CHAPTER 11 –THE KEY PLAYERS

Chapter 11 is the part of the U.S. Bankruptcy Code that provides for the reorganization of entities. While individuals may use Chapter 11, in most cases a debtor in Chapter 11 is an entity, such as a corporation, a partnership, or a limited liability corporation.[1] Certain entities, such as banks and insurance companies, may not reorganize under Chapter 11.[2] Because corporations or other companies are most often the debtors in Chapter 11 cases, this summary will refer to the Chapter 11 debtor as a company, and will use examples from the reorganization of a corporation.

While Chapter 11 is commonly referred to as the "reorganization" chapter, it is in fact oftentimes used for a controlled liquidation of a company. In these cases, the assets of the company are sold as a whole, or in parts, but if the sale occurs before a reorganization plan is confirmed, the court must approve the sale as being in the best interests of the debtors' constituents.[3] Sometimes the sale of assets happens at the conclusion of the case,[4] but recently it is increasingly common for all or substantially all of the assets of a debtor to be sold early or at the commencement of the case, if the sale is in the best interests of the Chapter 11 estate.

Key Terms and Structure. Before we describe the players in a typical Chapter 11 case, it is important to explain a few terms that we will use and provide a brief overview of the structure of Chapter 11. One common term is "pre-petition,"[5] which refers to the time before a company becomes a debtor in a Chapter 11 case.[6] A related term is "post-petition," which refers to the time period that the debtor is in Chapter 11. The period after emergence from bankruptcy is "post-emergence," "post-reorganization" or "post-confirmation" (these terms are less commonly used than are the terms "pre-petition" and "post-petition"). Another important term is "debtor:"[7] a debtor is the entity or person that goes into bankruptcy (United States' law used to refer to this entity as a "bankrupt," but now we use a less derogatory term). The debtor generally is in charge of the bankruptcy "estate," the assets that are owned by the debtor. A "reorganization plan" or "plan" is the scheme, virtually

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[1] 11 U.S.C. § 101(41)(definition of "person" includes an individual); 11 U.S.C. §
[2] 11 U.S.C. §§ 109(b); 109(d).
[3] 11 U.S.C. § 363(b).
[4] 11 U.S.C. § 1123(a)(5)(B)(plan may provide for transfer of estate assets).
[5] *Cf*. 11 U.S.C. §101(42)(petition commences case).
[6] Cases can be either voluntary or involuntary. In most circumstances, the Chapter 11 case is voluntary and is commenced automatically when the debtor files a petition for relief. 11 U.S.C. §§ 301(voluntary cases); 303(involuntary cases).
[7] 11 U.S.C. § 101(13)(defining "debtor").

always voted on by affected creditors,[8] that provides for the resolution of the debtor's obligations and its emergence from bankruptcy. As suggested above, this plan can provide for the reorganization or liquidation of the debtor, and describes which creditors receive a distribution and how much they will receive.[9] Finally, another special term in Chapter 11 is "confirmation," which refers to the approval of the reorganization plan by the judge overseeing the Chapter 11 case. In this regard, it is important to understand that it is the creditors, rather than the judge, who initially approve the plan by their votes,[10] which are taken after the creditors receive a disclosure statement describing the reorganization plan, containing the reorganization plan (or, in rare cases, a summary of the plan), and setting forth other information necessary for the creditors to make an informed vote.[11]

After the plan has received the vote necessary for approval,[12] the judge holds a confirmation hearing on notice in which he or she hears the evidence presented by proponents of the plan and any objectors. After hearing the evidence, the judge confirms the plan if it meets the requirements of Chapter 11. Among the most important requirements are (1) the vote of affected creditors approving the plan by more than 2/3 in amount of claims and ½ in number of claims, (2) the requirement that no objecting creditor receive less than it would receive if the debtor were liquidated, (3) the requirement that legitimate expenses incurred by the debtor during the case be paid in full when the plan goes into effect absent consent from an affected creditor, (4) the requirement that the plan be feasible and (5) the requirement that groups of creditors that do not vote for the plan are paid in accordance with the absolute priority rule, which requires secured creditors to be paid before unsecured creditors, and unsecured creditors to be paid before equity.[13]

In addition to the special terminology above, two characteristics of the American judicial system deserve highlighting in order for the discussion below to make sense. First, the American judicial system is a federal system: each of the 50 states have their own courts that have jurisdiction over most matters, including family law, criminal law, tort law, estate law and many commercial law matters. Second, the American judicial system has a federal system of courts, divided into eleven circuits, that hear (1) matters of criminal and non-criminal federal law, and (2) cases involving parties from different states in which the amount in controversy

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[8] 11 U.S.C. §1129(a)(10)(if a class of claims is impaired under a plan, at least one class must have accepted the plan in order for the plan to be confirmed).
[9] 11 U.S.C. § 1123(contents of reorganization plan).
[10] Theoretically, if the rights of no creditor are impacted by the plan, no creditor has to vote on this plan. That is only theoretical, because as a practical matter some creditors must always vote on the plan.
[11] 11 U.S.C. § 1125.
[12] Of course, the parties may dispute whether the plan has received the requisite votes, and may ask the court to determine whether a vote should be disqualified. *See generally* 11 U.S.C. §§ 1126; 1129(a)(7).
[13] 11 U.S.C. § 1129.

is more than $75,000. The bankruptcy courts are part of the federal system, because the United States constitution specifically gives the United States Congress the power to pass laws relating to bankruptcy.[14] Although the bankruptcy courts are part of the federal system, different courts can have a somewhat different interpretation of the federal laws because, most importantly, each of the circuits are not bound by the decisions of the other circuits but rather are only bound by the decisions of the United States Supreme Court, which hears almost all bankruptcy law matters in its discretion. In turn, the district courts and the bankruptcy courts are bound by the decisions of the circuit courts in which they are located.

The Judge. A Chapter 11 case is held before a federal judge, generally a bankruptcy judge.[15] This judge does not control the company directly, but rather decides contested matters or lawsuits related to the Chapter 11 case that are brought to the court by the parties in the case.[16] The bankruptcy judge is appointed for terms of 14 years. Because being a federal judge is extremely prestigious, the position is highly sought after. Accordingly, bankruptcy judges are typically very respected lawyers with considerable experience who are highly regarded for their knowledge and personal characteristics. In many cases, a judge has practiced bankruptcy law for years before being appointed to the position, and accordingly oftentimes has considerable expertise in that specialty.[17] In any event, because bankruptcy judges' cases are limited to bankruptcy cases and related matters, if they are not expert in the specialty at the time they are appointed, they quickly become experts.

In addition to having excellent intellectual and practical backgrounds, bankruptcy judges are also highly regarded for their fairness. It is almost unheard of for anyone to question the impartiality of a bankruptcy judge. In part, this may arise from the fact that the bankruptcy judges themselves are appointed by a panel of imminent judges – judges on the circuit courts of appeal – who are free from political interference because they have lifetime appointments and are well compensated. Moreover, after the panel designates a person to fill the role of bankruptcy judge, that person undergoes a thorough background check by the Federal Bureau of Investigation, the most highly regarded investigatory body in the United States.

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[14] U.S. Const. Art. I, § 8, cl. 4.

[15] 28 U.S.C. § 151. As a technical matter, bankruptcy cases are "referred" by the district court, the general federal trial court, to the bankruptcy court, a specialized court. The law provides that the district court can revoke the reference, either generally or in specific cases. That is extremely rare.

[16] 11 U.S.C. § 105(a) provides that a court may take action *sua sponte* to enforce its orders or rules or "prevent an abuse of process."

[17] For example, the educational and practical backgrounds of judges on the Southern District of New York Bankruptcy Bench can be found on the web site of the Bankruptcy Court for the Southern District of New York at www.nysb.uscourts.gov/judges-info.

There is one other characteristic of the court that bears emphasis: bankruptcy courts are extremely accessible. Given the fact that companies near collapse oftentimes need emergency hearings until the business is stabilized, the availability of the courts has been one key to the success of the system. In turn, the courts are so available because the judges and their clerks have been willing to work long hours to address emergencies if need be. For example, the hearing to approve the sale of a large portion of the assets of Lehman Brothers continued until well past midnight and took place less than a week after the case was filed.[18] Therefore, to conduct the hearing, the court not only had to stay in session until the middle of the night but also had to study and become thoroughly versed in numerous pages of complex documents before the hearing. As another example, in the Chapter 11 case of Refco, Inc., an international conglomerate including commodity brokers, the court began the hearing to sell substantially all its assets late in the day on a Friday in the middle of a holiday weekend (at a time financial markets were closed) because that time worked best given the fact that many of the assets to be transferred were owned by a commodity broker.[19]

The Debtor in Possession. In most Chapter 11 cases, the debtor remains in possession of its assets. In other words, the debtor continues to manage the company for the benefit of its constituents.[20] The term used to express the role of the debtor is "debtor in possession,"[21] or, in shorthand, the "DIP." This is in great contrast to the situation in many countries, in which a trustee, receiver or similar distinct entity takes over the operations of the debtor once it goes into bankruptcy.

The transition from an entity being a pre-petition entity indebted to others, or "debtor," to becoming a "debtor in possession" is seamless. In other words, the minute a voluntary bankruptcy petition is filed, until the moment the reorganization plan becomes effective, the debtor is a "debtor in possession": no special court order is needed. In the less common involuntary case, in which creditors (usually at least three[22]) file an involuntary bankruptcy petition to force the debtor into Chapter 11, the debtor instantly becomes a debtor in possession if the Court signs an order granting the request for an involuntary bankruptcy.[23]

Some theoreticians have suggested that the fact that the debtor's pre-bankruptcy managers can continue to manage the company after bankruptcy is a

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[18] "*Judge: Lehman Bros. Can Sell Units to Barclays*, USA Today, Sept. 22, 2008 (noting sale was approved on a Saturday morning after midnight).
[19] *See generally*, *Refco Timeline*, The Wall Street Journal, Nov. 26, 2005. The Author served as counsel to Refco as debtor-in-possession.
[20] 11 U.S.C. § 1107.
[21] 11 U.S.C. § 1101(1).
[22] 11 U.S.C. § 303(b)(if debtor has 12 or more creditors holding claims not subject to a bona fide dispute, at least 3 creditors must file any involuntary petition).
[23] 11 U.S.C. § 303(h).

factor that has aided the effectiveness of Chapter 11 cases. Because the pre-petition officers and directors continue in their roles (unless they choose voluntarily to resign or are removed from their positions in accordance with non-bankruptcy corporate or other law), officers and directors are more open to filing a Chapter 11 case while the situation might be salvageable: one concern of many experts in the restructuring field is that some companies wait too long to file a Chapter 11 case, until they can no longer be resuscitated.

As much of the world understands, Americans can be rather litigious,[24] and individuals involved with a bankruptcy company are often concerned that they will personally become involved in litigations. However, certain practices have arisen in cases that protect the managers who remain in control of the DIP from frivolous lawsuits arising from their management of the DIP. First, there is case law that holds decisions of the court during the case might preclude post-reorganization suits. Secondly, in some jurisdictions, reorganization plans include what are referred to as "exculpation clauses," that protect key parties in the case from post-confirmation lawsuits arising from their actions during the case so long as the parties did not engage in fraud or willful misconduct. Third, although some courts will not approve such "exculpation clauses," they will approve provisions in the reorganization plan that funnel post-confirmation cases to the bankruptcy judge who oversaw the case, thus tending to protect management against frivolous lawsuits.[25] Moreover, the Bankruptcy Code specifically protects entities that solicit votes on plans in good faith from specific liabilities.[26]

The Trustee. In most Chapter 11 cases, there is no case trustee managing the estate. Rather, a trustee may be appointed only for cause – including fraud, defalcation, or other wrongdoing – on motion of an interested party or an arm of the United States Department of Justice, part of our executive branch.[27] The bankruptcy judge decides whether to appoint a trustee after a trial. Although the grounds for appointing a trustee were broadened in amendments to the Bankruptcy Code that went into effect in 2005, courts continue to be reluctant to appoint trustees except in the most extreme cases. The courts are reluctant even though the party seeking the appointment of a trustee is very often a representative of the executive branch of government, which is called, just to make things somewhat confusing, the Office of the United States Trustee.[28]

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[24] Eric Bennet Rasmusen and J. Mark Ramseyer, *Are Americans More Litigious? Some Quantitative Evidence;* January 8, 2010, available at papers.SSRN.com/So3/papers.cfmFabstract_id+1907203.
[25] *See Generally*, Sally McDonald Henry and Robert L. Ordin, "*Chapter 18, Plan Releases*," in *Ordin on Contesting Confirmation,* (Wolters Kluwer Law & Business 2013).
[26] 11 U.S.C. § 1125(e).
[27] 11 U.S.C. 1104(a)(standing to move for appointment of trustee and grounds for appointment of a trustee).
[28] 11 U.S.C. § 307(powers of the United States Trustee).

In the rare cases in which a trustee is appointed, the trustee steps into the shoes of the governance of the entity in Chapter 11 and has all the powers of that entity.[29] Thus, for example, a trustee is, in essence, the board of directors of a corporation of which he or she is the trustee. As such, the trustee may wield all the powers of the corporation (subject to court approval, in the case of actions outside the ordinary course of business). Indeed, the trustee may even exercise powers that may seem somewhat personal, such as waive the attorney-client privilege for a company in Chapter 11. Equally important, the trustee can negotiate and file a reorganization plan on behalf of the debtor, which is the key role the DIP plays in a Chapter 11 case.

<u>The Examiner</u>. As noted above, trustees are rarely appointed in large Chapter 11 cases. It is much more common to have an examiner in a large case; indeed, the Bankruptcy Code requires that an examiner be appointed in large cases where one is requested.[30] Despite general language in the Code providing for the duties of an examiner, [31] courts typically exercise considerable oversight with respect to their duties: the examiner may undertake a tailored investigation, limited by the order under which he is appointed, he may have a limited budget, and, in any event, he is well aware that his fees must be approved by the Court, and thus he has to exercise careful judgment in undertaking his duties.

While in some cases the courts limit the duties of an examiner, in other cases the courts give the examiners a broad mandate. In some cases in which it may have appeared initially that a trustee is appropriate, the Court may instead appoint an examiner with expanded powers, keeping the officers and directors in charge a running the company. Such was the case in the Chapter 11 reorganization of A.H. Robins, Inc., in which the DIP contested allegations that it has misused its assets to favor certain creditors over others. There, the debtor had manufactured a medical

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[29] Before a trustee is appointed, a DIP has usually has the exclusive right to file a reorganization plan for up to 18 months; the case trustee does not have the exclusive right to propose a plan but rather the appointment of a trustee allows for the filing a plan by any interested party. 11 U.S.C. § 1121.

[30] 11 U.S.C. § 1104(c)(grounds for appointment of examiner; examiner may only be appointed if trustee has not been appointed). Although the plain language of the Bankruptcy Code appears to require the appointment of an examiner in all cases with fixed, liquidated, unsecured debts greater than $5,000,000, courts are not unanimous in reading the language of the Code to give the court no discretion. See generally Jonathan C. Lipson and Peter J. Liacouras, *Understanding Failure: Examiners and the Bankruptcy Reorganization of Large Public Companies*, 84 Am. Bankr. L.J. 1 (2010)

[31] 11 U.S.C. § 1104(c)("examiner may "conduct such examination of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor…").

device that had given rise to innumerable personal injury claims and had led to juries awarding multi-million dollar judgments. Despite the allegations of wrong-doing and the urging of the Department of Justice, the judge in that case declined to appoint a trustee, but rather appointed a former bankruptcy judge to serve as an examiner with a broad mandate. The case concluded with all creditors receiving full payment and equity obtaining a large distribution.

The appointment of an examiner with broad powers reflects the flexible solutions the Court and the parties often craft to deal with challenges. Sometimes the appointment of a trustee runs the risk of derailing on-going plan negotiations or putting a person without appropriate business background in charge of a shaky business. Accordingly, courts have come up with other ways to address some of the problems a trustee would address, without imposing the possible detriments of a trustee on the estate. This flexibility is consistent with the approach of the Bankruptcy Code to restructuring matters: indeed, the Bankruptcy Code specifically provides that "the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[32]

Chief Restructuring Officer. Although the Code nowhere designates the role of "Chief Restructuring Officer," (oftentimes referred to as a "CRO"), that role has been created by the parties and blessed by the Court to address situations when the Court or parties-in-interest are comfortable with more day-to-day oversight of the operations of the debtor than would be available from an examiner but do not want to impose a trustee on the company, totally replacing its governance. Such was the case in Refco, mentioned above, where the Office of the United States Trustee had moved for the appointment of a case trustee. There, the court denied that motion, after trial, despite the fact that there was a general belief that a principal of the debtor had engaged in pre-petition wrongdoing. Similarly, given the great complexity of the situation in the Lehman Brothers cases, the court in that case appointed a Chief Restructuring Officer, who was extremely important to the success of the case.

Typically, the CRO is a person who has a financial background, although that is not necessarily a requirement for the position: all the Bankruptcy Code states is that the estate may retain "professionals."[33] In any event, although the percentage of cases in which CROs are appointed is small, they play a critical role in contentious

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[32] 11 U.S.C. § 105(a). That section also provides that "[n]o provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process."

[33] 11 U.S.C. § 327(a)(the trustee or the debtor-in-possession "with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate. . .).

or potentially scandalous cases, by giving both the court and the interested parties comfort that an objective expert is at the helm.

The Office of the United States Trustee. The Office of the United States Trustee is an arm of the Department of Justice, which is part of the Executive Branch of the United States, under the indirect control of the President of the United States. Various districts have a United States Trustee who hires a staff of Assistant United States Trustees, typically lawyers with experience in the bankruptcy arena. The role the United States Trustee plays in Chapter 11 cases varies, although in all large cases they play a critical role because they appoint the Creditors' Committee,[34] described below. In addition, it is not unusual for the Office of the United States Trustee to move for the appointment of a case trustee in appropriate cases (although, as discussed above, the court may decide not to appoint a trustee). Moreover, the Office of the United States Trustee oftentimes examines requests for the allowance of fees and participates actively in the appointment of professionals retained by the estate, to ensure that those professionals are disinterested.

Committees. The Bankruptcy Code provides that a committee of unsecured creditors may be appointed in all Chapter 11 cases, and typically should consist of seven creditors representing diverse constituencies. These committees are routine in large cases. The Office of the United States Trustee appoints the members of the Creditors' Committee, and generally tries to select creditors with different interests, being sure to include creditors of the type with the most at stake.[35] Thus, for example, the committee may include an unpaid landlord, an unpaid vendor, an unpaid employee, and representatives of different tranches of unsecured debt, such as indenture trustees or large note holders. Although service on the committee involves a significant devotion of time, in large cases it is common for there to be a number of creditors vying for a position on the committee, because this committee plays a crucial role in crafting the Chapter 11 plan, even when it is, as a formal matter, the plan is proposed by the debtor. This is because the essence of Chapter 11 is negotiation, and plans that are not supported by the Creditors' Committee are rarely confirmed.

In addition to the general Creditors' Committee, a case might have other official or unofficial committees of creditors. For example, in the case of Winn-Dixie Stores, Inc.,[36] which was one of the largest supermarket chains in the United States

[34] 11 U.S.C. § 1102(a)(1)("the United States Trustee shall appoint a committee of creditors holding unsecured claims…").
[35] 11 U.S.C. §1102(b)(1) provides that "[a} committee appointed under subsection(a) of this section shall ordinarily consist of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on such committee, or if the members of a committee organized by creditors before the commencement of the case under this chapter, if such committee was fairly chosen and is representative of the different kinds of claims to be represented."
[36] The author served as counsel to the debtor in its reorganization case.

at the time it filed its Chapter 11 case, there was an unofficial landlords' committee, a vendors' committee, and a retired employees committee.[37] Sometimes these committees are appointed at the outset of the case; sometimes they are formed when tough issues arise relating to that specific group of creditors. By forming the committees, the debtor and other groups of creditors have someone with whom to negotiate whose knowledge and role will help convince other similarly situated creditors to agree to a negotiated resolution.

Finally, the Court may approve the appointment of a committee of equity holders in appropriate cases.[38] These committees are much less common than are creditors' committees, because they are generally appointed only if it appears there will be a return to equity. Sometimes representatives of equity holders try to convince the court that a return to equity is possible, but they oftentimes fail in this attempt. That was the case, for example, in both the Winn-Dixie and Refco Chapter 11 cases mentioned above.

The Role of and Protections for Committees. As mentioned above, Americans are believed to be litigious. Why, then, would individuals volunteer to serve on creditors' committees and make themselves potentially targets for litigation?

Self-interest. The key reason entities seek to serve on creditors' committees is enlightened self-interest. Although creditors' committees have a duty to keep creditors who do not belong to the creditors' committee informed, [39] in fact Chapter 11 cases are extremely complex, and usually by the time non-committee members receive detailed information – in the form of a court-approved disclosure statement – the reorganization plan has already been negotiated between the committee and the debtor or Chapter 11 trustee. Indeed, it is a rare reorganization plan that is sent out for a vote that does not have the support of the creditors' committee, because a confirmation battle with a committee is so very time-consuming, expensive, and potentially uncertain in outcome.

The Debtor Pays the Committees' Professionals. A major incentive for entities to join creditors' committees is that the estate – that is the debtor – pays the costs of attorneys, accountants, and other advisors for the official committee.[40] In complex cases, these costs can be high, and it is a great benefit to the creditors who

[37] *In re Winn-Dixie Stores, Inc.*, 356 B.R. 239 (M.D. Fla. 2006).
[38] 11 U.S.C. § 1102(2)("[o]n request of a party in interest, the court may order the appointment of additional committees of creditors or of equity security holders if necessary to assure adequate representation of creditors or of equity security holders. The United States Trustee shall appoint any such committee").
[39] 11 U.S.C. § 1103(b)(3).
[40] 11 U.S.C. § 1103(a)(providing for the committee selection of its advisors); 11 U.S.C. § 330(a)(providing for the court to order compensation from the estate of the debtor for advisors to the committee and other estate professionals).

participate in a committee to have the group's professional fees paid from the estate. Indeed, a reorganization plan may not be confirmed unless these fees are paid on the plan's effective date[41] or when they are determined, unless otherwise agreed to by the parties.

The foregoing paragraph describes the payment of professionals retained by the official committee of creditors (or other official committees). The Bankruptcy Code also provides that the expenses of individual members of the committee may be paid by an estate.[42] Note that while the *expenses* of individual members may be paid, the individual (as opposed to group) *professional fees* of committee members are not specifically provided for in the Bankruptcy Code; indeed, although the Code used to provide for the allowance of such fees, that is no longer the case. Nevertheless, in extraordinary situations, the courts have allowed for the professional expenses of individual committee members to be paid if the committee members made a substantial contribution to the Chapter 11 case.[43]

But there are still more fees to be paid: the expenses of an indenture trustee and its counsel may be paid when the trustee has made a substantial contribution to the case. Indeed, it is common for indenture trustees to serve on creditors' committees.

The Bankruptcy Code Limits the Liability of Committee Members. As noted, Americans have been accused of being rather litigious, and it would make sense for committee members to fear liability for their actions as members if they were not somehow shielded from litigation. In fact, however, several important courts have interpreted section 1103(c) of the Bankruptcy Code to shield creditors' committee members and their advisors from all but gross negligence or wrongful misconduct.[44] While all the circuit courts of appeal have not yet explicitly adopted

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[41] 11 U.S.C. § 1129(a)(9).

[42] 11 U.S.C. § 503(b)(3)(F)("the actual, necessary expenses . . .[of] a member of a committee appointment under section 1102 of this title if such expenses are incurred in the performance of the duties of such committee" may be allowed as expenses of administration and must be paid to confirm a plan if so allowed).

[43] See, e.g., *Davis v. Elliot Mgmt. Corp. (In re Lehman Bros. Holdings, Inc.*), 2014 U.S. Dist. LEXIS 48102 (S.D.N.Y. March 31, 2014)(remanding to Bankruptcy Court for a determination of whether individual members' counsel fees met the factual test for allowance as having made a substantial contribution to the estate); *see generally, In re Adelphia Commc'ns Corp*., 441 B.R. 6 (Bankr. S.D.N.Y. 2010)(allowing counsel fees for ad hoc (unofficial) committees that made a substantial contribution to the reorganization effort).

[44] *In re PWS Holding Corp.*, 228 F.3d 224, 245 (3d Cir. 2000)(approving plan that contained provision based on theory that 11 U.S.C. § 1103(c) limited liability of committee members under Bankruptcy Code); *see also Bank of New York Trust Co. v Official Unsecured Creditors' Committee (In re Pacific Lumber Co.)*, 583 F.3d 229 (5th Cir. 2009)(11 U.S.C. § 1103(c) limits liability of committee members); *see also In re*

the rule, the fact that two prominent appellate courts have done so has given many potential creditors' committee members comfort and encouraged them to volunteer for committee work.

Principles of Res Judicata Protect Committee Members. In a number of different contexts, courts have held that previous actions in court have shielded committee members – or other participants in a Chapter 11 case – from subsequent lawsuits relating to the case. The United States system believes in carious legal doctrines – such as res judicata and judicial estoppel, that make it extremely difficult for post-confirmation suits to be brought against any of the estate fiduciaries or professionals. Thus, for example, courts have held that the allowance of fees to professionals cuts off later lawsuits with respect to the services for which the professionals were paid; after all, the fees could not have been awarded if the work had not been done correctly.[45]

In addition, the Bankruptcy Code provides that a reorganization plan may retain causes of action of the estate to be prosecuted post-confirmation.[46] However, many courts have held that these causes of action must be very specifically retained and disclosed; otherwise, they are waived.[47] Because these causes of action must be disclosed in the plan and described in the disclosure statement (if not sufficiently described in the plan), a committee will likely oppose a plan that retains any causes of action against it. Moreover, in connection with the confirmation proceedings, individual causes of action against individual creditors – including committee members – may be waived to gain the consensus necessary to confirm a reorganization plan.

L.F. Rothschild Holdings, Inc., 163 B.R. 549 (Bankr. S.D.N.Y. 1994); *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 717, 722 (Bankr. S.D.N.Y 1992).

[45] *See, e.g., Frazin v. Haynes & Boone, L.L.P. (In re Frazin)*, 732 F.3d 313 (5th Cir. 2013)(in light of determination of counsel's fees, malpractice claim was barred under the theory of res judicata; however, Texas Deceptive Trade Practices Act claims were not barred); *Osherow v. Ernst & Young, L.L.P.* (*In re Intelogic Trace, Inc.*), 200 F.3d 382, 387 (5th Cir 2000)(after professional's fees were allowed by the bankruptcy court, malpractice claim could not be maintained; "an award of fees for professionals. . . employed by the bankruptcy estate represents a determination of 'the nature, extent, and the value of the services'" and thus is res judicata with respect to subsequent malpractice actions").

[46] 11 U.S.C. § 1123(b)(3)(B) provides that the plan may provide for "the retention and enforcement by the debtor, by the trustee or by a representative of the estate appointed for such purpose, of any such claim or interest [belonging to the debtor or the estate]."

[47] *See. e.g.*, *In re MPF Holdings US*, 701 F.3d 449 (5th Cir. 2012)(standing to assert post-confirmation avoidance actions requires disclosure that the claims "may exist," although the plan need not specifically and unequivocally" identify defendants and claims).

Exculpation and Retention of Jurisdiction. Because reorganization plans are negotiated, they oftentimes provide for other protections for fiduciaries and professionals from post-confirmation lawsuits. The most common of these provisions is the so-called "exculpation clause." This is a provision in a plan that basically releases the committee and the debtor, other fiduciaries and their professionals from any liability for actions taken in connection with the case post-confirmation. The exculpation clause may bar the entire world from bringing claims, or it may only bar creditors who affirmatively agree to the clause by voting for the plan.[48]

These exculpation clauses are arguably the release of non-debtors, which is prohibited in some circuits, such as the Ninth Circuit Court of Appeal.[49] Moreover, other circuits have indicated that courts should be very reluctant to approve reorganization plans that contain third-party releases. For that reason, although these provisions were very popular at one time, some courts now refuse to confirm reorganization plans that contain such provisions and rather enter an order in connection with the conformation of the plan requiring that any plaintiffs obtain leave of court to commence an action against the former committee member, fiduciary, or a professional.[50] Nevertheless, a great many courts continue to confirm plans with broad exculpation clauses.[51]

Professionals. But we are not finished in introducing the various players in the confirmation drama, because the most visible players in a Chapter 11 case are oftentimes the professionals retained by the estate and the committees. In large cases, this includes lawyers, financial advisors, investment bankers, and accountants. Of course, given the complexity of the cases, it is not uncommon for

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[48] Of course the logic that a creditor who votes for a reorganization plan – which could be his only realistic way of getting paid – thereby affirmatively agrees to the exculpation of fiduciaries and their counsel from liability is open to question.

[49] Numerous courts hold that non-voluntary third-party releases are never allowable in a reorganization plan. *See, e.g., Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss)*, 67 B.R. F.3d 1394, 1401 (9th Cir. 1995)(Bankruptcy Code § 524(e) prohibits third-party releases). *See also Bank of N.Y. Trust Co v. Official Unsecured Creditors' Committee (In re Pacific Lumber Co.)*, 584 F.3d 229, 252-253 (5th Cir. 2009)(noting hostility in Fifth Circuit cases to third-party releases and refusing to approve broad exculpation clause).

[50] *See, e.g., In re Motors Liquidation Co*., 447 B.R. 198 (Bankr. S.D.N.Y. 2011)(exculpation clause had to be removed from plan because it failed the tests for the approval of third-party releases in the circuit); *In re Bigler, L.P.*, 442 B.R. 537 (Bankr. S.D. Tex. 2010)(release of committee for gross negligence and actions outside the scope of committee members' duties could not be approved in the Fifth Circuit).

[51] *See. e.g., In re Winn-Dixie Stores, Inc.*, 356 B.R. 239, 260-261 (Bankr. M.D. Fla. 2006)(confirming plan with broad exculpation clause for wide range of professionals and committee members with no carve out for bad faith).

the fees to amount to tens of millions of dollars – or even more –before the case is concluded. The debtor is generally responsible for paying all of these fees. In addition to paying all of these fees, a debtor may be obligated to pay the fees of professionals of its secured lenders (in accordance with agreements approved by the court or pre-petition agreements) and the fees of indenture trustees (which will have been provided for in pre-petition documents, which typically provide that unpaid fees to indenture trustees come out of any distribution to the debt holders they represent).

Generally, these professionals specialize in restructuring and bankruptcy. It is a rare large case in which the lawyers and financial advisors are not led by professionals with years of experience in complex restructurings. Moreover, it is common for the adversaries to have met time and time again on the other side of the negotiating table or the courtroom. Although a few critics have complained that the professionals are too familiar with each other, many observers note that the parties seem to be vigorous in their representation of the clients. What is perhaps less common in the bankruptcy arena than in other fields, however, is a lack of professional courtesy or sharp practice that borders on raising ethical issues; the professionals know that they will meet again and memories are long. They also know that they likely will appear before the same judge again, and they have to retain their credibility for the duration of the case at issue and the many cases in the future in which they will appear before that judge. At the same time, in many cases the clients will appear again and again,[52] and thus it is absolutely critical that a professional retain a reputation for fighting smart and hard for her client.

Other Parties. While the entities and professionals listed above are usually the most active in any case, other parties may, and usually do, participate in all cases. Under the Bankruptcy Code, the Securities and Exchange Commission can participate in a case, for example.[53] In addition, all creditors may raise and appear on any issue. In particular, secured creditors tend to play a key role in reorganizations because oftentimes they lend the debtor working capital that is oftentimes critical to any reorganization. Moreover, because the sale of assets or of the business is common in Chapter 11 cases, prospective purchasers and their counsel are oftentimes active in a case, although they have far less leeway to participate than the creditors and equity holders have.

Conclusion. Practitioners often believe that it is the combination of the wide dissemination of information and the spirited participation and negotiation of many

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[52] Hopefully, the debtor will not appear again, although there have been some repeat cases (called colloquially "Chapter 22s") and even some debtors who have filed for Chapter 11 three times (the rare "Chapter 33s"). Nevertheless, it is common for creditors to become "regulars" in cases, because the trading of debt in distressed companies is a specialized business, and thus an individual debt holder could reappear in a number of cases.

[53] 11 U.S.C. § 1109(discussing standing and party-in-interest status).

constituents in the United States Chapter 11 process that has led to the perception that the process can save businesses and jobs. Of course, the process is expensive and time-consuming. That being said, it is a rare large Chapter 11 case in which the parties eventually do not negotiate many contested issues that could derail a reorganization. The fact that parties believe their hard-fought negotiations will eventually lead to universal peace and a new beginning – or a rational liquidation – encourages participation, which may, in turn, help the process to succeed in many cases. The number of United States' companies that have successfully reorganized or sold their assets in Chapter 11 – including American Airlines, Kmart, Bloomingdales, Chrysler, Winn-Dixie, Continental Airlines, Macy's, General Motors, US Air, and many others – may be some evidence of the importance of encouraging negotiations and protecting the parties who participate in good faith in the demanding negotiations.

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