INSIDE: Evolution of Chapter 11 Practice ◆ A Guide to Types of Bankruptcies ◆ Chapter 11 and *Purdue Pharma*

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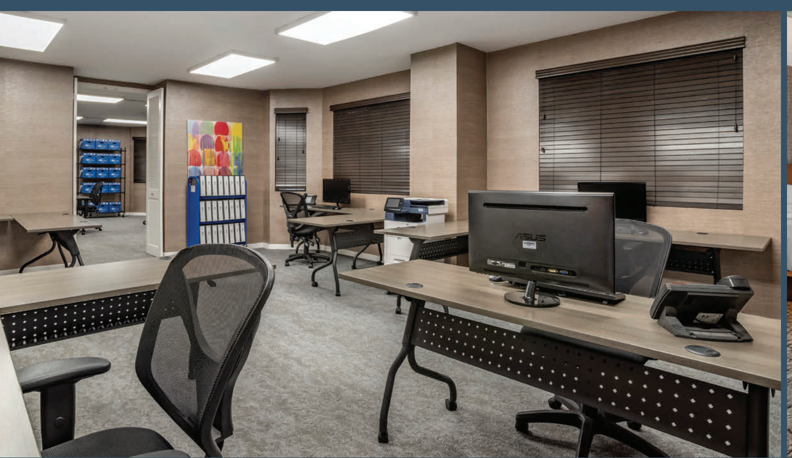

422 Delaware Avenue Wilmington, DE 19801
P 302.576.8040 | E Cperry@sheratonwilmington.com

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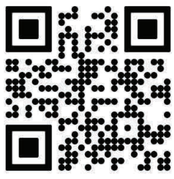

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Chairman: Robert Martinelli
Group Publisher: Richard Martinelli
General Manager: Kim Fortuna
Editor: Tina Irgang Leaderman
Art Director: Ross Meadows

Subscription orders, contact:
Jennifer Floor, 302-656-1830
jjfloor@todaymediainc.com

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Andrea Hill, 302-504-1326
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Advertising information, call:
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Mark D. Collins

As a longtime Delaware bankruptcy lawyer, I've had the privilege of witnessing the important role the Delaware Bankruptcy Court has played in shaping corporate bankruptcy law and practice in the United States.

Today, Delaware continues to serve as a venue of choice for the nation's largest troubled companies, whether they are seeking to rebalance their capital structures, maximize value through going-concern sales or liquidate assets to optimize creditor recoveries.

With eight nationally recognized bankruptcy judges, a highly respected and efficient clerk's office, a talented and diverse bankruptcy bar numbering in the hundreds, and the unique collegiality of the "Delaware Way," Delaware's position as a preeminent Chapter 11 forum appears secure for the foreseeable future.

The world of corporate Chapter 11 cases is more varied than many outside the field might realize. From the types of industries and businesses that seek refuge in the Delaware Bankruptcy Court to the range of reorganization strategies and case dynamics employed by bankruptcy lawyers and other professionals, it can be challenging to fully grasp the scope and complexity of what occurs daily in our courtrooms.

For this edition of *Delaware Lawyer*, we wanted to provide our readers with a deeper understanding of how the Delaware Bankruptcy Court rose to national and international prominence, how Chapter 11 strategy and participation have evolved over the years, and the variety of businesses and industries that have come through its doors.

Our first article, by Norm Pernick, traces the history and evolution of Delaware's Chapter 11 practice from the 1980s to the present. Norm expertly outlines the shifting dynamics that have shaped bankruptcy practice over the decades.

Our second article, by Katie Good, titled *The Many Faces of Distress*, details the type and scale of businesses that routinely seek relief in the Delaware Bankruptcy Court.

Our third article, by Adam Landis and Katherine Dute, explores how Chapter 11 cases present themselves today, spotlighting the varied strategies and techniques used to restructure distressed companies.

Our fourth and final article, by Mike Merchant, focuses on mass-tort bankruptcy cases — a uniquely complex and challenging subset of Chapter 11 cases.

As Delaware lawyers, we can take great pride in the history and reputation of our bankruptcy court and the leading role the Delaware Bankruptcy Court continues to play in business reorganization cases.

Mark D. Collins

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- Citizenship Education: Funding courses that prepare eligible immigrants in Sussex County to pass citizenship tests, with 50 new citizens graduating this spring.
- Backpacks for Foster Graduates: Partnering with the DSBA to provide essential items for foster care graduates, helping them embark on independent futures.
- Youth Mentorship: Funding an Out-of-School Youth Mentor to guide disconnected teens with job training, GED preparation, and life skills for brighter futures.

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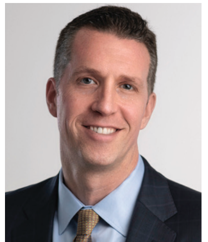
Katherine S. ("Kate") Dute is an associate at Landis, Rath & Cobb. She concentrates her practice in the areas of Corporate Bankruptcy and Restructuring and Bankruptcy Litigation. Dute's experience primarily focuses on creditor-side representations in complex Chapter 11 proceedings, including creditors' committees, secured and unsecured creditors, trusts and liquidation trustees, and asset purchasers.

Katie Good is co-head of Potter Anderson's bankruptcy team. She focuses her practice on corporate restructuring, distressed situations, bankruptcy and creditors' rights. She regularly represents distressed companies in both in- and out-of-court restructurings as well as advising secured lenders, asset purchasers, committees, liquidation trusts and other parties in Chapter 11 cases and other distressed transactions, as well as foreign representatives and other parties in Chapter 15 and other cross-border proceedings. In addition, Good has experience advising independent special committees conducting investigations inside and outside of Chapter 11 cases. She also routinely litigates in bankruptcy court as well as in federal district courts and courts of appeals. Good has substantial experience preparing opinions for structured finance transactions.

Adam G. Landis co-founded Landis Rath & Cobb LLP in Wilmington in 2003 after having practiced corporate bankruptcy law in New York and Delaware since 1991. Landis has counseled clients in some of the largest and most complex restructurings in the country, most often in the United States Bankruptcy Court for the District of Delaware. He holds an A.B. from Bowdoin College and a J.D. from Northeastern University School of Law. Recognized in Chambers USA as a Leading Lawyer in Bankruptcy, Landis has held a Band 1 rating since 2010 and was elected a Fellow of the American College of Bankruptcy in 2021. When not practicing law or helping manage his firm, Landis enjoys scuba diving, racquet sports and cooking.

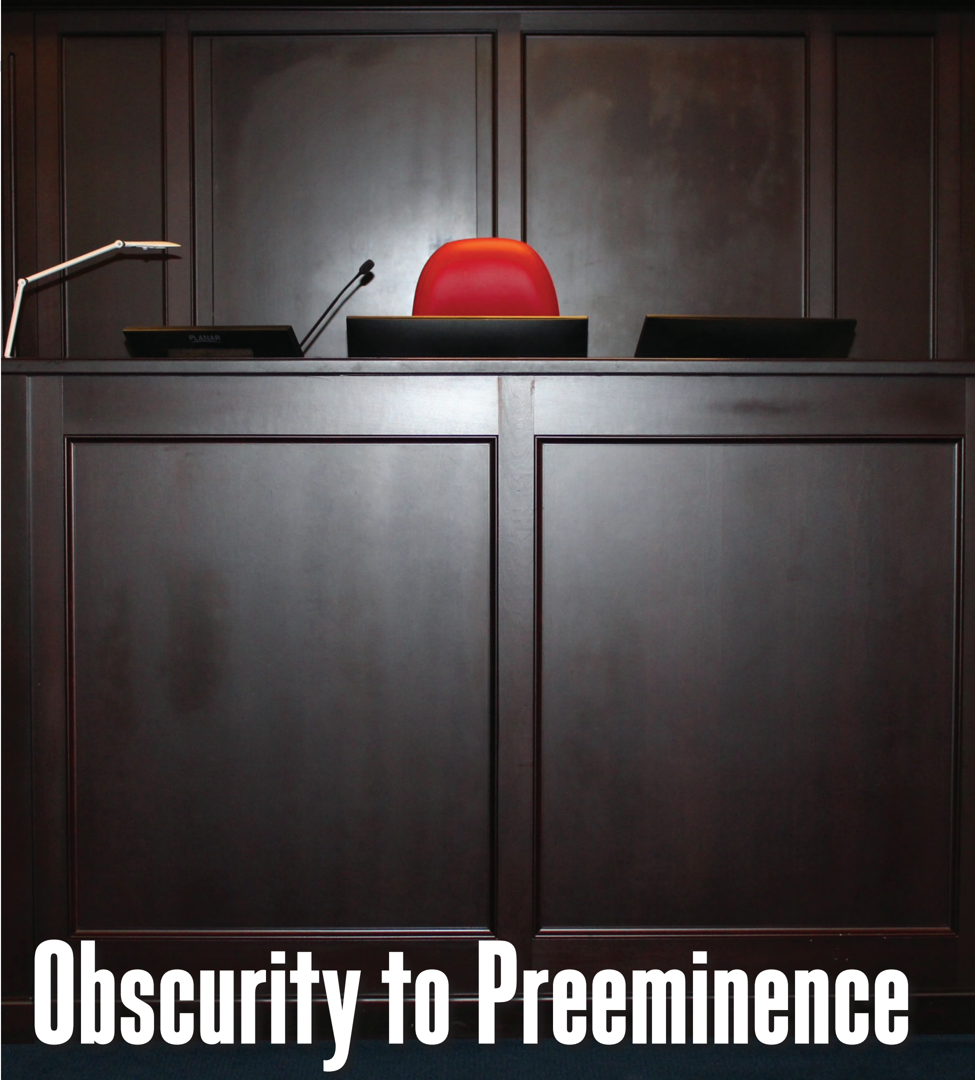


Michael J. Merchant is a director of Richards, Layton & Finger, Delaware's largest law firm. As chair of the firm's Bankruptcy & Corporate Restructuring Department, Merchant represents the full range of participants in bankruptcy cases and corporate restructurings, including debtors, secured and unsecured creditors, official and unofficial committees, and acquirers of distressed assets. Merchant's clients include biopharmaceutical companies, bank holding companies, subprime lenders, telecommunications companies, and businesses in the retail and manufacturing sector. He also has significant experience helping companies facing mass tort exposure navigate through the Chapter 11 process. Merchant is recognized in Chambers USA, Best Lawyers in America, Lawdragon 500 Leading Lawyers, Super Lawyers, and as a *Delaware Today* Top Lawyer. He earned a B.S. from Pennsylvania State University and a J.D., *cum laude*, from Villanova University School of Law, where he was editor in chief of the *Villanova Sports & Entertainment Law Journal*.

Norman L. Pernick is co-chair of Cole Schotz, P.C.'s Bankruptcy & Corporate Restructuring Department. He is also a former long-serving member of the firm's Executive Committee, and the founding member and former head of the Wilmington office. Pernick has served as a trusted advisor, strategist, and either lead or substantive co-counsel in numerous notable Chapter 11 cases. He focuses his bankruptcy and workout practice on representing public and privately held debtors, but also represents creditors' committees, major creditors, management, and boards of directors and trustees. Norm is a fellow of the American College of Bankruptcy. He is the author of the *Bankruptcy Deadline Checklist*, which is published by the Business Law Section of the American Bar Association, and is a frequent speaker and author on Chapter 11 topics. Pernick is very active in the community and currently serves as a senior advisor with Downtown Visions. Downtown Visions, along with its Wilmington Main Street division, is the umbrella organization for a community-wide effort to revitalize downtown Wilmington. Pernick is also a founding member and first board chair of the Wilmington Main Street program. This program is accredited by the National Trust for Historic Preservation and is the largest Main Street program in the country.

FEATURE

Norman L. Pernick



From Relative Obscurity to Preeminence

The Evolution of Chapter 11 Practice in Delaware

It's hard to believe that I'm at the stage of my career when one of my friends and colleagues is putting together a *Delaware Lawyer Magazine* on bankruptcy practice in Delaware and he picks me as the most logical one to write about the changes I've seen in the practice over my now 41-year career. That being said, it's an honor to reflect back on the amazing opportunity we all have to practice Chapter 11 bankruptcy in this fantastic state and jurisdiction.

When Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984, few could have predicted that over the following four decades, the District of Delaware would evolve into one of the most significant — and respected — venues for Chapter 11 bankruptcy filings. From humble beginnings to a powerhouse of corporate restructurings, Delaware's Chapter 11 practice has undergone dramatic changes in case dynamics, participants, timelines and outcomes. This article explores the shifting landscape of Chapter 11 practice in Delaware from the 1980s to today, providing practical insights for newer and mid-level practitioners and reaffirming Delaware's continuing role as a preferred venue for complex business reorganizations.

I. The 1980s: Setting the Stage

Before Continental Airlines filed its second Chapter 11 case in Delaware in 1990 — a so-called "Chapter 22" following its first reorganization in Houston in 1983 — the largest bankruptcy case Delaware had seen was

Claymont Steel, filed in 1983, which involved approximately $100 million in assets and liabilities. Continental, by contrast, was a multi-billion-dollar case that landed in Delaware with little warning. Virtually overnight, Delaware became a favored jurisdiction — alongside the Southern District of New York — for handling the largest and most complex corporate reorganizations.

For the handful of Delaware lawyers (notably Peter Walsh at Bayard Handelman, Ted von Wettberg at Morris James, Jim Patton at Young Conaway, William Witham at Prickett Jones, David Stratton at Potter Anderson, and a few others) who even knew where the Bankruptcy Court was located at the time (then housed in the United States District courthouse), the shift was dramatic. Phones began ringing off the hook with calls from debtors, creditors and their out-of-state counsel seeking local expertise. It was a heady time, as Delaware's restructuring practice began to expand rapidly in both profile and volume.

The Chapter 11 landscape in the 1980s was dominated by smaller, traditional reorganizations — lengthy, stakeholder-driven processes aimed at preserving going concerns. A debtor might stay in bankruptcy for a year or more, develop a business plan, test that plan, revise it over the course of a season or two, and then move toward confirmation. That kind of reorganization rarely happens today. Frankly, with the exception of asbestos and other mass tort cases that require more consensus than other cases, many fewer true long-term reorganizations happen. Businesses and jobs are often effectively reorganized and saved. The vessel has become either a bankruptcy sale of the business to a third party or the lender(s), or a prepackaged or pre-negotiated case.

Cases were smaller and relatively infrequent compared to today, and participants were largely debtors-in-possession (DIP), secured banks, unsecured creditors' committees and institutional bondholders. All Chapter 11 cases were heard by one Judge — Helen Balick, who was appointed as Delaware's first federal bankruptcy judge in 1974.

Even then, Delaware's unique strengths — its corporate law tradition, centralized court system and deep bench of legal professionals — made it an attractive venue. The Bankruptcy Code, still in its relative infancy post-1978, was applied with deference to equitable principles and a strong emphasis on debtor rehabilitation.

In this era, counsel for unsecured creditors' committees often faced substantial uncertainty regarding compensation. Carve-outs from secured creditor collateral were not always available or guaranteed, and committee professionals at times had more difficulty being paid their fees under the shadow of priority disputes, making them somewhat less effective. Over time, however, the carve-out has become standard, and the amounts allocated to committee professionals have grown significantly — particularly in larger and more complex cases. This development has strengthened the voice of unsecured creditors and increased overall transparency in the process.

It's also worth noting that in the early days of Delaware bankruptcy practice, written opinions were the exception rather than the rule. Judge Balick often issued her rulings orally from the bench, and transcripts of those decisions effectively served as the body of precedent. Despite their informal format, these transcript rulings were well thought out and presented, and were therefore closely followed by the bar locally and nationally. While today's judges author more written opinions, transcript rulings remain an important and respected feature of Delaware practice. They facilitate the prompt resolution of complex matters and keep cases moving at the pace modern restructurings demand.

II. The 1990s: Venue Choice and Growth

The 1990s saw Delaware's rise as a dominant Chapter 11 venue. Driven partly by federal bankruptcy venue statutes consistent with many other areas of federal law that permitted filings in a company's state of incorporation, and supported by a reputation for excellence in corporate law, more companies — especially those incorporated in Delaware — began filing their bankruptcies there. Key cases, such as *Continental Airlines*, *Columbia Gas Systems*, *Trans World Airlines* and *Marvel Entertainment*, helped solidify this trend.

Judge Balick's efficiency-focused tradition continued under Judge Peter J. Walsh, who joined Judge Balick on the bench in 1993. Judge Walsh frequently opened first-day hearings by stating, for example, "I only need to hear the DIP financing motion; the rest of the first-day motions are fine unless anyone has any objections." Specifically with regard to debtor-in-possession financing orders, Judge Walsh in 1998 issued a seminal letter to the Delaware bankruptcy bar regarding what he and Judge Balick would and would not approve in DIP financing orders at a first-day hearing. This letter was so effective that it eventually became a detailed Local Rule that is followed to this day. It also formed the cornerstone of what is today's version of Rule 4001 of the Federal Rules of Bankruptcy Procedure.

The Bankruptcy Court, with Judges Balick and Walsh at the helm, became known for thoughtful and efficient handling of complex cases, and they implemented many revolutionary and practical ways of doing so. First-day hearings became more standardized, and a consistent set of procedural expectations began to emerge. General procedural orders became a more comprehensive set of Local Rules. "First Day" hearings granting needed interim relief within the first day or two of the bankruptcy

filing eased companies into Chapter 11 and allowed them to operate as close to normal as possible, resulting in more successful reorganizations and recoveries for creditors. In fact, although the practice was initially harshly criticized by some, in 2007, the Supreme Court of the United States expressly endorsed it nationwide by incorporating it into Federal Rule of Bankruptcy Procedure 6003 and formally providing for exigent relief in appropriate circumstances. Omnibus (usually monthly) hearings with dedicated hearing times (as opposed to a calendar call with multiple cases scheduled for the same time of day) were implemented, creating further case efficiency. As caseloads grew and those cases were handled more and more efficiently, so did the perception — accurate then and now — that Delaware offered a highly competent, commercially savvy and fair venue for Chapter 11. Judge Balick's and Judge Walsh's pragmatic approaches to case management streamlined proceedings and continue today among many judges.

III. Institutional Growth: Delaware's Bankruptcy Bench

From its early years with a single judge, Delaware's Bankruptcy Court has grown into one of the most sophisticated commercial law forums in the world. A pivotal moment came when Chief District Judge Joseph Farnan withdrew the reference of bankruptcy cases in 1999, which resulted in District Court judges hearing bankruptcy cases as trial judges rather than just appellate judges for several years. This prompted a unique era of cross-court collaboration. As the bankruptcy bench expanded and matured, the reference was reinstated, cementing the Bankruptcy Court's leadership in case management and legal reasoning. The appointments of Judges Walrath, Shannon, Carey, Sontchi, Gross and, more recently, Silverstein, Dorsey, Owens, Stickles and Horan, brought continued deep expertise and national respect.

IV. The 2000s: The Rise of Financial Players

The early 2000s brought even more significant transformation. The collapse of the dot-com bubble and the 2008 financial crisis brought an influx of large, complex cases. Traditional players — banks and trade creditors — gave way to the predominance of hedge funds, private equity and distressed debt investors in Chapter 11 cases.

Capital structures grew more complex. Companies increasingly filed with multiple tranches of secured debt, layered intercreditor agreements and little-to-no equity cushion due to changing lending practices. This environment gave rise to fulcrum securities and "loan-to-own" strategies. The 2006 *Radnor Holdings* case (which underscores the importance of transparency and disclosure in bankruptcy proceedings, particularly concerning potential conflicts of interest involving legal counsel and creditors) marked a turning point as committees began challenging debt acquisition strategies.

The court adapted quickly. It gained four new judges between 2005 and 2006: Judges Shannon, Carey, Sontchi and Gross. With six judges, Delaware had the capacity and legal firepower to handle virtually any restructuring. The practice matured, and Delaware firmly established itself as a key jurisdiction of choice.

Pre-packaged and pre-negotiated plans became more common, especially in sponsor-backed cases. These cases often resulted in senior secured creditors taking control of the reorganized company shortly after filing. Delaware judges efficiently managed these cases, building credibility and consistency in the process.

Private credit began to replace money-center banks, further changing the tone of negotiations. Gone in large part were the regional workout officers; in came MBAs and analysts from global asset managers, wielding sophisticated models and tight deadlines. Delaware's judges and practitioners kept pace.

V. The 2010s: Streamlining and Strategizing

By the 2010s, Chapter 11 in Delaware had become faster, more transactional and more investor-driven. The median case duration shortened, and many cases concluded with a sale followed by a structured dismissal or conversion to Chapter 7, rather than a traditional plan.

Restructuring Support Agreements (a binding contract between a debtor and key creditors outlining the agreed terms and timeline of a proposed restructuring) and "death trap" provisions (a plan feature that offers creditors better treatment if they vote to accept the plan and worse treatment if they reject it) became fixtures in many more filings. The voice of unsecured creditors weakened in many cases as sponsors and secured lenders drove terms through pre-petition negotiations.

There are of course more practice changes over this long period of time than can be mentioned in this one article. Two are worth noting, however. In the mid-1980s, the litigation was simpler and more streamlined. For "heavy" litigation, commercial litigators were parachuted into Chapter 11 cases and the bankruptcy lawyers taught them what they needed to know about bankruptcy and the particular dispute at issue. While the Federal Rules of Civil Procedure (FRCP) and Evidence (FRE) were in use, they were often not as vigorously applied. Compare that to today, where many bankruptcy lawyers are just as adept as litigators, and the FRCP and FRE are vigorously enforced. Landlord/tenant dynamics have also shifted dramatically. In earlier eras, landlords contested nearly every detail of a retail bankruptcy — from the size and placement of "Going Out of Business" signs to the color of the banners. Today, landlords rarely fight those battles. Many times, the last thing many want is their space returned. Market conditions and

retail contraction have reshaped incentives, making cooperation the norm in many retail filings.

Despite these trends, Delaware's courts continued to provide a balanced forum — efficient but principled. The "Delaware Way" persisted: professionalism, civility, and respect between court and counsel. The culture of the bar fostered cooperation, practical lawyering and fair outcomes, even if heated combat was involved. That culture remains a defining asset.

VI. The 2020s: Resilience and Reinvention

The COVID-19 pandemic marked another inflection point. Retail and hospitality filings surged. Delaware, already operating at a high level, transitioned quickly and seamlessly to remote hearings and digital dockets.

Cases became even more complex, involving litigation finance, global enterprise groups and mass tort liabilities. Third-party releases, dual-track sale/plan strategies and increasingly aggressive funding tactics tested the bounds of the Code — and the skill of the court. Delaware met the challenge.

Additional competing venues, particularly the Southern District of Texas and New Jersey, emerged as viable alternatives. Yet Delaware's institutional strength — its judiciary, bar, clerk's office, reputation, and now years of reliable precedent — ensured its continued preeminent place in high-stakes restructurings.

Conclusion: The Delaware Distinction

Delaware's trajectory has mirrored the century-long rise of its Court of Chancery — but on a much faster timeline. In just a few decades, Delaware created a business court of global stature in the insolvency field, with now legions of outstanding rulings that are followed by courts not only around the country, but around the world. The bench and bar should be proud of what they have built together.

Since 1984, Delaware's Chapter 11 practice has evolved from a rehabilitative, plan-focused process to a sophisticated system for resolving corporate distress. Though few reorganizations look like those of the 1980s, Delaware continues to lead through innovation, integrity and institutional strength. Delaware remains a proving ground: efficient, ethical and constantly adapting. The court's pragmatic approach and its culture of professionalism ensure that even the most complex cases are handled with fairness and rigor. Chapter 11 continues to be about saving companies, businesses and jobs, managing transition, maximizing value and resolving risk. Delaware remains among the best places in the country to do exactly that. ◆

Katie Good

The Many Faces of Distress

A Guide to Different Kinds of Bankruptcies

Members of the Delaware bar know that the United States Bankruptcy Court for the District of Delaware (hereafter the "Delaware Bankruptcy Court" or "the Court") has been a busy court since the early 1990s. Indeed, its bench has grown over the past few decades from one judge to two, then six and now eight. However, those who do not regularly appear before the Delaware Bankruptcy Court may have little understanding of the Court's docket and the cases that keep Delaware's bankruptcy bench and bar active. A wide variety of businesses, both in type and scale, have sought relief before the Delaware Bankruptcy Court along with the state's consumer debtors, and the Court has become adept at expeditiously addressing complex legal issues that face distressed businesses and financially struggling individuals.

Bankruptcy Basics

Before delving into the cases handled by the Delaware Bankruptcy Court, a short primer on bankruptcy procedure is probably helpful for readers unfamiliar with it. The United States Constitution authorizes Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States," and Congress has enacted various such laws throughout the history of our nation,[1] including the current Bankruptcy Code, enacted in 1978 (with a few notable amendments since its original enactment).[2]

The Bankruptcy Act of 1978 established a bankruptcy court in each judicial district as an adjunct to the district court. Bankruptcy judges are appointed to 14-year terms with jurisdiction to oversee "all civil proceedings arising under Title 11 [of the United States Code] or arising in or related to cases under Title 11." Bankruptcy cases (other than cross-border recognition proceedings under Chapter 15 of the Bankruptcy Code)[3] may be commenced in the district "in which the domicile, residence, principal place of business in the United States, or principal assets in the United States" of the debtor have been located for the 180 days immediately preceding the commencement of the bankruptcy case.[4] Thus, individuals may file for bankruptcy where they reside.

However, businesses, particularly national or international ones, may file where they have a principal place of business or principal assets in the United States or where they are domiciled. Venue is also proper in the district where an affiliate, general partner or partnership of the debtor has a pending case.[5] Because so many businesses are incorporated under the laws of Delaware, Delaware's Bankruptcy Court is a venue option for those businesses when they are facing distress and considering filing for bankruptcy.

The current Bankruptcy Code addresses bankruptcy filings for both individuals and business through a few types of cases referred to by their chapter in the Code:

- **Chapter 7** – liquidations
- **Chapter 9** – adjustment of debts of a municipality
- **Chapter 11** – reorganization
- **Chapter 12** – adjustment of debts of a family farmer or fisherman with regular annual income
- **Chapter 13** – adjustment of debts of an individual with regular income, and
- **Chapter 15** – ancillary and other cross-border cases.

Unlike traditional civil litigation, where the plaintiff complains of harm caused by the defendant and the defendant responds, bankruptcy cases are commenced voluntarily by a business or individual or involuntarily by their creditors, and upon the filing, the individual or business may seek relief from the Court to pay certain claims, continue business operations, and seek approval of a sale of assets or confirmation of a plan to maximize and distribute value to creditors and, in some cases, equity holder constituents. Creditors are provided notice and opportunities to object to relief and submit their own documentation of the claims they have against the business or individual debtor. The Court is then tasked with hearing motions and applications as well as any objections that may be filed to the amount or validity of those claims, among other things.

In business cases, the Court will look at the company's business judgments about claim settlements, asset sales and other decisions in the context of approving those decisions, rather than scrutinizing such decisions after the fact. Thus, the Court often requires more information about the nature and operation of the business and the potential impact of certain actions and decisions than in traditional civil litigation.

Business Bankruptcies

Businesses seek relief in the Delaware Bankruptcy Court to address financial distress[6] caused by one or more concerns, including management issues ranging from operational dysfunction to mismanagement or fraud; macroeconomic issues like rising interest rates or recessionary environments; societal or technological changes; legal challenges in the form of significant pending lawsuits, judgments or regulatory changes; impending debt maturities; and bad investments or business decisions.

When financial markets have suffered in the past two decades, the Delaware Bankruptcy Court has presided over cases involving distressed financial institutions.[7] For example, the subprime mortgage crisis led issuers like New Century Financial Corporation and American Home Mortgage Holdings Inc.to file for bankruptcy. Then, as the impacts of subprime lending continued to permeate the market, larger bank holding companies filed, including Washington Mutual, Inc. Similarly, when the "crypto winter" hit in 2022, the Delaware Bankruptcy Court presided over notable cryptocurrency-related cases, including *FTX Trading Ltd.*, but also cases filed by Bittrex, Inc., Terraform Labs Pte. Ltd. and, more recently, Silvergate Capital Corporation. Silvergate is the bank holding company for Silvergate Bank, a common bank for crypto companies, including FTX.

Societal and technological changes have also driven numerous case filings in the Delaware Bankruptcy Court. Numerous retailers have filed in the wake of financial struggles as consumers shifted to more online ordering and retailers faced greater competition in the "fast fashion" marketplace. Some of these companies include Brooks Brothers, RadioShack, Claire's Stores, Golfsmith, Ashley Stewart, Charlotte Russe, Forever21, True Religion, Charming Charlie's, John Varvatos and rue21. Bankruptcy has allowed these retailers and many others opportunities to maximize value and change their business strategies in challenging retail environments through actions including (1) rejecting some or all of their leased real estate locations, (2) selling their businesses as a going concern, (3) conducting store closing sales at some or all of their physical locations, and (4) monetizing key intellectual property.

Mass tort litigation has prompted several bankruptcy filings in Delaware as well. Opioid manufacturer Mallinckrodt Pharmaceuticals plc filed Chapter 11 twice in Delaware to address litigation claims and then again to restructure debt obligations. Takata Corporation's U.S. subsidiary, TK Holdings, Inc., the maker of airbags for

many major automobile manufacturers, filed Chapter 11 in Delaware to address liabilities, including significant personal injury claims from exploding airbags. Blitz USA, a manufacturer of portable gas cans sold in retailers like Walmart, filed to address litigation claims due to explosions allegedly caused by the use of such cans. In addition, Boy Scouts of America filed in Delaware to address numerous sexual abuse claims.

Businesses facing significant legal claims have benefited from bankruptcy's automatic stay, which pauses ongoing litigation for the duration of the bankruptcy case to allow negotiations with key stakeholders and insurers for plans of reorganization that channel existing and future litigation claims into trusts and provide procedures for resolution of such litigation claims, while allowing the underlying business to move forward without the uncertainty of litigation costs and outcomes.

The Delaware Bankruptcy Court oversaw a mass-tort bankruptcy that hit closer to home with the bankruptcy filing of the Catholic Diocese of Wilmington. The Wilmington Diocese was the seventh U.S. diocese bankruptcy filing following the clergy sex abuse scandal that broke in 2002. The Court was faced with deciding challenging issues surrounding whether certain pooled funds were assets of the Diocese's bankruptcy estate available to pay abuse victims and other creditors. Ultimately, the Court confirmed a reorganization plan that provided $77 million in settlements for alleged abuse victims while enabling the Diocese to meet other financial obligations, including to lay employees and other creditors.

Countless other types of businesses have sought relief in the Delaware Bankruptcy Court to address their financial distress, including automotive suppliers, manufacturers, trucking companies, pre-revenue pharmaceutical and technology developers, oil and gas companies, power plants and more. The size of these businesses can also vary widely from small local "mom and pops" to billion-dollar international conglomerates.

Cross-Border Bankruptcies

The Delaware Bankruptcy Court has also played a role in significant cross-border disputes. One of the largest of these involved Nortel Networks, Inc. Nortel Networks, Inc. and certain of its affiliates filed Chapter 11 cases in the Delaware Bankruptcy Court and other affiliates commenced insolvency proceedings in Canada and in the United Kingdom.[8] The assets of the U.S. debtors and their foreign affiliates were sold for over $5 billion and the U.S. and foreign insolvency estates then proceeded with litigation over the allocation of those proceeds between the respective estates. The Delaware Bankruptcy Court approved cross-border court-to-court protocols and conducted a 21-day trial jointly with the Ontario Superior Court of Justice, Commercial List, with the two judges presiding jointly and two courtrooms connected via extensive technology. Both the Delaware Bankruptcy Court and its Canadian counterpart issued decisions on the allocation of sale proceeds.[9] The joint trial involved months of planning and coordination between the litigants and the courts to ensure a seamless trial experience between the two courts.

In addition, through Chapter 15, which was added to the Bankruptcy Code by Congress in 2005 and is based off the United Nations Commission on International Trade Law's Model Law on Cross-Border Insolvency, the Delaware Bankruptcy Court has also given effect within the territorial jurisdiction of the United States to orders of several foreign jurisdictions relating to foreign businesses with operations, assets or litigation in the United States. The Court has considered recognizing foreign proceedings and giving effect to foreign orders from countries around the world, including Canada, Australia, the United Kingdom, Austria, the Cayman Islands, New Zealand, Japan and others. Through these Chapter 15 cases, the Delaware Bankruptcy Court considers and applies principles of international comity and cooperation while ensuring that recognition of such proceedings and orders is not manifestly contrary to U.S. public policy.

Consumer Bankruptcies

The Delaware Bankruptcy Court also handles all of the state's consumer bankruptcy filings, overseeing the process by which thousands of Delawareans seek relief from their financial struggles. In other districts, consumer filings represent the lion's share of their district's bankruptcy court docket. However, with Delaware's relatively smaller population, consumer filings represent a much lower proportion of the docket, such that currently only two of Delaware's eight bankruptcy judges regularly preside over consumer cases. This is a stark contrast to other jurisdictions, such as the Northern District of Georgia or the Southern District of Texas, where only a few of their judges preside over complex Chapter 11 cases. The population in those districts as compared to Delaware means those bankruptcy courts face a much larger volume of consumer filings.

While Delaware's population as compared to its number of domiciled businesses may mean there are relatively fewer consumer cases, the Delaware Bankruptcy Court still serves an important role in addressing those cases and allowing individuals facing financial hardships the opportunity for a fresh start. This can involve determining whether an individual can utilize Chapter 7 to obtain a discharge after providing any excess assets to be sold for its creditors or will be required to make payments over time to those creditors in a Chapter 13 case.

In one such case, the Delaware Bankruptcy Court was faced with such a decision in the context of a uniquely Delawarean asset: a low-numbered license plate. In 2007, Judge Shannon authored an opinion in a consumer bankruptcy case that centered around the First State's low-numbered automotive licensing fascination. "This is a case about a $200,000 license plate," the opinion begins.[10]

The debtor, an 86-year old man, had been gifted plate number 67 in the 1960s, and when he filed bankruptcy in 2007, did not schedule the plate on the schedules of assets and liabilities that all debtors, corporate or consumer, are required to complete under penalty of perjury. The Court was faced with determining whether the man's failure to schedule the license plate constituted bad faith such that he should not be permitted to convert his Chapter 7 case to a Chapter 13 case. In concluding that the man was not acting in bad faith, the Court noted "the value of the license plate . . . is not obvious. It is frankly astonishing to the Court that a person would pay over $200,000 for the privilege of having only two digits on their license plate instead of the more typical five or six."[11] The debtor in question was permitted to convert his case to Chapter 13 and coordinate a sale of the license plate to provide recovery to his creditors.

Conclusion

From its courtrooms in an office building in downtown Wilmington, the Delaware Bankruptcy Court has presided over bankruptcy cases of numerous businesses in a variety of industries whose operations may be local, regional, national or international. To understand the relief brought before it by these businesses, the Court must hear evidence regarding the nature of the business, its operations, employees, capital structure and creditors, and understand how the relief will impact the companies and their stakeholders. It has also heard the cases of many struggling individual Delawareans, applying the Bankruptcy Code's requirements to their cases with compassion and fairness.

Regardless of the size of the business, the span of its operations or the debts faced by an individual, one consistent principle that the Delaware Bankruptcy Court shares with its fellow Delaware courts is the expectation of the highest levels of professionalism, civility and courtesy of the attorneys practicing before it — the "Delaware Way" is alive and well even in cases of extreme financial distress. ◆

NOTES

1. *See generally* David A. Skeel, Debt's Dominion: A History of Bankruptcy Laws in America (2014).
2. 11 U.S.C. §§ 101-1532.
3. *See* 28 U.S.C. § 1410 (establishing venue of Chapter 15 cases ancillary to foreign proceedings in the district "(1) in which the debtor has its principal place of business or principal assets in the United States; (2) if the debtor does not have a place of business or assets in the United States, in which there is pending against the debtor an action or proceeding in a Federal or State court; or (3) in a case other than those specified in paragraph (1) or (2), in which venue will be consistent with the interests of justice and the convenience of the parties, having regard to the relief sought by the foreign representative.").
4. 28 U.S.C. § 1408(1).
5. 28 U.S.C. § 1408(2).
6. *In re LTL Management, LLC*, 64 F.4th 84 (3d Cir. 2023) (requiring a putative debtor to be in financial distress to obtain relief under the Bankruptcy Code).
7. Banks and credit unions are not eligible for relief under the Bankruptcy Code and are separately administered through other federal and state regulatory systems; however, other financial institutions like bank holding companies and mortgage originators may be eligible for relief as debtors under the Bankruptcy Code. *See generally* 11 U.S.C. § 109.
8. *In re Nortel Networks, Inc.*, 532 B.R. 494 (Bankr. D. Del. 2015).
9. *Id.*
10. *In re Murray*, 377 B.R. 464 (Bankr. D. Del. 2007).
11. *Id.* at 469.

Adam G. Landis and
Katherine S. Dute

A Fresh Start

An Overview of Types of Chapter 11 Cases

Corporate Chapter 11 bankruptcies offer companies a fresh start by permitting them to shed past debts, restructure their balance sheets, and emerge from bankruptcy with a business plan that has been proposed by the debtor, vetted by stakeholders and approved by the Bankruptcy Court.

While certain relief sought — e.g., the discharge of debts — is universal across all types of Chapter 11 bankruptcies, the strategy for achieving that relief depends on goals of the debtor. Most often, companies will use the tools available to them in the Code[1] to seek to reorganize on a "stand-alone" basis through a plan of reorganization. Almost as frequently (and sometimes in combination with a stand-alone reorganization), companies will seek to shed unprofitable or "non-core" assets and business lines to emerge from Chapter 11 as a healthier enterprise. Less often, companies may use Chapter 11 to fully or partially liquidate while operating as a going concern in order to maximize value.

This article provides an overview of these common types of Chapter 11 cases.

Common Types of Chapter 11 Bankruptcies

Bankruptcy provides countless tools to achieve a debtor's goals, making every case unique. Although there are many different types of Chapter 11 cases, they share common features that inform debtors and practitioners navigating the Chapter 11 process. Just as Delaware has become a preeminent jurisdiction for corporate law, because of the high quality of its bench and

bar, Delaware has become a magnet for complex business restructurings for entities across the nation and around the globe.

Stand-Alone Reorganizations

The most traditional type of Chapter 11 bankruptcy is a "stand-alone" reorganization, in which a debtor seeks to emerge from bankruptcy as a going concern with a restructured balance sheet. In stand-alone reorganizations, debtors seek to have the Bankruptcy Court approve (or "confirm") a plan of reorganization, which details the proposed economic treatment of stakeholders based on a business plan that the court has determined is "feasible."[2]

A stand-alone reorganization maintains the enterprise as a going concern, preserving jobs, vendor and client relationships, and goodwill. To get there, a debtor must contend with numerous challenges, including liquidity concerns, negotiations with key constituents and public scrutiny. For the majority of debtors, financial distress is a driving force, making budgeting and managing cash vitally important.

Chapter 11 offers a slew of statutory and equitable tools unavailable outside of bankruptcy to help debtors achieve a stand-alone reorganization. For example, a debtor can halt creditors' collection efforts through the automatic stay;[3] reject burdensome executory contracts while assuming favorable ones;[4] recover certain payments made prior to the bankruptcy;[5] and bind dissenting creditors to a plan of reorganization approved by the Bankruptcy Court.[6]

To confirm a plan consensually and emerge as a healthy enterprise, a debtor must satisfy several substantive and procedural requirements under the Code, including receiving a significant level of support from creditors — more than half in number and two thirds in amount of allowed claims.[7] In order to gain this acceptance, the debtor will negotiate with unsecured creditors (typically represented collectively by a statutory committee comprised of diverse creditors serving in a fiduciary capacity for all unsecured creditors) in order to reach agreement. Often, plans of reorganization provide for creditors to receive payments over time and/or equity in the emerging enterprise on account of their prepetition claims.

Myriad companies have filed Chapter 11 in Delaware, drawing on the experience and expertise of the bench and bar to facilitate their standalone restructurings. From household names like The Franchise Group[8] and Tribune Company[9] to lesser-known enterprises like Peekay Acquisition[10] and Tuscany International Drilling,[11] companies that seek to emerge from Chapter 11 as standalone entities know that Delaware is the place to get it done.

Sale Cases

The Chapter 11 process also may be used to maximize value for stakeholders by selling assets as a going concern, which typically fetches greater value than a piecemeal liquidation in Chapter 7 (where a company generally cannot continue to operate). A sale in bankruptcy — known as a "363 Sale" after the Code provision governing non-ordinary course sales in bankruptcy[12] — provides benefits that cannot be achieved in a merger or acquisition outside of bankruptcy. Chief among them is the ability to effectuate the sale without approval of ownership interests, reject burdensome contracts, and sell assets "free and clear" of liens, claims and other encumbrances (such as successor liability).[13] When a bankruptcy court approves a 363 Sale, it enters an order finding that the consideration was reasonable and the sale was conducted in good faith to a good-faith purchaser, offering a level of certainty that is not available outside of bankruptcy.

There are, however, challenges to achieving a 363 Sale. The marketing and sale process, supervised by the Bankruptcy Court, often occurs quickly — 45 to 90 days is not unusual because debtors rarely have the liquidity to survive longer. The public nature of the process can present strategic disadvantages to some parties — potential purchasers who prefer to pay as little as possible are subject to a competitive process where the "highest or otherwise best" bid must be accepted.[14] The Code also permits secured creditors to "credit bid," using secured debt as currency, where third parties have to pay cash or other consideration.[15]

363 Sales of substantially all of a debtor's assets have become commonplace. The Code also permits debtors to sell their assets on a piecemeal basis, enabling enterprises to shed non-core or unprofitable business lines. This type of sale is particularly relevant in sectors such as retail, where debtors may have assets throughout the United States.

Delaware is in a prime position to resolve liquidations efficiently under the supervision of the Bankruptcy Court. For example, Forever 21 entered bankruptcy in Delaware on March 16, 2025, and by the end of April, was substantially liquidated.[16] Similarly, on January 15, 2025, Joann Fabrics filed for bankruptcy in Delaware and that same day outlined its plan to liquidate its stores. The following month, the Delaware Bankruptcy Court approved Joann's liquidation plan.[17]

Pre-Petition Preparation and Planning

While a debtor's desired outcome drives the optimal goal of a Chapter 11 case, practitioners must account for the realities of what a debtor can accomplish pre-filing, what must be accomplished during the Chapter 11 case, and the possibility that unforeseen events may require a Chapter 11 filing with little to no preparation.

While free-falls and pre-packs present the two extremes of Chapter 11 case preparation and planning, most cases fall somewhere between the poles.

Pre-Packaged Bankruptcies

In a "pre-packaged" bankruptcy, a debtor files its case with a plan of reorganization accepted by creditors entitled to vote. Prior to filing, the debtor (i) negotiates with its largest creditor constituencies (typically its secured creditors, who in this situation often are willing to exchange their secured debt for equity in the reorganized enterprise), (ii) drafts a plan and disclosure statement that satisfy the Code, (iii) solicits its creditors, and (iv) receives sufficient votes in favor of the plan to satisfy the Code's requirements. Then, the debtor will file its case and present the accepted plan for Court approval. If the plan satisfies the requirements of the Code, the Bankruptcy Court can confirm the plan of reorganization in a matter of days or weeks.[18] Pre-packs thus provide speedy resolutions of Chapter 11 cases, de-risking the process and saving the time and money required to conduct the restructuring entirely in Bankruptcy Court.

Despite the appeal of pre-packs, however, they are not always possible to execute. In cases with many disputed claims or unknown creditors, it is not feasible to solicit votes from all eligible parties pre-filing. Debtors pursuing pre-packs risk having the pre-filing process rejected by the Bankruptcy Court, whether on the basis of inadequate disclosure, improper solicitation or inappropriate treatment of claims in the plan of reorganization. Failure to satisfy any of the Code requirements could force the debtor to start over in Chapter 11 — an expensive, uncertain and value-destructive outcome. Extensive prepetition planning and preparation is the only way to avoid these potential negative results, and there are many examples of successful pre-packs in the Delaware Bankruptcy Court.

The Delaware Bankruptcy Court is particularly adept at handling pre-pack bankruptcies. For example, HighPoint Resources filed its pre-packaged case and the Bankruptcy Court confirmed its plan four days later.[19]

Free-Fall Bankruptcies

On the other side of the preparation and planning spectrum is arguably the most difficult scenario for a Chapter 11 debtor, known as a "free-fall" bankruptcy. A free-fall filing may be the only option to preserve value in the face of an existential threat, such as a judgment creditor's exercise of remedies that would effectively shut down the business. Even without the kind of preparation and planning that ordinarily would facilitate a smooth transition into Chapter 11, a free-fall bankruptcy filing triggers the automatic stay, preventing seizure and dissipation of assets that could cause a collapse of the enterprise.[20] Despite the risks associated with a free-fall bankruptcy, an entity forced into this position is not helpless. It can use the "breathing spell" offered by the automatic stay to stave off creditor action while it employs the powerful tools in the Code to attempt to successfully reorganize and/or conduct a 363 Sale.

The collapse of FTX Trading, the well-known crypto currency exchange, serves as one of the best examples of a successful free-fall bankruptcy. As massive fraud was coming to light, crypto values were collapsing, and creditors from across the globe raced to withdraw assets from the FTX platform, the company hurriedly filed for Chapter 11 in Delaware on November 11, 2022, staying creditor action and creating a single forum in which to reorganize or liquidate in a controlled fashion. Notwithstanding the free-fall filing, the FTX debtors were able to utilize Chapter 11 to stabilize the enterprise, conduct numerous 363 Sales, and locate and claw back billions of dollars that had been improperly siphoned from the company. Despite the unstructured way it entered Chapter 11, two and a half years after filing, many creditors are receiving more than full value for their allowed claims, an outcome that would not have been achievable outside of Chapter 11.[21]

While free-falls and pre-packs present the two extremes of Chapter 11 case preparation and planning, most cases fall somewhere between the poles. A debtor may enter Chapter 11 seeking to propose and confirm a stand-alone plan of reorganization, only to have circumstances dictate a shift to a 363 Sale. Conversely, a Chapter 11 debtor intending to market and sell substantially all its assets may, after consultation with parties in interest, find that there is a viable path to an operational and balance sheet restructuring. In all events, Delaware is sure to see its share of all types of Chapter 11 cases for the foreseeable future.

Conclusion

Given the fluid nature of Chapter 11, case strategy can and often does change as circumstances change. Although the overview of Chapter 11 cases described in this article provides a general sense of how and why a case may be filed, the nuances of any particular situation will dictate how the case progresses to its conclusion. ◆

NOTES

1. 11 U.S.C. §§ 101 *et seq.* (the "Code").
2. "A debtor must prove a [C]hapter 11 plan's feasibility by a preponderance of the evidence. [] Section 1129(a)(11) of the Bankruptcy Code codifies the feasibility requirement, permitting confirmation of a plan if '[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan[.]'" *In re Paragon Offshore plc*, No. 16-10386, 2016 Bankr. LEXIS 3967, at *55 (Bankr. D. Del. Nov. 15, 2016).
3. 11 U.S.C. § 362.
4. 11 U.S.C. § 365.
5. 11 U.S.C. §§ 547 & 548.
6. 11 U.S.C. § 1129(b).
7. 11 U.S.C. § 1126(c) and (d).
8. *Confirmation Order, Franchise Group, Inc.*, Case No. 24-12480 (Bankr. D. Del. June 2, 2025) [D.I. 1596].
9. *Confirmation Order, Tribune Co.*, Case No. 08-13141 (Bankr. D. Del. Jul. 23, 2012) [D.I. 12074].
10. *Confirmation Order, Peekay Acquisition, LLC*, Case No. 17-11722 (Bankr. D. Del. Nov. 15, 2017) [D.I. 374].
11. *Confirmation Order, Tuscany Int'l Holdings*, Case No. 14-10193 (Bankr. D. Del. May 21, 2014) [D.I. 375].
12. 11 U.S.C. § 363.
13. 11 U.S.C. § 363(f).
14. *Motion to Approve Bid Procedures, FTX Trading LTD*, Case No. 22-11068 (Bankr. D. Del. Dec. 15, 2022) [D.I. 233] (proposing bid procedures to ensure the assets are "sold for the highest or otherwise best bid(s)," which "take into account any factors the Debtors reasonably deem relevant to the value of the offer"); *Motion to Approve Bid Procedures, In re Infinity Pharmaceuticals Inc.*, Case No. 23-11640 (Bankr. D. Del. Sept. 29, 2023) [D.I. 11] (same); *Motion to Approve Bid Procedures, SFP Franchise Corp.*, Case No. 20-10134 (Bankr. D. Del. April 1, 2020) [D.I. 349] (same).
15. 11 U.S.C. § 363(k).
16. *See Disclosure Statement, F21 OpCo, LLC*, Case No. 25-10469 (Bankr. D. Del. May 14, 2025) [D.I. 344].
17. *Order (A) Approving and Authorizing Sale of the Debtors' Assets, Free and Clear of All Liens, Claims, Encumbrances, and Other Interests, and (B) Granting Related Relief, Joann Inc.*, Case No.; 25-10068 (Bankr. D. Del. Feb. 26, 2025) [D.I. 520] (approving the debtors' agreement with third parties to have the third parties run the liquidation of substantially all of the debtors' assets).
18. 11 U.S.C. § 1126 (b).
19. *Findings of Fact, Conclusions of Law, and Order Approving the Debtors' Disclosure Statement Relating to, and Confirming, the Debtors' Joint Prepackaged Plan of Reorganization Pursuant to Chapter 11 of The Bankruptcy Code, HighPoint*, Case No. 21-10565 (Bankr. D. Del. Mar. 18, 2021) [D.I. 110].
20. 11 U.S.C. § 362 ("a petition filed . . . operates as a stay, applicable to all entities, of . . . the enforcement, against the debtor or against property of the estate, of a judgment").
21. *Findings Of Fact, Conclusions of Law and Order Confirming the Second Amended Joint Chapter 11 Plan of Reorganization of FTX Trading Ltd. and Its Debtor Affiliates, FTX Trading LTD*, Case No. 22-11068 (Bankr. D. Del. Oct. 8, 2024) [D.I. 26404].

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FEATURE

Michael J. Merchant[1]

Mass Tort Liability

The Use of Chapter 11 Both Pre- and Post-*Purdue Pharma*

The defense of mass tort cases can overwhelm a company in terms of both expense and administrative burden. Companies that are subject to mass tort liabilities are often required to defend multiple suits in different jurisdictions, while facing the risk of disparate judgments.

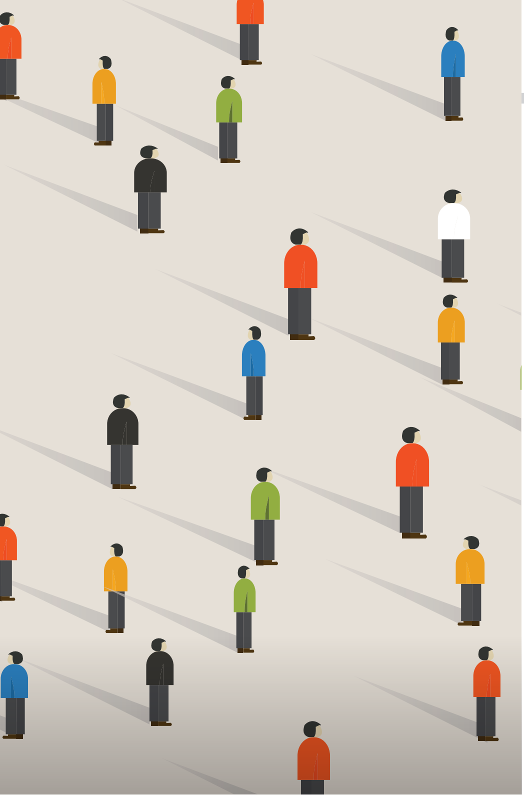
Dating back to *In re Johns-Manville Corp., et al.*, Case No. 82-11656 (CGM) (*Johns-Manville*), the bankruptcy process has provided companies with useful tools for addressing current and future mass tort liability in a centralized forum. Indeed, Chapter 11 has been used as a means for addressing mass tort liabilities related to, among other things, asbestos exposure, opioid addiction, airbag malfunctions, sexual abuse, talc exposure and defective medical devices.

The Delaware Bankruptcy Court, being one of the most sophisticated and experienced venues for handling Chapter 11 cases, has played a significant role in the mass tort bankruptcy space. A small sampling of the mass tort cases that have been handled by the Delaware Bankruptcy Court includes *Mallinckrodt* (opioids), *Boy Scouts of America* (abuse claims), *TK Holdings* (defective airbags), *Blitz U.S.A.* (defective gas cans), *Paddock Enterprises* (asbestos), *Imerys Talc America* (talc/asbestos), *Federal Mogul Global* (asbestos) and the *USG Company* (asbestos).

This article is intended to provide a high-level overview of the use of Chapter 11 as a means of addressing a company's mass tort liability, as well as a discussion of the Supreme Court's opinion in *Harrington v. Purdue Pharma*, 603 U.S. 204 (2024) (*Purdue Pharma*), and the effect that it may have on the mass tort bankruptcy practice moving forward.

1. Chapter 11 as a Means of Addressing Mass Tort Liability

Chapter 11 provides a company with the ability to create a process for resolving all claims against the company and potentially against certain non-debtor entities in a single centralized bankruptcy proceeding. The tools available under the Bankruptcy Code also provide a debtor with, among other things, the ability to stay actions pending against the company in various jurisdictions on account of prepetition claims, enter into settlements with insurers and other joint tortfeasors that provide for the funding of a settlement



trust in exchange for consensual and/or non-consensual third-party releases (with respect to asbestos-related liabilities), and channel all current and future tort claims to such settlement trust to be administered in connection with court-approved trust distribution procedures.

2. *Johns-Manville* and the Rise of Mass Tort Bankruptcy Cases

The modern use of the bankruptcy process to address mass tort liabilities finds its origins in *Johns-Manville*, a case filed in 1982. Johns-Manville Corp., a large asbestos processor and cement manufacturer, filed a Chapter 11 case in response to significant asbestos litigation. The plan structure in *Johns-Manville* involved the channeling of current and future claims to a trust that was funded by a percentage of the reorganized entity's future earnings, as well as contributions from the company's insurers and other third parties. In exchange for such contributions, the insurers and settling third parties received consensual and non-consensual releases of asbestos-related claims from the debtors and all creditors.

Congress subsequently enacted Section 524(g) of the Bankruptcy Code, which codified the trust structure established in *Johns-Manville* as a construct for addressing asbestos-related liability in bankruptcy. Section 524(g) provides specific statutory authority for the channeling of current and future asbestos liability pursuant to a channeling trust structure under which non-debtor third parties may contribute consideration to the trust in exchange for the non-consensual release of creditor claims (claims typically related to liability arising from exposure to the debtor's products). These are commonly referred to as "non-consensual third-party releases" and were the focus of the Supreme Court's decision in *Purdue Pharma* (as discussed herein).

While Section 524(g) is specific to asbestos-related claims, Chapter 11 has also been used as a means of addressing non-asbestos mass tort liabilities. Bankruptcy practitioners have traditionally relied upon Sections 105(a) and 1123(b)(6) of the Bankruptcy Code in expanding the channeling trust structure to non-asbestos cases. Section 105(a) of the Bankruptcy Code allows a bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

11 U.S.C. § 105. Section 1123(b) of the Bankruptcy Code lists certain things that a debtor can accomplish through a Chapter 11 plan. The first five subsections of Section 1123(b) concern the rights and responsibilities of the debtor and its relationship to its creditors. Section 1123(b)(6), however, contains a "catch-all" provision which provides that a Chapter 11 plan may "include any other appropriate provision not inconsistent with the applicable provisions of this title."[2] These two sections of the Bankruptcy Code served as a statutory basis for implementing a *Johns-Manville* type trust structure for non-asbestos tort liabilities, including the implementation of non-consensual third-party releases relating to mass tort liabilities. Post-*Johns-Manville*, the Delaware Bankruptcy Court has been a preeminent jurisdiction for both asbestos and non-asbestos-related mass tort bankruptcy cases.

3. Bankruptcy Tools for Dealing with Mass Tort Claims

In addition to the escalation of defense costs, the defense of multiple tort cases in different forums creates a risk of disparate judgements as plaintiffs pursue venues where they are more likely to receive favorable outcomes. The commencement of a bankruptcy case, however, allows a company to funnel all claims, including latent or future claims, into a centralized Chapter 11 proceeding. Moreover, bankruptcy provides a company with not only a forum for dealing with its mass tort liability, but also an avenue for addressing issues with its capital structure resulting from funded and trade debts and other contractual liabilities.

The Bankruptcy Code provides a debtor with various tools for addressing its mass tort liabilities. As soon as the debtor files its bankruptcy petition, the automatic stay afforded under Section 362(a) of the Bankruptcy Code will halt all pending actions and the commencement of future actions against the debtor outside of the bankruptcy court on account of pre-petition claims. A debtor may also seek to extend the automatic stay (by adversary proceeding) to related actions against co-defendants (e.g., directors, officers, affiliates and joint tortfeasors). The automatic stay is thus a fundamental component of the "breathing spell" afforded to debtors throughout the bankruptcy process.

During this "breathing spell," the debtors are afforded an opportunity to negotiate with key constituencies regarding a plan and potential resolution of the Chapter 11 case. An official committee will likely be appointed pursuant to Section 1102 of the Bankruptcy Code to represent tort claimants and/or other general unsecured creditors. To the extent that a debtor seeks to channel future asbestos-related claims to a trust, a future claims representative must also be appointed in accordance with Section 524(g) of the Bankruptcy Code to protect the rights

of future claimants with unmanifested claims. Other key constituents, including secured parties, insurers, non-debtor affiliates and joint tortfeasors, will likewise be separately represented in connection with the Chapter 11 case. Thus, the ability to interact and negotiate with all constituencies in a single forum provides an effective tool for reaching consensus.

In addition to the automatic stay, the Bankruptcy Code provides a debtor with numerous other instruments for resolving mass tort claims. Indeed, consistent with the framework established in *Johns-Manville* (and incorporated into Section 524(g) for asbestos-related liabilities), the treatment of mass tort liabilities is often resolved through the implementation of a channeling injunction that directs all tort claims to a settlement trust. The settlement trust may then be funded with cash, equity interests in the reorganized debtor, insurance proceeds, settlement amounts received from third parties or joint tortfeasors (often contributed in exchange for consensual and non-consensual third-party releases to be provided pursuant to the plan) and other estate assets. As a result of the channeling injunction, the debtor's mass tort liability is effectively capped at the value of the trust assets. The plan structure will typically incorporate trust distribution procedures (TDP) that establish a set of rules by which the settlement trustee may determine the validity and value of tort claims and the path by which claimants can challenge or appeal the trust's determination of their claims. This settlement trust structure has provided companies with an effective bankruptcy option for addressing mass tort liability.

4. *Purdue Pharma* and the Use of Non-Consensual Third-Party Releases

The Supreme Court's decision in *Purdue Pharma* arose in the context of a settlement with the company's long-time owners, the proceeds of which would be used to compensate opioid victims and fund various abatement initiatives. In exchange for the settlement payment, the former owners sought, among other things, non-consensual third-party releases of any current or future opioid-related claims that could be asserted against them.

Basing its decision primarily on its reading of Section 1123(b) of the Bankruptcy Code (identifying things that a Chapter 11 plan "may" do), the Court concluded that a bankruptcy court does not have the power to discharge claims against a non-debtor without the consent of affected non-debtor claimants. Of particular importance in the mass tort context, the Court noted that because the Bankruptcy Code specifically authorizes non-consensual third-party releases in asbestos-related cases, "it is all the more unlikely that § 1123(b)(6) is best read to afford courts that same authority in *every* context."[3] Thus, the breadth of the "catch-all" provision in Section 1123(b)(6) of the Bankruptcy Code did not provide sufficient statutory authority for granting non-consensual third-party releases in non-asbestos related cases.

Prior to the Court's decision in *Purdue Pharma*, a debtor was able to utilize non-consensual third-party releases as an effective tool for addressing the potential liabilities of third parties caused by the debtor's conduct. This often enabled the debtor to secure significant settlements with insurers and joint tortfeasors in exchange for plan releases that would bind potential plaintiffs. Except with respect to asbestos-related cases, a debtor no longer has the ability to offer third-party non-consensual releases (unless Congress acts to amend Section 524(g) of the Bankruptcy Code to extend it to other types of mass tort claims).

The practical implication of the Court's ruling is that tort claimants in non-asbestos cases will have the ability to opt out of bankruptcy third-party releases and future claimants will no longer be bound by such releases. Thus, the inability to provide complete finality to non-debtor affiliates and other potential settling parties with regard to their tort exposure will undoubtedly affect a debtor's leverage in negotiating settlements with such parties.

All is not lost, however, as *Purdue Pharma* did not affect a debtor's ability to effectuate consensual releases for third parties or to release derivative causes of action that are "owned" by the debtor's estate upon the commencement of a bankruptcy case. Courts differ in their views of what constitutes a "consensual release," but generally a claimant is deemed to have consented to a third-party release where it has failed to affirmatively opt out of such release pursuant to court-approved solicitation procedures. The use of an opt-out approach, combined with a broad noticing process, can maximize the scope of any consensual releases received by settling parties.

The Delaware Bankruptcy Court has been at the forefront of addressing the bounds of consensual releases post-*Purdue Pharma*. Moreover, derivative claims "owned" by the estate may include, among other things, fraudulent transfer, successor liability, breach of fiduciary duty, insurance coverage and *alter ego* claims. Additionally, some debtors have effectively used the "buy back" of insurance policies free and clear of any liens, claims and encumbrances under Section 363(f) of the Bankruptcy Code as an effective means of providing relief to settling insurers. This approach was likewise not addressed by the Supreme Court in its decision. Accordingly, a debtor still maintains effective tools for resolving claims in non-asbestos cases even without the ability to utilize non-consensual third-party releases, and the Delaware Bankruptcy Court will undoubtedly continue to be an attractive forum for such cases moving forward. ◆

NOTES

1. Michael J. Merchant is a director of Richards, Layton & Finger in Wilmington, Delaware. The views expressed in this article are those of the author and do not reflect the views of Richards, Layton & Finger or its clients.
2. 11 U.S.C. § 1123(b)(6).
3. *Purdue-Pharma*, 603 U.S. at 222.

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