may not be due, depending on the outcome of a future event, such as a court's ruling. Generally, contingent liabilities must be considered *pro rata* in relation to their probability. For example, let's imagine that a company is involved in ongoing litigation where it will be decided whether it has to pay $10 million to a creditor. The probability of the court ruling in the company's favor is 40 percent. For the liquidity test, 60 percent of the amount, or $6 million, may need to be considered. Therefore, one key to decreasing risk is getting a numerical probability assessment from licensed legal professionals as soon as the contingent liability arises.

Shifting Trade Balances

Trade balances are the amounts owed to and from creditors and debtors. Usually, they are booked in so-called open-items lists. These lists can be comprised of thousands of lines and are, hopefully, handled through accounting software that sums up all entries for each creditor or debtor automatically. A debtor's overpayments sometimes lead to switching a debtor's balance to a credit and hence have to be considered as liability in the liquidity test, while at other times it is creditors who might owe the company. However, without the explicit right to set off obligations, all due invoices from such creditors still must be considered due. These issues can add up to big distortions in the liquidity assessment. If significant, they can be resolved and even leveraged to reach a positive insolvency assessment by procuring additional agreements clarifying payment terms.

Intercompany Relations

Just as with trade balances, intercompany payables need to be considered unless a written agreement stating otherwise exists. Further, schemes such as cash-pooling or profit-transfer agreements should be considered if they are binding.

Proof of Committed Financing

One must tread carefully with what can be counted as future available cash, such as credit lines promised by the bank but pending closing, when calculating whether a company is insolvent. Based on past court rulings, future financing must meet strong probability standards, which vary depending on the party that is committing to finance the com-

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By Robert G. Drummond

Videoconferencing § 341 Meetings: One Year Later

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Bob Drummond has been the standing chapter 13 trustee for the District of Montana since 1991. He was president of the National Association of Chapter 13 Trustees from 2012-13. He is currently on the editorial advisory board of the American Bankruptcy Law Journal*, and is the publisher of the* Montana Bankruptcy Reporter.

In 2023, the U.S. Trustee Program (USTP) unveiled its initiative to virtually conduct § 341 meetings. However, due to the COVID-19 pandemic, which started in March 2020, many trustees had already been turning to Zoom's videoconferencing platform to conduct their § 341 meetings prior to the USTP's initiative. In fact, some chapter 13 trustees had been conducting videoconferenced § 341 meetings for decades.

At this juncture, the issuance of the USTP's Zoom licenses to trustees is nearly complete. This article discusses the implementation of the USTP's Zoom protocols for conducting § 341 meetings.

History of Videoconferencing

It has long been recognized that videoconferencing court appearances and § 341 meetings saves parties both time and money. This is especially true when debtors are inaccessible or located a long distance from the courthouse or site of the § 341 meeting. In recognition of the utility of videoconferencing § 341 meetings in chapter 13 cases, the USTP has authorized the purchase of videoconferencing equipment and hardware as an authorized budget item.[1]

The USTP amended the *Handbook for Chapter 13 Standing Trustees* in February 2014 to allow trustees to expend trust funds for the equipment and software necessary to regularly conduct meetings of creditors remotely,[2] including equipment that allows point-to-point videoconferenced § 341 meetings when both the trustee and the far-end videoconferencing site have dedicated videoconferencing hardware. The debtor is required to appear at the far-end video site, be sworn in and produce the authorized forms of identification used for examination by the trustee.

The COVID-19 pandemic limited debtors' ability to appear at far-end video locations. With the USTP's support, many trustees migrated to the Zoom videoconferencing platform, which allowed debtors to appear from a remote location of their choosing. To enable this, private chapter 13 trustees purchased Zoom licenses to conduct § 341 meetings, other meetings and court appearances over the platform, with the USTP's approval.

Emergence of the Zoom Platform

The USTP's annual report for fiscal years 2022 and 2023 discussed the implementation of virtual § 341 meetings. It stated that after the COVID-19 pandemic, "private Trustees pivoted to primarily telephonic meetings...."[3] The program announced a pilot of videoconferenced meetings and a launch of its virtual rollout of § 341 meetings by videoconference.

The pilot program contemplated that private trustees would conduct § 341 meetings using USTP-provided Zoom licenses. Trustees who were conducting § 341 meetings using their own licenses were required to switch to the USTP-issued license. As part of the launch, the USTP issued underlying documents, including a "best practices" document and "Interim Procedures for Trustees to Conduct Virtual 341(a) Meetings in Chapter 7, 12, and 13 Cases."[4] Lastly, the USTP issued an "Acknowledgement by Private Trustee Regarding the Terms of Use of Video Conference Licenses for the Purpose of Conducting Virtual Section 341(a) Meetings of Creditors."[5]

Interim Procedures

This nine-page document established procedures for the conduct of the § 341 meeting by trustees. As indicated in the document,

> upon the effective date, and until further notice, the 341 meetings of creditors for Chapter 7, 12, and 13 cases will be held by video-conference. The purpose of these interim procedures is to facilitate access to 341 meetings by all parties in interest while promoting efficiency by reducing travel costs

1 *See Handbook for Chapter 13 Standing Trustees*, Dep't of Justice, Exec. Office for U.S. Trustees, at 3-15 (Oct. 1, 2012), justice.gov/ust/file/1584346/dl?inline (unless otherwise specified, all links in this article were last visited on Feb. 25, 2025).

2 *Id.* The *Handbook for Chapter 7 Trustees* and *Handbook for Chapter 12 and 13 Standing Trustees* has been removed from the U.S. Trustee's list of significant guidance documents. *See* "Significant Guidance Documents," *U.S. Trustee Manual and Policies*, www.justice.gov/ust/significant-guidance-documents.

3 "U.S. Trustee Program Annual Report, Fiscal Years 2022 and 2023," U.S. Dep't of Justice, U.S. Trustee Program at 9, justice.gov/ust/media/1348371/dl.

4 "Best Practices for Debtors, Debtors' Attorneys, and Other Parties-in-Interest for Attending Virtual § 341(a) Meetings of Creditors in Chapter 7, 12, and 13 Cases," U.S. Dep't of Justice, U.S. Trustee Program (Aug. 25, 2023), www.justice.gov/ust/page/file/1590001/dl.

5 Michael Bujold, Robert Gebhard, Patrick Layng, Krista Hale & Nicole Zollars, "The Transition to Virtual § 341 Meetings: Lessons Learned, and Looking Ahead," XLIII *ABI Journal* 1, 64-65, 95-96, January 2024, abi.org/abi-journal/the-transition-to-virtual-%C2%A7-341-meetings-lessons-learned-and-looking-ahead.

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By Boris J. Steffen

Capital Structure Arbitrage

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Capital structure arbitrage[1] is one of many strategies used by distressed-debt investors within the context of a firm's bankruptcy.[2] The strategy is premised on the assumption that the market prices of equity, debt and credit default swaps (CDSs) can temporally diverge from their relative value in equilibrium due to the different types and strategies of investors active in the market, as well as differences in investor expectations regarding the performance of an investee company.[3] The objective of capital structure arbitrage is to profit by exploiting the misinformation that may exist between equity and debt markets, and related mispricing of a single issuer's securities,[4] thereby hedging the risk of the subject credit investment, or bet on the default of the firm and the secondary market trading levels of its securities on default.[5]

Background[6]

The practice of capital structure arbitrage goes back to at least 2002. Based on the assumption that both equity and debt can be viewed as options on the underlying value of a firm, with default occurring when the value of the asset falls below a predetermined default barrier,[7] the concept is relatively straightforward: Take a position in a debt instrument to hedge an equity position, and vice versa. This evolved out of fundamental changes in how the credit markets traded, given the development of the credit default market and, in particular, CDSs, which allowed investors to go long on equity and short on debt "synthetically" — that is, by using the CDS as a derivative instrument.

Credit Default Swaps

A CDS is a derivative contract that allows an investor to hedge the risk of a credit investment or bet on a firm's default and subsequent trading levels of its securities in the secondary market.[8] In practice, the buyer pays the seller a periodic, upfront fee, referred to as the CDS spread or CDS premium, that is equal to a fraction (the premium calculated as a proportion of the notional value of the CDS in basis points) of the notional, or face, value[9] of the underlying reference asset, whether it is a bond, loan or other liability,[10] in addition to an annual premium to compensate the seller for taking the default risk. The spread reflects the probability of default and the recovery rate.[11] In the case of a credit event, such as a failure to pay a debt or bankruptcy filing, the seller is obligated to pay the buyer the par value of the debt, regardless of where it is trading.

CDSs may also be used to make speculative investments absent a position in a related debt. Sellers of CDSs are synthetically going long on the firm's credit under the assumption that it will not default. Conversely, buyers of CDSs are synthetically going short the firm's credit assuming that it will default. The implication is that CDSs can be used in place of debt-to-arbitrage disparities in the relationship between the pricing of a firm's debt and equity securities. The use of CDSs rather than bonds is also preferable given the greater liquidity and responsiveness of CDSs to market dynamics.[12]

The Nature of Arbitrage

Pure arbitrage is described as the process of producing riskless profit today by statically or dynamically matching current and future obligations to offset each other *exactly*, including *known* costs of financing.[13] The underlying principle is the *law of one price*, which holds that the same item cannot sell for two different prices simultaneously.[14] Given the sophistication of the capital markets today, opportunities to profit from pure arbitrage are limited. Consequently, hedge funds and proprietary trading desks rely extensively on relative value arbitrage, which is trading to realize a profit today by statically or dynamically matching current and future obligations that *nearly* offset each other, net of *estimated* financing costs. In substance, relative value arbitrage is equivalent to capital structure

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1 These include distressed debt for control, spread-tightening, fundamental value, trade claims, vendor puts and liquidation trades.

2 Michael A. Gatto, *The Credit Investors Handbook: Leveraged Loans, High Yield Bonds and Distressed Debt* (John Wiley & Sons. Inc.), p. 269.

3 M.P. Wojtowicz, *Pricing Credit Derivatives and Credit Securitization* (Tinbergen Inst. 2014) (PhD-thesis, research and graduation internal, Vrije Universiteit Amsterdam).

4 *Id.*

5 Gatto, *supra* n.2 at p. 322.

6 Antony Currie & Jennifer Morris, "And Now for Capital Structure Arbitrage," *Euromoney* (December 2022).

7 Robert C. Merton, "On the Pricing of Corporate Debt: The Risk Structure of Interest Rates," *Journal of Finance*, Vol. 29, No. 2 (1974).

8 Steven G. Moyer, *Distressed Debt Analysis: Strategies for Speculative Investors* (J. Ross Publishing Inc.), pp. 322-26.

9 Yuan Wen & Jacob Kinsella, "Credit Default Swap –Pricing Theory, Real Data Analysis and Classroom Applications Using Bloomberg Terminal," State Univ. of New York at New Paltz, p. 2, assets.bbhub.io/professional/sites/10/WhitePaper_Wen.pdf.

10 George Chacko, Anders Sjöman, Hideto Motohashi & Vincent Dessain, *Credit Derivatives: Understanding Credit Risk and Credit Instruments* (Pearson Education Inc.), p. 152.

11 *Id.* at p. 24.

12 Bocconi Students Investment Club, "A Primer on Capital Structure Arbitrage," Bocconi Univ. (February 2022), bsic.it/wp-content/uploads/2023/10/A-primer-on-Capital-Structure-Arbitrage.pdf.

13 Robert Dubil, *An Arbitrage Guide of Financial Markets* (John Wiley & Sons Ltd.), p. 13.

14 *Id.* at p. 12.

arbitrage within the context of quantitative finance, which entails the use of quantitative, structural models to identify and take advantage of pricing discrepancies between related securities of a firm based on statistical and historical patterns and relationships.[15]

Although beyond the scope of this article, pricing discrepancies between related securities of a firm might also be identified and traded based on strategies developed using fundamental credit analysis.[16] The objective of financial due diligence is to understand the value of the firm and its short-term financial issues for use in connection with the findings of legal due diligence to develop a valuation and strategy with respect to a specific security in the firm's capital structure. A nonexhaustive list of analyses typically performed include (1) historical financial information; (2) the outlook for the industry and firm position within it; (3) projections of future operating results; (4) identification of the corporate location of key operations and significant liabilities; (5) a liquidation analysis; and (6) valuation of tax attributes.[17]

The documents analyzed in legal due diligence[18] might include credit agreements, indentures, registration statements, 10-Ks and 10-Qs. The issues assessed arise as a matter of law, or in contracts or documents pertinent given the situation. Bankruptcy brings additional considerations that surface when the debtor has filed or may file for bankruptcy. Matters to be considered could include voidable preferences, substantive consolidation, equitable subordination, claims in nonnegotiable instruments, and whether the firm has entered the zone of insolvency.[19]

General Approach

In a quantitative finance setting, arbitrageurs generally use a structural model such as that introduced by Black and Scholes (1973),[20] Merton (1974)[21] or CreditGrades[22] to predict what a fair CDS spread should be given the price of a subject firm's equity.[23] The inputs of the structural model (including the volatility of the asset price, amount of debt outstanding, barrier below which default is expected, and percent recovery expected in case of default) are calibrated using CDS market quotes and maturities.[24] If the relationship between equity and CDSs observed in the market is mispriced based on a comparison with that predicted by the model, the arbitrageur might sell overvalued CDS protection and short equity, or buy undervalued CDS protection and buy equity. The arbitrageur will only profit, however, if the instruments traded revert toward equilibrium.

For background, the Merton Model posits that a firm can be divided into two parts: debt and equity, both of which can be thought of as derivative securities on the value of a firm's assets.[25] Specifically, the model illustrates that equity is a call option (a contract that gives the holder the right — but not the obligation — to buy the underlying security for a specified price on or before a specific date[26]) on the market value of a firm's total assets, with a strike price equal to the book value of the firm's debt. Debt can also be regarded as a put option (gives the holder the right, but not the obligation, to sell the underlying security for a specified price on or before a specific date)[27] on the market value of the total assets of the firm, with a strike price equal to the book value of the firm's debt.

15 *See* "What Is Arbitrage?," Certificate in Quantative Fin. *CQF Blog*, cqf.com/blog/quant-finance-101/what-is-arbitrage (unless otherwise specified, all links in this article were last visited on Feb. 25, 2025).
16 Gatto, *supra* n.2, pp. 49-203; Moyer, *supra* n.8 at pp. 95-117; 119-36; 257-307.
17 Moyer, *supra* n.8 at pp. 267-84.
18 *Id.* at p. 286.
19 *Credit Lyonnais, c. Pathe Commc'ns*, 33 Del. Ch. 215 (Dec. 30, 1991).
20 Fischer Black & Myron Scholes, "The Pricing of Options and Corporate Liabilities," *The Journal of Political Economy*, Vol. 81, No. 3 (May/June 1973), pp. 637-54, cs.princeton.edu/courses/archive/fall09/cos323/papers/black_scholes73.pdf.
21 Merton, *supra* n.7.
22 Christopher Finger & Thomas Ta, "CreditGrades Technical Document," MSCI (May 1, 2002), msci.com/www/research-report/creditgrades-technical-document/018193536; Wojtowicz, *supra* n.3 at pp. 90-91.
23 Wojtowicz, *supra* n.3 at p. 84.
24 Damiano Brigo & Marco Tarenghi, "Credit Default Swap Calibration and Equity Swap Valuation Under Counterparty Risk with a Tractable Structural Model" (Aug. 24, 2004), ssrn.com/abstract=581302.

25 Oliver Berndt & Bruno Stephan Veras de Melo, "Capital Structure Arbitrage Strategies: Models, Practice and Empirical Evidence," School of HEC at Univ. of Lausanne, Inst. of Banking and Finance (November 2003), p. 22, citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=03f082c7f3fbfe61063126cfb96eee1b42a13fee.
26 Chacko, *et al.*, *supra* n.10 at p. 71.
27 *Id.*

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OPTIONAL EVENTS

ABI Endowment Event: Baltimore Orioles vs. Washington Nationals Baseball Game

Wednesday, April 23 | 6:45-9:00 p.m.

Sponsored by BakerHostetler

Women's Reception

Friday, April 25 | 6:00-7:00 p.m.

Sponsored by Greenberg Traurig, LLP and JW Infinity Consulting, LLC

Register today at abiasm.org

President's Inauguration Dinner

Friday, April 25 | 7:30-10:00 p.m.

Current ABI President **Christopher A. Ward** will pass the gavel to ABI President-Elect Hon. **Bruce A. Harwood** (ret.). **Apollo Robbins**, "The Gentleman Thief," returns to ABI's Annual Spring Meeting for a third time and will entertain attendees using pickpocketing and sleight-of-hand to demonstrate perception management, diversion techniques and self-deception.

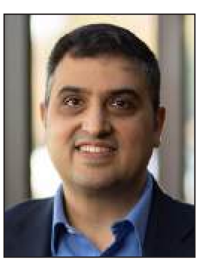
Dinner sponsored by Gray Reed. Dinner Entertainment sponsored by ComputerShare; Dundon Advisers, LLC; Inspira Financial; Pachulski Stang Ziehl & Jones; Polsinelli; Synovus; and Squire Patton Boggs.

ESSENTIAL SESSIONS

Economic Impact of Current Trends in Politics and Policies

Friday, April 25 | 9:45-10:45 a.m.

Domestic and foreign economic policies (and potentially laws and regulations) are undergoing a seismic shift, leading to increased uncertainties and greater market volatility. This panel will consider the business impacts of tariffs, trade policies, tax reform, changes in the regulatory environment, and disruptions in both the public and private sectors. Given the rapid pace of proposed and actual changes, this discussion will focus on current events — with a healthy amount of prognostication — to explore areas of increased or potential financial distress.



Luncheon and Keynote with Roben Farzad

Friday, April 25 | 12:15-2:00 p.m.

Roben Farzad is an acclaimed journalist, broadcaster and author known for his sharp insights into the intersection of business and culture. As the host of the popular public radio program "Full Disclosure," he dives into the forces shaping industries, innovation and society.

Sponsored by Bates & White, LLC and Skadden, Arps, Slate, Meagher & Flom LLP

Unjust Debts: A Candid Conversation About the Bankruptcy System and Paths to Reform

Saturday, April 26 | 8:05-9:30 a.m.

Have you ever fallen in and then out of love with someone or something? If you have, was that love ever rekindled? Those questions will set the stage for our Saturday morning plenary conversation between **Prof. Melissa Jacoby**, author of *Unjust Debts*, and **Sam Gerdano**, formerly ABI's executive director. The story will involve a deep analysis of, among other things, bankruptcy law's origins, policy objectives, interpreting the Bankruptcy Code, and consequences in practice.

Luncheon Program: Bill Rochelle's Top 10 *Daily Wires*

Saturday, April 26
12:15-1:55 p.m.

Sponsored by Okin Adams Bartlett Curry LLP

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The nationally recognized attorneys in Bernstein Shur's Business Restructuring and Insolvency Group — including two Fellows of the American College of Bankruptcy and two recent recipients of the ABI's coveted "40 Under 40" award — have decades of experience providing sophisticated legal counsel to companies facing financial difficulties, creditors, and sources of financing to and acquirors of businesses in distress. Our work for borrowers includes representing clients in chapter 11 reorganizations, debt restructurings, workouts, litigation, obtaining new business financing and asset sales. We also serve as and represent estate fiduciaries. Whether representing a lender, creditors' committee, asset-purchaser, fiduciary or a debtor, we provide comprehensive and creative legal counsel to meet all your needs.

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Blank Rome LLP is an *AmLaw 100* firm with a nationally recognized and *Chambers USA*-ranked Finance, Restructuring and Bankruptcy Practice, built on four decades of serving as a trusted advisor to leading domestic and foreign businesses. The practice includes more than 80 experienced and diverse finance and bankruptcy lawyers, primarily located in New York, Chicago, Delaware, Philadelphia, Los Angeles, Houston, Dallas, Pittsburgh and Washington, D.C. Blank Rome's attorneys regularly provide counsel with respect to all aspects of in- and out-of-court restructurings, including domestic and cross-border matters. Our team of problem-solvers regularly brings creative solutions to challenging situations to enable us to deliver outstanding outcomes for the benefit of our clients, whether they are institutional lenders, equity sponsors, non-traditional lenders, borrowers, purchasers or sellers of distressed assets, or fiduciaries, including committees, directors and officers, trustees, assignees and receivers.

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The Brattle Group answers complex economic, regulatory, and financial questions for corporations, law firms, and governments around the world. Our Bankruptcy & Restructuring Practice is a leading provider of economic analysis and testimony in valuation disputes, financial investigations, and litigation of confirmation issues. We aim for the highest level of client service and quality in our industry. We are distinguished by our credibility and the clarity of our insights, which arise from the stature of our experts; affiliations with leading international academics and industry specialists; and thoughtful, timely, and transparent work. Our clients value our commitment to providing clear, independent results that withstand critical review. Brattle has 500 talented professionals across North America, Europe and Asia-Pacific.

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Computershare Corporate Trust is a market leader with decades of experience as a provider of trustee and sophisticated agency services for private and public companies, investment banks, and asset managers. We offer a wide range of services that fulfill our clients' needs in corporate and structured finance, debt issuance and M&A. Computershare Corporate Trust is an industry leader with USD$5.8 trillion of debt under administration, and USD$342.7 billion in assets under administration and cross-border capabilities, including USD$1.3 trillion in funds movements across 75-plus currencies in foreign exchange and distributions. (Data for the 12-months ending June 30, 2024, and DUA includes all issues within the paying agency system of record.) With the acquisition of Wells Fargo CTS in November 2021, Computershare Corporate Trust is among the top providers in the U.S., ranking #1 in CMBS, CRE CLO and top three in RMBS, CLO, ABS, Convertible and High Yield Debt. Our team of more than 2,000 employees continues our commitment to delivering the highest standards of service and value to our entire client base.

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Clients partner with Cooley LLP on transformative deals, restructurings, complex IP and regulatory matters, and high-stakes litigation. Our business restructuring lawyers provide forward-focused advice to clients designed to achieve their strategic objectives. With deep experience in all aspects of in- and out-of-court restructurings, we guide clients through chapter 11 and other insolvency proceedings, distressed M&A transactions and bankruptcy-related litigation. With nearly 1,400 lawyers across 19 offices in the U.S., Asia and Europe, and a total workforce of more than 3,000 people, Cooley has the range and experience to serve companies of all sizes to seize opportunities in today's global marketplace.

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Cozen O'Connor's Bankruptcy, Insolvency & Restructuring practice counsels clients on domestic and international insolvency, creditors' rights, bankruptcy, out-of-court restructuring and reorganization issues. With lawyers in the U.S. and Canada, we represent parties on all sides of domestic and cross-border bankruptcy matters. Our attorneys are quick to anticipate the needs and priorities of divergent constituencies, and able to devise winning strategies. We also serve as mediators in high-level disputes, making them adept at focusing on negotiations and navigating potential obstacles. With more than 925 attorneys in 32 cities, our full-service firm has award-winning practices in business law, litigation and government relations, with lawyers experienced in operating in all sectors of the economy.

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CR3 Partners, LLC is a national turnaround and performance-improvement firm serving organizations and stakeholders across a broad range of industries during times of transition, opportunity or distress. Our team consists of seasoned executives and industry veterans who bring a profound bias for action and exceptional results, with a keen focus on turnaround management, restructuring and operational-improvement services. From our offices in Atlanta; Boston; Charlotte, N.C.; Chicago; Dallas; Houston; Los Angeles; New York; and Richmond, Va., CR3 Partners infuses agility, passion, experience and value-creation into everything we do. To discover how we can transform the future of your business, please contact us.

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Cravath, Swaine & Moore LLP has been active in restructuring since its early days and continues to represent clients in some of the largest, most complex and most high-profile restructurings. The firm has substantial experience across the full suite of restructuring, reorganization and bankruptcy matters, including debtor- and creditor-side engagements, debtor-in-possession and exit financing, liability-management transactions, distressed M&A and bankruptcy litigation. Clients benefit from Cravath's role as a strategic partner when faced with issues triggered by financial distress or insolvency, receiving complete representation from its restructuring specialists and premier finance, M&A, litigation and board advisory teams.

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Deloitte's Turnaround & Restructuring Practice is a leader in helping organizations transform disruptions or transitions, financial difficulties, or crises into opportunities for resilience. Having worked with both large multinational organizations and mid-market companies, we apply our deep experience and foresight to help our clients, their creditors and other stakeholders achieve successful outcomes. Whether the goal is to enhance the performance of a company or guide stakeholders through a complex turnaround or bankruptcy reorganization, our team works closely with the client to quickly understand their business and their most urgent issues.

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Development Specialists, Inc. (DSI) is one of the leading providers of management-consulting and financial-advisory services, including turnaround consulting, financial restructuring, litigation support, fiduciary services and forensic accounting. Our clients include business owners, private-equity investors, corporate boards, financial institutions, secured lenders, bondholders and unsecured creditors. For 45 years, DSI has been guided by a single objective: maximizing value for all stakeholders. With our highly skilled and diverse team of professionals, offices in the U.S. and international affiliates, and an unparalleled range of experience, DSI has built a solid reputation as an industry leader.

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Dundon Advisers LLC was established in 2016 to provide financial advisory services to institutional clients in the domains of restructuring, distressed investments, litigation finance and loan private placements. It has leading national positions in advisory roles for Official Committees of Unsecured Creditors and for investors in litigation and other complex claims against financially distressed companies. Dundon Advisers LLC carries out most of its real estate-related engagements through IslandDundon LLC, its joint venture with Island Capital Group. The firm is based in New York, with a branch office in Florida and additional personnel elsewhere in the U.S. and abroad.

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East West Bank, Specialty Deposit Services, offers companies and their advisors specialty banking and treasury management services designed to meet the specific needs of the Liquidating Trustee, Bankruptcy/Restructuring Attorneys, State and Federal Court Receivers, Chief Responsible Officers, Chief Restructuring Officers, Assignees, the Debtor in Possession and the Chapter 7 Trustee. Additionally, East West Bank maintains accounts for disputed depository relationships, litigation escrows, disbursement accounts, interpleader accounts or accounts where a blocked or control account is required.

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When facing financial uncertainty and distress, Foley & Lardner LLP's Bankruptcy & Business Reorganizations Practice will help you limit losses and enhance value. Whether from the vantage of creditors seeking to maximize recoveries or debtors navigating unique challenges, Foley will partner with you to establish a clear and effective path forward. With more than 60 restructuring professionals nationwide, Foley's practice is among the largest and most robust in the nation, representing myriad creditor and debtor constituencies. Foley's nationally recognized practice emphasizes practical solutions tailored to specific business needs.

FTI Consulting, Inc. (Presidential Partner)

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FTI Consulting, Inc. is a global business advisory firm dedicated to helping organizations manage change, mitigate risk and resolve disputes. Our Corporate Finance & Restructuring Segment consists of more than 2,100 professionals in 70 offices across 26 countries, focusing on the strategic, operational, financial, transactional and capital needs of our clients. We couple our industry experts with seasoned operators and multidisciplinary professionals to deliver customized, sustainable, out-of-the-box, yet practical, solutions in complex situations, centered around four core offerings: Turnaround & Restructuring, Transactions, Business Transformation and Strategy.

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Gavin/Solmonese LLC leads business situations to resolution using hands-on strategies. We lead turnarounds, restructurings and sales, and advise debtors, committees and lenders on reorganization/restructuring, bankruptcy plan evaluation, recovery optimization and litigation, in addition to serving as management, advisor, independent director, plan administrator, examiner or trustee. As interim management, the firm's Corporate Recovery Practice provides leadership and maximizes value for underperforming and troubled companies and their stakeholders. We are seasoned and battle-tested expert witnesses in matters relating to avoidance actions, fraudulent transfers, D&O fiduciary duty disputes and Caremark claims, business failures, forensic investigations, board/transaction issues, criminal matters, bankruptcy/advisory proceedings, due diligence, fraud discovery, mediation and settlement negotiations. We bring objectivity, expertise and unimpeachable experience to each engagement.

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Gray Reed's Corporate Restructuring and Bankruptcy Practice Group assists clients in pursuing efficient, innovative and sophisticated solutions in distressed financial situations. Our attorneys have significant experience representing troubled companies, trustees, secured and unsecured creditors, official and ad hoc committees, equityholders, owners, managers and other constituents in financial distress, workout, turnaround, restructuring, planning and bankruptcy scenarios — both in and out of court. A full-service law firm with offices in Dallas, Houston and Waco, Gray Reed has 150 attorneys who assist clients with myriad legal issues beyond corporate restructuring and bankruptcy, including commercial litigation, corporate transactions, oil and gas, tax planning and litigation, real estate, construction, health care, insurance, employment law, intellectual property, trusts and estates, and family law.

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Getzler Henrich & Associates LLC is one of the nation's oldest and most respected names in middle-market corporate restructurings and operations improvement, and has successfully worked with thousands of companies to achieve growth and profitability. Working with a wide range of companies, including publicly held firms, private corporations and family-owned businesses, Getzler Henrich's expertise spans more than 50 industry sectors, from "new economy" technology and service firms to "old economy" manufacturing and distribution businesses.

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Greenberg Traurig, LLP's internationally recognized Restructuring & Bankruptcy Practice provides clients with deep insight and knowledge acquired over decades of advisory transaction and litigation experience. The team has a broad and diverse practice developing creative strategies to the highly complex issues that arise in connection with in- and out-of-court reorganizations, restructurings, workouts, liquidations, and distressed acquisitions and sales. Using a multidisciplinary approach, the firm's vast resources and invaluable business network, the team helps companies navigate challenging times and address the full range of issues that can arise in the course of their own restructurings or dealings with other companies in distress.

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Loeb & Loeb LLP is a multi-service law firm with more than 450 lawyers in eight offices across the U.S. and Asia. Our Restructuring and Bankruptcy Practice brings experience to all aspects of insolvency and bankruptcy law. We represent creditors, debtors, committees and trustees, as well as buyers and sellers of distressed assets, across a host of industries, including real estate, financial services, media and entertainment, energy, airline, health care, retail and telecommunications. Our practice provides clients with consistent counsel from one integrated team by combining litigators and transactional lawyers to offer a multi-disciplinary approach that achieves results efficiently and expeditiously.

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Okin Adams Bartlett Curry LLP is a boutique Texas law firm assisting businesses of all sizes with many of the legal, financial and strategic challenges they frequently face. We provide our clients with business-based, practical solutions to these challenges by applying years of experience in the areas of bankruptcy, commercial litigation and corporate transactions.

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Pachulski Stang Ziehl & Jones LLP (PSZJ) is the nation's leading corporate restructuring boutique, with offices in Los Angeles, New York, Wilmington (Del.), Houston and San Francisco. Our attorneys are experienced in representing all major constituencies in bankruptcy proceedings and out-of-court workouts, including debtors, committees, trustees, bondholders, asset-purchasers and third-party plan proponents. PSZJ also handles sophisticated business litigation and transactional matters as part of its renowned practice. The firm is perennially named a Bankruptcy "Best Law Firm" by *U.S. News & World Report*, as well as a Bankruptcy and Restructuring "Practice Group of the Year" by *Law360*.

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Reid Collins & Tsai LLP is a nationally recognized trial boutique firm that prosecutes high-stakes commercial and bankruptcy-related litigation on a success-fee basis. The firm is unique in several respects, including its (1) expertise with high-profile cases involving large-scale financial fraud; (2) expertise in pursuing claims against officers, directors, accountants, lawyers and banks relating to the underlying fraud; and (3) willingness to pursue those claims on a success-fee basis. Reid Collins has earned many professional accolades, such as being named a "Top 10 Plaintiffs Firm in America" by *Benchmark Litigation* and as "Elite Trial Lawyers" for bankruptcy and commercial litigation by *The National Law Journal*.

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SC&H Capital is a national investment bank specializing in distressed M&A, capital-raises and financial restructurings for middle-market companies. Its 35-year-old Special Situations Team has preserved an estimated 65,000 jobs in more than 650 M&A and financing transactions, including more than 300 § 363 sales in 73 districts. Other services include business valuations, sell-side M&A and ESOPs for healthy companies. SC&H Capital serves numerous industries, including manufacturing, construction, health care, agribusiness, consumer, food and beverage, government contracting, and business and professional services, and is recognized for delivering tailored solutions to achieve true strategic value.

Skadden
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Skadden, Arps, Slate, Meagher & Flom LLP's Corporate Restructuring Group has consistently been recognized as one of the top restructuring practices in the world. We provide innovative solutions to clients involved in distressed-company situations, allowing clients to enhance value, minimize costs and properly position themselves for the future. This past year, Skadden welcomed Hon. Robert D. Drain (ret.) to its Corporate Restructuring Practice. Skadden has recently served as company counsel for Endo International plc and Armstrong Flooring Inc., purchaser counsel in SVB Financial Group, lender counsel in Diamond Sports Group and Voyager Aviation Holdings LLC, and equity committee counsel to Core Scientific Inc.

SpencerFane

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Spencer Fane is known for skillfully guiding clients through insolvency matters and the complexities of the bankruptcy process. Understanding a client's position in their industry and market, the current and future risks and opportunities, and the business strategies and relationships that contribute to their success, we devise legal solutions that address both their immediate and longer-term goals. Our experience includes representation of Trustees, Receivers, secured lenders, Debtors-in-Possession, buyers of distressed assets, Official Committees of Unsecured Creditors, trade creditors, landlords, and defendants in insolvency-related litigation, along with Judicial Receivers, and Assignees for the Benefit of Creditors in complex litigation and liquidations.

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Squire Patton Boggs is a full-service global law firm specializing in providing insights at the point where law, business and government meet. We have one of the largest, most experienced and respected global restructuring practices, with more than 80 lawyers in 30 offices in 13 countries collaborating on domestic and cross-border restructuring matters. Our seasoned team is expert in all facets of restructuring and insolvency engagements, including, among others, U.S. chapter 11 reorganizations, chapter 15 cross-border insolvencies, chapter 9 municipal restructurings, all forms of U.K. and AU receivership, administration and liquidation, and bankruptcy and voluntary arrangements, out-of-court restructurings and related contentious work.

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Stretto delivers a full spectrum of case-management services, depository solutions, loan-modification services and technology tools to fiduciaries and legal professionals. Offering a comprehensive suite of corporate-restructuring, consumer bankruptcy and debt-resolution capabilities, along with multi-faceted deposit and disbursement services, Stretto provides an unparalleled portfolio of solutions under the executive leadership of industry veterans Eric Kurtzman and Jonathan Carson. Sitting at the center of the bankruptcy ecosystem, Stretto leverages deep industry expertise and market insights to facilitate every aspect of case and cash management for its corporate-restructuring and consumer bankruptcy clients, as well as fiduciaries and other industry professionals.

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Synovus Financial Corp.'s Legal Industry Depository Services Group provides private banking to legal industry fiduciaries; including Trustees, Receivers, Assignees, Liquidating Agents, Qualified Settlements and 1031 Qualified Intermediaries. Our team focuses on the banking needs of court-appointed fiduciaries while providing white-glove service. Synovus is a financial services company based in Columbus, Ga., with approximately $60 billion in assets. Synovus provides commercial and consumer banking and a full suite of specialized products and services, including private banking, treasury management, wealth management, mortgage services, premium finance, asset-based lending, structured lending, capital markets and international banking through 247 branches in Georgia, Alabama, South Carolina, Florida and Tennessee. Synovus is a Great Place to Work Certified Company.

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Annual Spring Meeting sponsorships are still available. Contact Sharisa Sloan at ssloan@abi.org for more information.

President's Column

ABI President
Christopher A. Ward
Polsinelli
Wilmington, Del.

Chris Ward is chair of Polsinelli's Bankruptcy and Restructuring Practice and managing partner of the firm's Wilmington, Del., office. He previously served as ABI's Vice President-Development.

I still cannot believe it has been a year already since the 2024 Annual Spring Meeting (ASM). As we once again get ready to descend on Washington, D.C., for our annual event later this month, I want to take this time to reflect on the past year, thank those who made it possible, and look forward to our future.

First, none of this is possible without the understanding and support of my incredible wife, Christine. She has attended more conferences in the past year than she thought was humanly possible. But then again, she has been a trooper for the past 18 years and has become the integral centerpiece of not just the Ward family, but the ABI Family. The love and support of our kids — Liz and her husband Kevin (remember the mind-blowing speech Liz gave at ASM 2024!), Dan and Zak — as well as our extended family, make this journey worth it. I also need to thank my fellow shareholders and colleagues at Polsinelli. Their moral, and monetary, support made this dream achievable, especially **Shanti M. Katona** (Wilmington, Del.) and **Randye B. Soref** (Los Angeles), who all too often over the past year (or maybe decade??) were left filling in for me as I addressed my ABI duties, but they also attended ABI conferences at my side (not to mention the dozen Polsinelli attorneys that took over ASM last year!). I appreciate Polsinelli's support of ABI since I joined the firm 17 years ago, and I am proud that we are now an ABI Executive Partner.

I also need to thank ABI and its staff for making this possible. I will miss my two-year run of weekly ABI President's calls, first as ABI President-Elect alongside **Soneet R. Kapila** of KapilaMukamal, LLP (Fort Lauderdale, Fla.), and this past year with the next leader of ABI, Hon. **Bruce A. Harwood** (ret.). I am grateful to ABI Executive Director **Amy Quackenboss** and ABI Chief Operating Officer (and AI guru) **Karim Guirguis** for providing weekly updates, from the status of conference planning, to member committee updates, to discussions of ABI's future. I know ABI will be well cared for with Judge Harwood and new ABI President-Elect **Stephen D. Lerner** of Squire Patton Boggs (Cincinnati), but what will I do with my Thursday mornings now?!? Maybe more Peloton? (Don't forget to follow me @Word2Ward.)

It is not just ABI's senior leadership that makes this organization special; it is the entire organization and its staff. My monthly President's Columns would not have been possible without the insight, and patience, of Managing Editor **Elizabeth A. Stoltz**. I wanted to take advantage of the monthly platform for ABI President in the *Journal*, and the staff made sure that I lived up to my appearance in each *Journal* during my term, including ABI Senior Editor **Carolyn M. Kanon**. Be sure to check out those past columns at abi.org/abi-journal. I also deeply appreciate the work of Director of Communications **James H. Carman**, Director of Membership **Christoper Thackston** and Public Affairs Officer **John Hartgen**, especially the wonderful work he does in getting ABI and its endeavors covered by outside media. I have talked about the Partner programs (abi.org/about-us/partners) and the splendid work of Director of Business Development and Partner Programs **Barbara Grant Bereskin**, Partner Program Relationship Manager **Yasmin Agudelo**, Business Development Coordinator **Megan Loper** and Business Development Sales Manager **Sharisa L. Sloan**.

What about our event planners, who put on 30-plus conferences per year, not only domestically but last year in Mexico City and London, and this year in Colombia and Germany? Led by Director of Conferences and Events **Jennifer Guirguis**, and guided by Meeting Planners **Allyson Donohue**, **Maureen Ball**, **Julia Macnamara**, **Charlotte Ringle** and **Katie Stanish**, it is utterly amazing how it all comes together. To use a cliché, no one wants to see how the sausage is made, but being able to see behind the scenes and the work and dedication of ABI's staff was truly heartwarming and is the keystone of the ABI Family.

This is not to exclude others on ABI's staff who dedicate their time and effort into making this organization what it is. The ABI Family

Both my family (above) and colleagues at Polsinelli (below) were in the crowd when I officially became ABI's President at the end of ASM 2024.

I will treasure talking with numerous ABI members over the course of my presidency, such as with Ira L. Herman of Blank Rome LLP (r) during ABI's Caribbean Insolvency Symposium in January in the Cayman Islands.

starts from within and grows from there. While I may be stepping away from being the captain of this ship, the ship will continue to sail (I can see a meme of Judge Harwood saying, "I am the Captain now!" LOL!).

The list of thank yous can go on forever, including our volunteer members who serve on the Board of Directors, Executive Committee, Management Committee and member committees, and who speak at conferences and write articles for the *ABI Journal* — the list goes on. We are the organization that we are because of our volunteer members, and they deserve our recognition.

If you have attended ABI conferences this year, you have seen me give the opening remarks. By my count, my ABI year started at ASM in Washington, D.C., and continued to the New York City Bankruptcy Conference in Manhattan and the Central States Bankruptcy Workshop in Chicago; I met with ABI's staff at their headquarters in Alexandria, Va., then went to the Northeast Bankruptcy Conference & Consumer Forum in North Falmouth, Mass.; Southeast Bankruptcy Workshop in Naples, Fla.; Mid-Atlantic Bankruptcy Workshop in Annapolis, Md.; Southwest Bankruptcy Conference in Las Vegas; Health Care Program in Nashville, Tenn.; TMA Annual program in Philadelphia; Delaware Views from the Bench in Wilmington, Del.; and International European Insolvency Symposium in London; then capped off the year with the Winter Leadership Conference in Scottsdale, Ariz. At each of these conferences, I got to meet many people I would not have met if not for my role in ABI's leadership. I enjoyed getting to meet our members and hear their ABI stories.

If you were in attendance at any of these events, you also heard me talk about ABI's future. I used the phrase "gray hairs and no hairs" quite frequently to describe an aging membership (as a no-hair, I get a pass here), and that in order to succeed, we need to attract and support our new and young members. We now have eight classes of "40 Under 40" (read about past honorees at abi40under40.org), many of whom are in ABI leadership positions and incredibly active in the organization. This is something we should all be proud of and continue to support into the future.

Without increasing the number of our young members by adding law clerks, law students and junior associates, we will not have the pipeline to succeed into the next generation. I am confident that us older members will continue to encourage our newer members to become active in ABI and help prepare them for their futures as restructuring professionals by imbuing in them a deep understanding of bankruptcy, restructuring and insolvency law. Equally important is developing a network of other professionals interested in ensuring the success of not only ABI, but the restructuring industry as a whole. Be sure to encourage all of the young colleagues in your office to join ABI at abi.org/membership.

We are heading to D.C. later this month for ASM (register at abiasm.org) in dynamic times — the likes of which most of us have never experienced. What will this environment mean for the restructuring industry? Time will tell, but our industry has always adapted and reacted to change, whether it was to the Bankruptcy Abuse Prevention and Consumer Protection Act, the Great Recession, or inflation and a higher-interest-rate environment. This is what separates restructuring professionals from our nonbankruptcy colleagues: we are always adapting to situations and solving problems. I am excited to see how ABI and its members provide guidance to our country and its business environment during trying times.

Before I step aside and pass the oversized gavel to Judge Harwood, I would like to one last time express my gratitude to ABI and its membership. You trusted me to lead this organization for the past year and to continue as Immediate Past President, then as Board Chair before moving on and allowing new blood to have their seats at the table. It is truly an honor. I have been practicing bankruptcy and restructuring law for 25 years, and to say that I was ABI President from 2024-25 will always bring a smile to my face and hold a special place in my heart.

It was truly an honor this past year to speak at ABI events as President.

I love the ABI Family and the support and opportunities it has provided me during my career. I hope that other members feel as strongly about ABI as I do. As I have said several times over the past year, ABI provides second-to-none educational resources and networking opportunities to its members. There are many outstanding restructuring organizations in the U.S. and beyond, but ABI is the preeminent organization for bankruptcy, restructuring and insolvency education and opportunities. I personally thank each and every one of our members for making that so.

I look forward to seeing many of you April 24-26 at the Marriott Marquis Washington, DC, and at other conferences throughout this year (learn more at abi.org/events). As we have routinely done, the Ward family will continue to use ABI as a platform for our family vacations, and we will all see you at ABI's Northeast Bankruptcy Conference & Consumer Forum July 14-16 in Bretton Woods, N.H. Again, I am honored to have served you, and I look forward to a bright future for ABI and its members. Godspeed. abi

Event Roundup

ABI, Stetson University Host Annual Paskay Seminar in Sunny Tampa

Kathleen L. DiSanto of Bush Ross, PA (Tampa, Fla.) and Luis E. Rivera II of GrayRobinson, PA (Fort Myers, Fla.) (far left) hosted the "Judicial Roundtable Workouts: Problems, Problems, Problems!" plenary session with bankruptcy judges, using a case study based on the musical Wicked! *The hosts also performed a* Wicked! *rap to kick off the roundtable.*

ABI and Stetson University College of Law hosted the 49th annual Alexander L. Paskay Memorial Bankruptcy Seminar, a memorial CLE program honoring the lifetime achievements of the late Bankruptcy Judge Alexander L. Paskay, Feb. 27-28 at the Tampa Marriott Water Street in Tampa, Fla. About 200 practitioners from throughout the Southeast and beyond took part in the business- and consumer-focused panels and numerous networking opportunities, including an optional dinner hosted by IWIRC Florida and a hockey game at Amalie Arena, where attendees watched the Tampa Bay Lightning beat the Calgary Flames 3-0 from a private suite (see the pictures on p. 55). Sponsored by Shumaker, Loop & Kendrick, LLP, the event raised money for the ABI Endowment Fund.

The program was packed with timely sessions, including Evidence: Empower, Excellence, Enjoy; PPP: Post-*Purdue Pharma*; Effective Motion Practice in Bankruptcy Court; Avoidance Actions Update; Student Loans; Restaurant Chains in Chapter 11; Treatment of Personal Property During Bankruptcy; Trustees Come in All

Regional Moot Court Competitions Held Across the U.S.

ABI congratulates the winning teams of each of the regional moot court competitions that were held around the nation in preparation for the 33rd Annual Duberstein Moot Court Competition in early March in New York. The results of these regional moot court competitions and their respective winning teams are as follows:

- *<u>Fourth Circuit Regional Moot Court:</u> Kate Strauch and Dean Marvastian from the University of Maryland Francis King Carey School of Law won first place, and Ms. Strauch received Best Oralist (pictured at top left);*
- *<u>ABI Shapero Cup Regional Moot Court:</u> Nicholas Langenberg, Brandon Matthews and Katherine Held (l-r) from the Michigan State University College of Law won first place, and Ms. Held also received Best Oralist (pictured at top);*
- *<u>Seventh Circuit Regional Moot Court:</u> Temi Fayiga and Veda Tsai from the University of Texas presented arguments before several current and retired bankruptcy judges (pictured at left center), and Rachel Lehmann (not pictured) from Chicago-Kent College of Law received Best Oralist; and*
- *<u>Eleventh Circuit Cristol Kahn Paskay Cup Moot Court Competition:</u> Grace Castillo, Gabriella Socarras and David Khazen from the University of Miami School of Law (pictured at left bottom) posed with several sitting bankruptcy judges and their competitors from the University of Alabama School of Law.*

Ross Fishman of Fishman Marketing (Chicago) (standing) delivered the luncheon keynote exploring how generative AI is transforming the legal profession.

Shapes and Sizes; Ethics and Professional Responsibility; and a judicial roundtable. Ross Fishman of Fishman Marketing (Chicago) presented the luncheon keynote, during which he explored the ways in which generative AI is transforming the legal profession. Attendees could earn up to 10.5 hours of CLE/CPE credit, including up to 1.2 hours of ethics.

ABI is grateful for the work of this year's advisory board, led by Judicial Co-Chairs Hon. **Caryl E. Delano** of the U.S. Bankruptcy Court for the Middle District of Florida (Tampa) and Hon. **Corali Lopez-Castro** of the U.S. Bankruptcy Court for the Southern District of Florida (Miami), and Program Chair **Luis E. Rivera II** of GrayRobinson, PA (Fort Myers, Fla.). We also thank the following firms for their generous financial support of this year's program: agencyIP/Sherwood Partners, Inc.; Anthony & Partners; BakerHostetler; Bush Ross, P.A.; Foley & Lardner LLP; GrayRobinson, P.A.; Shutts & Bowen LLP; Stichter, Riedel, Blain & Postler, P.A.; Trenam; Venable LLP; and Wilmington Trust.

Check back at abi.org/events for information on next year's program as it becomes available.

Hon. Lori V. Vaughan of the U.S. Bankruptcy Court for the Middle District of Florida (Orlando) (c) caught up with Past ABI President Soneet R. Kapila of KapilaMukamal, LLP (Fort Lauderdale, Fla.) (r) and his wife, Prabodh, during the conference.

Texas A&M School of Law Wins 33rd Annual Conrad B. Duberstein National Moot Court Competition

Texas A&M School of Law cinched first place for this year's Conrad B. Duberstein National Bankruptcy Moot Court Competition (above). Second place went to Fordham University School of Law (below).

Texas A&M School of Law won the 33rd Annual Conrad B. Duberstein National Bankruptcy Moot Court Competition, held March 1-3 in New York City. The competition is co-sponsored by ABI and St. John's University School of Law. Fordham University School of Law took second place in the competition, and teams from UC Law San Francisco and the University of Kansas School of Law shared third-place honors. Lincoln Memorial University Duncan School of Law won for Best Brief, and Marissa Wakhu of Texas Southern University-Thurgood Marshall School of Law won the Best Advocate award.

The competition consisted of eight rounds of oral arguments and final rounds. ABI practitioners and aca-

Bankruptcy, district and circuit court judges from around the nation volunteered their time to adjudicate the competition.

Best Brief went to Lincoln Memorial University Duncan School of Law (above). Marissa Wakhu of Texas Southern University-Thurgood Marshall School of Law (c) won the Best Advocate award (below).

demics coached many of the teams, and nearly 200 lawyers and federal judges donated their time and expertise to help judge the event. The fact pattern for the competition focused on two key developments in bankruptcy law: (1) whether 11 U.S.C. § 1322(b)(2) precludes a chapter 13 debtor from modifying the rights of the holder of a secured claim that is secured only by a security interest in real property consisting of both the debtor's principal residence and income-generating rental property; and (2) whether 11 U.S.C. § 1325(b)(1) allows a chapter 13 debtor to exclude from the calculation of disposable income voluntary, post-petition contributions to his or her 401(k) retirement plan.

Final-round judges for the 2025 competition were Judge Joseph Bianco of the U.S. Court of Appeals for the Second Circuit, U.S. District Court Judges Pamela K. Chen and Hector Gonzalez (E.D.N.Y.), and Chief Bankruptcy Judge **Alan S. Trust** (E.D.N.Y.). Bankruptcy Judges **John T. Gregg** (W.D. Mich.; Grand Rapids) and **Paul R. Hage** (E.D. Mich.; Detroit) drafted this year's fact pattern.

The Duberstein Competition, named for the late Judge **Conrad B. Duberstein**, a St. John's alumnus and former ABI director, has grown into the largest appellate moot court competition in the nation. ABI's Endowment Fund awarded $13,000 in cash prizes for the winners during a gala reception held at the New York Marriott Downtown on March 3.

For more information on the Conrad B. Duberstein National Bankruptcy Moot Court Competition, please visit stjohns.edu/law/academics/centers-institutes/center-bankruptcy-studies/32nd-annual-duberstein-bankruptcy-moot-court-competition. abi

Members in the News

Numerous ABI members were inducted in March 2025 as Fellows in the 36th Class of the College during the American College of Bankruptcy's Annual Meeting in Washington, D.C. The new inductees are **Keith M. Aurzada** of Reed Smith LLP (Dallas), an ABI member since 2004; Hon. **Martin R. Barash** of the U.S. Bankruptcy Court for the Central District of California (Woodland Hills), an ABI member since 2002 and a past member of ABI's Board of Directors; Prof. **Laura B. Bartell** of the Wayne State University Law School (Detroit), an ABI member since 1999 and past ABI Resident Scholar; **Chuck C. Choi** of Wagner Choi & Verbrugge (Honolulu), an ABI member since 2001; **Ted A. Dillman** of Latham & Watkins LLP (Los Angeles), an ABI member since 2009; **Jeremy R. Fischer** of Drummond Woodsum (Portland, Maine), an ABI member since 2009, a 2017 ABI "40 Under 40" honoree and a member of ABI's Board of Directors; Prof. **Pamela Foohey** of the University of Georgia School of Law (Athens, Ga.), an ABI member since 2009 and a 2019 ABI "40 Under 40" honoree; Prof. **Michael A. Gerber** of Brooklyn Law School (Brooklyn, N.Y.), an ABI member since 1989; **Patricia E. Hamilton** of Stevens & Brand LLP (Topeka, Kan.), an ABI member since 2015; **James R. Irving** of Dentons (Louisville, Ky.), an ABI member since 2010, a 2017 ABI "40 Under 40" honoree and a member of ABI's Board of Directors; **Kevin A. Krakora** of Getzler Henrich & Associates LLC (Chicago), an ABI member since 2003; **Lisa Gonsior Laukitis** of Milbank LLP (New York), an ABI member since 2003; **Stephanie Crane Lieb** of Trenam Law (Tampa, Fla.), an ABI member since 2007 and a 2018 ABI "40 Under 40" honoree; Prof. **Diane Lourdes Dick** of the University of Iowa College of Law (Iowa City, Iowa), an ABI member since 2020; **John S. Mairo** of Gibbons PC (Newark, N.J.), an ABI member since 2003; **Ainat M. Margalit** of Legal Aid Chicago (Chicago), an ABI member since 2017; **Jennifer M. McLemore** of Williams Mullen (Richmond, Va.), an ABI member since 2004 and ABI's Vice President-Communications & Information Technology; **Michael R. Nestor** of Young Conaway Stargatt & Taylor LLP (Wilmington, Del.), an ABI member since 2000 and co-chair of ABI's Financial Advisors and Investment Banking Committee; Hon. **Daniel S. Opperman** of the U.S. Bankruptcy Court for the Eastern District of Michigan (Bay City), an ABI member since 2000; **Peter J. Roberts** of Seyfarth Shaw LLP (Chicago), an ABI member since 1999 and an associate editor for the *ABI Journal*; **Damian S. Schaible** of Davis Polk & Wardwell LLP (New York), an ABI member since 2005 and a past member of ABI's Board of Directors; **Sarah A. Schultz** of Akin Gump Strauss Hauer & Feld LLP (Dallas), an ABI member since 2022; **Lisa P. Sumner** of Maynard Nexsen, PC (Raleigh, N.C.), an ABI member since 2022; **John N. Tedford** of Levene, Neale, Bender, Yoo & Golubchik LLP (Los Angeles), an ABI member since 2019; **Michael F. Thomson** of Greenberg Traurig LLP (Salt Lake City), an ABI member since 2010; Hon. **Alan S. Trust** of the U.S. Bankruptcy Court for the Eastern District of New York (Central Islip), an ABI member since 2008; and **Matthew L. Warren** of Paul Hastings LLP (Chicago), an ABI member since 2010 and an advisory board member of ABI's Central States Bankruptcy Workshop.

Robert J. Stearn of Richards, Layton & Finger, PA (Wilmington, Del.) has been recognized in the 2025 edition of *Benchmark Litigation*. He has been an ABI member since 2003.

Two attorneys with McGuireWoods LLP in Richmond, Va., have been included in *Virginia Business*'s 2024 Legal Elite. **Sarah Beckett Boehm** has been an ABI member since 2001. **Dion W. Hayes** has been an ABI member since 1994 and is a member of the advisory board of ABI's New York City Bankruptcy Conference.

Richard A. Chesley of DLA Piper (Chicago) has received a 2024 Restructuring Leader Award from Global M&A Network. He has been an ABI member since 1999.

Jennifer Barker Lyday of Waldrep Wall Babcock & Bailey PLLC (Winston-Salem, N.C.) has been appointed chair of the Local Rules Committee for the U.S. Bankruptcy Court for the Middle District of North Carolina. She has been an ABI member since 2010.

Maria Carr of McDonald Hopkins LLC (Cleveland) has been named a 2025 Rising Star by *Ohio Super Lawyers*. She has been an ABI member since 2022.

Jordan Krasne of FTI Consulting, Inc. (New York) has been promoted to senior managing director. He has been an ABI member since 2019.

Kortney Otten of Gallagher & Kennedy (Phoenix) has been named a 2025 AzBusiness Leader by *AzBusiness*. She has been an ABI member since 2018.

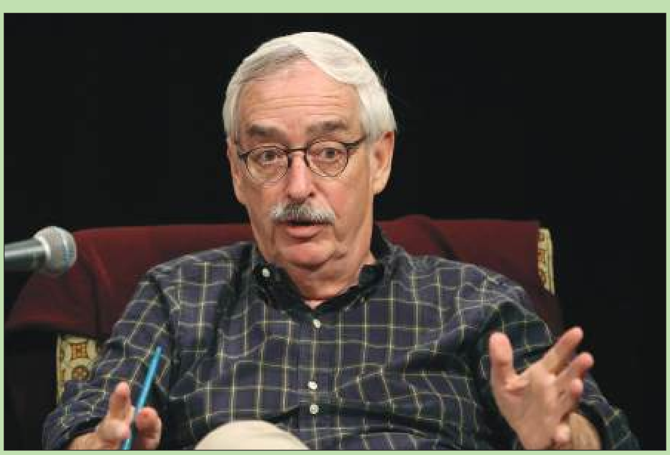
Robert J. Stearn

Jennifer Barker Lyday

In Memoriam

***Brady C. Williamson**, 79, a shareholder with Godfrey & Kahn SC in Madison, Wis., passed away on Feb. 16, 2025, from complications of cancer. He was a constitutional and corporate litigator who had taught at the University of Wisconsin Law School and University of California-Berkeley. He had represented clients before the U.S. Supreme Court and often appeared in federal and state appellate courts on constitutional issues. Since October 2017, Mr. Williamson served as the court-appointed fee examiner in the $120 billion PROMESA reorganization proceedings for the Commonwealth of Puerto Rico. He also continued his* pro bono *litigation and student collaboration project with the Media Freedom & Information Access Clinic at Yale University Law School. He was involved in global constitutional and election law projects, and his* pro bono *constitutional work has been sponsored by the National Democratic Institute for International Affairs. In the U.S., his practice focused on appellate advocacy, corporate law and reorganization. Mr. Williamson was a member of the National Bankruptcy Conference and a Class VII Fellow of the American College of Bankruptcy, as well as a contributing editor to* Collier on Bankruptcy. *In 1996, he was appointed by the U.S. President to chair the National Bankruptcy Review Commission, which submitted its comprehensive recommendations to Congress, the Chief Justice and the President. Mr. Williamson had been an ABI member since 1991 and will be deeply missed.*

Photo below taken by Cap Times *(used with permission from Godfrey & Kahn, SC).*

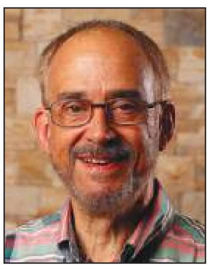


Prof. Juliet M. Moringiello

*Prof. **Juliet M. Moringiello** of Widener University Commonwealth Law School in Harrisburg, Pa., passed away on Feb. 27, 2025. She was the Associate Dean for Academic Affairs at Widener Law and was seen as a leader in law reform on the state and national levels. In 2014 and 2021, the graduating class honored Prof. Moringiello with the Outstanding Faculty Award for excellence in teaching; she also received the Douglas E. Ray Excellence in Faculty Scholarship Award four times. She left a lasting impression on Widener, and her influence will continue to be felt through the thousands of students she guided into careers that are helping others every day. Outside of the classroom, Prof. Moringiello played a key role with the Pennsylvania Bar Association's Business Law Section in the enactment in Pennsylvania of Revised Articles 1, 7 and 9 of the Uniform Commercial Code and the Uniform Voidable Transactions Act. She was an elected member of the American Law Institute and was a Uniform Law Commissioner for Pennsylvania, and in 2020, she was appointed vice chair of the joint ALI/ULC Drafting Committee on the Uniform Commercial Code and Emerging Technologies. In 2021, the Pennsylvania Bar Association recognized Prof. Moringiello's law reform work by honoring her with the W. Edward Sell Business Lawyer Award. In 2022, she was selected by the Uniform Law Committee to serve as co-chair of a Study Committee on the Use of Tokens or Other Similar Products in Real Property Transactions. Prof. Moringiello served as ABI's Resident Scholar for the Spring 2010 semester, and she regularly spoke at ABI events and programs and contributed articles on timely bankruptcy issues. During her time as resident scholar, Prof. Moringiello edited the Sixth Edition of ABI's* Bankruptcy Overview: Issues, Law and Policy *to provide an updated overview of the fundamental features of chapters 7, 11, 12 and 13 of the U.S. Bankruptcy Code. Prof. Moringiello was a Professional Ski Instructors of America Level 1-certified Alpine ski instructor, and could be found on winter weekends teaching skiing at Roundtop Mountain Resort. A celebration of life was held on March 20 at Widener Law. She had been an ABI member since 1995 and will be deeply missed.*

Thomas S. Kessler

Bozena Diaz



C. Scott Pryor

Lori A. Schwartz

Robert C. Furr

Thomas S. Kessler of Cleary Gottlieb Steen & Hamilton LLP (New York) has been named among the top 25 Rising Legal Stars in Latin America for 2025 by *Latinvex*. He has been an ABI member since 2018 and is a 2024 ABI "40 Under 40" honoree.

Two attorneys with Wolfson Bolton Kochis PLLC in Troy, Mich., have been included in *DBusiness Magazine*'s 2025 Top Lawyers list. **Michelle H. Bass** has been an ABI member since 2017. **Scott A. Wolfson** has been an ABI member since 2004.

John Elrod of Greenberg Traurig, LLP (Atlanta) has been named to *Georgia Trend*'s 2024 Legal Elite list. He has been an ABI member since 2011 and is an advisory board member of ABI's Southeast Bankruptcy Workshop.

Bozena Diaz of Cullen and Dykman LLP (New York) has been appointed to serve as a member of the New Jersey Supreme Court Committee on the Tax Court for its 2024-26 term. She has been an ABI member since 2022.

Andrew B. Still of Snell & Wilmer, LLP (Costa Mesa, Calif.) has been elected partner. He has been an ABI member since 2016.

C. Scott Pryor announced that he has retired from the faculty at the Campbell University School of Law (Raleigh, N.C.) as of Dec. 31, 2024. He has been an ABI member since 1992 and served as ABI Robert M. Zinman Resident Scholar in Spring 2013.

Two attorneys with Nelson Mullins Riley & Scarborough, LLP have been promoted to partner. Based in Atlanta, **Adam D. Herring** has been an ABI member since 2017, is co-chair of ABI's Ethics and Professional Compensation Committee and is a 2019 ABI "40 Under 40" honoree. Based in Denver, **Rachel A. Sternlieb** has been an ABI member since 2019 and is an advisory board member of ABI's Rocky Mountain Bankruptcy Conference.

Jeffrey E. Oleynik of Brooks, Pierce, McLendon, Humphrey & Leonard, LLP (Greensboro, N.C.) has been included in *Business North Carolina*'s 24th edition of "Legal Elite" and recognized as a member of its "Legal Elite Hall of Fame." He has been an ABI member since 1996.

Lori A. Schwartz has been appointed co-chair of Leech Tishman's Business Restructuring and Insolvency Practice Group in New York. She has been an ABI member since 2010.

Eric D. Madden of Reid Collins & Tsai LLP (Dallas) was named the 2025 U.S. Bankruptcy Litigator of the Year during the 2025 Benchmark Litigation Awards. He has been an ABI member since 2000 and is a member of ABI's Board of Directors. **William (Bill) T. Reid IV** was also shortlisted for U.S. Plaintiff Litigator of Year. He has been an ABI member since 2007 and is based in Austin, Texas. In addition, the firm was a named a finalist for both U.S. Plaintiff Firm of the Year and for U.S. Bankruptcy Firm of the Year.

Aaron M. Williams of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, PC (Boston) has been promoted to member. He has been an ABI member since 2018.

Lorenzo Marinuzzi of Morrison Foerster (Washington, D.C.) has been recognized as an Outstanding Restructuring Lawyer of 2024 by *Turnaround & Workouts*. He has been an ABI member since 2023.

Gabriel A. Morgan of Weil, Gotshal & Manges LLP (Houston) has been named among *Turnarounds & Workouts*' Outstanding Restructuring Lawyers for 2024. He has been an ABI member since 2023.

Robert C. Furr of Furr Cohen, PA (Boca Raton, Fla.) has been reelected to the board of the American Board of Certification and is chairman of its Long-Range Planning Committee. He has been an ABI member since 1988 and is an advisory board member of ABI's Alexander L. Paskay Memorial Bankruptcy Seminar.

Stretto announced that it has unveiled Stretto Conductor, a new AI-powered platform designed specifically for bankruptcy case management and communications. ABI members with Stretto include **George M. Basharis**, **Dave Beltran**, **Melinda Bennett**, **Jonathan A. Carson**, **Michael A. Cohen**, **Anthony Facciano**, **Dewayne Johnson**, **Denise Kaloudis**, **Nicholas R. Kennedy**, **Robert Klamser**, **Eric S. Kurtzman**, **Drew Lockard**, **James M. Le**, **Jeph Ledda**, **Daniel C. McElhinney**, **Sean McGuire**, **MaryBeth Robinson**, **J.W. Song**, **Brian J. Soper**, **Cristina M. Terrasini**, **Angela W. Tsai**, **Christopher J. Updike**, **Travis K. Vandell**, **George Vogl**, **David S. Watkins**, **Alexa Westmoreland**, **Morgan R. Wisbey** and **Todd Wuertz**. abi

American Bankruptcy Institute

Opinions

New and Improved!

ABI's newly redesigned Opinions site, a robust bankruptcy, circuit and district court research database, has been enhanced with an additional 50,000 cases, courtesy of Case.Law, and features upgraded search functionality to make your research a breeze. Bookmark it today!

Print, Share or Bookmark cases for future reference!

opinions.abi.org

What's Happening at ABI

Exciting Things Will Be Happening at ABI's Annual Spring Meeting This Month; Will We See You There?

ABI's Annual Spring Meeting (ASM) is close, but there is still time to make plans to attend if you haven't done so already. In addition to our captivating panels, roundtables, networking opportunities, optional events and other conference staples, this year's event will also feature an insightful keynote and mesmerizing entertainment!

Make plans to join us April 24-26 at the Marriott Marquis Washington, DC in Washington, D.C., by registering at abiasm.org.

"Full Disclosure" Host and Journalist Roben Farzad to Deliver Keynote

Roben Farzad

Roben Farzad, an acclaimed journalist, broadcaster and author known for his sharp insights into the intersection of business and culture, will be delivering the keynote during ASM. As the host of the public radio program "Full Disclosure," he dives into the forces shaping industries, innovation and society. A frequent commentator on MSNBC, he is also a regular presence on "PBS NewsHour" and midday public radio program "Here & Now." His expertise has been featured across major media outlets, with bylines in the *New York Times*, *Wall Street Journal* and *Boston Globe*.

Beyond his reporting, Mr. Farzad is the bestselling author of *Hotel Scarface*, a gripping true story about the infamous hotel that served as the epicenter of Miami's cocaine trade in the 1970s and '80s. His career includes serving as a senior writer for Bloomberg Businessweek, a summer reporting fellow for *The New York Times* and a staff writer for Dow Jones.

Mr. Farzad remains a passionate advocate for journalism's role in uncovering the stories that shape our world and in driving meaningful conversations. His unique perspective, creative analysis, and ability to connect business with broader cultural trends make him a must-hear voice in today's media landscape.

Friday Night Dinner Entertainment: Apollo Robbins

Apollo Robbins

Known as "The Gentleman Thief," **Apollo Robbins** is a pioneer in the application of deception to real-world environments, using pickpocketing and sleight-of-hand to demonstrate perception management, diversion techniques and self-deception. Now returning to ASM for a third time, he has picked the pockets of more than 250,000 and first made national news as the man who pick-pocketed the Secret Service while entertaining former U.S. President Jimmy Carter. *Forbes* has called him "an artful manipulator of awareness," and *Wired* magazine has written that "he could steal the wallet of a man who knew he was going to have his pocket picked."

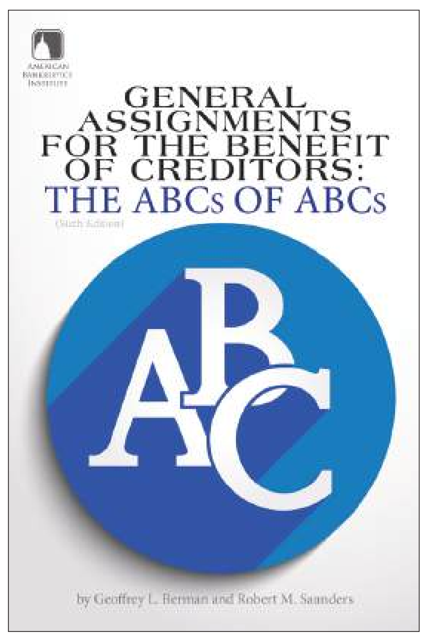
Mr. Robbins has been featured in *The New Yorker*, *New York Times*, *Los Angeles Times* and *Wall Street Journal*. He also produced and co-hosted the National Geographic program "Brain Games," which was nominated for an Emmy as an Outstanding Informational Series. In addition, his appearance on "The Today Show" is a YouTube favorite, having garnered more than 7 million views.

Have an Idea for a Topic for an ABI Conference Session? Submit Your Proposal at "Call for Abstracts" Page!

ABI has launched an online portal for professionals to submit proposals for educational sessions at future ABI conferences. Submitters can describe their proposed topic, outline the session's focus and learning goals, suggest speakers, and provide contact information via the portal's detailed form at abi.org/call-for-abstract.

All submissions will be reviewed by an internal Education Committee, which will contact the submitter to ask questions as needed and to discuss the status of the proposal. Submissions will be reviewed on a rolling basis.

Easy as ABC: New Publication Now Available from ABI



Since the publication of the fifth edition of *General Assignments for the Benefit of Creditors: The ABCs of ABCs* in 2021, there have been significant developments, especially in Delaware and Florida, that provide new direction in those states and offer guidance for other jurisdictions, which may clarify the future path of ABCs. In addition, the Uniform Law Commission is reviewing a final draft Uniform Act that reflects a growing consensus on ABCs, while recognizing the considerably different approaches of the states. This developing consensus is influenced in part by the legislative approach in Florida and the judicial approach in Delaware toward changing how ABCs are conducted, and their effects on participants and stakeholders.

With this update, Past ABI President **Geoffrey L. Berman**, retired from Development Specialists, Inc. as a senior managing director emeritus, and **Robert M. Saunders** of Pachulski Stang Ziehl & Jones LLP (Los Angeles) continue the tradition of this book by providing readers with a concise overview of the current status and potential foreseeable changes in ABCs. As alternatives such as chapter 11 bankruptcies have become prohibitively expensive for many companies, the relative cost-effectiveness of ABCs continues to make them an attractive option. The variety of states' approaches to ABCs — particularly in California, Delaware, Florida and Minnesota — and the compromises made in crafting the Uniform Law Commission's draft Uniform Act introduce a dynamism that was not present even as recently as 2021.

The new edition is available for preorder now at the online bookstore (store.abi.org), with print copies available later in April and at the Annual Spring Meeting this month in Washington, D.C. Be sure to log in with your ABI member credentials to secure the member discount.

ABI Members Get Married

__Luis E. Rivera II__ of GrayRobinson, PA (Fort Myers, Fla.) and __Kathleen L. DiSanto__ of Bush Ross, PA (Tampa, Fla.) were married on Nov. 24, 2024, in Tampa, Fla., at Le Meridien, the former federal courthouse, surrounded by their 10 children. Hon. __Caryl E. Delano__ of the U.S. Bankruptcy Court for the Middle District of Florida (Tampa) presided over the ceremony and made all of the necessary findings for a long and happy marriage: approving the assumption of the bride and groom's executory contract to love and honor each other, finding that all interests were adequately protected, and confirming their most excellent life plan as being fair, equitable and feasible. The bride's flowers were made from the pages of a 2022 Bankruptcy Code (the year the couple started dating) and featured all of her favorite Code sections. In addition, the newlyweds (both of whom are past ABI "40 Under 40" honorees) also co-authored an article on p. 16. Congratulations to the happy couple!

Access All Current ABI Titles Through ABI's Digital Book Subscription!

One of the best collections of bankruptcy books is now available as an annual digital subscription! ABI's bankruptcy library opens the door to a constantly evolving area of the law, and our books are continually being updated by top industry professionals. Auto-renewing annual subscriptions guarantee immediate access to this invaluable resource, which is comprised of fully searchable content that's always available on any digital device. Convenient pricing plans for individual and institutional subscribers offer immediate and unlimited access to our entire digital library of books — nearly 100 treatises! Plus, you get advanced access to new and revised books as soon as they are published — all included in your annual subscription. Learn more at abi.org/individual-abi-book-subscription!

ABI and ION Analytics' Debtwire Launch "Women in Restructuring" Podcast to Highlight Leading Women in the Insolvency Industry

ABI and Debtwire have collaborated to launch the Women in Restructuring podcast series to spotlight influential women shaping the insolvency industry. Through engaging interviews, the podcast series highlights important insolvency developments and the career journeys of top professionals.

The inaugural episode featured host **Sarah Foss**, global head of Legal and Restructuring at Debtwire (a service of ION Analytics), talking with **Alice Eaton**, deputy chair of the Restructuring Department at Paul, Weiss, Rifkind, Wharton & Garrison LLP, about key restructuring developments and how Ms. Eaton's bankruptcy career took shape at an early age.

The second episode was a special International Women's Day (March 8) edition featuring a discussion between Ms. Foss and **Kate Stephenson**, a partner in Kirkland & Ellis International LLP's European Restructuring Group, Ms. Stephenson provides key insights on restructuring plan developments in the U.K. and a few lessons that she's learned in her international restructuring career.

Listeners can access these and future episodes of the "Women in Restructuring" podcast at wir.podbean.com. The site provides the flexibility of listening to the interview on the page or accessing episodes on a user's preferred podcast service, including Apple Podcasts, Spotify, Amazon Music, iHeart Radio, PlayerFM and Podchaser.

Up-and-Coming Industry Leaders, We Are Looking for You!

Since its inception in 2017, ABI's "40 Under 40" program has recognized younger insolvency professionals

who are committed to the highest standards of achievement at work and in their communities. The outstanding list of 2024 honorees hailed from all practice areas and all regions of the country. The 2025 application period is currently underway and is open to bankruptcy, insolvency and restructuring professionals from around the world who are 40 years old or younger as of Dec. 1, 2025. You need not be an ABI member to be considered, and there is no fee to apply. You can nominate yourself or a colleague, and those who were nominated previously are encouraged to reapply.

Please visit abi40under40.org for more details and to read biographies on past honorees. **Applications will be accepted until June 30.** Nominees will be judged by a diverse steering committee of insolvency professionals. The selection process is highly competitive; we expect more than 300 nominations this year.

Volo: Get Bankruptcy Court Summaries — Fast!

Volo provides members with the timeliest bankruptcy decisions from the U.S. courts of appeals and bankruptcy appellate courts. Volunteers provide summaries of new opinions within 24 hours of their release, and each summary includes the full text of the opinion, case status, citation and judges involved. You can also subscribe to email alerts from the circuit(s) that interest you the most. Learn more at volo.abi.org.

GlobalInsolvency.com Is Getting an Upgrade!

Globalinsolvency.com, ABI's go-to site for cross-border news, information and research, is getting a big upgrade. Our massive chapter 15 case database will now be updated in real time from BankruptcyData.com! Each case provides a summary (most cases), circuit, judge and relevant Bankruptcy Code section, as well as a link to the PDF online. The site also features educational materials, firm articles, cross-border news headlines and more. Check it out, or forward it to a colleague!

Subchapter V Experiences to Share? ABI Wants to Hear from You!

ABI is continuing its study of subchapter V, and it needs your help! We are particularly interested in learning more about the real-world impact of subchapter V. So our question is, do you have a story about a distressed business or creditor who has used or benefited from the subchapter, and/or the ways in which the lower debt cap has affected debtors? Any and all responses are welcome. Submit your story at abi.org/subvstories.

Deloitte Becomes an ABI Executive Partner!

Joseph L. Steinfeld of ASK LLP (St. Paul, Minn.) is pictured at an event with ABI Executive Partner Deloitte's logo on his badge.

Deloitte recently elevated its ABI Partnership to Executive from Capital Partner. They are a dedicated and valued contributor to ABI's success, with a through focus on serving on Conference Advisory Boards, Committees and the "40 Under 40" program. We love that Deloitte's logo is prominently displayed on many ABI conference attendee name badges! ABI has been working closely over the past several years with **Ryan A. Maupin**, who is national leader of Deloitte's Turnaround & Restructuring Practice.

If your firm would like to become a Partner, please contact ABI Director of Business Development and Partner Programs **Barbara Grant Bereskin** at bbereskin@abi.org. Please visit abi.org/about-us/partners to get to know ABI's Presidential, Executive and Capital Partners.

Ramp Up Your Summertime Plans with ABI's Summer Regionals

ABI's Summer Regional events provide great opportunities to interact with other restructuring professionals in more intimate and relaxing environments. More details on each event will be posted soon at abi.org/events, but please

ABI Staffer Welcomes Baby Girl

*ABI Endowment Manager **Erin Green** and her husband, David Richardson, welcomed their second daughter, Keely Grace Richardson, on Feb. 27, 2025. Her big sister, Rylee, is excited about the addition and can't get enough of her!*

block off these dates on your calendar and be sure to join us for these family-friendly ABI conferences:

- *June 11-13:* Rocky Mountain Bankruptcy Conference at The Chateaux Deer Valley in Park City, Utah;
- *June 18-20:* Central States Bankruptcy Workshop at The Ritz-Carlton, Chicago in Chicago;
- *July 14-16:* Northeast Bankruptcy Conference & Consumer Forum at the Omni Mt. Washington Resort in Bretton Woods, N.H.;
- *July 24-27:* Southeast Bankruptcy Workshop at The Ritz-Carlton, Amelia Island in Amelia Island, Fla.;
- *Aug. 18-20:* Mid-Atlantic Bankruptcy Workshop at Hershey Lodge in Hershey, Pa.; and
- *Aug. 25-27:* Southwest Bankruptcy Conference at The Ritz-Carlton Bacara, Santa Barbara in Santa Barbara, Calif.

ABI Endowment Fund Update

33rd Annual Duberstein Competition Held in March

The 33rd Annual Duberstein Bankruptcy Moot Court Competition was held March 1-3 in New York, sponsored by ABI and St. John's University School of Law. The Anthony H.N. Schnelling Endowment Fund provides cash prizes to the winning team, as well as the second- and third-place teams, best brief and best oralist. Thanks to generous donations, the ABI Endowment was able to once again offer $13,000 in cash prizes to the winners of the annual Duberstein Bankruptcy Moot Court Competition. The winning team received $5,000, while the second-place team was awarded $3,000. The two other semi-final teams each received $1,500, with the best advocate winning $1,000 and the team with the best brief winning $1,000. See the full summary and photos on p. 47.

Sheila Smith Young Woman in Restructuring Scholarship Announced

Sheila Smith

The ABI Endowent Fund has announced the creation of the Sheila Smith Young Woman in Restructuring Scholarship. **Sheila Smith** was a leading national authority in the restructuring marketplace and known as an exceptional mentor to young women in her field. She was co-leader of Deloitte's Corporate Restructuring Group, and she led its New England Financial Advisory Services Practice, as well as working for Gordon Brothers as a senior advisor (among other roles) during her career. She passed away in November 2023 after a battle with pancreatic cancer.

The Sheila Smith Scholarship Fund will provide support to female financial restructuring professionals to attend ABI's Annual Spring Meeting, April 24-26 at the Marriott Marquis Washington, DC in Washington, D.C. Applications will be accepted soon. To donate, please visit abi.org/endowment/giving and select the option to donate directly to the Sheila Smith Scholarship Fund.

Hockey Was the Name of the Game at Paskay Fundraiser in February

Endowment supporters enjoyed a private suite at Amalie Arena in late February for the Tampa Bay/Calgary hockey game!

Endowment supporters gathered on Feb. 27 (the first day of the Alexander L. Paskay Memorial Bankruptcy Seminar) to watch the Tampa Bay Lightning take on the Calgary Flames from a donated suite at Amalie Arena in Tampa, Fla. A big "thank you" goes to Shumaker Loop & Kendrick LLP/**Steve Berman** for hosting the event in the firm's suite, and to everyone who attended this fun event. All proceeds benefited the ABI Endowment Fund.

Space Is Filling Up Fast for Baseball Game at Annual Spring Meeting

The ABI Endowment will be hosting an evening at Nationals Park in Washington, D.C., the night before the start of ABI's Annual Spring Meeting (April 24-26). See two young and talented teams play as the Baltimore Orioles

face off against the Washington Nationals on April 23 at 6:45 p.m. in the "Battle of the Beltway"!

Watch young stars take the field, including the Orioles' Gunnar Henderson, Jackson Holliday and Colton Cowser, and the Nationals' Dylan Crews, James Wood and MacKenzie Gore, all from a luxury suite, which has been generously donated and is being sponsored by BakerHostetler. Tickets are $300, which includes food and beverages. Sponsorship tickets are $1,000 and include two tickets plus acknowledgment. If your firm would like to sponsor this event, please contact ABI Endowment Manager **Erin Green** at egreen@abi.org.

Levels of Support for the ABI Endowment

Diamond Level	$80,000-$100,000
Platinum Level	$65,000-$79,999
Millennium Level	$50,000-$64,999
30th Anniversary Circle	$30,000-$49,999
Century Council Member	$25,000-$29,999
Visionary Member	$20,000-$24,999
Legacy Member	$15,000-$19,999
Lifetime Member	$10,000-$14,999
Benefactor	$5,000-$9,999
Sustaining Member	$2,000-$4,999
Leadership Club	$1,000-$1,999
Donor	$100-$999

Donate online at abi.org/endowment. Donations are tax-deductible and can be paid over five years. Contact Erin Green at egreen@abi.org for more information. abi

New Members

January (partial list)

Seth J. Leskanic
Stetson University
St. Petersburg, Fla.

Jordan W. Leu
King & Spalding LLP
Dallas

Dylan M.I Long
Campbell University
Nakina, N.C.

Hon. Mary E. Lopinot
U.S. Bankruptcy Court (S.D. Ill.)
East St. Louis, Ill.

Madison Lowe
University of Alabama
Tuscaloosa, Ala.

Christina Madden
Burford Capital
New York

Monica Mahal
U.S. Bankruptcy Court (D. Colo.)
Denver

Karan Manohar
Kent University
Chicago

Jarrod Martin
Chamberlain, Hrdlicka, White, et al.
Houston

Hon. J. Barrett Marum
U.S. Bankruptcy Court (S.D. Cal.)
San Diego

Claire Marvaso
Bloomberg Law
New York

Jason Mbakwe
Carey Olsen
Grand Cayman, Cayman Islands

Richard J. McIntyre
McIntyre Thanasides, et al.
Tampa, Fla.

Jacob A. Mertus
The University of Toledo
Toledo, Ohio

David Miller
Paul Hastings LLP
New York

Laura Miller
Cooley LLP
New York

Kate Mills
SC&H Capital
Sparks Glencoe, Md.

Nicholas P. Miner
Seattle University
Seattle

Constance Morrow
Mississippi Dept. of Human Servs.
Jackson, Miss.

Richard Murphy
D.M. Financial
Grand Cayman, Cayman Islands

Justin Naidu
Maples Group
George Town, Grand Cayman

Doug A. Nail
Parker, Hudson, Rainer & Dobbs
Atlanta

Karen Nevins
CohnReznick LLP
New York

David W. Newman
Office of the U.S. Trustee
Salt Lake City

Darío A. Oscós
Oscos Abogados
Coyoacan, Mexico

Mary (Marybeth) Parrilla
Tampa, Fla.

Fernando Pérez-Correa
Perez Correa Gonzalez
Mexico City

Marissa Pilconis
Cooley LLP
New York

Justin D. Plean
Quintairos, Prieto, Wood, & Boyer
Lake Worth, Fla.

Diane Pressley
Inspira Financial
Oak Brook, Ill.

Matthew Quinn
Univ. System of New Hampshire
West Winfield, N.Y.

Pratik Kumar Raj Ghosh
MoloLamken LLP
New York

Loida Reusi
Blank Rome LLP
New York

Amy Roberts
Alvarez & Marsal North America
Tampa, Fla.

Ian Roberts
Weil, Gotshal & Manges LLP
New York

MaryBeth Robinson
Stretto
New York

Dennis R. Rodriguez
B. Riley Financial
Boca Raton, Fla.

Ana Yaressy Romero
St. John's University
Bellevue, Wash.

Elizabeth P. Royalty
U.S. Bankruptcy Court (D. Mass.)
Springfield, Mass.

Michaella Rudsky
Brooklyn Law School
Brooklyn, N.Y.

Daniell Rupp
University of New Hampshire
Francestown, N.H.

Alejandro Sainz
Sainz Abogados, SC
Mexico City

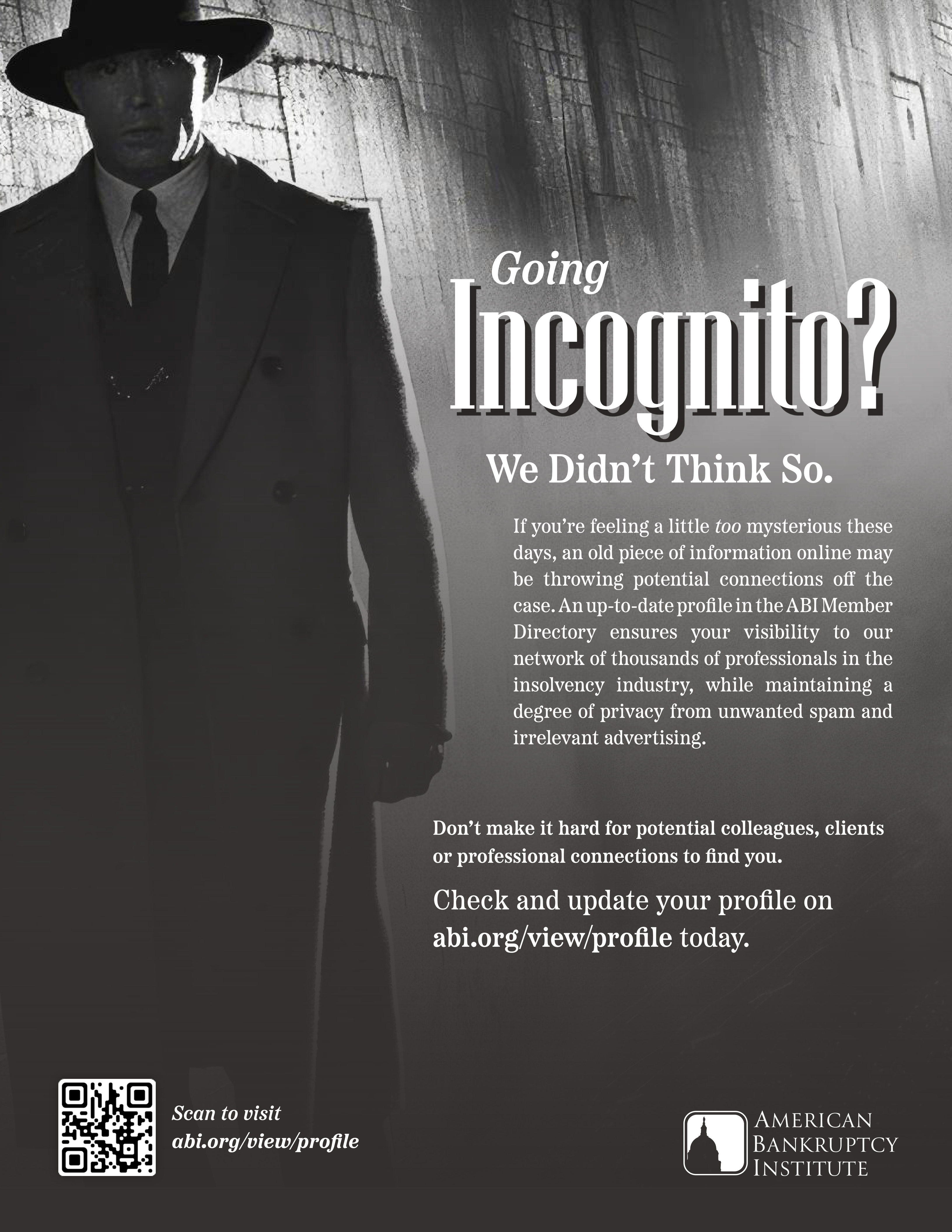
Lilian Onyekachi Sampson
Washington and Lee University
Colonial Heights, Va.

Eric R. Schachter
Davidoff Hutcher & Citron LLP
White Plains, N.Y.

Roy Sexton
Vedder Price PC
Chicago

Arbri Shameti
GLAS
Jersey City, N.J.

Charles Shaw
University of New Hampshire
Concord, N.H. abi


Going
Incognito?
We Didn't Think So.
If you're feeling a little *too* mysterious these days, an old piece of information online may be throwing potential connections off the case. An up-to-date profile in the ABI Member Directory ensures your visibility to our network of thousands of professionals in the insolvency industry, while maintaining a degree of privacy from unwanted spam and irrelevant advertising.
Don't make it hard for potential colleagues, clients or professional connections to find you.
Check and update your profile on **abi.org/view/profile** today.
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rights,[12] while others permit class members to file — even if they received notice of the bar date and have not shown reliance on the class claim.[13]

Successful Motion Required

A number of courts require the class to succeed on a motion to apply Bankruptcy Rule 7023 before it may file a class claim. These courts have held that any kind of conditional authority possessed by a representative of a purported or certified class is insufficient to support a representative proof of claim.[14] Since, per these courts, "a curative motion under Rule 9014(c) seeking to apply Rule 7023 is not a defense to an objection to a proof of claim purportedly filed on behalf of a class of creditors," a successful motion must come first.[15] These cases find the lack of authority so evident that, without prior authorization, a class claim is subject to "an obvious defect that will otherwise certainly result in disallowance of the claim."[16]

It is arguable that *In re Musicland Holding Corp*., possibly the key case regarding substantive application of Rule 7023, falls into this category.[17] In this case, a class proof of claim was filed before the bar date, and a motion to apply Civil Rule 23 was filed after the bar date. The court felt that application of class principles was not warranted, effectively invalidating the filed class claim. It did not generally reopen the claims-filing procedures for class members, only for those who might not have received notice of the bankruptcy. Class members who received notice and relied on their representatives to file as a class were unable to recover.

No Motion Required

Courts that do not require a pending or successful motion do so for several reasons. The simplest is that no provision of the Bankruptcy Code or Bankruptcy Rules restricts certification to a particular point in the lifecycle of a case.[18] Another straightforward rationale is that if a class is certified outside the bankruptcy, the certification decision is binding and authorizes the class to file claims for money as a class.[19]

Many courts in this group utilize a technical argument. They note that Rule 7023 applies only in adversary proceedings, and the filing of a claim is neither an adversary proceeding nor a contested matter. As a result, these courts conclude that no motion is necessary for a class claim;

> [H]owever, when an objection is made to a filed proof of claim, a contested matter arises ... [and] the first opportunity a claimant has to move under Bankruptcy Rule 9014, to request application of Bankruptcy Rule 7023, occurs when an objection is made to a proof of claim. Prior to that time, invocation of [Civil] Rule 23 procedures would not be ripe, because there is neither an adversary proceeding nor a contested matter.[20]

This rationale has been employed by several courts, which have relied on the idea that a claim is allowed until a party objects.[21] Even courts that reject this rationale have called it an "ingenious use of Rules 9014 and 7023 [to] allow the court to bootstrap the permissibility of the class proof of claim."[22]

As appealing as this principle is — it would permit unobjectionable class claims to stand while requiring in-bankruptcy certification of objectionable claims — it is inconsistent with the rules. A claims objection is a contested matter. While many Part VII Rules apply to contested matters, Bankruptcy Rule 7023 is not one of them.[23]

This leaves supporters and detractors of the "allowed until objection" school in a strange spot, as the rules do not permit Rule 7023 to be applied in the face of an objection. They also do not permit Rule 7023 to be applied in any other contested matter, like a motion for application of Rule 7023. How can authority to file a class claim be reconciled with the existing cases and rules? It cannot, absent changes to the rules.

Solution: Amend the Rule to Clearly Permit Certified Classes to File Claims, Require Authority for Uncertified Classes

Bankruptcy Rule 7023 permits class treatment in theory, and it is sensible to permit class proofs of claim. Courts have applied wildly differing analyses for how to obtain class treatment, who may obtain this treatment and when the treatment must be sought.

The benefits to debtors of allowing class claims are real and tangible. It is impractical to force a class certified pre-petition to seek that same certification in the bankruptcy case, driving up expenses for the class and estate.[24] To solve this problem, Rule 7023 should be amended to allow classes certified pre-petition to file and defend a class claim without a motion.

A putative class has provisional authority to act for its members, but provisional authority is not enough to provide the mutual binding benefits of a class claim in bankruptcy. Bankruptcy Rule 7023 should also clearly state that a putative class does not have authority to file a proof of claim unless it does so after requesting or receiving court authorization to act in the bankruptcy for the putative class. abi

12 *See In re TWL Corp.*, 712 F.3d 886, 899 (5th Cir. 2013); *see Gentry v. Siegel*, 668 F.3d 83, 91 (4th Cir. 2012).
13 *See In re Connaught Grp. Ltd.*, 491 B.R. 88, 97 (Bankr. S.D.N.Y. 2013); *see In re Vanguard Nat. Res. LLC*, 2017 WL 5573967, at *5 (Case No. 17-30560) (Bankr. S.D. Tex. Nov. 20, 2017).
14 *See In re Circuit City Stores Inc.*, 2010 WL 2208014, at *11-12 (No. 08-35653) (Bankr. E.D. Va. May 28, 2010). *Reid v. White Motor Corp.*, 886 F.2d 1462, 1470-71 (6th Cir. 1989).
15 *In re Associated Cmty. Servs. Inc.*, 520 B.R. 650, 655 (Bankr. E.D. Mich. 2014).
16 *In re Comput. Learning Ctrs. Inc.*, 344 B.R. 79, 88-89 (Bankr. E.D. Va. 2006).
17 *See In re Musicland Holding Corp.*, 362 B.R. 644 (Bankr. S.D.N.Y. 2007).
18 *See In re F-Squared Inv. Mgmt. LLC*, 546 B.R. 538, 547 (Bankr. D. Del. 2016) (objection to class claim denied because there is no "*per se* bar against certifying a class claim after the confirmation of a plan").
19 *See In re Trebol Motors Dist. Corp.*, 211 B.R. 785 (Bankr. D.P.R. 1997) (representative of certified class had authority to file class claim without motion).
20 *In re Charter Co.*, 876 F.2d 866, 874 (11th Cir. 1989).
21 *United Cos. Fin. Corp.*, 276 B.R. 368 (Bankr. D. Del. 2002) (no request for class treatment until objection was filed).
22 *In re FIRSTPLUS Fin. Inc.*, 248 B.R. 60, 70 (Bankr. N.D. Tex. 2000) (stating in *dicta* that claim subject to no objection must be supported by immediate motion for class certification).
23 *See* Fed. R. Bankr. P. 9014(c) (providing that Rules 7009, 7017, 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7064, 7069 and 7071 apply in contested matters).
24 The author does not suggest giving a certified class a complete pass on invoking Bankruptcy Rule 7023. For any action aside from filing a proof of claim, the court should be able to address whether class treatment is warranted under the facts and circumstances in play. Since class claimants are often unsecured creditors in cases where a committee is appointed, they commonly have an existing fiduciary that may moot the need to do anything other than file a claim.

from page 17

Debtors also argue that applying § 523 to corporate subchapter V debtors presents temporal procedural issues. Rule 4007 of the Federal Rules of Bankruptcy Procedure fixes the time for filing a complaint objecting to discharge under § 523(a)(2), (a)(4) and (a)(6) as 60 days after the first date set for the § 341 meeting of creditors — before the debtor may know whether the plan will be confirmed consensually or nonconsensually, and whether § 1192 governs the discharge.

Presumably, a bankruptcy court might abate a preconfirmation nondischargeability complaint until it is determined whether the debtor is able to confirm a plan consensually to avoid additional and unnecessary administrative expenses. However, extending the time for filing dischargeability complaints is not a solution, because a debtor will want to know before confirmation whether it will face litigation over the dischargeability of a debt so that the costs of litigation can be factored into the debtor's projected disposable-income calculations. Another wrinkle is this: Can a debtor withdraw the subchapter V election if a nondischargeability complaint is filed and proceed under traditional chapter 11 when the debtor has an impaired accepting class and can overcome the absolute-priority rule?

Creditors, on the other hand, might argue that subchapter V affords debtors significant advantages, and that applying § 523's exceptions to discharge to corporate debtors was a fair trade. For example, only the debtor may propose a plan, plans may be confirmed nonconsensually without the acceptance of any creditors, and the absolute-priority rule does not apply. Is it fair for the individual responsible for the acts or conduct giving rise to a dischargeability complaint to retain his or her interest in the debtor without paying the claim of the aggrieved creditor in full? Perhaps, as acknowledged by the Fifth Circuit in *GFS Industries*,[16] applying § 523 to corporate debtors strikes a balance between the rights of debtors and creditors in subchapter V, while also incentivizing debtors to pursue a consensual plan consistent with the policy goals and objectives of the subchapter V process.

Creditors might also argue that they have wielded their right to object to dischargeability judiciously. Since the SBRA's enactment, only a small number of adversary proceedings to determine the dischargeability of debt under § 523 have been initiated against corporate subchapter V debtors. The Middle District of Florida leads the U.S. in subchapter V filings with more than 1,000 cases to date, yet adversary proceedings initiated against corporate subchapter V debtors in that district have led to only two published decisions on the issue.

Finally, while there is scant legislative history on the addition of § 1192 to the preamble of § 523, creditors often note the fact that the SBRA's drafters modeled subchapter V after chapter 12 in many instances.[17] For 30 years, courts have interpreted nearly identical language to apply § 523 to corporate chapter 12 debtors.[18] In addition, the "Notice of Chapter 11 Bankruptcy Case for Corporations or Partnerships under Subchapter V" (Official Bankruptcy Form 309F) and the "Official Plan of Reorganization for Small Business Under Chapter 11" (Official Bankruptcy Form 425A) both contemplate that § 523's exceptions to discharge apply to corporations and partnerships. Most commentators also embrace the application of § 523 to non-individual debtors in the context of subchapter V.[19]

Alas, insolvency practitioners may never enjoy the satisfaction of knowing whether applying § 523 of the Bankruptcy Code to corporate debtors was Congress's informed policy decision or merely a drafting error. Perhaps the answer is immaterial, given the statute's plain language and the consistent interpretation to date by the circuit courts of appeals. A predictable system that allows for strategic and deliberate decision-making benefits debtors and creditors alike.

Even so, as courts try to harmonize the strained interplay between §§ 1192 and 523, Congress should either re-evaluate the policy considerations behind subjecting corporate subchapter V debtors to nondischargeability litigation, or more clearly articulate the policy objectives of balancing the interests of debtors and creditors. One suggestion might be for Congress to amend § 1192 to exclude from the exception to discharge those kinds of debts that are most hotly contested and less suited to corporate debtors: claims that a debt results from fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny (§ 523(a)(4)); and claims that a debt results from willful and malicious injury by the debtor to another (§ 523(a)(6)). Generally, these kinds of claims are least suited to corporate debtors because of the *mens rea* requirement,[20] yet they can easily derail a case to the detriment of both debtors and creditors alike.

One might also argue that claims that a debt was obtained by false pretenses, a false representation or actual fraud (§ 523(a)(2)) should also be excluded from § 1192's exception to discharge given the potential for meritless fraud claims.[21] Wherever the line is drawn, a narrowing of § 1192's exceptions to discharge would balance Congress's primary policy objective of streamlining the reorganization process for small businesses while maintaining a balance between the rights of debtors and creditors in subchapter V. abi

Editor's Note: *ABI's Subchapter V Task Force's Final Report and recommendations to Congress is posted at subvtaskforce.abi.org. All members are invited to submit their experiences with subchapter V at abi.org/subvstories.*

16 *GFS Indus. LLC*, 99 F.4th at 232. In rejecting the debtor's arguments, the Fifth Circuit explained that the debtor "misunderstands the compromises [that] Congress made in Subchapter V" and attempts to "rewrite that compromise."

17 *See* William L. Norton III, 2021 No. 6 *Norton Bankr. L. Adviser NL* 1 ("It appears that Subchapter V was drafted with the intention to apply dischargeability exceptions under ... § 523 to corporations.").

18 *Sw. Georgia Farm Credit v. Breezy Ridge Farms Inc. (In re Breezy Ridge Farms Inc.)*, Adv. No. 08-12038-JDW, 2009 WL 1514671 (Bankr. M.D. Ga. May 29, 2009); *New Venture P'Ship v. JRB Consol. Inc. (In re JRB Consol. Inc.)*, 188 B.R. 373 (Bankr. W.D. Tex. 1995).

19 *See* William L Norton III, 2021 No. 6 *Norton Bankr. L. Adviser NL* 1; William L. Norton III & James B. Bailey, "The Pros and Cons of the Small Business Reorganization Act of 2019," 36 *Emory Bankr. Dev. J.* 383, 386 (2020); I.R.M. 5.9.8.5.1; *but see* Hon. Paul W. Bonapfel, *Guide to the Small Business Reorganization Act of 2019*.

20 *See, e.g., Matter of Berkemeier*, 51 B.R. 5, 6 (Bankr. S.D. Ind. 1983) (noting that embezzlement is act committed by individual).

21 *See* H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 365 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5787 (noting potential for creditors to initiate "false financial statement exception to discharge actions [under § 523(a)(2)] in the hopes of obtaining a settlement from an honest debtor anxious to save attorney's fees. Such practices impair the debtor's fresh start").

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is closely tied to the real property but technically is not a fixture, such as with crops.

- *Providing a Simplified Process for Fixture Filings in Article 9 UCC Sales:* Article 9 could establish more streamlined procedures for fixture filings by reducing the amount of information required, providing a standardized process of filing a financing statement to perfect a security interest in a fixture, and allowing the electronic filing of fixture financing statements to expedite the process.
- *More Clearly Establishing Priority Rules for Real Estate Liens in Article 9 Sales:* Article 9 could establish clearer rules for determining priority between an Article 9 security interest in real property-related collateral and a traditional real estate lien, potentially based on the timing of filing or recording.
- *Providing for Automatic Perfection for Certain Collateral in Article 9 UCC Sales:* Article 9 could provide for automatic perfection of security interests in certain real property-related collateral like crops, where the secured party's interest is already well-established through existing real estate documentation.

Conclusion

Making some or all of these changes to UCC Article 9, along with providing a national definition for "commercial reasonableness," would provide a clearer, more comprehensive national framework for handling secured transactions that involve both personal and real property. Given the recent rise in Article 9 sales involving the sale of membership interests in real property holding entities, and the number of court cases involving disputes over what is "commercially reasonable" in an Article 9 sale, the time for considering these legislative changes has come. abi

The International Scene: Workouts for Corporate Restructurings in Japan
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impartial oversight ensures a fairer distribution of repayment and promotes creditor confidence in the process.

Expedited Resolution: Due to their less complex nature, out-of-court restructurings typically conclude within six to 10 months, whereas in-court proceedings may continue significantly longer before completion. The expedited resolution enables debtor firms to recover and resume operations more swiftly following the restructuring.

Tax Benefits for Creditors: When creditors waive claims pursuant to a restructuring plan that complies with rule-based workout requirements, they may include the associated costs as deductible expenses for tax purposes. This provision ensures parity between the tax treatment of in-court and out-of-court restructurings.

Protection of Management as Guarantors for the Next Step: In Japan, the "Guidelines for Debt Workouts of Company Managers' Guarantee Obligations" stipulate cases where management, such as directors, might be protected — such that they do not have to file for bankruptcy for the personal liability of guarantees against the corporate creditors, and can maintain their residences or other incentive assets if they comply with the requirements. This guideline can even be used when a corporate debtor files for a court procedure, but these protections might be granted more readily in a workout process if the corporate restructuring plan is unanimously consented to. The framework encourages more prompt decision-making and restructuring while safeguarding management, especially if they share less of the blame for the company's financial distress.

Grace Period for Delisting: A form of rule-based workout, turnaround alternative dispute resolution (ADR) is particularly suited for larger enterprises, such as listed companies. Unlike court-supervised restructuring, which may lead to delisting, turnaround ADR does not trigger delisting. A company is normally subject to delisting if it has been in a state of insolvency for two consecutive fiscal years, according to the Tokyo Stock Exchange Listing Regulations. However, if the insolvency is expected to be resolved through turnaround ADR, the grace period for delisting will be extended by one year.

Disadvantages

Requirement of Unanimous Creditor Approval: Unlike court-supervised restructurings, where a majority vote can authorize a restructuring plan, workouts necessitate unanimous creditor consent to bind said creditors to the restructuring plan. This stringent requirement increases the likelihood of dissenting creditors obstructing the process, potentially complicating the approval of viable restructuring plans.

Absence of Standstill Provisions for Trade Creditors: While workouts might facilitate a standstill agreement between a debtor and its financial creditors, trade creditors are typically excluded from the process. If a debtor faces immediate repayment obligations to commercial creditors, the lack of a legally enforceable standstill might precipitate financial collapse before the workout can be completed. In such cases, transitioning to court proceedings might become necessary.

Overview of Specific Rule-Based Out-of-Court Workout Procedures

Turnaround ADR

This procedure was established under the present Act on Strengthening Industrial Competitiveness.[1] The pro-

1 For the translated text of the Act on Strengthening Industrial Competitiveness (Act No. 98 of 2013), visit www.japaneselawtranslation.go.jp/ja/laws/view/4605. For an overview of the proceeding, visit meti.go.jp/policy/jigyou_saisei/kyousouryoku_kyouka/jigyousaiseiadr_gaiyo_R6_2.pdf (in Japanese). All links in this article were last visited March 5, 2025.

cess is supervised by experts, usually two attorneys and one certified public accountant, who are appointed as "operators" by the Japanese Association of Turnaround Professionals (JATP), a private organization certified under the Act on Promotion of Use of Alternative Dispute Resolution. These operators preside over the process and review the proposed restructuring plan. Turnaround ADR mainly targets medium- to large-sized companies, including global enterprise groups with foreign subsidiaries, due to the higher procedure fees than the council scheme in § 3.2. This method has gained prominence in international restructuring cases due to its structured approach and professional oversight.

Small and Medium-Sized Enterprise Revitalization Council

The Small and Medium-Sized Enterprise Revitalization Council, a public institution, was established under the present Act on Strengthening Industrial Competitiveness. It supports the workout process and organizes a review team to examine the proposed restructuring plan from an objective standpoint. This framework[2] is used by small and medium-sized enterprises that have 300 or fewer employees and capital of JPY 300 million or less, with the actual size requirement depending on the debtor's industry. The procedure is less expensive than others, as there is no fee for the council, and the due diligence might be partly subsidized by the government.

Rehabilitation-Type Out-of-Court Workouts for Small and Medium-Sized Enterprises

This type of workout was newly adopted in 2022 under the Guidelines for Restructuring of Small and Medium Enterprises.[3] Distressed debtors using this scheme would appoint third-party supporting experts, such as lawyers from the public list of accredited experts, with the consent of major creditors, to assess the fairness of the proposed restructuring plan. This scheme also focuses on small and medium-sized enterprises, but the difference between it and the council is that the debtors must choose third-party experts and that the legal fees for the attorneys representing the debtor might be partly subsidized by the government in addition to the cost of due diligence.

Regional Economy Vitalization Corporation of Japan

The Regional Economy Vitalization Corporation of Japan (REVIC) is an organization established under the Regional Economic Revitalization Corporation Act[4] that proactively takes the lead in restructuring small and medium-sized enterprises with 1,000 or fewer employees and capital of JPY 500 million or less, with some exceptions. The REVIC conducts the debtor's due diligence, formulates its restructuring plans, and coordinates the interests of financial institutions and other stakeholders as a neutral and fair third-party organization, unlike the third parties in the three methods previously explained, which review the plan formulated by the debtor. Thus, the fee is generally the most expensive among the options. The REVIC is unique in the following comprehensive functions: investment, lending of capital, guarantee of financial obligations, turnaround staffing and debt-purchasing.

Special Conciliation

Special conciliation is a proceeding governed by the Act on Special Conciliation for Expediting Arrangement of Specified Debts,[5] where debtors who are about to become insolvent may settle on the payment conditions of their financial debts with their creditors via court mediation. It involves a court mediator, but unlike in-court insolvency proceedings, special conciliation basically requires the individual and active consent of all creditors to the settlement. If the settlement is not agreed upon in the mediation, the court may issue an order; if there is no objection to the order within two weeks, it becomes effective. The court's involvement enhances transparency and fairness among creditors in the process compared to the other rule-based workouts. Special conciliation is originally more common for a consumer insolvency process, thus it is a rather less common method of corporate rescue.

Potential Future Developments

Out-of-court workouts in Japan currently require unanimous creditor approval for restructuring plans to be binding. In contrast, civil-rehabilitation and corporate-reorganization proceedings both allow for majority-vote approval. In March 2025, the Japanese government submitted a bill that adopts a new pre-insolvency workout legislation, under which a restructuring plan will be legally binding if it receives a certain percentage more than a majority of the financial institution creditors' votes and court confirmation, following a protracted discussion among academics and practitioners. This hybrid workout is supposed to be similar to some extent to the Scheme of Arrangement in the U.K., StaRUG in Germany and WHOA in the Netherlands.

The adoption of a majority-vote system raises concerns regarding creditors' protections and procedural fairness. To address these issues, legislative safeguards must ensure equitable voting structures and adequate due-process protections for dissenting creditors. One potential safeguard is the requirement for court confirmation of restructuring plans, ensuring a balance between expeditious corporate restructuring and fairness to all stakeholders. The forthcoming legislation will provide clarity on these considerations, shaping the future of corporate restructuring in Japan. abi

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2 For the procedure's rules, visit www.chusho.meti.go.jp/keiei/saisei/2024/240329kaitei/003.pdf (in Japanese).

3 "Further Business Rehabilitation Support through the 'Guidelines for Business Revitalization, etc. of Small- and Medium-sized Enterprises,'" Financial Services Agency (March 8, 2022), www.fsa.go.jp/en/ordinary/coronavirus202001/20220509-2.html. For the full text of the guidelines, visit zenginkyo.or.jp/fileadmin/res/abstract/adr/sme/sme-gl/sme-guideline_202401.pdf (in Japanese).

4 "Small and Medium Enterprises (SMEs) Revitalization and Regional Economy Vitalization," Cabinet Office, www.cao.go.jp/en/pmf/pmf_18.pdf. For the full text of the Regional Economic Revitalization Corporation Act (Act No. 63 of 2009), visit laws.e-gov.go.jp/law/421AC0000000063 (in Japanese).

5 For the translated text of the Act on Special Conciliation for Expediting Arrangement of Specified Debts (Act No. 158 of 1999), visit www.japaneselawtranslation.go.jp/ja/laws/view/2722.

a powerful mechanism for accomplishing a global settlement within bankruptcy cases, even without nonconsensual third-party releases.

Section 157(b)(5) Transfers Address the Major Limitations of MDLs

Using § 157(b)(5) to create a super-MDL by aggregating claims has several advantages over a traditional MDL. First, the reach of a § 157(b)(5) transfer is much broader than a traditional MDL's reach. A § 157(b)(5) transfer reaches any cases "related to" a bankruptcy, including cases pending in state court.

Thus, while the jurisdiction of an MDL court is limited only to cases pending in federal court, § 157(b)(5) allows the district court to draw *all* pending federal and state cases to a single forum. This effectively eliminates the risk that parallel litigation in state court will continue while the MDL is pending, thereby stopping the "race to the courthouse" and focusing efforts on a single forum to resolve the mass tort.

Second, unlike MDL courts, district courts after a § 157(b)(5) transfer can hold trials, which (1) eliminates the incentive for MDL courts to retain cases, even when trial might be appropriate or helpful to the parties in settling; (2) allows the district court to exercise discretion about whether, when and which issues should be resolved through final judgment to decide questions helpful to a comprehensive resolution; and (3) allows the district court to make those determinations after discussion with the parties and consultation with the bankruptcy court about what is necessary to effect a comprehensive solution for all stakeholders.

Third, aggregating tort cases in the district court where the bankruptcy is pending allows the mass tort defendant to use bankruptcy tools to help resolve the mass tort within the super-MDL. For example, bankruptcy courts are particularly adept at using focused, expedited litigation to narrow disputes for ultimate resolution. The more flexible appellate rules in bankruptcy can also allow for more efficient appellate review of issues pertinent to the resolution of the mass tort, which allows for quicker resolution of discrete issues necessary for a global resolution.

Fourth, creating a super-MDL allows for much more efficient coordination between the bankruptcy and district courts than can be achieved when cases are pending all over the nation. For example, standing orders referring bankruptcy cases to bankruptcy courts and procedural rules allowing a district court to withdraw that reference make moving disputes from the bankruptcy court to the district court simple. Since claims against the estate pending in the bankruptcy court also will often overlap with civil litigation claims pending against the debtor, coordination can avoid piecemeal litigation and ensure that similar issues are resolved once.

Section 157(b)(5) Transfers Address Some of the Limitations of Courts

Using a § 157(b)(5) transfer to create a super-MDL at the district court also helps to solve problems faced by mass tort chapter 11 debtors. Specifically, the fact that bankruptcy courts lack jurisdiction to enter final judgment on personal-injury claims[3] incentivizes two key parties — insurers and individual claimants — to resist participating in the bankruptcy process in favor of litigation in other courts. However, consolidating these cases in the district court, which *does* have jurisdiction to enter final judgment on the claims, focuses everyone on the single consolidated proceeding.

Insurance is a major issue in nearly all mass tort situations. There often are pending coverage actions between the debtor and its insurers, and these actions sometimes are filed by the debtor to obtain a determination that the insurer is liable for some or all of the loss. Other times, the insurers themselves file actions seeking a declaratory judgment that they have no responsibility for the claims.

When a bankruptcy is filed, these coverage actions are often withdrawn to the district court on the grounds that a bankruptcy court does not have jurisdiction to try a tort case or determine the amount of tort claims for purposes of distribution. This creates an odd dynamic within the chapter 11 case, and creates an opportunity for insurers to refuse to engage in the bankruptcy process on the grounds that the district court's (often longer time frame) decision regarding their coverage must take precedence.

A § 157(b)(5) super-MDL helps with this dynamic. After transfer, all existing tort cases will be pending in the district court, *along with* the insurers' coverage actions, so the parties have no choice but to engage in this forum. Insurers who do not meaningfully engage risk the district court making determinations that fix their liability without their participation, which even extends to settlement negotiations. For example, it is possible for the debtor and plaintiffs to enter into a global settlement that establishes an agreed amount of the plaintiffs' claims. While a bankruptcy court cannot approve such a settlement, a district court can. The district court's approval would likely result in a judicial finding of the amount of liability under the insurers' policies, which the insurer would be liable to pay absent a defense.

As recognized in such cases as *Drennen v. Certain Underwriters at Lloyd's of London*,[4] it is the fixing of the *face amount* of the allowed claim by the district court that determines the insurer's liability, regardless of what is ultimately paid from the debtor's estate under a chapter 11 plan. An insurer who does not meaningfully participate in settlement discussions does so at its own peril that the debtor and

3 *See* 28 U.S.C. § 157(b)(2)(B).
4 *See Drennen v. Certain Underwriters at Lloyd's of London (In re Residential Cap. LLC)*, No. 12-12020 (MG), 2022 WL 17836560, at *79-80 (Bankr. S.D.N.Y. Dec. 21, 2022), *reconsideration denied*, No. 12-12020 (MG), 2023 WL 2978894 (Bankr. S.D.N.Y. April 17, 2023).

some (or all) plaintiffs will reach a settlement on their own that will fix the insurer's liability at a point well above what it would otherwise prefer.

A second and related problem involves individual plaintiffs. At the commencement of a mass tort bankruptcy, there are typically hundreds or thousands of individual lawsuits pending throughout the state and federal system, yet those tort plaintiffs are typically represented by a few dozen major plaintiffs' law firms. Here again, the fact that bankruptcy courts cannot finally determine the amount of tort plaintiffs' claims creates incentives for individual plaintiffs and plaintiffs' counsel to attempt to stay out of the bankruptcy case and push for the resolution of their claims in the tort system.

The fact that the Bankruptcy Code typically requires the appointment of a single committee to represent all unsecured creditors also creates a structure that can interfere with participation by relevant stakeholders. Committee members must be individual creditors, even though the key decision-makers are often the lawyers advising the significant groups of plaintiffs. These lawyers end up being two steps removed from the debtor, which primarily interacts with the committee. Professional ethics rules further restrict the ability of plaintiffs' lawyers to participate directly in settlement negotiations with counsel for the debtor by prohibiting counsel with multiple clients from participating in negotiations or recommending a settlement without informed consent from each client.[5]

Here again, creating a super-MDL in the district court through § 157(b)(5) can help with this dynamic by facilitating more productive negotiations. Aggregating all mass tort cases in the district court to create a super-MDL could simplify the leadership structure to more easily resolve related disputes, given that all parties (including both state and federal plaintiffs) would be consolidated into one forum. Judges, lawyers and parties in MDLs have had to sort through similar issues regarding plaintiff representation and decision-making in the MDL, and have developed various approaches (*e.g.*, plaintiffs' steering committees (PSCs) and common benefit funds) to address them.

The same types of approaches could be used in super-MDL chapter 11 cases. For example, upon consolidating all state and federal cases in the district court, the district court can issue an order appointing a PSC consisting of the largest plaintiffs' counsel. The PSC's purpose would be to effectively and efficiently represent the common interests of all plaintiffs by reviewing documents, taking depositions, drafting briefs, developing legal arguments and prosecuting the aspects of the litigation that are common to all plaintiffs. PSC members would also take a lead role in negotiating settlements and would be fully authorized by the district court to do so.

This would allow the chapter 11 debtor — in its capacity as a tort defendant in the consolidated super-MDL — to interact directly with plaintiffs' counsel authorized to do so by a court order, thus eliminating any professional responsibility concerns and narrowing the artificial distance between the debtor and the individual claimants. In addition, a common benefit award established through a global settlement can also be implemented via a chapter 11 plan, just as provisions related to payment of professional fees for official committees and *ad hoc* committees are routinely implemented in chapter 11 plans. Thus, as with insurers, a consolidated super-MDL within the chapter 11 case can most efficiently ensure that decision-makers are all aligned on the effort to resolve, once and for all, the mass tort in the chapter 11 process.

> **Section 157(b)(5) ... is Congress's chosen method for dealing with mass torts related to a bankruptcy, and it presents an opportunity to capture many of the benefits of an MDL without some of its limitations.**

A Suggested Strategy for Using § 157(b)(5) in Mass Tort Bankruptcies

This leads to the final point: How can § 157(b)(5) be employed in a mass tort chapter 11? The following framework strategy should be considered.

First, upon filing the chapter 11 case, the debtor should also file a motion with the district court under § 157(b)(5) seeking the transfer and consolidation of all related mass tort litigation. There is longstanding precedent for this strategy, including in *A.H. Robbins* and *Dow Corning*, and legal authority suggesting that the presumption should be in favor of transfer. Once the cases have been consolidated, the debtor should ask the district court to create a PSC consisting of key plaintiffs' counsel. The debtor can work with the PSC to determine how to handle the litigation pending in state court —whether to pause the litigation or to allow some focused issues to go forward that would aid in final resolution.

The debtor should also develop a practice and procedures for enabling close coordination between the bankruptcy and district courts, particularly with respect to the claims-allowance process in the bankruptcy court and any coverage litigation with insurers. The parties should also then work toward final resolution through negotiations, using the tools available through the bankruptcy and district courts to narrow disputes and drive toward a consensual resolution.

Conclusion

Section 157(b)(5)'s aggregation device should be one of the key tools in the mass tort lawyer's toolkit moving forward. It is Congress's chosen method for dealing with mass torts related to a bankruptcy, and it presents an opportunity to capture many of the benefits of an MDL without some of its limitations. abi

5 *See* Model Rules of Prof'l Conduct r. 1.8(g) ("A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients ... unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.").

On the Edge: The Sale of Biogenetic Data in a Bankruptcy Proceeding

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the ability for individuals to pursue class action litigation for noncompliance.[16]

In addition, § 5 of the Federal Trade Commission (FTC) Act protects against deceptive trade practices whereby the FTC acted to enforce privacy promises.[17] An example of the FTC's use of § 5 is *In re Toysmart.com LLC*,[18] whereby the debtor sought to sell customer lists within the bankruptcy after promising prior to the bankruptcy not to do so.[19] The FTC sought to enjoin the sale of the customer lists and obtained an injunction, and the sale was ultimately blocked.[20]

Conclusion

While there are some protections in place to protect a person's DNA or biometric data within a bankruptcy sale (*e.g.*, a company's privacy statement), additional protections are needed. State laws need to progress with the speed of the potential uses of the genetic data. As of January 2025, a bill has been referred to the New York Senate Consumer Protection Committee seeking to establish the Biometric Privacy Act in New York, which would set strict guidelines for private entities on the collection, storage, use and disclosure of biometric identifiers and information.[21] The bill requires entities to inform and obtain written consent from individuals before acquiring their biometric data, prohibits profiting from this data, and mandates that it be protected with the same or higher standards as other sensitive information.[22]

As the use of DNA and biometric data is presumed to still be within its infancy stage, more laws will still need to be implemented to fully protect consumer rights. There are currently still protections in place in certain states and with the FTC that would protect DNA or biogenetic data in the event that a company's database is sold in a bankruptcy, which would protect one's data would be used for malicious intent. Unfortunately, these protections are unavailable in case of a significant data breach; therefore, a consumer must decide whether keeping genetic data on a company's database is worth the risk, or whether the consumer would be better off requesting that the data be deleted and completely removed from the database prior to any potential bankruptcy sale. abi

16 Kyle R. Fath, Kristin L. Bryan & David J. Oberly, "New 2023 Legislative Proposals Could Reshape the Biometric Privacy Landscape," *Nat'l Law Rev.* (Feb. 18, 2023), natlawreview.com/article/new-2023-legislative-proposals-could-reshape-biometric-privacy-landscape.

17 Janger, *supra* n.6 at *81.

18 *In re Toysmart.com LLC* (Bankr. D. Mass. 2000).

19 Janger, *supra* n.6 at *81.

20 *Id.* at 83.

21 "New York: Bill for Biometric Privacy Act Referred to Committee," DataGuidance (Jan. 13, 2025), dataguidance.com/news/new-york-bill-biometric-privacy-act-referred-0 (subscription required to view article).

22 *Id.*

Trustee Talk: Videoconferencing § 341 Meetings: One Year Later

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and time commitments for participants and enhancing fact-finding over telephonic meetings.[6]

The interim procedures were designated as a "supplement to the handbook" for private trustees. The procedures should also be revised to allow trustees to use the USTP-provided Zoom license for work-related matters in addition to conducting § 341 meetings. This might include court appearances and meetings related to the conduct of trustee and bankruptcy organization-related business.

Technology

Under the Interim Procedures, the USTP would provide a Zoom license for trustees to use "on their computer," but its application was limited. The procedures required that the trustee conduct the § 341 meeting from "the Trustee's primary business location" or other USTP-approved location in the district. The trustee "may not" conduct the § 341 meeting from outside of the district without prior USTP approval, and must ensure that "appropriate decorum is maintained." The procedures limited the use of the Zoom license to conduct virtual § 341 meetings, as it would be used for § 341 meetings and "no other purpose."

The USTP established Zoom settings and features, including a virtual background that a trustee "must use" when conducting § 341 meetings. The virtual background is a light background with the USTP badge and U.S. flag in the background. The interim procedures acknowledged that the private trustees had already established secure portals for the conveyance of § 341 meeting documents. The interim procedures did not, however, contemplate the use of dedicated videoconferencing hardware that had previously been approved under the 2014 handbook additions. The required hardware under the interim procedures is limited to computer-based hardware.

Trustee Acknowledgment

Each private trustee is responsible for millions of dollars of receipts and disbursements each year. In view of this, it is incredible that the trustees were required to sign an "Acknowledgment by Private Trustee Regarding the Terms of Use of Video Conference Licenses for the Purpose of Conducting Virtual Section 341(a) Meetings of Creditors" to safeguard against trustee misuse of the USTP-provided Zoom licenses. The acknowledgment imposed onerous conditions on the trustees, who were being required to use the USTP license. The USTP would not issue the Zoom license to the trustee until it received their signed acknowledgment.

6 *Id.*

The USTP reserved the right to modify, suspend or revoke the agreement at its discretion "based on the private Trustee's noncompliance with this acknowledgment or such other related terms and conditions as the USTP requires." Noncompliance with the acknowledgment would result in immediate suspension of the Zoom license, "which may result in the inability to conduct the meetings of creditors and affect the ability to continue to serve as a Trustee." Other noncompliance measures could include disciplinary action, including suspension, termination or removal.

Interestingly, the trustee was required to certify that they would comply with all system requirements, including a "computer with a built-in camera, speakers, and a microphone, or a webcam to perform these functions," and a "dual-core two gigahertz or higher processer with four gigabytes of RAM." Standalone videoconferencing devices are not authorized under the USTP's requirements — even though the 2014 additions to the *Handbook for Chapter 13 Trustees* authorized their purchase as a budget item.

The handbooks for chapter 7 and 13 trustees require that all § 341 meetings be electronically recorded "using equipment provided by, or purchased with the approval of the" U.S. Trustee.[7] Unlike the new Zoom protocol, the USTP provided Marantz recorders for use by trustees without requiring trustees to enter into onerous and punitive agreements restricting their use.

In its fiscal year 2025 Congressional Budget submission (dated March 2024), the USTP applauded its own efforts in implementing virtual § 341 meetings. It explained that the permanent switch to the virtual format, "which was based on the USTP's experience through the COVID-19 pandemic in conducting meetings primarily by telephone," resulted in greater participation. The USTP stated, "The change was made following internal and external consultation with stakeholders to assess the effectiveness of virtual meetings."[8] If there has been any ongoing consultation after the initial rollout, it has not included all stakeholders.

Trustees' Use of Zoom Going Forward

The use of the Zoom platform has made attendance at § 341 meetings easier and more cost-effective. However, going forward, the USTP should consider the following suggestions.

Avoid Duplication

Prior to the issuance of their USTP Zoom license, many trustees had been conducting § 341 meetings using their own Zoom licenses. In addition, chapter 13 trustees used their own Zoom licenses for other meetings, mediations and court hearings. The *Chapter 13 Trustee Handbook* requires either the use of a USTP-provided recorder, or the use of one purchased by the trustee "with the approval" of the U.S. Trustee. This would be a good pattern to follow for Zoom licenses. The USTP could avoid duplication and expense to the Department of Justice by allowing chapter 13 trustees to use one license, purchased at the trustee's expense, for all videoconferencing needs. Issuing a Zoom license at the USTP's expense that can be used only for § 341 meetings results in unnecessary cost and duplication.

The interim procedures should be revised to allow trustees to use the USTP-provided Zoom license for work-related matters in addition to conducting § 341 meetings. This might include court appearances and meetings related to the conduct of trustee, and bankruptcy organization business.

Allow the Use of Sophisticated, Dedicated Videoconferencing Hardware

This videoconferencing hardware may include Polycom, Logitech and Neat Bar. These dedicated standalone videoconferencing units offer a superior presence in videoconferenced meetings. Their purchase is already authorized under the terms of the *Chapter 13 Trustee's Handbook*. Limiting § 341 meetings to primitive laptop and desktop hardware also limits the professional presentation of the meetings. Limiting use of the cameras integrated with desktop or laptop computers might lead to presentation problems, such as substandard camera angle and lack of clarity of video transmission.

Eliminate the USTP's Virtual Background

The professionalism of the trustee's appearance at the § 341 meeting is of paramount importance. The use of the USTP virtual background sometimes leaves shadows over the speaker's shoulders and around the speaker's head, which are enhanced because of the light-colored background. Virtual backgrounds generally make the speaker disappear or reappear as they move around and talk. The use of the virtual background requires the speaker to refine distance and lighting issues. Eliminating the required USTP virtual background would dispense with many of these problematic issues and allow the trustee to display the sign provided by the USTP that informs people that the Department of Justice investigates bankruptcy crimes.

The Interim Procedures Should Be Revised to Allow § 341 Meetings from Elsewhere

The interim procedures should be revised to allow trustees to conduct § 341 meetings from venues other than their primary office, as travel takes trustees out of the office. Such technology as virtual private networks and Zoom allow for the virtual conduct of § 341 meetings from anywhere without the far-end user even knowing that the trustee is not in the office.

Conclusion

Videoconferenced § 341 meetings are both time- and cost-efficient, and the Zoom platform has made the § 341 meetings easily accessible to all stakeholders. However, improvements can be made to make the system less costly to the USTP while maintaining a professional and efficient meeting protocol. **abi**

Editor's Note: *The views expressed in this article are solely those of the author and not ABI.*

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7 *See Handbook for Chapter 13 Standing Trustees*, *supra* n.1 at 3-14; *Handbook for Chapter 7 Standing Trustees*, Dep't of Justice, Exec. Office for U.S. Trustees at 3-9 (Oct. 1, 2012), justice.gov/ust/page/file/762521/dl?inline.

8 The USTP conducted meetings with private trustees explaining its Zoom rollout using the Microsoft Teams videoconferencing software.

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pany. When financing or any other restructuring contributions come from third parties, there is no need for it to be legally binding. It is required that the contributions can more likely than not be expected — that is, a probability of more than 50 percent.[5]

On the other hand, nonbinding shareholder commitments can only be considered in special exceptional cases (*e.g.*, if a payment can be expected based on the shareholder's creditworthiness, interests or previous conduct). However, managing directors always retain the burden of proof that the financing could be seen as expected back then.[6]

What Can Be Done If a Company Is Illiquid?

If the test as of a certain date shows a liquidity gap, the next step is to assess the cash-flow projection of the next three weeks. If the gap can be closed, it will be assumed that payments are delayed ("*Zahlungsstockung*"), and no obligation to file arises. However, if it shows that the gap cannot be closed, the amount of the remaining shortfall will be decisive:

- If the gap is more than 10 percent in the next three weeks, the only chance to avoid a filing obligation is if, with "*a probability near certainty*," it can be expected that the liquidity gap will be completely closed. In exceptional cases, this period can be up to six months if creditors can reasonably be expected to wait for their payments.
- If the gap remains at less than 10 percent, usually only a delay of payments, but not a reason to file, is assumed. However, a cash-flow projection for the next three to six months needs to be developed. Should this projection show a permanent liquidity gap or an increase of the gap to more than 10 percent, then an obligation to file for insolvency arises.[7]

Ground B: Overindebtedness

According to § 19 of the German Insolvency Code, overindebtedness exists if the debtor's assets no longer cover the existing liabilities, unless the continuation of the company as a going concern is predominantly probable throughout the next 12 months. Hence, overindebtedness has two components: the balance-sheet test, and the going-concern forecast.

The Balance-Sheet Test

Overindebtedness is calculated by subtracting all liabilities, whether due or not, from all assets at liquidation value. Liquidation values are calculated as if the company had ceased operations. Hence, they do not always match the more favorable market or book values. The company's balance sheet is the starting point. However, off-balance-sheet items are to be added back, assets are to be adjusted to actual values, and contested receivables are to be considered according to expected recovery. The careful assessment and preparation of each item is key.

It is good advice not to rely solely on a positive balance sheet, as the items and values considered can easily be questioned. The best way to beat an overindebtedness filing ground is to present a well-founded, positive going-concern forecast.

The Going-Concern Forecast

A negative balance-sheet sum does not lead to overindebtedness if the company can produce a positive liquidity forecast covering the next 12 months. The assessment of the company's situation is based on the "*knowledge available to a prudent manager at the specific date*."[8] A margin of judgment is allowed for the liquidity forecast. However, it should fully comply with insolvency law to exclude liability risks for the company's leadership.

The going-concern forecast derives from the profit-and-loss and cash-flow forecasts. It requires directors to estimate earnings and expenses, if and when customers pay, and whether financing inflows come in, among others. Therefore, the courts accept a degree of uncertainty. To address these uncertainties, the courts differentiate between two sources of inflow: shareholders and third parties.

Imminent Insolvency

A third ground for filing is imminent insolvency. A debtor is deemed to face imminent insolvency if it is likely that he will be unable to meet his payment obligations on the date of their maturity. The forecasting period is generally 24 months.[9] Imminent insolvency leads to a right and not an obligation to file. In addition, the statutory period of review can be extended into the future if liabilities can already be identified and individualized. Hence, solid liquidity monitoring and forecasting are crucial. However, managing directors have been charged with fraud in the past (*e.g.*, for the acceptance of prepayments while the company was in a state of imminent insolvency), which also applies in the case of a negative 12-month going-concern forecast.

Shareholders' Contributions

When a shareholder wants to vouch in front of third parties for the financing of its subsidiaries or offers to provide additional cash, he or she might consider signing a letter of comfort. Letters of comfort alone can therefore turn a negative going-concern forecast into a positive one. However, they need to be legally binding.[10] "Soft" letters,

5 Federal Supreme Court ruling of 13 July 2021 (II ZR 84/20).
6 *Id.*
7 Federal Supreme Court ruling of 24 May 2005 — IX ZR 123/04.

8 Federal Supreme Court ruling of 6 June 1994 — II ZR 292/91; Federal Supreme Court ruling of 12 February 2007 — II ZR 309/05.
9 Section 18(2)2 of the German Insolvency Code.
10 Federal Supreme Court ruling of 20 September 2010 — II ZR 296/08; Federal Supreme Court ruling of 19 May 2011 — IX ZR 9/10.

which only declare the intention of the parent company to cover for the subsidiary, are, in principle, not enough. Management can only rely on them if payment is more likely than not. The creditworthiness, special interests and previous conduct of the shareholder are used to assess this probability. The burden of proof, however, remains on the directors. When your neck is on the line, nothing is more reassuring than "*legally binding*."

Third-Party Contributions

On the other hand, third-party contributions can be considered as soon as the chance to receive them overcomes the threshold of a 50 percent probability. Hence, management has some leeway in forecasting liquidity resulting from third-party contributions. However, these forecasts need to be monitored and adjusted in short intervals to the actual occurrence or cancellation of cash flows, especially if the company's liquidity situation keeps deteriorating.[11]

11 Federal Supreme Court ruling of 13 July 2021 — II ZR 84/20.

Hedging the Risk in Cross-Border Businesses

Most directors of German companies are unaware and cautious of their duties and liabilities during a crisis at their full complexity, despite being threatened by criminal and civil liability risks. These risks are even larger if leaders of cross-border businesses are directors on paper of portfolio companies, investment vehicle entities and local subsidiaries, but are likely not involved in the day-to-day business of every subsidiary. Hence, they often become targets of the above-mentioned fines and penalties. Other usual suspects are acting managing directors and board members with special knowledge.

The best practice in this sense is to not only closely monitor cash flows but also to keep a diligent recording of fluctuations and adjustments. The burden of proof of prudent business management lies with managing directors — or whomever acts as such. Local advisors, both from the legal and financial side, are key to ensuring that all activities done and measures taken are sufficient to meet legal obligations. Better safe than sorry. abi

Consumer Corner: The Marital Adjustment: What Is It?

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The household-centric courts look to the purpose and nature of the expense or underlying debt.[33] If the household benefited, then it will not be included as a marital adjustment.[34] Only those expenses "purely personal" to the spouse are allowed to be deducted, even if the expense is a debt solely in the spouse's name.[35]

The *Vollen* court found that the spouse's credit cards and other debts were used for household expenses and could not be excluded.[36] The court found no reason to treat the expense of meals that the spouse ate out any differently from the expense of meals made at home.[37] However, the court also found that since the 401(k) loan repayment was deducted directly from the spouse's income, it was never part of the household income stream and was properly deducted as a marital adjustment regardless of the purpose.[38] Similarly, payment on a mortgage solely in the nonfiling spouse's name but for property in which the debtor or their dependents reside will not be excluded as a marital adjustment because housing is a household expense of the debtor or their dependents.[39]

In *Trimarchi*, the debtor deducted the mortgage payments as a marital adjustment on Form 122C-1 and also deducted the standard mortgage allowance on Form 122C-2.[40] The chapter 13 trustee objected to the double-dipping.[41] The court agreed with the trustee, finding that the mortgage payments were household expenses and could not be excluded from CMI.[42]

Debtor-centric courts focus on whether the expense is that of the debtor (or their dependents) to determine whether it should be excluded.[43] In *Toxvard*, the court found that since the debtor did not own the residence and was not liable for the mortgage payments, it was not an expense of the debtor and had been properly excluded from CMI as part of the marital adjustment.[44]

In *In re Gregory*, the debtor deducted expenses paid by the nonfiling spouse to maintain a jointly owned former residence.[45] The court agreed with the debtor that household expenses included only those expenses related to a debtor's primary residence, essentially day-to-day expenses.[46] Thus, expenses associated with real property that was not the family residence had been properly deducted as marital adjustments.[47]

For other household expenses, the *Toxvard* court determined first whether the expenses were joint or solely that of either the debtor or the spouse.[48] The cost of feeding the debtor's horse was an expense solely of the debtor, so the spouse's payment for that could not be deducted.[49] The household utilities and car loan payment were joint expenses

33 *Montalto*, 537 B.R. at 152; *Persaud*, 486 B.R. at 262-63; *In re Rable*, 445 B.R. 826, 829 (Bankr. N.D. Ohio 2011); *Vollen*, 426 B.R. at 370.
34 *Montalto*, 537 B.R. at 152; *Persaud*, 486 B.R. at 262-63; *Rable*, 445 B.R. at 829; *Vollen*, 426 B.R. at 370.
35 *Tapply*, 652 B.R. at 131; *Persaud*, 486 B.R. at 262; *Rable*, 445 B.R. at 829.
36 *Vollen*, 426 B.R. at 373; *see also Montalto*, 537 B.R. at 156-57; *Tapply*, 652 B.R. at 132.
37 *Vollen*, 426 B.R. at 373.
38 *Id.* at 374.
39 *In re Trimarchi*, 421 B.R. 914, 920-21 (Bankr. N.D. Ill. 2010); *see also Rable*, 445 B.R. at 829.
40 *Trimarchi*, 421 B.R. at 916.
41 *Id.* at 919.
42 *Id.* at 921.
43 *Toxvard*, 485 B.R. at 436.
44 *Id.* at 437-439; *see also In re Shahan*, 367 B.R. 732, 736-37 (Bankr. D. Kan. 2007); *In re Clemons*, 2009 Bankr. LEXIS 1959 (Bankr. C.D. Ill. 2009).
45 *In re Gregory*, 2011 Bankr. LEXIS 4639, *3 (Bankr. E.D.N.C. 2011).
46 *Id.* at *8.
47 *Id.* at *11; *see also In re Campbell*, 2019 Bankr. LEXIS 485 (Bankr. S.D. Fla. 2019).
48 *Toxvard*, 485 B.R. at 436.
49 *Id.* at 440.

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paid by the spouse, so the court allowed a deduction for the spouse's half of the utilities and car loan.[50]

Toxvard highlights a fundamental flaw in the marital adjustment: the apportionment of expenses. A nonfiling spouse is included as a member of the debtor's household, so when the expense side of the means test is calculated on either Form 122A-2 or 122C-2, the spouse's day-to-day expenses (*e.g.*, food, clothing, miscellaneous, etc.) are included as expenses of the debtor. However, debtor-centric courts allow what the spouse spent on those items to be excluded from either CMI or disposable income.

In re Travis also acknowledged this defect.[51] The court agreed with the U.S. Trustee that the amounts that the spouse contributed for food and utilities could not be included in the marital adjustment, but then held that the spouse could include her expenditures for clothing and other personal items, even though the means test already provided a standard deduction for those items:[52]

> If the nonfiling spouse spends his [or] her income on his [or] her own expenses, those are legitimate [marital deductions], regardless of whether those expenses could also be generally categorized as household expenses.[53]

The court did not explain why food and utilities were different from clothing and personal items. Perhaps the reasoning is that food and utilities are harder to separate by person, whereas clothing and personal items tend to be person-specific.

In re Hammock involved a chapter 7 debtor whose nonfiling spouse earned almost five times more than the debtor, yet the debtor deducted approximately 80 percent of the spouse's income as a marital adjustment, claiming that the spouse contributed little to the household expenses.[54] Without analysis, the court did not question the amount of the marital deduction but found that the applicable standard deductions on Form 122A-2 should be reduced by the amount being claimed for those same categories as part of the marital deduction.[55]

Conclusion

Given the stated BAPCPA objective of having more debtors repay more of their debts, the marital adjustment should be narrowly construed to include only those amounts that are clearly not for household expenses, such as the spouse's tax liabilities, support for others who are not part of the debtor's household (*e.g.*, elderly parents, children from another relationship, etc.), student loan payments or criminal restitution payments. The Official Forms have a debtor add all the spouse's income, then only deduct their expenses.

If the nonfiling spouse's separate expenses were meant to be broadly interpreted, there is no reason for the marital adjustment at all. The nonfiling spouse's contribution to household expenses could be included on the same line with every other nonspouse contributor. Unfortunately, until Congress reconsiders the means test, courts will remain divided, and debtors, their counsel and trustees will have to continue to litigate what was meant to be a straightforward objective test. abi

50 *Id.* at 439-40.
51 *In re Travis*, 353 B.R. 520 (Bankr. E.D. Mich. 2006).
52 *Id.* at 527.
53 *Id.*
54 *In re Hammock*, 436 B.R. 343, 348 (Bankr. E.D.N.C. 2010).
55 For example, the debtor testified that her spouse contributed $120 per month toward food, clothing and other items, so the court reduced the amount of the standard deduction from $985 to $865. *Id.* at 349-50.

Value & Cents: Capital Structure Arbitrage
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Strategies and Outcomes

Generally

Strategies that have developed for arbitrage between debt and equity from the Merton Model[28] include shorting stocks of highly levered firms while going long on their bonds; trading the misalignment of CDS spreads (CDS as an alternative to debt) and declining stock prices; and selling the high implied volatility (a measure of how much the price of the asset is expected to change in the future) of one asset class and buying the lower volatility of the other asset class. Differences between theoretical credit spreads and traded spreads in the market, and between different classes of debt, junior and senior, may also be arbitraged.

For example, assume that an arbitrager has sold a CDS and shorted equity. For purposes of this example, if an arbitrager take such a position, the investor believes that four potential outcomes can be identified.[29]

The case in which both the CDS spread and stock price fall indicates convergence, with both positions profitable. First, if the CDS spread falls while the price of equity rises, the trade will still be profitable on net if the CDS spread falls quicker than the increase in the price of equity, facilitating convergence. Second, where the CDS spread increases and the equity price decreases, the position will still be profitable provided that the equity price falls faster than the CDS spread increases. Third, both the CDS spread and equity price rise in the case of divergence. Fourth, both

28 Berndt & Veras de Melo, *supra* n.25 at p. 11.
29 Ričardas Visockis, "Capital Structure Arbitrage," Tilburg Univ. (April 4, 2011), p. 9, arno.uvt.nl/show.cgi?fid=115341.

sides of the trade will suffer losses regardless of the size of the equity hedge.

Distressed Investor[30]

Capital structure arbitrage strategies used by distressed investors include liquidity plays, legal analysis plays, insurance/overheated market trades, hedged convertible bond trades, *pari passu* securities with different maturities, and senior vs. junior securities. In a *liquidity play*, a firm's short-term bonds are bought and its long-term bonds are sold short on the assumption that while the firm has sufficient liquidity to attempt a turnaround, it will nevertheless file for bankruptcy. Also referred to as a "curve trade," the strategy entails the arbitrage of different instruments across the yield curve.

Getting the timing of the bankruptcy is important, however. Short-term bonds trade higher than long-term bonds, the former reflecting the probability of being paid and the latter the recovery value in bankruptcy. As all bonds with the same seniority and security converge to the same price in chapter 11, the loss on the long position will exceed the gain on the short.

Legal analysis plays arise out of differences in a firm's bond indentures that result in one bond in a company's capital structure having better terms and conditions than another. In this case, the strategy is to buy the better bond and sell the other short. An example of this strategy is the LBO of Safeway. Certain of Safeway's bonds had a change of control put that gave the owner the right to compel the company to repurchase the bonds at 101 in the case of an LBO. Alternatively, Safeway's bonds that lacked this provision would "travel "with the company and likely decrease in value, as Safeway would have a significant amount of new debt. Hedge funds consequently bought the bonds with the change of control put and sold short those without it.

In *insurance/overheated market trades*, when a market is overheated — with securities overvalued and at unsustainable levels due to factors, including asset bubbles, excessive growth and inflation, or otherwise disrupted such as in the Great Recession — risk might not be correctly priced. For example, in 2006 and early 2007, certain investors thought that the market was not pricing the spread between healthy firm secured and unsecured debt. Those investors opted to arbitrage the difference by going long on secured debt and shorting unsecured debt to insure against losses from a primary investment or exposure, and to profit from the convergence of the difference.

In *hedged convertible bond trades*,[31] the arbitrageur purchases a convertible bond and goes short on an appropriate amount of stock. Shorting the stock offsets the effect on the price of the convertible bond of changes in the price of the stock. This serves to "lock in" the coupon income with minimal capital investment.

Where two bonds with different maturities in the capital structure are considered to be *pari passu*, but trade at a significant spread, there are usually two opportunities to arbitrage.[32] The first is where the near-term maturity exhibits a price spread that may contract, and the second is where two securities trade at similar levels but have different claim statuses, suggesting that the spread may widen.

Senior vs. junior securities trades[33] might be put on when the relationship between the prices of a senior and junior security diverge from their relative value in equilibrium. Depending on the complexity of the capital structure, this can arise in a variety of contexts. For example, this could include senior secured vs. senior unsecured, senior vs. subordinated, or holding company vs. operating company. In each scenario, investors look to identify a discrepancy that misstates the actual value or potential recovery.

Conclusion

Capital structure arbitrage is a complex trading strategy used to profit from misinformation that might exist between equity and debt markets, and the related mispricing of a single issuer's securities. The strategy can serve to hedge the risk of a credit investment or bet on the default of a firm and the trading levels of its securities in the secondary market subsequently.

The Merton Model, from which the strategy is derived, posits that a firm can be divided into two parts: debt and equity. Both can be thought of as derivative securities on the value of a firm's assets. Equity is a call option on the market value of a firm's total value, and debt is a put option on the market value of the total assets of the firm with a strike price equal to the book value of the firm's debt. Depending on the investor's investment thesis, the investor can employ one of the aforementioned strategies to take advantage of situations that the investor believes reflect misinformation in the equity and debt markets. abi

30 Gatto, *supra* n.2 at pp. 339-43.

31 Moyer, *supra* n.8 at pp. 243.
32 *Id.* at p. 250.
33 *Id.* at p. 252.

Benchnotes

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was not dispositive, and that even if it were, it did not apply in the context of a specific uptier transaction between Serta and the prevailing lenders.

The court also rejected the argument that the excluded lender's appeal from confirmation of the chapter 11 plan was subject to dismissal pursuant to the equitable moot doctrine. This appeal focused on whether the plan's allowance of certain of the prevailing lenders' indemnification claims violated 11 U.S.C. § 502(e)(1)(B) (requiring disallowance of certain claims for reimbursement or contribution by creditors who are jointly liable with the debtor). The factors the Fifth Circuit considered in evaluating an equitable mootness claim of appellees included whether (1) the plan was stayed pending appeal; (2) the plan has been consummated; and (3) the

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court's decision will impair the rights of parties not before the court to threaten the success of the plan.

The court acknowledged that the first two factors (lack of a stay and substantial consummation) weighed in favor of a finding of equitable mootness, but the third factor did not. First, the parties affected by the outcome of the court's decision — Serta and the prevailing lenders who participated in the uptier transaction — were already before the court. The excision of the indemnification language might have some conceivable impact on those lenders who did not participate in the uptier but subsequently acquired super-priority loans on the secondary market. However, the court observed that they "never needed the indemnity in the first place," and any nominal impact the court's decision would have on those lenders could not justify declining the court's "virtually unflagging obligation" to exercise its appellate jurisdiction.

In addition, the court held that excising the indemnification provision would not jeopardize the plan's success. If anything, it would enhance the likelihood of success, because Serta would be relieved of its indemnification liability. The court also rejected the prevailing lenders' argument that excising the indemnification provision would be unfair to them because their acceptance of the plan was based, at least in part, on the inclusion of the indemnification language. It held that such an argument "would effectively abolish appellate review of even clearly unlawful provisions in bankruptcy plans," and that "adverse appellate consequences were foreseeable to them as sophisticated investors who opted to press the limits of bankruptcy confirmation rules." Serta is likely to serve as a landmark opinion on the permissibility of uptier transactions and an important precedent in the emerging dispute over the continued viability of the equitable-mootness doctrine.

Second Circuit Adopts "Billing Date" Approach on Payment Obligations and Personal Property Leases

Under 11 U.S.C. § 365(d)(5), a chapter 11 trustee or debtor-in-possession generally must "perform all of the obligations of the debtor ... first arising from or after 60 days after the order for relief" under an unexpired lease of personal property "until such lease is assumed or rejected, notwithstanding section 503(b)(1)." In general, two different approaches to determining when an obligation "arises" for purposes of this subsection have emerged.

The "accrual approach ... requires the debtor to pay only those obligations that accrued post-petition, irrespective of when those obligations come due under the operative lease." On the other hand, the "billing date" approach "requires the debtor to pay obligations once they come due under the operative lease, regardless of when the obligation can be said to have accrued."[4] In its opinion in *In re Avianca Holdings SA*, the Second Circuit Court of Appeals sided with the courts adopting the billing-date approach, and affirmed the bankruptcy court's order for the debtor to pay more than $4.3 million in brokerage commissions that came due under the debtor's aircraft leases more than 60 days after the chapter 11 petition date but before the aircraft leases were rejected.

Avianca Holdings SA, one of the largest Latin American airlines, filed a chapter 11 petition in May 2020. Many years earlier, Avianca retained brokers to find aircraft to lease. The brokers were successful in procuring 20 such leases. Their commissions were to be paid as "additional rental payments" under each aircraft lease, payable in accordance with a preset schedule over the life of the lease. By the time Avianca filed its chapter 11 petition, the brokers were no longer performing any services, but they were still entitled to payments coming due under the unexpired leases.

Avianca did not assume or reject the aircraft leases within the first 60 days of its bankruptcy case, although it ultimately rejected each of them over the course of two years. The brokers moved to compel payment of all commissions that came due under the leases between the expiration of the 60-day period and the rejection date, arguing that Avianca's obligation to pay the commissions "first arose as the payments came due under the leases' schedules."

Avianca objected, arguing that its obligation to pay the brokers arose prior to the petition date because the brokers "rendered all of their brokerage services pre-petition and the payment terms in the leases were set prior to Avianca's bankruptcy filing." The bankruptcy court sided with the brokers, and the district court affirmed its decision on appeal.

The Second Circuit also affirmed, holding that under a plain-meaning approach, the phrase "timely perform all of the obligations" used in § 365(d)(5) assumes "the existence of some presently existing duty that the debtor must fulfill," which "come[s] into being" at least 60 days after the petition. This reading aligns with the billing-date approach.

The approach also gives effect to the distinction between "when a creditor's claim arises and when a debtor's obligation arises," which the accrual approach conflates. Under the Bankruptcy Code's broad definition of a "claim" under § 101(10), a claim arises pre-petition if, prior to the petition date, "the relationship between the debtor and the creditor contained all of the elements necessary to give rise to a legal obligation — 'a right to payment' — under the relevant nonbankruptcy law." For example, a claim for indemnification arises as soon as the debtor executes the indemnification agreement. However, § 365(d)(5) "speaks in terms of the *debtor's obligations*, not the *creditor's claims*," and the use of different language in these two Code sections indicates that Congress intended different meanings. To account for the difference in terminology, the court must apply a different test to determine when the debtor's obligations arose under § 365(d)(5). This test is "whether payment has come due under the terms of the lease."

4 *In re Avianca Holdings SA*, 127 F.4th 414 (2d Cir. 2025).

The billing-date approach also recognizes that § 365(d)(5) requires the payment of obligations arising more than 60 days after the order for relief "notwithstanding section 503(b)(1)," meaning that personal property lessors entitled to priority payment under § 365(d)(5) need not satisfy the requirements for administrative priority under § 503(b)(1), such as notice, a hearing, and a demonstration that the creditor conferred some post-petition benefit upon the bankruptcy estate.[5] Finally, the court held that the legislative history of § 365(d)(5) reveals that it was intended to "tip the balance" between respecting a creditor's state law rights to payment and the debtor's rights under the Code to reorganize its debts slightly in favor of creditor protection — another factor weighing in favor of the billing-date approach.

Miscellaneous

• *Chaudhary v. Ali (In re Riverstone Resort LLC)*, --- F.4th ---, 2024 WL 5036280 (5th Cir. Dec. 9, 2024) (adversary defendants lacked appellate standing as "persons aggrieved" by bankruptcy court's judgment, because defendants were completely successful at trial due to plaintiff's failure to file lawsuits before expiration of applicable statutes of limitations; bankruptcy court entered "take nothing" judgment in favor of defendants, even though opinion contained less-than-favorable findings about defendants (*i.e.*, bankruptcy court explained that defendants likely defrauded plaintiff, but that plaintiff failed to bring action before filing deadline); court of appeals explained that it reviews judgments, not opinions, and defendants were not aggrieved by "take nothing" judgment; at appellant's request, court of appeals remanded for bankruptcy court to consider whether grounds existed to equitably toll filing deadline; specifically, court of appeals explained that bankruptcy court did not consider whether plaintiff has been tricked or induced by defendants into allowing filing deadlines to pass, which, if true, would justify equitable tolling);

• *In re Jackson*, --- B.R. ---, 2024 WL 5064165 (B.A.P. 8th Cir. Dec. 11, 2024) (dismissal of involuntary petition was affirmed on appeal, but Bankruptcy Appellate Panel (BAP) remanded the case back to bankruptcy court to hold evidentiary hearing on alleged debtor's motion for sanctions, damages and other relief; BAP specifically rejected appellees' argument that sanctions and damages under §§ 303(i) and 303(k) can be awarded because bankruptcy court dismissed petition under § 305 rather than § 303; bankruptcy court had advised parties earlier in proceeding that it would hold evidentiary hearing on damages if petition was dismissed; because bankruptcy court ultimately dismissed petition under § 305, but then declined to hold promised evidentiary hearing on sanctions, BAP concluded that evidentiary record was incomplete and required remand); and

• *In re Hardin*, --- B.R. ---, 2024 WL 5055623 (Bankr. D.S.C. Dec. 5, 2024) (in debtors' third bankruptcy filing, court addressed whether to extend the automatic stay under § 362(c); current case was filed on exact same day (Nov. 1), one year after debtors' first case was dismissed, and there was second case filed and dismissed in intervening time; thus, court first addressed how many cases had been filed in the past 365 days; if it had only one case, then § 362(c)(3) would have applied, meaning that stay was in place for 30 days absent an order extending stay, but because court found that first case was still pending on first day of prior calendar year, court concluded that § 362(c)(4) applied, and it was debtors' burden to rebut presumption of bad-faith filing as condition to getting order imposing automatic stay in newly filed case; here, debtors offered no evidence to rebut that bad-faith presumption; thus, court denied debtors' motion for extension of stay). abi

5 Notably, while the Second Circuit's opinion refers to "priority payment" under § 365(d)(5), it does not expressly address whether that statute automatically entitles lessors to an administrative priority for all obligations coming due more than 60 days after the order for relief — another issue that has divided the courts.

Legislative Highlights

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In addition to sponsorship by Sen. Haggerty, the GENIUS Act was also cosponsored by Senate Banking Chair Tim Scott (R-Fla.), Kirsten Gillibrand (D-N.Y.), Cynthia Lummis (R-Wyo.) and Angela Alsobrooks (D-Md.). S. 394 would define payment stablecoins as digital assets, issued for payment or settlement and redeemable at a predetermined fixed amount (*e.g.*, $1), that hold assets in reserve and that can be liquidated only to redeem the stablecoins. Issuers would be required to hold at least $1 of permitted reserves for every $1 of stablecoins. Additional provisions of the GENIUS Act[8] include:

• Implementing reserve requirements and tailored regulatory standards for stablecoin issuers;

• For issuers of more than $10 billion of stablecoins, applying the Federal Reserve's regulatory framework to depository institutions and the Office of the Comptroller of the currency's framework for nonbank issuers;

• Allowing for state regulation of issuers under $10 billion in market capitalization, and providing a waiver process for issuers exceeding the threshold to remain state-regulated;

• Establishing supervisory, examination and enforcement regimes with clear limitations; and

• Granting stablecoin-holders priority over all other claims against the issuer in bankruptcy.

"Stablecoins enable faster, cheaper, and competitive transactions and facilitate seamless cross-border payments," Scott said. "This legislation will ensure the industry can innovate and grow here in the United States while promoting the U.S. dollar's global position."

At press time, the GENIUS ACT was slated for a mark-up hearing on March 13 to be considered by the Senate Banking Committee. abi

8 "Scott Joins Hagerty, Colleagues in Reintroducing Updated Legislation on Stablecoins," Senate Banking Committee Press Release (March 10, 2025), banking.senate.gov/newsroom/majority/scott-joins-hagerty-colleagues-in-reintroducing-updated-legislation-on-stablecoins.

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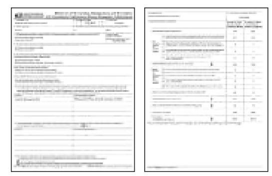

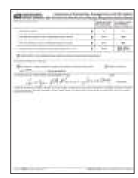

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