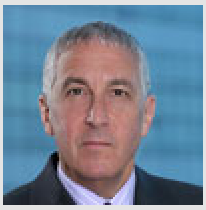
The Legal 500 & The In-House Lawyer
Comparative Legal Guide
United States: Restructuring & Insolvency (3rd edition)

This country-specific Q&A provides an overview to restructuring and insolvency laws and regulations that may occur in the United States.

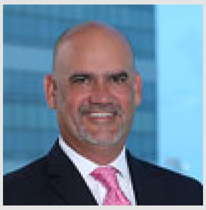
This Q&A is part of the global guide to Restructuring & Insolvency (3rd edition). For a full list of jurisdictional Q&As visit http://www.inhouselawyer.co.uk/practice-areas/restructuring-and-insolvency-3rd-edition/

Country Author: Berger Singerman LLP



Paul Steven Singerman, Partner & Co-Chair

singerman@bergersingerman.com



Jordi Guso, Partner

jguso@bergersingerman.com

Ilyse M. Homer, Partner

ihomer@bergersingerman.com

Christopher A. Jarvinen, Partner

cjarvinen@bergersingerman.com

1. **What forms of security can be granted over immovable and movable property? What formalities are required and what is**

the impact if such formalities are not complied with?

Article 9 of the Uniform Commercial Code, as enacted in each state in the U.S., is the primary statute regarding the consensual granting of a security interest in personal property (i.e., movable property). Security interests in real property (i.e., immovable property) are granted through a deed of trust or mortgage filing in the public records where the real property is located. Security can be granted over immovable and movable personal property by filing a financing statement (in the case of interests in personal property) or a mortgage or deed of trust (in the case of immovable or real property), taking possession of collateral, or obtaining control over the collateral. Security interests are not enforceable and do not attach unless: (i) the collateral is in the possession of the secured party pursuant to agreement, or the party granting the security interest has signed a security agreement (or other agreement which clearly expresses the intention of the grantor to grant a lien or confer control to the grantee/secured party) which grants the security interest and contains a description of the collateral, (ii) value has been given; and, (iii) the party granting the security interests has rights in the collateral. A security interest in personal property is perfected by the filing of a financing statement in the public records of the state in which the debtor is incorporated. If a creditor fails to properly perfect its interest, the interest may be avoided.

2. What practical issues do secured creditors face in enforcing their security (e.g. timing issues, requirement for court involvement)?

As discussed below, once a party granting a security interest (i.e., the debtor) files a bankruptcy case under the U.S. Bankruptcy Code (the “Code”), a statutory automatic stay is immediately imposed as a matter of law which prohibits creditors from taking actions to enforce their security interests or to exercise control over the property in which they may claim a security interest. In order to obtain modification of the automatic stay, a secured creditor must obtain bankruptcy court approval.

3. What is the test for insolvency? Is there any obligation on directors or officers of the debtor to open insolvency procedures upon the debtor becoming distressed or insolvent? Are there

any consequences for failure to do so?

There are three tests for establishing insolvency in the U.S.: (i) balance sheet insolvency, where a company's liabilities exceed its assets, at fair valuation; (ii) equitable insolvency, where a company fails to pay its debts as they ordinarily come due; and (iii) the inadequate capitalization test, which analyzes whether at the time of a transfer or as a result thereof, the debtor/company had or was left with insufficient capital to continue to conduct its business and affairs.

U.S. law does not require an insolvent company's board to commence insolvency proceedings when the company becomes insolvent and provides the board with the latitude to pursue alternative strategies to maximize the value of the company. As a general rule, directors and officers of a solvent company owe fiduciary duties only to its shareholders, and not to its creditors. When a company is insolvent or in the zone of insolvency, however, such fiduciary duties generally expand to include the entire enterprise, including creditors.

4. What insolvency procedures are available in the jurisdiction? Does management continue to operate the business and / or is the debtor subject to supervision? What roles do the court and other stakeholders play? How long does the process usually take to complete?

Insolvency Procedures: In the U.S., the primary insolvency procedures are governed by the Code and are described in greater depth below as well as on the website of the U.S. Courts (https://www.uscourts.gov/services-forms/bankruptcy). They include:

- Chapter 7 (Individual and business liquidations): Liquidation under chapter 7 is available to both businesses and individuals. In a chapter 7 liquidation, including when a chapter 11 case is converted to chapter 7, the U.S. Trustee (or the bankruptcy court in Alabama and North Carolina) appoints an impartial case trustee for the debtor. The trustee is responsible for liquidating the debtor's nonexempt assets, reconciling the claims of creditors and making distributions to creditors in accordance with the priorities of the Code. A chapter 7 case does not involve the filing of a plan of repayment.
- Chapter 9 (Municipalities- cities, towns, villages, taxing districts, municipal utilities and school districts): The purpose of chapter 9 is to provide a financially distressed municipality protection from its creditors while it develops and negotiates a plan for adjusting its debts. The management of the municipal debtor remains in control and is

vested with broad powers to use its property, raise taxes, and make expenditures as it sees fit. The goal of a chapter 9 case is the confirmation of a plan of debt adjustment negotiated between the municipality and its creditors.

- Chapter 11 (Reorganization and Liquidation): Chapter 11 is the reorganization chapter of the Code. Relief under chapter 11 is available to individuals and businesses. In a business chapter 11 case, management of the debtor remains in control of the debtor’s assets and operations, unless the court finds cause to displace management and appoint a chapter 11 trustee. Under section 1104 of the Code, cause for the appointment of a trustee includes establishing fraud, incompetence or gross mismanagement by the management of the debtor. As a general rule, the objective in a chapter 11 case is to obtain bankruptcy court approval of a plan of reorganization the effectuates a financial, and at times operational, restructuring of the business. Chapter 11 may also be used to liquidate a business, as a going concern or piecemeal. The chapter 11 plan must provide, among other things, for a greater recovery than would be available to creditors if the debtor were liquidated under chapter 7 of the Code.
- Chapter 12 (Family farmers and fishermen): This chapter provides for a streamlined process enabling financially distressed family farmers and fishermen to propose and carry out a plan to repay all or part of their debts. Under chapter 12, debtors propose a repayment plan to make installment payments to creditors over three to five years. When a chapter 12 petition is filed, an impartial trustee is appointed to administer the case. As in chapter 13, the trustee evaluates the case and serves as a disbursing agent, collecting payments from the debtor and making distributions to creditors.
- Chapter 13 (Wage earner’s plan): A chapter 13 enables individuals with regular income to develop a plan to repay all or part of their debts. Under this chapter, debtors propose a repayment plan which may last up to, but no more than, five years. Chapter 13 offers individuals a number of advantages over liquidation under chapter 7. Perhaps most significantly, chapter 13 offers individuals an opportunity to save their homes from foreclosure. When an individual files a chapter 13 petition, an impartial trustee is appointed to administer the case. The chapter 13 trustee evaluates the case and serves as a disbursing agent, collecting payments from the debtor and making distributions to creditors.
- Chapter 15 (Cross-border cases): This chapter is based upon the UNCITRAL Model Law on Cross Border Insolvencies, with narrow exceptions, and it was enacted in the U.S. on October 17, 2005. The purpose of chapter 15 is to provide effective mechanisms for dealing with insolvency cases involving debtors, assets, claimants and other parties in interest involving more than one country, thereby promoting a uniform and coordinated legal regime for cross-border insolvency cases. Unlike a bankruptcy case commenced under chapters 7, 9, 11, 12 and 13, a chapter 15 case is not a plenary bankruptcy case, but rather, is ancillary to the foreign proceeding.

Time to complete insolvency process: The time it takes for a debtor to undergo an insolvency process under any of the chapters of the Code depends on the facts and circumstances of the case.

The role of the bankruptcy court: Although the debtor (in cases under chapters 9, 11 and 15) or the trustee (in cases under chapters 7, 12 and 13) is generally responsible for undertaking a significant amount of the work in a bankruptcy case, the bankruptcy court: (i) presides over and manages each bankruptcy case; (ii) acts as the final arbiter in contested matters; (iii) resolves disputes; and (iv) handles other issues.

Stakeholders: Subject to the bankruptcy protections afforded to debtors under the Code, creditors and other stakeholders are interested parties in bankruptcy cases, and they may pursue their legal or equitable rights in the proceedings, subject in all instances to the provisions of section 362 of the Code regarding the automatic stay. The Code also authorizes the appointment of official committees of unsecured creditors and other types of official committees (e.g., equity, retirees) in chapter 9 and 11 bankruptcy cases.

State-level insolvency procedures: Although the Code is the primary insolvency approach used by businesses and consumers in the U.S., most states have also adopted certain, limited legal insolvency frameworks (e.g., assignment for the benefit of creditors and receiverships).

5. How do creditors and other stakeholders rank on an insolvency of a debtor? Do any stakeholders enjoy particular priority (e.g. employees, pension liabilities)? Could the claims of any class of creditor be subordinated (e.g. equitable subordination)?

The Code establishes the priority to be accorded to different types of claims. The priority of the claim will determine the holder’s rights in the proceedings, including the holder’s rights to a distribution. The priorities in a bankruptcy case are generally the following:

- Priority (or Super Priority) DIP (debtor-in-possession) Financing: This is a type of financing provided to a debtor during a bankruptcy case. It must be approved by the court and generally has the highest priority of repayment under the Code.
- Other Secured Claims: These are other pre- or post-petition claims which are secured by a lien on collateral (comprised of property of the debtor). The claim is secured up to the value of the collateral.

- Administrative Expense Claims: Generally, these are liabilities incurred by the debtor after the commencement of the case (e.g., vendors, labor, professionals). However, pre-petition claims can be granted this priority status (e.g., critical vendors, goods sold to/received by the debtor within the 20-day period immediately prior to the bankruptcy filing).
- Priority Unsecured Claims: The Code assigns priority, which may be limited in amount, to certain pre-petition claims (e.g., taxes, employee wages, consumer deposits).
- General Unsecured Claims: These are pre-petition claims which do not qualify for secured, administrative expense, or priority unsecured status (e.g., most vendor claims and unsecured bond type claims).
- Subordinated Claims: These are claims which are subordinated by agreement, operation of law, or order of the bankruptcy court (e.g., equitable subordination).
- Equity Interests: The Code places equity interests at the bottom of the priority list. As a general rule, the holders of equity interests receive nothing until all creditors have been paid in full (unless the all creditors agree otherwise).

6. Can a debtor’s pre-insolvency transactions be challenged? If so, by whom, when and on what grounds? What is the effect of a successful challenge and how are the rights of third parties impacted?

Yes. Sections 544, 547 and 548 of the Code authorize the debtor or a trustee to seek to challenge the debtor’s pre-insolvency transactions through what are commonly referred to as avoidance or “claw back” actions. One of the most common avoidance actions under the Code is found in section 548 which provides that trustee may avoid any pre-petition transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred within two years before the date of the filing of the petition, if the debtor voluntarily or involuntarily made a transfer or incurred an obligation with actual intent to hinder, delay or defraud any entity to which the debtor is indebted. Such avoidance affects not only the transferee but all parties in interest who have claims against the debtor. The proceeds of a successful avoidance actions are property of the estate, unencumbered by pre-insolvency liens or security interests. This impacts all creditors and parties in interest by augmenting the estate. Notably, while avoidance actions themselves are typically brought by a trustee, in certain circumstance the court may grant standing to other parties, most commonly an official committee of unsecured creditors.

7. **What form of stay or moratorium applies in insolvency proceedings against the continuation of legal proceedings or the enforcement of creditors' claims? Does that stay or moratorium have extraterritorial effect? In what circumstances may creditors benefit from any exceptions to such stay or moratorium?**

Immediately upon the filing of a petition in a bankruptcy case under any chapter of the Code, a broad statutory injunction comes into effect as a matter of law without any court action. This injunction is known as the "automatic stay," and it serves to enjoin any action to enforce a debt against the debtor or any property of the debtor. The injunction applies to all property of the estate, whether located within or outside of the U.S. Section 362(b) of the Code lists exceptions to the automatic stay, including certain types of financial contracts (e.g., forward contracts), the exercise of a governmental unit of its police or regulatory powers so long as the action is not to enforce a money judgement, and criminal proceedings.

8. **What restructuring and rescue procedures are available in the jurisdiction, what are the entry requirements and how is a restructuring plan approved and implemented? Does management continue to operate the business and / or is the debtor subject to supervision? What roles do the court and other stakeholders play?**

Chapter 11 is the reorganization chapter of the Code and is available to both individuals and business debtors. A chapter 11 case is commenced by filing a petition and paying the filing fee. During a chapter 11 case, the management of a debtor presumptively remains in control. If cause is shown, however, the bankruptcy court may remove management and order the appointment of a trustee. If appointed, the trustee displaces management and the board of directors of the debtor. As a general rule, the debtor's objective in a chapter 11 case is to obtain bankruptcy court approval of a plan of reorganization or liquidation. A bankruptcy court may confirm a plan of reorganization by consent of creditors voting on the plan, which occurs when 66% of the amount of the claims and the majority of creditors in each class of creditors under the plan who vote on the plan, elect to accept the plan. The bankruptcy court may also impose the plan over one or more dissenting creditors (this is referred to as a "cram-down") if it finds that the plan is fair and equitable and otherwise meets the requirements for confirmation set forth in section 1129 of the Code.

The bankruptcy court (i) presides over and manages each bankruptcy case, (ii) acts as the final arbiter for deciding whether a request should be approved, (iii) resolves disputes, and (iv) handles other issues. Subject to the bankruptcy protections afforded to debtors under the Code, creditors and other stakeholders are interested parties in bankruptcy cases and may pursue their legal or equitable rights before the bankruptcy court.

9. Can a debtor in restructuring proceedings obtain new financing and are any special priorities afforded to such financing (if available)?

The Code permits a debtor or trustee to obtain DIP financing. The financing must be approved by the bankruptcy court. To facilitate the debtor's ability to obtain DIP financing, the Code authorizes the bankruptcy court to grants a lender providing DIP financing security in the form of "priming liens" which may be senior to other prior perfected liens, thereby granting the DIP lender the highest priority of repayment (i.e., this type of claim has priority over all other claims in a bankruptcy case).

The Code also grants administrative expense status to the claims held by creditors doing business with a debtor after the commencement of the debtor's bankruptcy estate so long as the post-petition transaction was beneficial to the debtor's estate.

10. Can a restructuring proceeding release claims against non-debtor parties (e.g. guarantees granted by parent entities, claims against directors of the debtor), and, if so, in what circumstances?

Under certain circumstances, non-debtor parties may be released in a bankruptcy case. For example, bankruptcy court orders approving DIP financing, sales of assets under section 363 and approving settlements under Bankruptcy Rule 9019 may contain non-consensual third-party releases of non-debtor parties. In addition, a debtor's plan of reorganization may also release non-debtor parties. To be approved, the releases in a plan should be necessary for the debtor's reorganization and fair to creditors and other interested parties, and the debtor's estate must receive consideration from the individuals and entities being released. In addition, a debtor's plan may contain an exculpation provision which immunizes directors and other stakeholders (e.g., professionals representing the debtor or an official committee) from liability for actions taken in the reorganization case, including the formulation and confirmation of a plan of reorganization.

11. Is it common for creditor committees to be formed in restructuring proceedings and what powers or responsibilities to they have? Are they permitted to retain advisers and, if so, how are they funded?

Yes, the Code explicitly provides for unsecured creditors' committees to be formed in chapter 9 and 11 cases. The Office of the U.S. Trustee (which is a division of the U.S. Department of Justice) generally appoints a creditors' committee early in a bankruptcy case.

An official committee of unsecured creditors is the most often type of committee formed and is typically comprised of the holders of the five, seven, or nine largest general unsecured claims who are willing to serve. The committee and each of its members are fiduciaries and they are charged with representing the interests of all of the general unsecured creditors. The Code grants broad powers to a creditors' committee, including the rights to consult with the debtor, investigate the debtor and its business operations, and to participate in the formulation of the reorganization plan. Subject to bankruptcy court approval, a creditors' committee may employ one or more attorneys, financial advisors and other professionals to represent the committee. The professional fees of the committee professional constitute a cost of administration and, subject to court approval, are borne by the debtor's bankruptcy estate.

12. How are existing contracts treated in restructuring and insolvency processes? Are the parties obliged to continue to perform their obligations? Will termination, retention of title and set-off provisions in these contracts remain enforceable? Is there any ability for either party to disclaim the contract?

Pursuant to section 365 of the Code, contracts that are executory as of the petition date must continue to be performed by the debtor and non-debtor party even where pre-petition defaults exist pending approval of the bankruptcy court of the debtor's request to either "assume" or "reject" the contract. As a general rule, contracts are "executory" when there are material obligations remaining to be performed by both parties. Section 365 permits the debtor to reject a contract that is burdensome or not beneficial to the estate. Rejection is deemed a breach of the contract as of the petition date, entitling the counter-party to the contract to assert a pre-petition claim against the estate. Subject to certain limitations in the Code, a debtor may also assume a contract or unexpired lease. If the debtor assumes a contract, it is must cure, or provide adequate assurance that it will cure, all defaults and that it can perform under the contract after assumption.

Absent approval by the bankruptcy court, the general rule is that a debtor is forbidden from paying any prepetition amounts accrued but unpaid on an executory contract as of the petition date.

13. What conditions apply to the sale of assets / the entire business in a restructuring or insolvency process? Does the purchaser acquire the assets "free and clear" of claims and liabilities? Can security be released without creditor consent? Is credit bidding permitted? Are pre-packaged sales possible?

The sale of assets in chapter 11 requires that a sound business reason for the sale exists; that accurate and reasonable notice of the sale is given to interested persons; that the sale yields a fair and reasonable price; and that the parties have acted in good faith. The purchaser can acquire title to the assets free and clear of all liens and encumbrances if (i) such a sale is permitted under applicable non-bankruptcy law, (ii) the party asserting a lien consents to such sale, (iii) the purchase price is greater than the aggregate amount of all liens on the property, (iv) the interest or lien is the subject of a *bona fide* dispute; or (v) the party asserting the lien could be compelled to accept a money satisfaction for such interest. The Code also permits a holder of an allowed secured claim to credit bid to purchase the assets.

14. What duties and liabilities should directors and officers be

mindful of when managing a distressed debtor? What are the consequences of breach of duty? Is there any scope for other parties (e.g. director, partner, shareholder, lender) to incur liability for the debts of an insolvent debtor?

The law of the state in which a business entity is formed and the Code define the fiduciary duties of its directors and officers. As a general rule, the directors and officers of a solvent corporation owe fiduciary duties only to its shareholders. When the corporation becomes insolvent, however, these fiduciary duties expand to the entire enterprise including the creditors of the corporation.

Directors and officers owe two core fiduciary duties – duty of care and duty of loyalty. The duty of care requires that they act with the degree of care that an ordinarily prudent person would exercise under the same or similar circumstances, including informing themselves of material information reasonably available to them, and acting in a rational and deliberate manner. Under the duty of loyalty, they must act in good faith to make decisions that are in the best interests of the company and refrain from self-dealing and usurping corporate opportunities for personal gain. If directors and officers breach any of their regular fiduciary duties or the additional obligations imposed upon a debtor in a bankruptcy case, they are subject to personal liability (subject to any exculpation and indemnification rights they may possess) and/or removal.

Shareholders of a closely held company are normally shielded from liability for the debts of a corporation, but they may become obligated to pay such debts if a court "pierces the corporate veil," thereby disregarding the legal separateness of the corporation. Although courts employ different tests, piercing the corporate veil generally requires a finding that the corporation was formed for an improper purpose and that the officers and directors failed to observe corporate formalities.

15. Do restructuring or insolvency proceedings have the effect of releasing directors and other stakeholders from liability for previous actions and decisions?

Although the Code does not contain explicit language specifically releasing directors and other stakeholders, prepetition claims held by a debtor against these persons, such as a derivative claim, are property of the debtor's estate and may be released by the debtor under a reorganization plan if a court finds that doing so represents a valid exercise of the debtor's business judgment, is fair, reasonable, and in the best interests of the debtor's estate.

A debtor's reorganization plan also may contain non-debtor, third-party releases (i.e., the release of claims or causes of action related to the debtor that are held by a non-debtor against another non-debtor) including claims against directors and other stakeholders. Although the approval by a court of consensual third-party releases, such as when a creditor votes in favor of confirming a reorganization plan containing third-party releases and does not otherwise object to their approval, is generally noncontroversial, courts remain divided over whether the Code authorizes non-consensual, third-party releases.

16. Will a local court recognise concurrent foreign restructuring or insolvency proceedings over a local debtor? What is the process and test for achieving such recognition? Has the UNCITRAL Model Law on Cross Border Insolvency or the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments been adopted or is it under consideration in your country?

Yes, a bankruptcy court will recognize a concurrent foreign restructuring or insolvency proceeding over a local debtor which is the subject of such foreign proceeding so long as the foreign representative satisfies the recognition requirements of chapter 15 of the Code. Chapter 15 is based upon the UNCITRAL Model Law on Cross Border Insolvency.

A foreign representative commences a chapter 15 case by filing a petition for recognition of the foreign proceeding under section 1515 of the Code in the U.S. bankruptcy court. The petition must be accompanied by certain documentary evidence which the bankruptcy court is entitled to presume is subject to section 1506 (regarding public policy exceptions). The bankruptcy court must grant recognition of the foreign proceeding if it finds, after notice and a hearing, that the foreign representative has satisfied the requirements of section 1517.

Although recognition of a foreign proceeding under chapter 15 is mandatory where the foreign representative satisfies these statutory requirements, U.S. courts have repeatedly held that (i) the recognition process is not a "rubber stamp" exercise, (ii) the foreign representative bears the burden of proof, by the preponderance of the evidence, that each of the recognition requirements has been met, and (iii) even in the absence of any objection, the bankruptcy court must undertake its own jurisdictional analysis and grant or deny recognition under chapter 15 as the facts of each case warrant.

17. Can debtors incorporated elsewhere enter into restructuring or insolvency proceedings in the jurisdiction?

Yes. With some exceptions (e.g., a railroad, insurance company, or a bank that has a branch in the U.S.), a foreign debtor may commence a bankruptcy case under one of the chapters of the Code. The foreign debtor will be required to satisfy the requirements of section 109 of the Code by having a domicile, a place of business, or property located in the U.S. at the time of the commencement of its bankruptcy case. Courts in the U.S. have interpreted the property requirement quite liberally finding section 109 satisfied where the foreign debtor had minimal or nominal amounts of property located in the U.S. (e.g., the foreign debtor had a U.S. bank account or paid a retainer to its U.S. professional that was being held in its U.S.-based trust account, etc.).

18. How are groups of companies treated on the restructuring or insolvency of one or more members of that group? Is there scope for cooperation between office holders?

Generally, each company that becomes insolvent or files a chapter 11 case is treated as an independent legal entity and the remaining members in the corporate group are not affected. The Code also does not impose additional obligations on the entire corporate group when one or more entities comprising it commence(s) a restructuring case.

It is common for all, or substantially all, entities in a corporate group concurrently to commence chapter 11 cases. In such instances, the Code permits a procedural mechanism, known as joint administration, which allows all of the individual chapter 11 cases to be administered together for procedural convenience.

Often, many of the same individuals serve as directors and officers of all of the entities comprising a corporate group, and in the event that some, but not all, of these entities commence chapter 11 cases, the affected directors and officers may need to evaluate whether a conflict of interest exists, and if so, resign from one or more positions and/or boards.

19. Is it a debtor or creditor friendly jurisdiction?

The U.S. is generally considered to be a debtor-friendly jurisdiction due to certain key features of the Code, including: (i) chapter 11 permits companies to reorganize, rather than requiring their immediate liquidation, thereby preserving and protecting operations and going-concern value; (ii) current management generally remains in place rather than being automatically replaced with a trustee or an administrator; (iii) a broad, global automatic stay is imposed throughout a bankruptcy case which provides a debtor with the necessary “breathing spell” to formulate an emergence-focused business plan; (iv) courts grant significant deference to debtors by permitting decisions to be evaluated under the relatively lenient “business judgement” standard; (v) unless the bankruptcy court orders otherwise, debtors, alone may have the right to propose and solicit a reorganization plan for up to the initial 20-month period of a case, thereby providing debtors with meaningful control of the process; and (vi) all types of debt may be impaired. With that said, the Code and other aspects of U.S. law seek to balance the rights of all parties impacted by a bankruptcy filing and provide safeguards for creditors.

20. Do sociopolitical factors give additional influence to certain stakeholders in restructurings or insolvencies in the jurisdiction (e.g. pressure around employees or pensions)? What role does the state play in relation to a distressed business (e.g. availability of state support)?

The Code, which is the product of the federal political process in the U.S., has been periodically revised since its adoption over four decades ago to reflect revisions proposed and lobbied for by various stakeholders, including: (i) “safe harbor” treatment for many types of investments; (ii) time limits for debtors to assume or reject a prepetition lease without landlord approval; (iii) section 1114 which prohibits a debtor from unilaterally modifying the payment of retirement benefits in a chapter 11 case without court approval; and (iv) sections 507(a)(4) and (5) which permits certain capped-amounts for prepetition employee wages, benefits, and contributions to employee benefit plans to have the status of priority unsecured claims.

Other than requiring debtors to comply with certain reporting and related obligations prescribed by the Office of the U.S. Trustee, individual states generally does not get involved in the affairs of a private company undergoing a restructuring or liquidation. In certain recent, and large, chapter 11 restructurings (e.g., General Motors, Chrysler), however, the federal government and some individual states have stepped in to provide necessary funding and other significant support.

21. What are the greatest barriers to efficient and effective restructurings and insolvencies in the jurisdiction? Are there any proposals for reform to counter any such barriers?

The two greatest impediments to effective and efficient restructurings are cost-related barriers to entry for small and medium-sized companies and the time restrictions imposed on companies limiting their ability to take full advantage of the “breathing spell” offered by chapter 11.

First, the significant and increasing costs of administering a chapter 11 case (e.g., professional fees of the lawyers and financial advisors (and sometimes other professionals) of debtor and the official committee of unsecured creditors and the effective interest rates charged by lenders that provide DIP financing) have had a significant impact on the ability of small and middle-market, financially-distressed companies to afford undertaking a chapter 11 case.

Second, the Code was originally designed to provide a financially-distressed company with an extended period of time to remain under bankruptcy protection in order to carefully assess operations and to develop a new business plan that would serve as the basis for emerging from bankruptcy. However, the combination of revisions to the Code during 2005 and time restrictions often imposed on debtors by lenders who provide DIP lending, have significantly curtailed the time that a debtor has to develop an effective business plan which, in turn, may be resulting in an increase number of “chapter 22” filings (repeat bankruptcy filings) and liquidations.

There are no concrete reform efforts related to these issues.