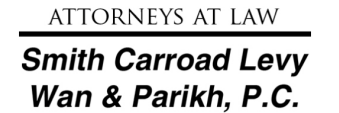





CLLA FALL VIRTUAL EDUCATION BONANZA SEPTEMBER 9 - 11

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The Latest and Greatest in Chapter 11 Plan Confirmation Issues

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FALL EDUCATION BONANZA
SEPTEMBER 11, 2020

“In the pantheon of extraordinary laws that have shaped the American economy and society and then echoed throughout the world, Chapter 11 of the U.S. Bankruptcy Code deserves a prominent place.”

- PROFS. ELIZABETH WARREN & JAY WESTBROOK

The Success of Chapter 11: A Challenge to the Critics, 107 MICH. L. REV. 603 (2009).

agenda

- Introductory Remarks
- Chapter 11 Overview and Plan Confirmation
- Disclosure Statements and Plans (11 U.S.C. §§ 1121-29; 1141)
- Selected Hot Topics
- Q&A

COVID-19

Seeing more Chapter 11 cases?

Besides the distressed retail and oil & gas sectors, the rumored wave of bankruptcies yet to come ...



aacerSM

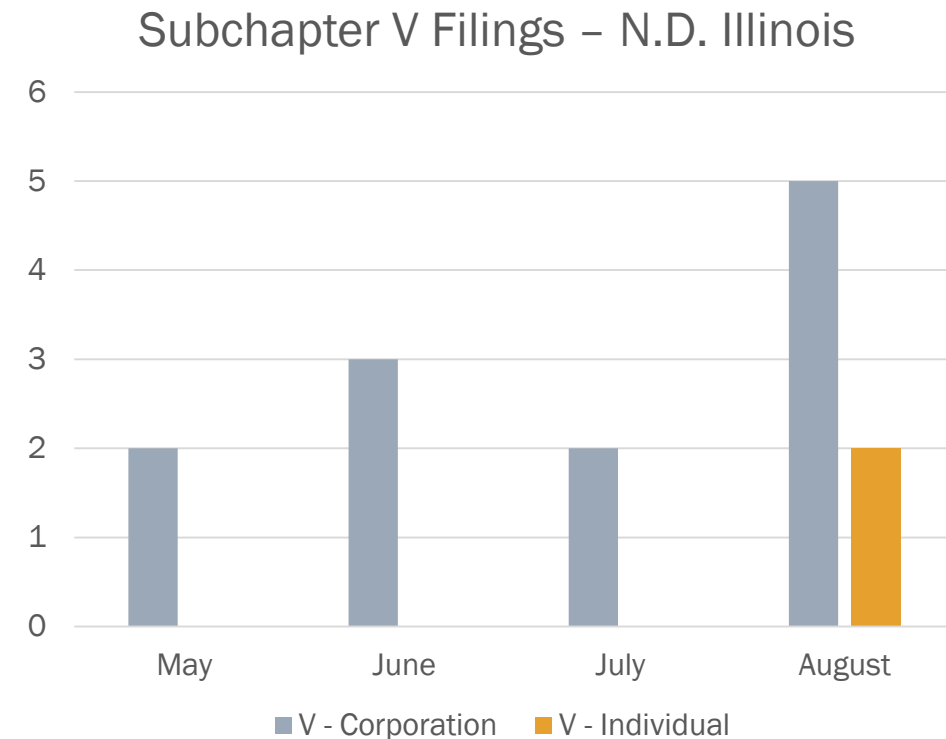
Month	Chapter 11 Filings Nationwide									
	2020	2019	2018	2017	2016	2015	2014	2013	2012	2011
January	631	366	367	402	494	523	392	488	750	788
February	549	685	425	407	485	364	485	623	757	770
March	530	449	774	471	450	414	567	598	687	789
April	562	444	394	576	681	409	690	710	666	802
May	723	487	448	581	613	502	431	542	717	722
June	609	424	310	601	503	366	483	499	545	761
July	643	423	415	333	359	645	359	540	704	596
August	-	450	364	499	368	534	360	604	653	711
September	-	420	312	446	366	337	377	584	525	697
October	-	530	557	317	406	431	390	528	550	687
November	-	449	662	435	387	392	298	488	670	604
December	-	392	456	703	338	401	357	397	565	748
Total	4,247	5,519	5,484	5,771	5,450	5,318	5,189	6,601	7,789	8,675

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Cases included in totals represent only commercial business bankruptcy filings

What's this Subchapter V Small Business Chapter 11 I've Heard About?

- ❑ **NEW.** SBRA 2019, in effect February 2020.
- ❑ Debt limit of *noncontingent, secured and unsecured* liquidated debt less than \$7,500,000, up from \$2,725,625 under the CARES Act (or one year).
- ❑ Like a chapter 12 or 13, pay disposable income to creditors over 3 to 5 years under a confirmed plan (filed within first 90 days). Protect home.
- ❑ Subchapter V Trustee appointed; Mediator-like role; Not like a chapter 7 trustee.
- ❑ **With PPP and other government aid ending amid continued stress for small business, will this chapter become a popular option?**



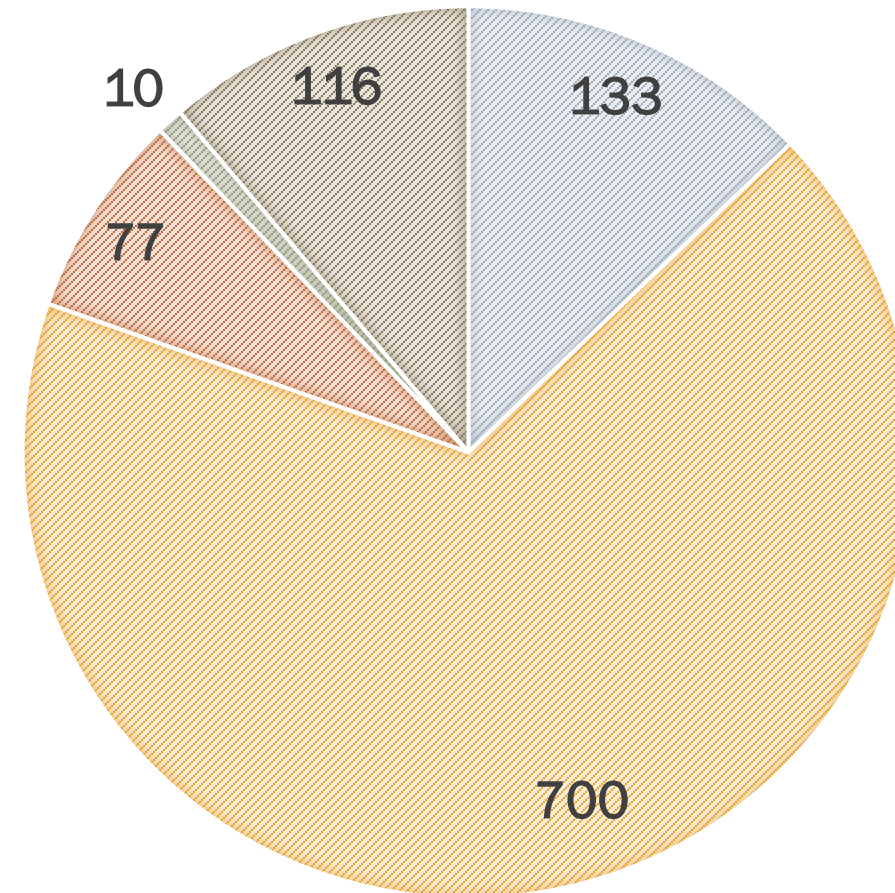
* June filings one corporate group with three entities.

Bankruptcy Venue – CLLA Hot Topic

- ❑ Chapter 11 filings concentrated in few districts despite bankruptcy courts coast to coast
- ❑ Reform to 28 U.S.C. § 1408 venue statute proposed, see H.R. 4421 (CLLA initiative)
- ❑ 42 AGs, 163+ former and current bankruptcy judges, 19+ cosponsors from 11 states

VENUE SHOPPING

■ SDNY ■ DEL ■ SD TEX ■ ED Va ■ Other



* Chapter 11 Cases Filed YE Mar. 31, 2020, Cases filed in state by out of state debtors. See Ed Flynn, *Bankruptcy Venue – Here We Go Again!* ABI (Aug. 2020) (based on US Courts data).

Chapter 11



Classes

Claims



Releases/
Trusts

Litigation



Treatment

Distributions

Chapter 11 – Treacherous Waters

BANKRUPTCY IS THE TIP OF THE
ICEBERG ... MUCH BELOW THE SURFACE



STAY ALERT

Chapter 11 cases usually involve significant pre-filing planning and negotiation between debtors, senior lenders, and buyers. *Many professionals.*

Prepackaged plan cases are sometimes over in a blink of the eye and present little peril. Other cases such as those with significant litigation, require the judicial process to resolve claims. All cases **MOVE FAST**.

Many cases feature an **asset sale** under section 363.

Chapter 7 liquidation or structured dismissals may cause the case to melt away.

Chapter 11 Key Events

- Petition Filing; First-Day Hearing
- Committee Appointment
- Second-Day Hearing
- Asset Sales – 363; Settlements
- Approvals; Motions; Procedural Milestones (Mandatory; Rules-based)
- Disclosure Statement Approval, Solicitation Procedures
- Plan Confirmation
- Post-Confirmation Matters; Trusts
- If no plan, liquidation under chapter 7 or dismissal



The Plan

1123

Claims



- Administrative/Priority (admin, fees, DIP, taxes)
- Classification and Treatment of All Other Claims
- Voting Rights; Deemed Accept or Reject
- Distributions
- Contingent, Unliquidated, Disputed Claims Resolution

Implementation



- Restructuring Transactions
- New Equity, New Debt Issuance
- Sources of Capital
- New Corporate Board & Actions
- Licenses or Approvals, Required before Effective Date; Conditions Precedent

Executory Contracts



- Accept or Reject
- Cure or Rejection Claims
- Other Contractual Agreements
- Postpetition Contracts

Discharge



- Releases
- Exculpation
- Injunction
- Effect of Confirmation
- Effective Date and Binding Provisions

Disclosure Statement

1125

Does the Disclosure Statement provide “adequate information”? 1125(a)(1)



iHeartMedia, Inc.
Case No. 18-31274

Case 18-31274 Document 1467 Filed in TXSB on 09/18/18 Page 8 of 184

Plan solicitation **AFTER** approval of the Disclosure Statement

And that happens after **NOTICE AND A HEARING**

Where creditors may **OBJECT** to the disclosures, the plan, solicitation procedures, and then again, at plan confirmation

It’s a big document that works like an offering memorandum – spans risks, operations, financials, plan details, voting and elections, releases, all manner of mandatory disclosures ...

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Solicitation/Voting

1122-26

Fred's, Inc.

Case # 19-11984

Judge Christopher S. Sontchi | Jurisdiction Delaware

Filed Sep 09 2019

 Retail

Debtors' Motion for Entry of an Order (I) Approving Disclosure Statement, (II) Fixing Voting Record Date, (III) Approving Solicitation Materials and Procedures for Distribution Thereof, (IV) Approving Forms of Ballots and Establishing Procedures for Voting on Plan, (V) Scheduling Hearing and Establishing Notice and Objection Procedures in Respect of Confirmation of Plan, and (VI) Granting Related Relief [D.I. 813]



EXHIBIT A

TABULATION SUMMARY

DEBTOR	ACCEPT		REJECT		CLASS VOTE
	AMOUNT	NUMBER	AMOUNT	NUMBER	
FRED'S, INC. (Case No. 19-11984)	\$21,587,183.31 80.76%	146 61.86%	\$5,142,181.37 19.24%	90 38.14%	Accept
FRED'S STORES OF TENNESSEE, INC. (Case No. 19-11982)	\$17,667,328.87 94.48%	29 60.42%	\$1,031,444.72 5.52%	19 39.58%	Accept
505 N. MAIN OPP, LLC (Case No. 19-11983)	NO BALLOTS WERE RECEIVED BY HOLDER'S OF CLAIMS ENTITLED TO VOTE IN THIS CLASS				Accept
NATIONAL EQUIPMENT MANAGEMENT AND LEASING, INC. (Case No. 19-11985)	\$6,846,443.55 100.00%	1 100.00%	\$0.00 0.00%	0 0.00%	Accept
NATIONAL PHARMACEUTICAL NETWORK, INC. (Case No. 19-11986)	NO BALLOTS WERE RECEIVED BY HOLDER'S OF CLAIMS ENTITLED TO VOTE IN THIS CLASS				Accept
REEVES-SAIN DRUG STORE, INC. (Case No. 19-11989)	\$6,846,443.55 100.00%	1 100.00%	\$0.00 0.00%	0 0.00%	Accept

Confirmation Hearing

1128

1128. Confirmation Hearing

- (a) After notice, the court shall hold a hearing on confirmation of a plan.
- (b) A party in interest may object to confirmation of a plan.

Evidentiary Hearing (sometimes contentious)

- Witnesses, testimony
- Documentation
- Objections
- Arguments



**PG&E 8-day Confirmation Hearing
held remotely beginning May 27, 2020**

Plan Confirmation

1129



**PG&E Corporation and
Pacific Gas and Electric
Company**

Case No. 19-30088

[PROPOSED] FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER CONFIRMING DEBTORS' AND SHAREHOLDER PROPONENTS' JOINT CHAPTER 11 PLAN OF REORGANIZATION DATED MAY 22, 2020 [D.I. 7581]

“Releases, Exculpations, and Injunctions. The release, exculpation, and injunction provisions contained in the Plan are fair and equitable, are given for valuable consideration, and are in the best interests of the Debtors and their chapter 11 estates, and such provisions shall be effective and binding on all persons and entities.”

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21 **UNITED STATES BANKRUPTCY COURT**
22 **NORTHERN DISTRICT OF CALIFORNIA**
23 **SAN FRANCISCO DIVISION**

24 **In re:**
25 **PG&E CORPORATION,**
26 **- and -**
27 **PACIFIC GAS AND ELECTRIC COMPANY,**
28 **Debtors.**

Bankruptcy Case
No. 19-30088 (DM)
Chapter 11
(Lead Case)
(Jointly Administered)

ORDER CONFIRMING DEBTORS' AND SHAREHOLDER PROPONENTS' JOINT CHAPTER 11 PLAN OF REORGANIZATION DATED JUNE 19, 2020

Affects PG&E Corporation
 Affects Pacific Gas and Electric Company
 Affects both Debtors
* All papers shall be filed in the Lead Case, No. 19-30088 (DM).

Entered on Docket
June 20, 2020
EDWARD J. EMMONS, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

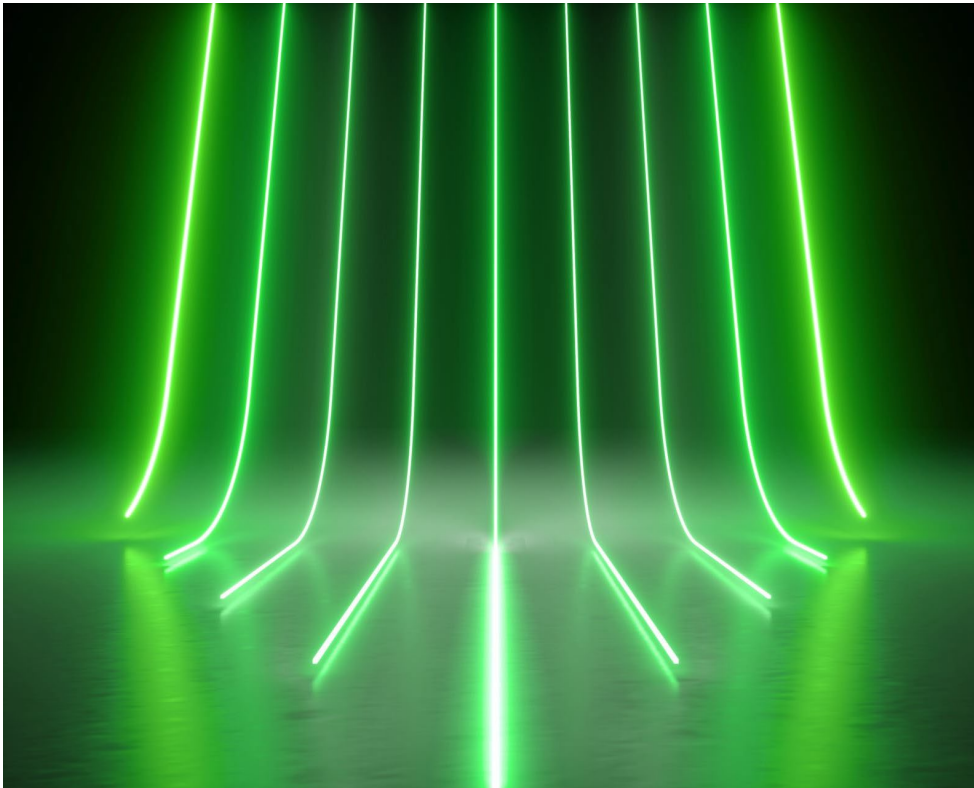
Signed and Filed: June 20, 2020

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Attorneys for Shareholder Proponents

Hot Topics for the Vigilant Creditor



- Object, and Object Some More
- Challenge Value and Claim Treatment
- Watch Out for Releases
- That's Unfair, Appeal!

Objections

- Claims Process
- Claims Classification
- Claims Treatment/Distributions
- Contract Rejection/Assumption
- Procedures
- Voting Rights/Solicitation
- Disclosure Statement
- Plan



Valuation and Claim Treatment Fights

1129(b)(1)

HERCULES OFFSHORE (2016)

- ❑ Equity Committee Appointed.
- ❑ Compromise: Consenting First Lien Lenders agreed to (i) subordinate their Claims in order to provide a **\$15 million guaranteed payment to HERO Common Stock holders** and (ii) reduce the amount of the Rejection Lender Wind Down Claim by \$32.5 million.
- ❑ Plan confirmed over wide-ranging Equity Committee objection. (Only objecting class.) "*Will you walk into my parlor?" said the spider to the fly...*
- ❑ See also *Pyxus International, Inc.*, No. 20-11570 (LSS) (July 20, 2020 equity committee appointed, prepackaged plan confirmed Aug. 21, 2020 and effective Aug. 24, 2020, over equity committee objection).

In re Hercules Offshore Inc., 565 BR 732 (Bankr. D. Del. 2016).

TRIBUNE (2020)

- ❑ Intercreditor dispute (classes IE and IF) arising from a **cramdown plan** (\$13 million in dispute relative to \$1.283 billion claim, a recovery improvement from 33.6% to 34.5% (dif. 0.9%) through disgorgement).
- ❑ Senior noteholders' plan objections based on certain intercreditor subordination agreements (PHONES and EGI Notes) and **unfair discrimination**.
- ❑ 1129(b)(1) cramdown provisions override section 510(a) governing subordination agreements based on **plain meaning** of "notwithstanding" ("in spite of") in Code.
- ❑ Followed "rebuttable presumption" test for "material" unfair discrimination. Mixed questions of law and fact ... "**rough justice**" and "**pragmatic**."
- ❑ "Wherever it may lie, the nine-tenths of a percentage point difference in the Senior Noteholders' recovery is, **without a doubt, not material**."

Chapter 11 Filing Date **2008**. Plan Effective Date **2012**. First Appeal decided **2015** (remand). Second DCT decision **2018**. This Appeal argued **2019**. This Final Decision **Aug. 26, 2020**. *In re Tribune Co.*, No. 18-2909, -- F.3d -- (3d Cir. 2020).

Releases, Injunctions, Exculpations: Third-Party, Nonconsensual Releases

FIRSTENERGY SOLUTIONS (2019)

- ❑ On OCC, Sierra Club, Environmental Citizen Organizations, UST, and other objections at **Disclosure Statement hearing**, bankruptcy court held proposed plan “**patently unconfirmable.**”
- ❑ Proposed third-party, nonconsensual release failed *Dow Corning* factors (6th Cir. seven-factor test).
- ❑ Debtors hoped to fully release nondebtor parent. After ruling, they revised the release and confirmed the plan.

In re FirstEnergy Solutions Corp., 606 B.R. 720 (Bankr. N.D. Ohio Aug. 29, 2019) [D.I. 3135]. For the Dow Corning factors test, see *Class Five Nevada Claimants v. Dow Corning Corp.* (*In re Dow Corning Corp.*), 280 F.3d 648 (6th Cir. 2002).

AEGEAN MARINE (2019)

- ❑ On SEC and UST objections at **Plan Confirmation hearing**, bankruptcy court denied approval of nonconsensual DIP lender release and exculpation of audit committee members.
- ❑ “[T]hird-party releases are not a merit badge that somebody gets in return for making a positive contribution to a restructuring. They are not a participation trophy, and they are not a gold star for doing a good job.”
- ❑ “[Releases] are supposed to be ordered only when they are **actually important and necessary** to the accomplishment of the transaction before the Court.”

In re Aegean Marine Petroleum Network, Inc., 599 B.R. 717 (Bankr. S.D.N.Y. Apr. 8, 2019, corrected Apr. 12, 2019) [D.I. 520, 521]. For the Second Circuit standard for approving third-party, nonconsensual releases “in rare cases,” see *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136 (2d Cir. 2005).

Consider important role of **PUBLIC INTEREST** players in curtailing third-party, nonconsensual releases.

Appeals

APPEAL AS OF RIGHT

- When to appeal?
 - Interlocutory
 - Final
 - What if you're not sure?
 - Direct Appeal an option? Expedited and unique in bankruptcy **Rule 8006**

- Where next?
 - District Court or BAP
 - Circuit Court
 - US Supreme Court

BANKRUPTCY RULES ARTICLE 8000; FRAP FOR CIRCUIT COURT



NRC image

Q&A

Thank you!

Call us with questions ...

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