

**STATEMENT OF**  
**STEPHEN E. HESSLER**  
**PARTNER, SIDLEY AUSTIN LLP**  
**BEFORE**  
**THE COMMITTEE ON THE JUDICIARY**  
**THE UNITED STATES SENATE**  
**SEPTEMBER 19, 2023**  
**HEARING ON**  
**EVADING ACCOUNTABILITY: CORPORATE MANIPULATION OF**  
**CHAPTER 11 BANKRUPTCY**

## **Introduction**

### **I. Enforcing Accountability—Congress**

#### **A. Debtor Obligations**

##### **1. Disclosure/Transparency**

- (a) Corporate Ownership Statement*
- (b) Lists of Creditors and Equity Holders*
- (c) Schedules and SOFAs*
- (d) Section 341 Meeting*
- (e) MORs*
- (f) Disclosure Statement*

##### **2. Bankruptcy Court Oversight**

- (a) “Good Faith”*
- (b) Notice/Objection/Approval*

#### **B. Stakeholder Rights**

##### **1. Procedural Protections**

- (a) Standing*
- (b) Discovery*
- (c) Lift Automatic Stay*
- (d) Trustee or Examiner*

##### **2. Substantive Protections**

- (a) Claims Process*
- (b) Avoidance Actions*

### **II. Enforcing Accountability—Bankruptcy Court Judges**

#### **A. Background**

#### **B. Proper Context**

## **Conclusion**

## **Introduction**

Mr. Chairman and members of the Committee, thank you for inviting me to testify at today's hearing. My name is Steve Hessler, and I am a partner at Sidley Austin LLP, and the head of our firm's restructuring group. In my career, I have primarily represented major corporations as company counsel in insolvency matters, though my practice also has included representing creditors, equity holders, investors, and other third parties in a wide variety of highly complex distressed situations. I have served clients from a range of industries, including telecommunications, energy, financial services, travel, gaming, hospitality, manufacturing, and real estate—and these cases have included some of the largest and most challenging chapter 11 reorganizations in history.

I have written and presented on several insolvency topics,<sup>1</sup> and this fall I will co-teach a course on corporate governance at the University of Chicago Booth School of Business. For many years I co-taught a class on distressed investing to law and business school students at the University of Pennsylvania, most recently as an Adjunct Full Professor of Finance at the Wharton School. I also co-founded the University of Pennsylvania Institute for Restructuring Studies, a multidisciplinary think tank focused on corporate insolvency issues.

From 2012-14, I was the co-chair of the Advisory Board on Administrative Claims, Critical Vendors, and Other Pressures on Liquidity for the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11. I also have served on the Local Bankruptcy Rules Committee for the Southern District of New York and the New York City Bar Bankruptcy & Corporate Reorganization Committee.

---

<sup>1</sup> See [www.sidley.com/en/people/h/hessler-stephen-e#insights](http://www.sidley.com/en/people/h/hessler-stephen-e#insights).

Lastly, I have previously testified before the Senate and House Judiciary Committees, most recently in November 2018,<sup>2</sup> in support of legislation to add a proposed chapter 14 to the Bankruptcy Code, to provide for the more effective restructuring of a failing systemically important financial institution (than is otherwise available under chapter 11 or title II of the Dodd-Frank Act).<sup>3</sup>

As before, please note the views expressed in my testimony, written and oral, are solely my own, and are not offered on behalf of my firm, any client, or other organization.

The title of today’s hearing indicates meaningful criticism (or at least skepticism) of certain facets of present bankruptcy practice. I believe much of that negative narrative, even if well-intended, rests on an incomplete understanding of the actual text, design, and application of the Bankruptcy Code—and/or it is misdirected.

---

<sup>2</sup> My prior testimonies are:

*Big Bank Bankruptcy: 10 Years After Lehman Brothers: Hearing Before the Comm. on the Judiciary*, 115th Cong. (2018) (statement of Stephen E. Hessler, Partner, Kirkland & Ellis LLP), available at <https://www.judiciary.senate.gov/imo/media/doc/Hessler%20Testimony.pdf>;

*The “Financial Institution Bankruptcy Act of 2017”*: *Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 115th Cong. 12 (2017) (statement of Stephen E. Hessler, Partner, Kirkland & Ellis LLP), available at <https://judiciary.house.gov/wp-content/uploads/2017/03/Hessler-Testimony.pdf>;

*The “Financial Institution Bankruptcy Act of 2015”*: *Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. 61 (2015) (statement of Stephen E. Hessler, Partner, Kirkland & Ellis LLP), available at <https://judiciary.house.gov/sites/evo-subsites/judiciary.house.gov/files/2016-02/Hessler-Testimony-1.pdf>; and

*The “Financial Institution Bankruptcy Act of 2014”*: *Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. 60 (2014) (statement of Stephen E. Hessler, Partner, Kirkland & Ellis LLP), available at <https://judiciary.house.gov/sites/evo-subsites/judiciary.house.gov/files/2016-02/Hessler-Testimony.pdf>.

<sup>3</sup> Although not (yet) adopted by the Senate, predecessor legislation to Chapter 14 was passed by the House Judiciary Committee in September 2014, March 2016, and April 2017—and passed by the full House in December 2014, April 2016, and April 2017.

I therefore also believe the Committee’s emphasis on accountability is entirely appropriate. As with any detailed body of law—featuring hundreds of pages of statutory language, informed by decades of practice norms and voluminous precedent—the Bankruptcy Code of course always may benefit from continual reform. But Congress deliberately designed the Bankruptcy Code and Bankruptcy Rules to require monumental accountability by corporate debtors, and those protective mechanisms demonstrably are being enforced by Bankruptcy Courts.

Accordingly, my testimony is organized as follows. Part I will summarize some of the litany of provisions Congress has included in the Bankruptcy Code and Bankruptcy Rules to ensure maximal transparency and compliance by corporate debtors and to provide stakeholders with robust rights to defend their interests against any attempts to circumvent these Congressional imperatives. Part II will then explore the critical role of Bankruptcy Court Judges in safeguarding the proper functioning of corporate bankruptcies.

## **I. Enforcing Accountability—Congress**

The Constitution provides “Congress shall have Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.”<sup>4</sup> Congress exercised that power in enacting the Bankruptcy Code in 1978 (and various amendments in the years since),<sup>5</sup> as implemented via the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), adopted in 1983 (and also amended routinely).<sup>6</sup>

---

<sup>4</sup> U.S. Const. art. I, § 8.

<sup>5</sup> 11 U.S.C. §101 et. seq.

<sup>6</sup> 11 U.S.C. App. §1001 et. seq.

The dictionary defines “accountability,” for an organization, as being “required to justify [its] actions [or] decisions.”<sup>7</sup> To that end, the Bankruptcy Code and Bankruptcy Rules are replete with provisions by which Congress directly and thoroughly requires chapter 11 debtors to justify their actions and decisions—all subject to Bankruptcy Court approval *and* subject to an array of powerful rights expressly granted to stakeholders to protect and pursue their interests in and claims against debtor corporations. The following is merely a sampling of these extensive safeguards, but even this snapshot illustrates that any assertion that corporations may “manipulate” chapter 11 to “evade accountability” is belied by the Congressional prerogatives already embedded in the Bankruptcy Code and Bankruptcy Rules.

**A. Debtor Obligations**

**1. Disclosure/Transparency**

Upon filing for chapter 11 protection, a debtor corporation is immediately, repeatedly, and consistently subject to disclosure requirements that vastly exceed those imposed upon public companies not in bankruptcy (and otherwise governed by Securities and Exchange Commission rules and regulations). Congress plainly intended these transparency mechanisms to advance the due process rights of a debtor and every constituency impacted by its bankruptcy—with severe consequences imposed upon the debtor if it fails to satisfy its obligations.

---

<sup>7</sup> *Accountable*, OED.com, [https://www.oed.com/dictionary/accountable\\_adj?tab=meaning\\_and\\_use#36720555](https://www.oed.com/dictionary/accountable_adj?tab=meaning_and_use#36720555) (last visited Sept. 17, 2023).

(a) *Corporate Ownership Statement*

In conjunction with commencing a case, a debtor “shall file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.”<sup>8</sup>

Further, “[t]he debtor shall file a supplemental statement promptly upon any change in circumstances that renders the corporate ownership statement inaccurate.”<sup>9</sup>

(b) *Lists of Creditors and Equity Holders*

A debtor must file lists of its creditors<sup>10</sup>—including specifically the name, address, and legal nature and amount of the claims of its largest unsecured creditors (which would include litigation claimants)<sup>11</sup>—and its equity security holders.<sup>12</sup>

If a debtor fails to disclose this information, the Bankruptcy Court may convert the chapter 11 reorganization case to a chapter 7 liquidation or dismiss it entirely.<sup>13</sup>

(c) *Schedules and SOFAs*

A debtor also must file promptly comprehensive schedules of its assets and liabilities, and its current income and expenditures, as well as statements of its financial affairs (SOFAs).<sup>14</sup> A debtor is further required to provide notice to affected parties if it

---

<sup>8</sup> Fed. R. Bankr. P. 7007.1, 1007(a)(1).

<sup>9</sup> *Id.* at 1007(a)(1).

<sup>10</sup> 11 U.S.C. § 521(a)(1).

<sup>11</sup> Fed R. Bankr. P. 1007(d); Official Form No. B 204.

<sup>12</sup> Fed R. Bankr. P. 1007(a)(3).

<sup>13</sup> 11 U.S.C. § 1112(e); Fed. R. Bankr. P. 1017(a).

<sup>14</sup> 11 U.S.C. § 521(a)(1)(B); Fed. R. Bankr. P. 1007(b).

amends these filings, and parties in interest can move to compel the debtor to make amendments.<sup>15</sup>

On this front as well, if a chapter 11 debtor fails to disclose this information, the Bankruptcy Court may convert the case to a chapter 7 liquidation or dismiss it entirely.<sup>16</sup>

*(d) Section 341 Meeting*

Within 21 to 40 days after a debtor commences a chapter 11 case, Section 341 of the Bankruptcy Code directs the United States Trustee’s Office—Department of Justice bankruptcy lawyers with the broad mandate to advance the public interest<sup>17</sup>—to preside at a meeting of creditors and examine a representative of the debtor, with testimony under oath and recorded verbatim electronically, about the financial information in the schedules and SOFAs, with the transcript made publicly available.<sup>18</sup>

Here also, if a chapter 11 debtor fails to fulfill its obligations under Section 341, the Bankruptcy Court may convert the case to a chapter 7 liquidation or dismiss it.<sup>19</sup>

*(e) MORs*

Chapter 11 debtors must file Monthly Operating Reports (MORs)<sup>20</sup> “so as to facilitate compilation of data and maximum possible access of the public, both by physical

---

<sup>15</sup> Fed. R. Bankr. P. 1007(h).

<sup>16</sup> See note 13 *supra*.

<sup>17</sup> 11 U.S.C. § 307; 28 U.S.C. §§ 581-586.

<sup>18</sup> 11 U.S.C. § 341(a); Fed. R. Bankr. P. 2003; see also, e.g., U.S. Dep’t of Justice Office of the U.S. Trustee for Region 2, Operating Guidelines and Reporting Requirements for Chapter 11 Debtors and Trustee, U.S. (revised March 1, 2023), at 2, [https://www.justice.gov/ust-regions-r02/file/region\\_2\\_operating\\_guidelines.pdf/download](https://www.justice.gov/ust-regions-r02/file/region_2_operating_guidelines.pdf/download).

<sup>19</sup> 11 U.S.C. § 1112(b)(4)(G).

<sup>20</sup> 28 C.F.R. § 58.8; 11 U.S.C. §§ 1106(a)(1), 1107(a).



inspection at one or more central filing locations, and by electronic access through the Internet or other appropriate media.”<sup>21</sup> To that end, “[t]he information required to be filed in the [MORs] . . . shall be that which is in the best interests of debtors and creditors, and in the public interest in reasonable and adequate information to evaluate the efficiency and practicality of the Federal bankruptcy system.”<sup>22</sup>

Failure by a debtor to file its MORs on time and with requisite information is remediable by conversion or dismissal of its chapter 11 case.<sup>23</sup>

*(f) Disclosure Statement*

A debtor may not solicit votes on a chapter 11 plan of reorganization, the key prerequisite to finishing bankruptcy successfully, until the debtor has transmitted to holders of claims and interests a “written disclosure statement approved, after notice and a hearing, by the court as containing adequate information,”<sup>24</sup> which means “information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor’s books and records . . . to make an informed judgement about the plan.”<sup>25</sup>

2. Bankruptcy Court Oversight

Stated generally, filing for chapter 11 protection means a corporation affirmatively places itself under federal court supervision. The Bankruptcy Court must authorize not

---

<sup>21</sup> 28 U.S.C. § 589b(b).

<sup>22</sup> *Id.* § 589b(c).

<sup>23</sup> 11 U.S.C. § 1112(b)(4)(F), (H).

<sup>24</sup> *Id.* § 1125(b).

<sup>25</sup> *Id.* § 1125(a)(1).

only a debtor’s entry into and exit from chapter 11, but also *every* action of substantive import proposed to be taken by the company—at all times subject to notice to (and an opportunity to object for) all parties in interest. The upshot of this dynamic of omnipresent Bankruptcy Court oversight is the opposite of “evading accountability”—a chapter 11 filing actually gives a debtor’s stakeholders *more* influence in the company’s affairs than they would have outside of bankruptcy.

(a) “*Good Faith*”

Although the term is not defined in the Bankruptcy Code, the conceptual requirement that a corporation must use bankruptcy in “good faith” pervades chapter 11.

Again, Congress drafted chapter 11 for the express purpose of facilitating the *reorganization* of debtors,<sup>26</sup> as distinct from chapter 7, which Congress drafted for the express purpose of facilitating the *liquidation* of debtors.<sup>27</sup> Section 1112 of the Bankruptcy Code provides:

[o]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter [11] to a case under chapter 7 or dismiss a case under this chapter [11], *whichever is in the best interests of creditors and the estate*, for cause . . . .<sup>28</sup>

Section 1112 also specifies more than a dozen instances of what suffices as “cause” to justify conversion or dismissal, including such catchall categories as “the absence of a reasonable likelihood of rehabilitation” or “gross mismanagement of the estate.”<sup>29</sup>

---

<sup>26</sup> See generally 11 U.S.C. §§ 1101-1195.

<sup>27</sup> *Id.* §§ 701-784.

<sup>28</sup> *Id.* § 1112(b)(1) (emphasis added).

<sup>29</sup> *Id.* § 1112(4)(A), (B).

Importantly, Bankruptcy Courts have also found that filing (or prosecuting) a chapter 11 case in “bad faith” also may be “cause” for conversion or dismissal.<sup>30</sup> And the Bankruptcy Code explicitly requires that the Court “shall confirm a [chapter 11 plan of reorganization] only if . . . [t]he plan has been proposed in good faith . . . .”<sup>31</sup>

In sum, it is axiomatic that corporate manipulation of chapter 11, especially for the purpose of evading accountability, cannot constitute good faith and would be cause for conversion or dismissal at any stage of the case.

*(b) Notice/Objection/Approval*

Like good faith, another near-universal requirement is that almost anything a corporate debtor wants to accomplish in chapter 11 requires notice to parties in interest, opportunity for stakeholders to object and be heard by the Bankruptcy Court, and approval by the Judge.

As an initial matter, when a corporation files for chapter 11 protection, it cannot access or spend any money without Bankruptcy Court permission. Accordingly, at the same time a debtor files its bankruptcy petition (to start the chapter 11 case), it also must file a series of “first day motions,” usually one to two dozen detailed pleadings that are heard by the Bankruptcy Court within 24 to 48 hours after the case is commenced, seeking authorization to continue to access bank accounts and spend cash for all typical financial

---

<sup>30</sup> See, e.g., *In re LTL Mgmt., LLC*, 64 F. 4th 84, 102, 108 (3d Cir. 2023) (dismissing chapter 11 case after finding that the debtor did not meet the exacting gateway requirement for commencing a chapter 11 case set forth in Section 1112(b) of the Bankruptcy Code that a case must be filed in good faith); *In re Nat'l. Rifle Assoc. of America and Sea Girt, LLC*, 628 B.R. 262, 280-83 (Bankr. N.D. Tex. 2021) (finding that the bankruptcy cases commenced by the NRA and a newly formed affiliate created to facilitate the bankruptcy process were not filed in good faith because the primary purpose of the filing was to avoid a potential dissolution pursuant to a New York attorney general’s enforcement action, and dismissing the case).

<sup>31</sup> 11 U.S.C. § 1129(a)(3).

and operational purposes, such as to pay employees, vendors, customers, landlords, government agencies (*e.g.*, taxes, customs duties), lenders, contract counterparties, *etc.* All parties in interest have the right to appear and be heard if they object to these proposed payments, but, because the hearing by necessity occurs quickly (so the debtor can continue its operations without interruption), the Bankruptcy Court typically approves the motions only on an interim basis—meaning the debtor has to return approximately one month later to (re)seek approvals on a final basis—thus giving parties the additional opportunity to present any opposition to the Bankruptcy Court (and, ideally, the opportunity to negotiate consensual resolutions with the debtor in advance of the hearing).<sup>32</sup>

Furthermore, during a case, every non-ordinary course transaction similarly requires this multi-step process of notice, opportunity to object, and Bankruptcy Court approval.<sup>33</sup>

Lastly, as noted above, the concluding step in a successful chapter 11 case is Bankruptcy Court confirmation of a plan of reorganization—which is subject not only to review and objection by any party in interest, but also requires at least one class of impaired creditors affirmatively to vote to accept the plan (without counting the votes of insiders).<sup>34</sup> Notably, if something goes wrong, and the debtor is unable to confirm a plan—or if the debtor finds its efforts stymied by objectors or the presiding Judge for any other reason—the debtor needs Bankruptcy Court approval to dismiss the case.<sup>35</sup>

---

<sup>32</sup> See Fed. R. Bankr. P. 2002; *see also* 11 U.S.C. § 107(a); Fed. R. Bankr. P. 5005(a)(1).

<sup>33</sup> See 11 U.S.C. § 363(b)(1).

<sup>34</sup> *Id.* § 1129(a)(10).

<sup>35</sup> *Id.* § 1112(b).

In other words, if a corporation is seeking to evade accountability by manipulating chapter 11, it must overcome stakeholder opposition and Bankruptcy Court oversight every step of the way—and if that effort is flailing, the debtor cannot simply “quit” chapter 11 and walk away from Bankruptcy Court supervision unless the Judge expressly grants permission to leave.

## **B. Stakeholder Rights**

In addition to imposing the above transparency and compliance obligations on debtors, Congress in the Bankruptcy Code and Bankruptcy Rules also armed opposition stakeholders with an arsenal of protective measures to combat potential improper debtor conduct.

### 1. Procedural Protections

#### *(a) Standing*

As an initial matter, any “party in interest,” including any creditor or equity holder (and any official or ad hoc creditor or equity committee), “may raise and may appear and be heard *on any issue* in a case under” chapter 11.<sup>36</sup> Notably, this expansive standing grant includes holders of tort or other litigation claims.<sup>37</sup> And as described above, it also includes the United States Trustee (again, Department of Justice bankruptcy lawyers acting on behalf of the public interest).<sup>38</sup>

---

<sup>36</sup> *Id.* § 1109(b) (emphasis added).

<sup>37</sup> *See In re Global Indus. Technologies, Inc.*, 645 F.3d 201, 210 (3d Cir. 2011) (“The list of potential parties in interest in § 1109(b) is not exclusive. On the contrary, that section ‘has been construed to create a broad right of participation in Chapter 11 cases.’”).

<sup>38</sup> *See* Section A.1.d *supra*.

(b) *Discovery*

Once a company is subject to the chapter 11 process, “[o]n motion of any party in interest, the [Bankruptcy] [C]ourt may order the examination of any entity” relating “to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter, which may affect the administration of the debtor’s estate, or the debtor’s right to a discharge” of liabilities.<sup>39</sup> This discovery right is generally broader than that under the Federal Rules of Civil Procedure, which limit the scope of discovery to matters that are relevant to a party’s claim or defense and proportional to the needs of the case.<sup>40</sup>

(c) *Lift Automatic Stay*

Filing for chapter 11 protection “operates as a stay, applicable to all entities, of [] the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced” before the petition date.<sup>41</sup> This “automatic stay” of litigation is one of the most valuable benefits chapter 11 provides to a debtor—especially a corporation facing significant alleged tort liabilities.

Conversely, Congress also provided stakeholders with the powerful ability to seek to lift the automatic stay. “On request of a party in interest and after notice and a hearing, the [Bankruptcy Court] shall grant relief from the [automatic stay], such as by terminating, annulling, modifying, or conditioning such stay [] for cause . . . .”<sup>42</sup> Filing a chapter 11

---

<sup>39</sup> Fed. R. Bankr. P. 2004(a), (b).

<sup>40</sup> Fed. R. Civ. P. 26(b).

<sup>41</sup> 11 U.S.C. § 362(a)(1).

<sup>42</sup> *Id.* § 362(d)(1).

case with a “bad faith” motive of unjustifiably thwarting litigation claims may serve as cause to lift the automatic stay (if not to dismiss the case entirely).<sup>43</sup>

(d) *Trustee or Examiner*

If a corporation is using chapter 11 for a manipulative purpose, the Bankruptcy Court may wrest control away from the debtor’s directors and officers and appoint an independent party to serve as a trustee or examiner to run or investigate the company:

At any time after the commencement of the [chapter 11] case but before confirmation of a plan [of reorganization], on request of a party in interest or the United States [T]rustee, and after notice and a hearing, the court shall order the appointment of a trustee [] for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause . . . if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate . . . .<sup>44</sup>

Relatedly, if the Bankruptcy Court does not order the appointment of a trustee:

then at any time before the confirmation of a plan [of reorganization], on request of a party in interest or the United States [T]rustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation 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, if [] such appointment is in the best interest of creditors, any equity security holders, or other interests of the estate . . . .<sup>45</sup>

2. Substantive Protections

A corporation may not (mis)use chapter 11 to shield, hide or transfer assets away from stakeholders that have a legal right to that value.

---

<sup>43</sup> *In re Porter*, 371 B.R. 739, 745 (Bankr. E.D. Pa. 2007) (citing several chapter 11 cases granting secured creditors stay relief on the basis of debtors’ bad faith).

<sup>44</sup> 11 U.S.C. § 1104(a).

<sup>45</sup> *Id.* § 1104(c)(1).

(a) Claims Process

Further to a debtor's filing of its lists of creditors and equity holders, and its schedules and SOFAs (explained above), the Bankruptcy Rules require that a register be kept on which parties in interest file proofs of claims, which state the legal nature and amount of an asserted right to payment from the debtor.<sup>46</sup> To confirm a plan of reorganization, a debtor must specify how every class of claims and interests will be treated (*e.g.*, reinstated, paid in full or in part, extinguished without payment, *etc.*).<sup>47</sup> And after a plan has been confirmed and become effective, a chapter 11 case cannot be "fully administered" and thus closed by final decree until the debtor shows that every claim on the register has been fully and finally addressed before the Bankruptcy Court.<sup>48</sup>

(b) Avoidance Actions

As a general matter, the holder of a legally valid claim may recover only from the distributable value (such as cash, debt, or equity) of the specific chapter 11 debtor against which the claim is asserted. This does not mean, however, that a debtor can diminish or eliminate the amount of value available for repayment to stakeholders by moving such property or cash out of the corporation before filing for chapter 11, as any such transfers may be "avoided" by stakeholders through specific causes of action that Congress included in the Bankruptcy Code.

The first category of avoidance action is the preference claim, which allows the claw back of any transfer made to a creditor on account of a preexisting debt while the

---

<sup>46</sup> Fed. R. Bankr. P. 3002(a)(b), 5005(a)(1).

<sup>47</sup> 11 U.S.C. § 1123(a).

<sup>48</sup> *Id.* § 350; Fed. R. Bankr. P. 3022.



debtor was insolvent, within 90 days of the petition date (or within one year if the transfer was made to an insider), if the transfer enabled the creditor to receive more than it would have in a chapter 7 liquidation.<sup>49</sup>

The second category of avoidance action is the actual or constructive fraudulent transfer claim. The former cause of action facilitates the claw back of any transfer made within two years of the petition date if the debtor “made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity.”<sup>50</sup> The latter does so if the debtor “received less than a reasonably equivalent value in exchange for such transfer” and was or became insolvent or undercapitalized before or as a result of the transfer.<sup>51</sup>

The third category of avoidance action is the unauthorized post-petition transfer claim. This cause of action facilitates the claw back, up to two years after the date of the applicable transfer, of transfers made after the commencement of the bankruptcy case that were not authorized by the Bankruptcy Code or Bankruptcy Court, enabling stakeholders to remedy transfers made in disregard of the notice, opportunity to object, and Court approval requirements under the Bankruptcy Code.<sup>52</sup>

---

<sup>49</sup> 11 U.S.C. § 547(b).

<sup>50</sup> *Id.* § 548(a)(1)(A).

<sup>51</sup> *Id.* § 548(a)(1)(B)(i), (ii). In addition to creating its own actual and constructive fraudulent transfer claims, the Bankruptcy Code also permits assertion of actual and constructive fraudulent transfer claims under applicable non-bankruptcy law. *Id.* § 544(b).

<sup>52</sup> *Id.* § 549(a), (d).

While avoidance actions are property of the debtor’s estate, and thus the debtor has primary standing to bring them, creditors may seek derivative standing to file suit on behalf of the debtor if the debtor unjustifiably refuses to do so.<sup>53</sup>

## **II. Enforcing Accountability—Bankruptcy Court Judges**

From my practitioner perspective, largely (and problematically) absent from the “corporate manipulation” thesis is the centrality of Bankruptcy Court Judges in enforcing accountability. To the extent critical inquiry is directed at the important question of whether the Bankruptcy Code is susceptible to abuse, the litany of provisions highlighted above, taken together, indicates:

*First*, the massive disclosure and compliance obligations that Congress included in the Bankruptcy Code and Bankruptcy Rules make it difficult for a corporate debtor to attempt to hide, much less successfully advance, an impermissible purpose; *and*

*Second*, even assuming otherwise, the adversarial tools that Congress provided to stakeholders in chapter 11 serve as a formidable deterrent and, if needed, potent remedy for manipulation.

Proving there is widespread evasion of accountability therefore would logically imply there is a breakdown in the *application* of chapter 11—which, in turn, brings into focus the indispensable role of Bankruptcy Court Judges in this debate.

### **A. Background**

To level set briefly, within the federal court system, Congress established in each judicial district a Bankruptcy Court with one or more Bankruptcy Court Judges who are appointed to fourteen-year terms by the United States Court of Appeals for the circuit in

---

<sup>53</sup> *Id.* § 1109(b); *see also id.* § 1103(c)(5).

which the district is located.<sup>54</sup> As distinct from Circuit and District Court Judges, who are appointed by the President and confirmed by the Senate to lifetime terms under Article III of the Constitution, Bankruptcy Court Judges serve as “judicial officers” of the District Court.<sup>55</sup>

Bankruptcy Court decisions are appealable, first, to the District Court, then to the Bankruptcy Appellate Panel or Court of Appeals; and, ultimately, certiorari may be sought from the Supreme Court.<sup>56</sup>

### **B. Proper Context**

In my experience, arguments about one or more perceived shortcomings of modern bankruptcy practice either largely overlook or misapprehend preexisting Bankruptcy Code provisions or precedent. Somewhat more indirect (though I believe still relevant) reassurances are found in properly contextualizing Bankruptcy Court Judges within certain potential criticisms.

One argument is that because Bankruptcy Court Judges are not appointed under Article III, and Bankruptcy Courts do not have juries, it is suboptimal for Bankruptcy Court Judges to resolve any issues involving mass tort allegations (which might otherwise be entitled to state or federal court jury trials). As a threshold clarification, chapter 11 addresses the resolution of claims against a debtor; it is not the substantive law that governs liability for those alleged claims. Further, beyond providing for appeals of Bankruptcy Court rulings to higher courts, Congress also has specified that any party in interest may

---

<sup>54</sup> 28 U.S.C. § 151.

<sup>55</sup> *Id.* § 152(a)(1).

<sup>56</sup> *Id.* § 158.

ask the District Court to “withdraw the reference” of a chapter 11 case (in whole or part) from the Bankruptcy Court, for cause shown—thus allowing one or more issues to be decided by an “Article III Judge” as appropriate.<sup>57</sup>

Another implied criticism seems to be that because they do not regularly adjudicate mass tort claims, Bankruptcy Court Judges may be less well-equipped to ensure tort claimants receive access to the Court. Here as well, beyond the reality that chapter 11 grants even broader standing to all stakeholders (not just plaintiffs and defendants), and provides even greater discovery rights than in a conventional (non-bankruptcy) state or federal court trial, Bankruptcy Court Judges are notably vigilant in enforcing parties’ rights to be heard. On a human level, presumably because of their deep experience dealing with challenging personal bankruptcy cases, Bankruptcy Court Judges are extraordinarily patient and assistive to parties before them, especially *pro se* litigants who may be unfamiliar with the unknown and intimidating forum in which they are appearing.

Lastly, recent rulings in certain high-profile mass tort chapter 11 cases speak for themselves, and serve as perhaps the most straightforward and compelling response to any contention that Bankruptcy Court Judges are somehow failing to enforce the accountability provisions that Congress enshrined in the Bankruptcy Code.

### **Conclusion**

Thank you again for inviting me to appear before you today. I appreciate the Committee allowing me to share my views. And I welcome the opportunity to answer any questions about my testimony.

---

<sup>57</sup> *Id* § 157(d); Fed. R. Bankr. P. 5011(a).