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LAW AND PRACTICE: p.3

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law and Practice

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1. Market Trends and Developments

1.1 The State of the Restructuring Market

Over the past several months, the government of Puerto Rico has been trying to cope with perhaps the most severe financial crisis in its history. Puerto Rico is struggling with USD73 billion in public debt, more than any other US state except for California and New York. In December 2015, the Governor of Puerto Rico warned the US Congress that the government could shut down due to insufficient liquidity and that the territory was on the verge of a humanitarian crisis. Puerto Rico has been and continues to be a very hot topic in the distressed municipal sector, and for good reason. Controversy surrounds the issuance of debt by Puerto Rico and its instrumentalities; credit downgrades (junk status), risk factor disclosures, waivers of sovereign immunity for some purposes, the enforceability of such waivers, the ability of bondholders to bring suit on Puerto Rico bonds in New York, and constitutional debates regarding Puerto Rico's inability to access the United States Bankruptcy Code, and the intersection of Puerto Rico politics and modern-day municipal restructuring concepts and topics are just some of the issues that continue to make the case of Puerto Rico an extraordinary one.

Further, Puerto Rico's bankruptcy rate has skyrocketed due to the current recession faced in the Commonwealth. By year end 2006, there were a total of 5,425 bankruptcies filed. However, by year end 2014, there were a total of 10,719 bankruptcies filed. The 2012 year was an all-time high for bankruptcies which totalled 12,380. In 2015, 10,746 bankruptcies were filed. When the yearly bankruptcy filings are compared to economic indicators such as the General Development Bank Economic Activity Index (GDB-EAI), there is a noticeable correlation between Puerto Rico's economic activity and the number of filed bankruptcies. For example, when the GDB-EAI was at an all-time high between the years 2011 and 2012, there was a decrease in the number of filed bankruptcies for these years (11,265 and 10,362 respectively). During the past years, the government has passed a number of legislative measures which have both positively and negatively affected the restructuring and insolvencies in the jurisdiction. As of September 2018, the American Bankruptcy Institute reported 5,767 bankruptcy filings in the District of Puerto Rico.

1.2 Changes to the Restructuring and Insolvency Market

Puerto Rico has seen a significant increase in distressed debt investors in light of its current economy. Given the fiscal problems the jurisdiction is encountering and the absence of debtor-in-possession financing, most commercial bankruptcies involve the distressed sale of assets.

2. Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

2.1 Overview of the Laws and Statutory Regimes

In the USA, bankruptcy is governed by federal law. The dispositions codified in Title 11 of the United States Code, commonly referred to as the "Bankruptcy Code" (hereafter "USBC"), are extensive to our jurisdiction. The procedural aspects of the bankruptcy process are governed by the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and local rules of each bankruptcy court. While bankruptcy cases are filed in the United States Bankruptcy Court, state laws are often applied when determining property rights; Butner v U.S., 440 U.S. 48 (1979).

2.2 Types of Voluntary and Involuntary Financial Restructuring, Reorganisation, Insolvency and Receivership

The USBC provides different restructuring regimes from which a petition for relief may be requested. Entities seeking relief under the USBC may file a voluntary petition for relief under a number of different chapters of the Code, depending on the debtor's circumstances. A debtor may request a petition for relief, such as liquidation, under Chapter 7, reorganisation under Chapter 11, Chapter 12 and Chapter 13, or cross-border insolvency under Chapter 15 of the USBC before the United States District Court of Puerto Rico. In our jurisdiction, involuntary bankruptcy is rare but permissible, with certain conditions and limitations. See below, **2.6 Ability of Creditors to Commence Insolvency Proceedings**.

2.3 Obligation to Commence Formal Insolvency Proceedings

Insolvent companies are not required to file for protection under the USBC. Companies can instead attempt to restructure their obligations, the operations and their contracts informally by direct negotiation with creditors, known as 'work-outs' or 'forbearance' agreements.

However, under a Chapter 11 bankruptcy, the debtor (unless a small business debtor) has a 120-day period during which it has an exclusive right to file a plan of reorganisation after filing a voluntary bankruptcy petition; see 11 U.S.C. § 1121(b). This period may be extended or reduced by the court, but may not be longer than 18 months; see 11 U.S.C. § 1121(d). If the debtor does not file a plan within this exclusivity period, any person (including a creditor or the US trustee) involved in the restructuring process can present a plan. Once the plan is accepted by the creditors, the Bankruptcy Court must confirm the plan by evaluating its compliance with the dispositions of the USBC.

2.4 Procedural Options

Business entities who desire to restructure their debt must do so within the parameters of Chapter 11. Upon a Chap-

ter 11 filing, an automatic stay applies to all claims against the debtor, who is then permitted to continue business as a debtor-in-possession, unless there is cause under Section 1104 of the USBC, such as fraud or gross mismanagement, for the appointment of a trustee to oversee the operations of the business; see 11 U.S.C. § 1104. After the order for relief of Chapter 11 is granted, the United States Trustee shall appoint creditor committees in order for each type of creditor class be represented in the plan evaluation and confirmation process.

Business entities who prefer liquidation may file a bankruptcy petition under Chapter 7 of the USBC, or may file a petition under Chapter 11 and, instead of filing a Plan of Reorganisation, may file a Liquidating Plan providing for the orderly liquidation of assets and payment to creditors in accordance with the provisions of the USBC.

2.5 Liabilities, Penalties or Other Implications for Failing to Commence Proceedings

Insolvent companies are not required to file for protection under the USBC. Companies can instead attempt to restructure their obligations, the operations and their contracts "informally" by direct negotiation with creditors known as work-outs or forbearance agreements. There are no penalties for not doing so. Notwithstanding, creditors may commence an involuntary bankruptcy case in certain circumstances that will be further discussed below.

2.6 Ability of Creditors to Commence Insolvency Proceedings

Involuntary bankruptcy starts when one or more creditors file a petition with the bankruptcy court under Section 303 of the USBC; see 11 U.S.C. § 303. A creditor may file an involuntary bankruptcy case only under Chapter 7 or Chapter 11 of the USBC, and only against a person (except a farmer, family farmer – or a corporation) that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced; id. Generally, a petitioning creditor is qualified to file an involuntary petition if it holds a claim against the debtor that (i) is "not contingent as to liability or the subject of a bona fide dispute as to liability or amount" and (ii) the undisputed claims aggregate at least USD15,775 (amount as adjusted by the Judicial Conference of the United States); id. The petitioning creditors' claims cannot be disputed and cannot be contingent; the amount of the claim must be known and not conditioned on some future event.

Most involuntary bankruptcies are a collaboration between some of the involved creditors. If the debtor has more than 12 unsecured creditors, at least three of these creditors must join the petition, and altogether the three must have at least USD15,775 in unsecured outstanding debt from the debtor-in-possession. A solitary creditor may also file an involuntary petition only if that creditor is owed at least USD15,775 and if the debtor has fewer than 12 unsecured creditors in total. If a partnership, (i) fewer than all the general partners in such partnership must petition the court or (ii) a general partner in such partnership or a holder of a claim against such partnership (if relief has been ordered with respect to all of the general partners in such partnership). Otherwise, a foreign representative of the estate in a foreign proceeding concerning such person may be a petitioning creditor. Moreover, if the petition is not timely controverted, the court "shall" enter an order for relief against the debtor in an involuntary case. Otherwise, and after trial, the court shall order relief against the debtor in an involuntary case only if the petitioning creditor demonstrates that the debtor is "generally not paying such debtor's debts as such debts become due" or if within 120 days before the date of the filing of the petition, a custodian (other than a trustee, receiver, or agent) appointed or authorised to take charge was in fact appointed, or took possession, and is generally not paying such debtor's debts as such debts become due; id.

The Bankruptcy Court may dismiss an involuntary petition on the motion of a petitioner, on consent of all petitioners and the debtor, or for want of prosecution, but only after notice to all creditors and a hearing. In the event that the Bankruptcy Court dismisses an involuntary petition without the consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment, the court may grant judgment: (i) against the petitioning creditors and in favour of the debtor for costs or reasonable attorney's fee; or (ii) against any petitioning creditor that filed the petition in bad faith, for any damages proximately caused by such filing or punitive damages; id.

2.7 Requirement for Insolvency to Commence Proceedings

A potential debtor does not have to show insolvency to be granted relief under the USBC. Likewise, creditors need not prove insolvency to file an involuntary bankruptcy petition against the debtor; they need only demonstrate that the debtor is not paying its debts as they generally come due.

Insolvency as defined by the USBC is based on the traditional balance sheet test in which debts exceed assets, exclusive of property exempted or fraudulently transferred. The USBC contains three statutory definitions for 'insolvent', which definition applies in any particular case is determined by examining the debtor. The three statutory definitions are as follows:

- for entities other than a partnership and a municipality, Section 101(32)(A) defines 'insolvent as a financial condition such that the sum of such entity's debts is greater than all of such entity's property;
- in reference to a partnership, Section 101(32)(B) defines 'insolvent' as a financial condition such that the sum of such partnership's debts is greater than the aggregate of

such partnership's property and the sum of the excess of the value of each general partner's non-partnership property; and,
- in reference to a municipality, Section 101(32)(C) defines 'insolvent' as a financial condition such that the municipality is not paying or unable to pay its debts as they become due.

For further details, see 11 USC § 101(32)(A)-(C).

2.8 Specific Statutory Restructuring and Insolvency Regimes

Commercial bank subsidiaries cannot file for bankruptcy. Instead, the Federal Deposit Insurance Corporation ("FDIC") acts as the receiver of the failed bank. The FDIC seeks to protect insured depositors by arranging a sale to a healthy bank, or by paying depositors directly for their deposit accounts to the insured limit. The liquidation process differs from bankruptcy proceedings for other types of business entities. The liquidation system is governed by receivership laws that seek to ensure the speedy resolution of banks and that therefore allow the receiver broader powers than the bankruptcy laws allow. The powers conferred on the FDIC allow it to expedite the liquidation process for banks and maintain confidence in the banking system. The main areas of differences involve

- the claims' determination process;
- contract repudiation;
- stay of litigation;
- avoidance powers; and
- special defences.

Further, the liquidation process is done by the FDIC directly, and is not subject to the direction or supervision of any other agency or department of the USA, or of the court. In fact, a court does not supervise the administration of the assets and liabilities of the failed bank and cannot review the decisions of the receiver except under limited circumstances.

On the other hand, a bank holding company can file for bankruptcy. This usually occurs when the FDIC seized its banking subsidiary. In such a Chapter 11 case, the bank holding company marshals the assets and pays out the results to creditors before liquidating. Generally, the FDIC argues that the holding company was party to a Capital Maintenance Agreement which required the holding company to support the bank, thus generating substantial claims that dilute other unsecured creditors. In certain cases, those agreements can give rise to priority claims against the holding company's assets, placing FDIC ahead of other unsecured creditor. Section 507(a)(9) of the USBC provides that to establish the existence of a Capital Maintenance Agreement, the FDIC must show that the holding company clearly and irrevocably committed to provide capital support to the debtor's subsidiary bank in a signed writing with the applicable regulatory agency; in re Imperial Credit Indus., 527 F.3d 959, 964 (9th Cir. 2008).

Furthermore, insurance companies are regulated by the Puerto Rico Insurance Commissioner, monitored and regulated by the state insurance office. The Puerto Rico Insurance Code includes specific provisions for the liquidation of an insurance company. When an insurance company is declared insolvent, the Puerto Rico Insurance Commissioner must request the state court to order the liquidation of the company. The Commissioner then acts as a receiver. The Commissioner takes control of the company's operations, and oversees an accounting of the company's assets and liabilities and administers the estate of the company. In doing so, the receiver seeks to maximise the company's assets, liquidate it, and distribute the proceeds to creditors having valid claims against the insurer in accordance with payment priorities specified by state law.

Lastly, in Puerto Rico, the major utility companies are state-run. In fact, Puerto Rico has multiple public corporations, which have their own Board of Directors and budgets, and are in charge of their own revenues and expenditures. These corporations include the Puerto Rico Electric Power Authority (PREPA), the Puerto Rico Aqueduct and Sewer Authority (PRASA), and the Puerto Rico Highways and Transportation Authority (PRHTA). These public entities hold approximately 40% of Puerto Rico's debt.

Although the USBC applies in Puerto Rico, Puerto Rico's municipalities and instrumentalities cannot be debtors under Chapter 9. A Chapter 9 is a bankruptcy proceeding that provides financially distressed municipalities with protection from creditors by creating a plan between the municipality and its creditors to resolve the outstanding debt. The USBC provides that Puerto Rico is considered a state for all purposes of the USBC, except for purposes of who may be a debtor under Chapter 9.

On 30 June 2016, the President of the United States signed into law the Puerto Rico Oversight, Management and Economic Stability Act (PROMESA), Public Law No 114-187 dated 30 June 2016, which, among other things, provides a mechanism for restructuring the debts of the Commonwealth of Puerto Rico; 48 U.S.C. §2101 et seq. Moreover, PROMESA designated a Financial Oversight and Management Board for Puerto Rico ("FOMB") to assist the Commonwealth, including instrumentalities, in managing its public finances, overseeing the development of budgets and fiscal plans, and for other purposes. PROMESA enables the Commonwealth and its instrumentalities to enter a bankruptcy-like restructuring process under Title III or voluntary negotiations with creditors under Title IV.

The provisions of Title III, 48 U.S.C. §§ 2161-2177 follow a similar framework to that of a municipality bankruptcy un-

der Chapter 9 of the USBC but are broader in scope. As with Chapter 9, Title III does not incorporate the concept of a debtor-in-possession; see 48 U.S.C. § 2161. PROMESA designates FOMB as the representative of the Commonwealth debtor. The Oversight Board may initiate a procedure for debt restructuring and submit or modify a plan of adjustment. The goal under Title III is to file and confirm a Plan of Adjustment of Debts that will be binding upon all creditors and the Commonwealth or instrumentality. The Commonwealth or instrumentality will continue to operate on a daily basis and the Title III filing will not interfere with any of the properties or revenues of the Commonwealth, which will continue to use or enjoy any of its income-producing property. Under Title III, the Commonwealth will still be able to use, sell or lease its property subject to certain limitations. Moreover, the Commonwealth will be able to obtain a discharge prohibiting creditors from collecting on any amounts, or debts, beyond those contemplated in the Plan. Additionally, the Commonwealth may seek post-petition financing.

On 3 May 2017, the Commonwealth of Puerto Rico filed a proceeding for the adjustment of debts under Title III. Similarly, on 2 July 2017, PREPA filed a debt adjustment case under Title III and subsequently, various other instrumentalities have also filed Title III proceedings.

The provisions of Title IV, 48 U.S.C. §§ 2161 et seq, create a structure for collective debt restructuring negotiations among the numerous classes of bondholders. The public pension systems, unions, retiree associations, and retirees themselves are not entitled to participate in the collective negotiations. Title VI further creates a streamlined process for achieving modifications of financial debt of the Commonwealth (or bonds) with the consent of a super-majority of those voting in any affected class or pool provided that super-majority of those voting also constitutes a majority of the bonds outstanding in such pool. If the voting thresholds are met, the terms of such restructuring will apply to everyone else within the same pool, including those who did not vote or who voted against the proposed modification. Sections 601 and 104(i) of PROMESA provide a process for submission and approval of a voluntary agreement modifying Bond Claims. The modification may be proposed by the issuer of the bond or by one or more holders of the right to vote of the issuer's outstanding bonds. If proposed by one or more holders of the right to vote, the Board may accept the proposed modification on behalf of the issuer.

If the Title VI bondholder negotiations fail to reach an overall resolution, the FOMB can commence proceedings in federal district court under Title III of PROMESA and seek court approval of a debt adjustment plan. The importance of Title VI is its potential speed relative to restructuring through a plenary court process (as under a Title III proceeding).

3. Out-of-court Restructurings and Consensual Workouts

3.1 Consensual and Other Out-of-court Workouts and Restructurings

Depending on the nature of the debt and the complexity of the financial problems, debtors and creditors resort to bankruptcy either to litigate or to get the protections of the USBC, such as the automatic stay or selling assets free and clear of all liens. Hence, there has been an increase in Chapter 11 reorganisation cases. Furthermore, Puerto Rico has one of the highest number of Chapter 13 bankruptcy petitions in the USA.

Consensual restructuring among debtor and creditors is common in our jurisdiction, with an increasing number of workouts and non-court restructuring procedures. Due to the high increase in bankruptcies and foreclosures in the real property market, banks have adopted the practice of referring distressed debtors to their mitigation department to modify, temporarily or permanently, the terms and conditions of the payment. Also, certain debt collection claims before the Puerto Rico Court of First Instance require a mediation session between the bank and debtor when the debtor's principal place of residence is the bank's collateral and thus would be sold in a judicial sale during the foreclosure process. Although the mediation is compulsory, there is no obligation to reach an agreement; only the initial session is mandatory. Further, Puerto Rico is experiencing a substantial increase in Chapter 7 liquidations for both individuals and corporations.

3.2 Typical Consensual Restructuring and Workout Processes

A consensual restructuring process requires the troubled business entity to contact all creditors and notify the intention of negotiating a voluntary restructuring of all the debts. This being a voluntary process, if the creditors accept, typically non-disclosure agreements are signed and depending on the size of the debtor's debt and number of creditors, committees may be formed varying on the type of debt. The duration of the non-disclosure agreement is subject to negotiation within the parties but will typically be short. The debtor will be required to disclose its entire financial situation and prepare inventory of all the assets it holds. Contrary to a bankruptcy proceeding, this information will be kept confidential and the process would be bound by the non-disclosure agreement. Negotiations can lead to extensions in payment, reduction of principle and interest, and a new payment plan, among others.

3.3 Injection of New Money

It is not common under our jurisdiction to establish a super-priority claim outside the applicable statutory provisions of real and personal property liens since permitting such super-priority would contravene the very essence of what the

established order represents. If new money is to be injected, the entity injecting new money, be it a bank or investor, may require covenants restricting the entity's operating actions or request a lien on unencumbered property. Nonetheless, super priorities are common in bankruptcy practices within the context of debtor-in-possession financing.

3.4 Duties of Creditors to Each Other, or of the Company or Third Parties

The Puerto Rico Civil Code requires that all negotiations be entered and executed in good faith and also has provisions against fraud. Any breach of duties of good faith may result in damages on theories of duties of good faith and fair dealing, fraud, deceit and misrepresentation. Furthermore, for an obligation or a contract to be valid, the clauses and conditions must not contravene law, moral, or public order

3.5 Consensual, Agreed Out-of-court Financial Restructuring or Workout

Out-of-court financial restructurings are fundamentally consensual and contractual. Accordingly, out-of-court restructurings are implemented without judicial intervention or approval, pursuant to the contractual terms between and among the debtor and creditors. A consensual restructuring plan outside of bankruptcy will be governed by general contractual principles under the Civil Code of Puerto Rico

If bankruptcy is filed, it will be governed by the USBC, which, depending on the type of bankruptcy filed, may have cram-down provisions. Generally, a cram-down is the imposition of a bankruptcy reorganisation plan by a court despite the objections of certain classes of creditors. A such, a 'cram-down' refers to any unfavourable deal forced on creditors by circumstance. Cram-down provisions are found in both Chapter 11 and Chapter 13 reorganisation.

In a Chapter 11 reorganisation, a proposed plan of reorganisation may only be confirmed if, with respect to each class of claims or interests, such class has accepted the plan or such class is not impaired under the plan; 11 U.S.C.A. § 1129(8). However, an individual debtor's proposed plan may include a provision to "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence"; 11 U.S.C. § 1123(b)(5). If all of the applicable requirements are met with respect to a plan of reorganisation under Section 1129(a), the court, on request of the proponent of the plan, shall confirm the plan if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan; see 11 U.S.C. 1129(b)(1). Cram-down occurs in Chapter 11 when the secured creditor's rights are altered by the plan under Section 1124 and the proposed Chapter 11 plan is confirmed as "fair and equitable" under Section 1129(b)(2)(A) even though the secured creditor does not accept the proposed plan treatment. As such, under the cram-down provisions of Chapter 11, if a class of creditors votes to reject the plan of reorganisation, the plan can nevertheless be imposed on the entire dissenting class if the bankruptcy court does not find that it discriminates unfairly amongst classes of similarly situated creditors and is otherwise fair and equitable.

In a Chapter 13 reorganisation, an individual debtor's proposed plan may include a provision to "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence"; 11 U.S.C. § 1322(b)(2). Cram-down occurs in Chapter 13 when the secured creditor does not accept the treatment proposed in the Chapter 13 plan and the property is not surrendered by the debtor, thereby permitting the debtor to retain the subject property only by paying the creditor the current value of the property; 11 U.S.C. § 1325(a)(5)(B). Once confirmed, a Chapter 13 plan is binding on the creditors regardless of whether they objected to, accepted, or rejected the plan; 11 U.S.C. § 1327(a).

4. Secured Creditor Rights and Remedies

4.1 Type of Liens/Security Taken by Secured Creditors

The following is a list of the types of securities taken over real property Puerto Rico jurisdiction:

- "true" legal mortgage
- equitable mortgage;
- statutory mortgage;
- fixed equitable charge, or bill of sale;
- floating equitable charge;
- pledge, or pawn;
- legal lien;
- equitable lien; and
- hypothecation, or trust receipt.

Article 9 of the Uniform Commercial Code of the USA regulates security interests in personal property rather than real property and develops a unified concept of what constitutes a security interest which creates a right in the debtors' property which secures the execution of an obligation or a payment. This article was enacted in all 50 US jurisdictions and all other US territories including Puerto Rico. This security interest is created by what is commonly called a security agreement in which a debtor grants a security in the debtor's property as collateral for the specific obligation or loan payment. In our jurisdiction the term 'security interest' is used interchangeably with the term 'lien'. This does not negate the fact that lien is more often directly associated with the resulting collateral of real property rather than private property.

If the debtor does not comply with the limitations of the obligation or the payment, the creditor may take possession of the property as a security interest of that unpaid or unfulfilled obligation. The possession of such property has to be entered into a public auction or a private sale, and proceeds have to be applied to be able to satisfy the underlying obligations. If the payment resulting from the sale of the property exceeds the amount that is owed to the debtor, the debtor is entitled to the remaining amount. If the total amount remains unpaid prior to the sale of the property the creditor might be entitled to collect from additional property of the debtor. The perfection of a security agreement is achieved with the filing of a financing statement with the government's department of state in the jurisdiction in which the corporate debtor is incorporated.

4.2 Rights and Remedies for Secured Creditors

Secured creditors have the following rights in the event of a default payment by the debtor.

Outside of bankruptcy, state law governs the rights and remedies of secured creditors. In the Commonwealth, secured creditors with mortgage liens on real property may, upon a default by the mortgagor, obtain a judgment in court to foreclose on the real property and force a judicial sale of the property. Likewise, the Uniform Commercial Code dictates the rights and remedies of a secured creditor with regard to chattel. Puerto Rico's Registry of Commercial Transactions operates under Chapter 9 of the Commercial Transactions Act, Act No 241-1996, as amended, which was reformulated and incorporated under Act No 21-2012. Puerto Rico's Department of State is the governmental agency responsible for administering the Registry of liens on personal property used as guaranty for incurred obligations.

A secured creditor has particular rights under the USBC and has a right to receive through bankruptcy the present value of its claim – that is, the value of its collateral. The creditor may seek relief from the automatic stay under 11 U.S.C. §362(d) in order to foreclose or execute its collateral for 'cause'. The Bankruptcy Code "does not define 'cause' but generally speaking, 'cause' is said to exist when the harm that would result from a continuation of the stay would outweigh any harm that might be suffered by the debtor or the debtor's estate if the stay is lifted. Determining whether 'cause' exists requires a fact intensive inquiry that must be made on a case by case basis"; Peerless Ins. Co. v Rivera, 208 B.R. 313, 315 (D.R.I. 1997), citing In re Turner, 161 B.R. 1, 3 (Bankr.D.Me.1993); In re Tucson Estates, Inc., 912 F.2d 1162, 1166 (9th Cir.1990).

4.3 The Typical Timelines for Enforcing a Secured Claim and Lien/Security

According to Article 9 of the United States Commercial Code a duty of commercial reasonableness on all aspects of a disposition of collateral is imposed. The commercial reasonableness disposition reads: "Every aspect of a disposition of collateral, including the method, manner, time, place and other terms must be commercially reasonable"; UCC § 9-610(b). Therefore, the court created a distinction between a notice and publicity which substantially expanded the responsibility of a foreclosing creditor to publicise the sale of the lien to augment the number of possible bidders. "Thus the minimum advertising required to make the publicity aspect a sale of foreclosed collateral commercially reasonable is the notice given by publication. But if placing the required legal notice is not a commercially reasonable method of informing potential buyers of the sale's time and place, the sale will fail to meet the requirements of commercial reasonableness"; 8 Cal 4th at 1233.

In terms of a bankruptcy proceeding, a secured creditor will generally receive adequate protection payments, depending on the extent of its security, and may not enforce its lien without an order from the Bankruptcy Court; see 11 U.S.C.A. § 361-364. The term 'adequate protection' is not defined in the USBC; however, it is interpreted as the right a holder of an interest in property affected by a bankruptcy stay has to reasonable assurance that the value of its secured interest is, and will continue to be, protected by the debtor; see 3 Collier on Bankruptcy P 361.02 (16th 2018).

4.4 Special Procedures or Impediments That Apply to Foreign Secured Creditors

According to Section 1513 of the USBC: "Foreign creditors have the same rights regarding the commencement of, and participation in, a case under this title as domestic creditors"; 11 U.S.C. § 1513. Section 1513 further establishes that the "allowance and priority as to a foreign tax claim or other foreign public law claim shall be governed by any applicable tax treaty of the United States, under the conditions and circumstances specified therein"; id.

4.5 Special Procedural Protections and Rights for Secured Creditors

The automatic stay imposed by Section 362 of the USBC prohibits collection actions and proceedings directed toward property of the bankruptcy estate; see 11 USC § 362. A secured creditor may collect from debtor's collateral through adequate protection payments or by obtaining an order from the Bankruptcy Court lifting the automatic stay

5. Unsecured Creditor Rights, Remedies and Priorities

5.1 Differing Rights and Priorities Among Classes of Secured and Unsecured Creditors

A creditor with a perfected pre-petition lien is a secured creditor to the extent of the value of their collateral. Typically, a perfected secured creditor's claim is entitled to first priority payment rights over unsecured creditors.

Unsecured creditors may only assert their unsecured claims as permitted by the USBC or by court order. Unsecured creditors are entitled to participate and be heard in the bankruptcy process, and may recover on their unsecured claims to the extent distributions are made to unsecured creditors.

In a Chapter 7 liquidation, claims are paid in descending order of priority, with the highest priority creditors receiving payment first, as governed by the statutory claims priority scheme set by Section 726 of the USBC, supplemented by the order specified in Section 507. In a Chapter 11, creditor rights are set by the terms of a confirmed plan of reorganisation or liquidation. In a Chapter 11 liquidation, the waterfall of distributions is fixed by the terms of the confirmed plan and by the priority order specified in Section 507.

Section 507 of the USBC provides the order that creditors must receive payments when a debtor files for bankruptcy. Priority, in descending order, is as follows:

- domestic support obligations;
- administrative expenses of parties who become creditors after the bankruptcy petition date and provide funds to the debtor to continue operating or liquidating;
- secured creditors – these include banks' lending money backed by security over the debtor's assets, such as a mortgage on a real estate or a lien vehicle;
- unsecured claims, but only to the extent of USD10,000 for each individual or corporation for: wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or sales commissions earned by an individual or by a corporation with only one employee acting as an independent contractor in the sale of goods or services for the debtor in the ordinary course of the debtor's business;
- general creditors, including suppliers of goods and lenders, who do not have a security interest in the debtor's assets – the distributions to general creditors are usually discounted;
- stockholders.

Section 503 of the USBC provides for the allowance of administrative expenses, which generally have priority over all other payments; see 11 U.S.C. § 503. Generally, administrative expenses are those incurred by the bankruptcy estate during the administration of said estate after entry of the order for relief. In Chapter 9 and Chapter 11, a plan cannot be confirmed unless it provides that all claims – including all Section 503(b) administrative expenses – will be paid in cash in full, on the effective date of the plan, unless the holder of the claim has agreed to a different treatment; 4 Collier on Bankruptcy, paragraph 503.01 (16th edition, 2018). Likewise, in Chapter 12 and Chapter 13, a plan cannot be confirmed unless full payment of all claims entitled to priority – including all Section 503(b) administrative expenses – is provided for, unless the holder of the claim has agreed to a different treatment; id.

5.2 Unsecured Trade Creditors

Even though unsecured creditors are involved in the restructuring process, there is no guarantee that they will be kept whole. Unsecured creditors have one or more representatives present during Chapter 11 negotiations depending on the types of debt incurred by the debtor, all of which participate in voting for the approval of the plan.

Moreover, once the value of property to be received under a plan of reorganisation has been calculated, the court must find that it equals or exceeds the amount that the holder would receive or retain if the debtor were liquidated under Chapter 7 of the USBC; see 11 U.S.C. § 1325(a)(4) ("the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date"); 11 U.S.C. § 1129(a)(7) ("will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date"). As such, every plan proponent must perform a liquidation analysis of the estate and ensure that the unsecured creditor receives or retains at least as much as under a Chapter 7 liquidation.

5.3 Rights and Remedies of Unsecured Creditors

Unsecured creditors' rights in a bankruptcy relief proceeding are limited. Among the limited rights to which unsecured creditors are entitled is the objection of debt discharges. Also, in Chapter 11 proceedings, the unsecured creditor is allowed to form committees depending on the types of debt, from which a representative is chosen to participate in the voting for the approval of the restructuring plan.

5.4 Pre-judgment Attachments

Unsecured creditors can obtain pre-judgment attachments through Rule 56.1 of the Puerto Rico Rules of Civil Procedure; see 32 LPRA App. III, § 56.1. Subject to the court's discretion, a provisional order to attach property is made in order to guarantee the effectiveness of the judgment. This proceeding requires proper notification to the adverse party and, depending on the circumstances, a bond provided by the creditor. If the pre-judgment attachment is for real property, Article 112 of the Puerto Rico Mortgage Act allows the creditor to request the registrar from the Property Registry to annotate the acquired right in the registry.

5.5 Typical Timeline for Enforcing an Unsecured Claim

An unsecured creditor seeking to enforce their claim against the debtor must initiate a lawsuit for debt collection in a

court of competent jurisdiction and obtain a valid judgment in their favour. The creditor must prove that the debt is liquid, due and enforceable. This process once initiated may take around a year or sometimes more to obtain a favourable judgment. One of the reasons it takes a long time to obtain a favourable judgment is due to the high amount of cases being managed in Puerto Rico's judicial system.

5.6 Bespoke Rights or Remedies for Landlords

A landlord-lessor's rights and remedies as a creditor against its tenant-lessee depend on whether the tenant-lessee has commenced bankruptcy. Outside of bankruptcy, if a lessee defaults under a lease, the landlord may assert its claims for unpaid rent and commence an eviction proceeding against the lessee in state court.

In bankruptcy, a landlord-lessor's claim for unpaid pre-petition rent is a general unsecured claim. Under Section 365 of the Bankruptcy Code, a debtor may assume or reject an executory contract or unexpired lease based on the debtor's business judgment and upon approval of the court; see 11 U.S.C. § 365. Generally, a Chapter 11 debtor may assume or reject an executory contract or unexpired lease at any time before confirmation of the plan; see 11 U.S.C. § 365(d)(2). However, "the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease"; id.

The tenant has 60 days to choose if he or she will assume the lease or not. If the tenant opts for not assuming the lease, it is deemed rejected as of the date of the bankruptcy filing. If the lease is assumed, the lessor's pre-petition claim is entitled to administrative expense priority treatment and must be paid in full. However, if the debtor rejects its obligations under the lease, the pre-petition claim will remain a general unsecured claim. The lessor's only remedy would be to file a claim for damages resulting from such rejection; id.

Moreover, even after the automatic stay applies when the bankruptcy petition is filed, landlords are entitled to waive the automatic stay. They are allowed to collect pre and post-petition defaults if the tenant decides to continue with the lease once the bankruptcy petition has been filed.

5.7 Special Procedures or Impediments or Protections That Apply to Foreign Creditors

Under Section 1513(a) of the USBC, foreign creditors have the same participation rights as any other domestic creditor.

5.8 The Statutory Waterfall of Claims

See above, **5.1 Different Rights and Priorities Among Classes of Secured and Unsecured Creditors**. A liquidation can occur under Chapter 7 or Chapter 11 of the USBC. State laws govern payment-priority waterfalls in state law proceedings. Generally, each higher priority class must be paid in full before the next class may receive any kind of distribution. In a Chapter 7 liquidation, claims are paid in descending order of priority, with the highest-priority creditors receiving payment first, as governed by the statutory claims priority scheme set by Section 726 of the USBC, supplemented by the order specified in Section 507. In a Chapter 11, creditor rights are set by the terms of a confirmed plan of reorganisation or liquidation and by Section 507.

5.9 Priority Claims

See above, **5.1 Differing Rights and Priorities Among Classes of Secured and Unsecured Creditors**.

5.10 Priority Over Secured Creditor Claims

See above, **5.1 Differing Rights and Priorities Among Classes of Secured and Unsecured Creditors**. Typically, a perfected secured creditor's claim is entitled to first priority-payment rights over unsecured creditors.

6. Statutory Restructurings, Rehabilitations and Reorganisations

6.1 The Statutory Process for Reaching and Effectuating a Financial Restructuring/Reorganisation

Chapter 11 is a chapter of Title 11 of the USBC, which permits reorganisation under the bankruptcy laws of the USA. Chapter 11 bankruptcy is most prominently used by corporate entities, although it may also be filed by individuals. When a company is unable to service its debt or pay its creditors, the business or its creditors can file with a federal bankruptcy court for protection under either Chapter 7 or Chapter 11. On the other hand, in Chapter 7, the business ceases operations, a trustee sells all of its assets, and then distributes the proceeds to its creditors. Any residual amount is returned to the owners of the company. Meanwhile, the debtor during Chapter 11 remains in control of its business operations as "debtor-in-possession", and is subject to the oversight and jurisdiction of the court. Chapter 11 consists of a reorganisation proceeding in which the debtor's business or personal assets and debts are administered according to the outstanding debt. In some instances, Chapter 11 can also be used as a mechanism for liquidation.

A Chapter 11 case begins with the filing of a petition with the bankruptcy court serving the area where the debtor has a domicile or residence. A petition may be a voluntary petition, which is filed by the debtor, or it may be an involuntary petition, which is filed by creditors that meet certain requirements. There is no requirement that the company be insolvent, but some financial distress is required for a good faith filing – a Chapter 11 may be dismissed as a bad faith filing if filing is determined to be an abuse of judicial process.

Usually a debtor-in-possession has the first opportunity to propose a plan during the period of exclusivity. The period of exclusivity gives the debtor 120 days from the date of filing for Chapter 11, to propose a plan of reorganisation prior to any creditor interference or an alternate plan is proposed by a party in interest. If the debtor proposes a plan within the 120-day exclusivity period, a 180-day exclusivity period from the date of filing for Chapter 11 is granted in order to allow the debtor to gain confirmation of the proposed plan. With some exceptions, in which the reorganisation is not necessarily classified as voluntary, the plan may be proposed by any party in interest. Creditors then vote for the proposed plan.

A Chapter 11 plan may be confirmed with votes of all such classes entitled to vote. Confirmation of a plan requires that it be accepted by requisite majorities of creditors voting in at least one impaired creditor class. A class of creditors accepts a plan if the holders of at least two thirds of the amount of the claims in this class vote on and for the plan. A plan's terms can be 'crammed down' on dissenting creditor and equity classes if Section 1129(b) cram-down requirements are met. As such, if one or more impaired creditor classes vote to accept a plan, its confirmed terms will be binding on all creditors, including creditors and equity interest holders in non-accepting classes. See **3.5 Consensual, Agreed Out-of-court Financial Restructuring or Workout** for more information on how a proposed plan of reorganisation may be confirmed.

A Chapter 11 plan of reorganisation must include, inter alia, terms that: (i) designate and define classes of claims and equity interests, specify the treatment of each class, and provide for the same treatment for each claim or interest in a particular class unless the holder of a claim or interest agrees to less favourable treatment; and (ii) provide adequate means for implementation of the plan; see 11 U.S.C. §1123.

Committees of both creditors and stockholders create alternate solutions through plan implementation to relieve the company from having to pay part of its debt and to restructure accordingly. This committee is usually referred to as the Official Committee for Unsecured Creditors and it represents the interest of all bondholders and unsecured creditors.

Generally, a written disclosure statement and a plan of reorganisation must be filed with the court. The disclosure statement is a document that must contain information concerning the assets, liabilities, and business affairs of the debtor sufficient to enable a creditor to make an informed judgment about the debtor's plan of reorganisation.

A debtor may recover from a Chapter 11 bankruptcy within a period of months or within several years, depending on the size of the company, the assets at their disposition the amount of creditors along with other complexities that might occur during the bankruptcy proceeding. An individual cannot file under Chapter 11 or any other Chapter if, during the preceding 180 days, a prior bankruptcy petition was dismissed due to the debtor's wilful failure to appear before the court or comply with orders of the court, or was voluntarily dismissed after creditors sought relief from the bankruptcy court to recover property upon which they hold liens.

Under a Chapter 11, debtors are also protected from other litigation against the business through the imposition of an automatic stay. The automatic stay provides a period of time in which all judgments, collection activities, foreclosures, and repossessions of property are suspended and may not be pursued by the creditors on any debt or claim that arose before the filing of the bankruptcy petition. Under specific circumstances, the secured creditor can obtain an order from the court granting relief from the automatic stay.

6.2 Position of the Company During Procedures

Bankruptcy proceedings in Puerto Rico provide an individual or entity with an automatic stay provided in Section 362 of the USBC upon filing a bankruptcy petition; see 11 USC § 362. As such, the automatic stay goes immediately into effect when a bankruptcy petition is filed in court. In essence, such automatic stay operates as a stay of:

- the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under the USBC, or to recover a claim against the debtor that arose before the commencement of the case under the USBC;
- the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under the USBC;
- any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
- any act to create, perfect, or enforce any lien against property of the estate;
- any act to create, perfect, or enforce against property of the debtor or any lien to the extent that such lien secures a claim that arose before the commencement of the case under the USBC;
- any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under the USBC;
- the set-off of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
- the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability

of a debtor who is an individual for a taxable period ending before the date of the order for relief under the USBC.

Under Chapter 11, a debtor is permitted to continue business as a debtor-in-possession, unless there is cause under Section 1104 of the USBC, such as fraud or gross mismanagement, for the appointment of a trustee to oversee the operations of the business; see 11 U.S.C. § 1104. See also **2.4 Procedural Options**. The trustee is appointed exclusively through an order from the court.

Under Chapter 7, a trustee is assigned by the court to liquidate the debtor's non-exempt assets; see 11 U.S.C. §§ 701, 704. The US trustee appoints individuals who may serve as Chapter 7 trustees and the court assigns such Chapter 7 trustees to Chapter 7 cases.

A debtor may obtain post-petition financing outside of the ordinary course of business under Section 364(c) of the USBC; see 11 U.S.C. § 364(c). Such post-petition financing may only be obtained with the court's approval and may be secured:

- with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of the USBC;
- by a lien on property of the estate that is not otherwise subject to a lien; or
- by a junior lien on property of the estate that is subject to a lien.

6.3 The Roles of Creditors During Procedures

Generally, distribution in bankruptcy will be as follows:

- administrative creditors;
- priority claims;
- secured creditors;
- unsecured creditors – suppliers, bondholders and banks have the next claim;
- stockholders – in certain situations they might never be paid at all due to the fact that they cannot receive any compensation until all of the secured and unsecured creditors are repaid fully.

Creditors play an important role during a Chapter 11 reorganisation process. The major distinction in bankruptcy is secured and unsecured creditors. Thus, upon the filing of a bankruptcy, creditors must evaluate the classification and extent of its collateral and the effect that bankruptcy will have on the value of the same. A secured claim under the USBC is an allowed claim secured by a lien on property in which the estate has an interest. It is secured only to the extent of the value of the collateral. Unsecured creditors play an important role, especially if they become members of the unsecured creditors' committee; see 11 U.S.C. § 1102. The fundamental objective is to protect the interest of the unsecured creditors. The committee consists of the seven largest unsecured claims creditors who are appointed by the US trustee. The committee (i) investigates the debtor's conduct and the operation of the business, (ii) consults with the debtor in position regarding strategies for administrating the case, (iii) and directly participates in the creation of the plan. A creditors' committee can even hire specialised professionals or attorneys to assist in the performance of the committees' duties. Their role in the process can become a very important safeguard for the proper management of the struggling business and the reorganisation of the debtor-in-possession affairs.

During a Chapter 11 reorganisation process, any of the creditors whose claim has not been scheduled, is scheduled as contingent, disputed or unliquidated must file a proof of claim along with evidence of the existence of the claim in order to be included in the plan for voting and distribution purposes. On the other hand, if the claim has already been scheduled it is not necessary to file proof for such claim because the debtor's schedules constitute evidence of the validity and amount of set claims. The creditor holds the responsibility of making sure that the claim is accurately listed and the debtor must then notify the others of the claims that have been added to the schedules. This notification should advise the creditors of their right to file proofs of claim and if they fail to do so, they could be prevented from voting upon the debtor's plan of reorganisation or participating in any distribution under that plan. "When a debtor amends the schedule of liabilities to add a creditor or change the status of any claims to disputed, contingent, or unliquidated, the debtor must provide notice of the amendment to any entity affected"; Fed. R. Bankr. P. 1009(a).

6.4 Modification of Claims

In preparing a plan under Chapter 11, the debtor classifies its creditors. In general terms, the provision of the USBC governing classification of claims provides that: (i) subject to certain exceptions, a plan may classify a claim or interest in a particular class only if such claim or interest is substantially similar to other claims and interest in such class, and (ii) a plan must provide the same treatment for each claim or interest in a particular class, unless the holder agrees to a less favourable treatment than the other claims or interest in that class.

If a class of creditors votes to reject the plan of reorganisation, the plan can nevertheless be imposed on the entire dissenting class if: (i) at least one impaired class has voted in favour of the plan; and (ii) the bankruptcy court does not find that the plan discriminates unfairly amongst classes of similarly situated creditors and is otherwise fair and equitable; see 11 U.S.C. 1129(b)(1). This is known as a 'cram-down.' Generally, a cram-down is the imposition of a bankruptcy reorganisation plan by a court despite the objections of certain classes of creditors.

6.5 Trading of Claims

In the absence of a bankruptcy court order to the contrary, creditors' claims under Chapter 11 can be traded; see Fed. R. Bankr. P. 3001. Parties may freely transfer bankruptcy claims, and the relevant rules permit the sale of claims in private transactions that are almost entirely free from court interference.

At what point and how a transfer is implemented and recognised depends on the type of claim and whether such was filed before or after the filing of a proof of claim. If a claim has been transferred before proof of the claim has been filed, the proof of claim may be filed only by the transferee or an indenture trustee; see Fed. R. Bankr. P. 3001(e)(1). If a claim (other than one based on a publicly traded note, bond, or debenture) has been transferred after the proof of claim has been filed, evidence of the transfer shall be filed by the transferee and the clerk shall immediately notify the alleged transferor of the filing of the evidence of transfer; see Fed. R. Bankr. P. 3001(e)(2). If a claim (other than one based on a publicly traded note, bond, or debenture) has been transferred for security before proof of the claim has been filed, the transferor and/or transferee may file a proof of claim for the full amount, supported by a statement setting forth the terms of the transfer; see Fed. R. Bankr. P. 3001(e)(3). Lastly, if a claim (other than one based on a publicly traded note, bond, or debenture) has been transferred for security after the proof of claim has been filed, evidence of the terms of the transfer shall be filed by the transferee and the clerk shall immediately notify the alleged transferor of the filing of the evidence of transfer; Fed. R – see Bankr. P. 3001(e)(4). Objection to a transfer must be filed within 21 days; without a timely objection, the transfer is valid.

6.6 Using a Restructuring Procedure to Reorganise a Corporate Group

Bankruptcy courts can allow for the substantial consolidation of bankruptcy cases of affiliated entities so that they are treated as a single entity, treating all assets of the debtor and its consolidated affiliates as a common pool of assets, and treating the claims of creditors against the debtor and its affiliates as claims against the common assets of all debtors and its consolidated affiliates. Otherwise, bankruptcy courts can authorise the joint administration of bankruptcy cases. Bankruptcy Rule 1015(b) authorises the procedural consolidation or joint administration of bankruptcy cases of a debtor and its affiliates. Different from the case of substantial consolidation, joint administration is a process to make administration of bankruptcy cases more efficient without affecting the substantive rights of creditors. Joint administration does not consolidate the debts or the assets of the debtors, which remain separate and distinct. Each debtor is reorganised or liquidated separately, with their respective creditors receiving from the assets or future income of the debtor against whom they had their claims.

6.7 Restrictions on the Company's Use of or Sale of Its Assets During a Formal Restructuring Process

Other than the reorganisation taking place during a Chapter 11 Bankruptcy proceeding, many other situations might arise which the debtor must attend to. According to Title 11 of the United States code: "[t]he debtor-in-possession may use, sell, or lease property of the estate in the ordinary course of its business, without prior approval, unless the court orders otherwise"; 11 U.S.C. § 363(c). Regardless, if the intended sale or use is outside the ordinary course of its business for obtaining the necessary transactional collateral, the debtor must obtain permission from the court.

A debtor-in-possession is not able to use 'cash collateral' without the consent of the secured party or authorisation by the court. The court must first examine whether the interest of the secured party is adequately protected; 11 U.S.C. § 363. Section 363 defines 'cash collateral' as: "cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents, whenever acquired, in which the estate and an entity other than the estate have an interest". This collateral includes any products, proceeds, offspring, profits, or rents of property and the charges, fees, accounts or payments for the use or occupancy of the facilities in the business subject to a creditor's security interest.

Under Section 363 of the USBC, secured creditors are entitled to receive additional protection when cash collateral is used. The debtor-in-possession, before utilising any of the cash collateral, must file a motion requesting an order from the court authorising its usage: "Pending consent of the secured creditor or court authorisation for the debtor-in-possession's use of cash collateral, the debtor-in-possession must segregate and account for all cash collateral in its possession"; 11 U.S.C. § 363(c)(4). To provide the adequate protection of the interested creditor a party with an interest in property being used may request that the court prohibit or condition this use to the extent necessary to protect the value of the creditor's interest in the property: "The debtor may make periodic or lump sum cash payments, or provide an additional or replacement lien that will result in the creditor's property interest being adequately protected"; 11 U.S.C. § 361. However, if and when the Chapter 11 debtor needs operating capital, it may be able to obtain it from a lender by giving the lender a court-approved 'super-priority' over other unsecured creditors or a lien on property of the estate; 11 U.S.C. § 364.

6.8 Asset Disposition and Related Procedures

Pursuant to Section 363(f) of the Bankruptcy Code, a debtor may sell property under Section 363(b) of the Bankruptcy Code free and clear of liens, claims and encumbrances if one of the following conditions is satisfied:

- applicable non-bankruptcy law permits the sale of the property free and clear of such interest;

- the entity holding the lien, claim or encumbrance consents to the sale;
- where the interest is a lien, the price at which such property is to be sold is greater than the aggregate value of all liens thereon;
- the interest is in bona fide dispute; or
- the entity could be compelled, in a legal or equitable proceeding, to accept a monetary satisfaction of its interest.

See 11 U.S.C. § 363(f). Sales may be private or through a public auction, and thus, a creditor may act as stalking-horse in the sale process. Disclosure and notice are pivotal and the sale must be in good faith and for a good business reason. Thus, if the sale is private, parties in interest may oppose if it is not in the best interest of creditors and the estate.

6.9 Release of Secured Creditor Liens and Security Arrangements

A plan of reorganisation generally discharges a debtor from its pre-petition debts to creditors, except for certain statutory exceptions, including security interests unless the confirmed plan provides otherwise. The timing of such discharge will depend on whether the debtor is an individual or an entity. Non-dischargeable debts include alimony and child support, certain taxes, debts for certain educational benefit over-payments or loans made or guaranteed by a governmental unit, debts for wilful and malicious injury by the debtor, debts for death or personal injury caused by the debtor's operation of a motor vehicle while intoxicated, and debts for certain criminal restitution orders; see 11 U.S.C. § 523(a). The foregoing also applies to Chapter 7 and Chapter 13 cases.

6.10 Availability of Priority New Money

Under Section 364 of the USBC, the bankruptcy court can allow a debtor to obtain post-petition financing outside the ordinary course of its business with court approval. The lender of new money may be granted a 'super-priority' claim by the court with priority over all other administrative and general unsecured claims. See above, **6.2 Position of the Company During Procedures**.

6.11 Statutory Process for Determining the Value of Claims

Per Fed. R. Bankr. P. 3012, a bankruptcy court may determine the value of a claim secured by a lien on property in which the estate has an interest after a hearing on notice to the holder of the secured claim; see Fed. R. Bankr. P. 3012. The value of a creditor's allowed claim is equal to "the value of such creditor's interest in the estate's interest" in collateral property; see 11 U.S.C. § 506(a)(1). While bankruptcy cases are filed in United States Bankruptcy Court, state laws are often applied when determining property rights; see Butner v U.S., 440 U.S. 48 (1979). As such, bankruptcy courts may apply non-bankruptcy law to determine and estimate the value of a claim.

6.12 Restructuring or Reorganisation Plan or Agreement Among Creditors

The confirmation of a plan of reorganisation is contingent on several prerequisites to ensure overall fairness. A plan must:

- be proposed in good faith;
- not be forbidden by law;
- designate all claims and interests into classes;
- specify the treatment of each class of claims or interests and determine whether such classes are impaired or unimpaired;
- provide adequate means for the plan's implementation; and
- be feasible.

See 11 U.S.C. §§ 1123, 1222 and 1322.

6.13 The Ability to Reject or Disclaim Contracts

Under Section 365 of the USBC, certain ongoing or 'executory' contracts may be assumed and performed by the debtor, assigned to a third party, or rejected; see 11 U.S.C. § 365. A contract is generally considered executory when both parties to the contract have not yet fully performed a material obligation of the contract. If rejected by either the trustee or a debtor-in-possession, the debtor's bankruptcy estate may be subject to breach of contract damages which are generally treated as unsecured claims.

6.14 The Release of Non-debtor Parties

In Callaway v Benton, 336 US 132 (1949), the Supreme Court of the United States held that there was no basis on which to displace the non-bankruptcy rights and obligations of non-debtors – as such, it prohibited the use of permanent non-debtor injunctions. Nevertheless, non-debtor releases have caused a circuit split amongst the bankruptcy courts and are an issue on which the US Court of Appeals for our First Circuit has not expressly ruled.

6.15 Creditors' Rights of Set-off, Off-set or Netting

The USBC recognises and preserves set-off rights to the extent they exist under non-bankruptcy law prior the debtor filing for bankruptcy; 11 U.S.C. § 553. Section 553(a) provides that the USBC "does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case"; id. As such, Section 553 does not create set-off rights, but merely preserves set-off rights that otherwise would exist under applicable non-bankruptcy law. See Collier on Bankruptcy, paragraph 553.04 (16th edition, 2017); Citizens Bank of Maryland v Strumpf, 516 U.S. 16 (1995).

Hence, if a creditor holds a valid right of set-off under non-bankruptcy law, it may exercise such rights in bankruptcy if:

- both debts are owed between the same parties and in the same right or capacity;
- both debts arose before the debtor's bankruptcy; and
- both debts are valid and enforceable.

6.16 Failure to Observe the Terms of an Agreed Restructuring Plan

A debtor's failure to observe the terms of a confirmed plan or its inability to consummate substantially a confirmed plan constitutes grounds for dismissal or conversion. The bankruptcy court may give the debtor the opportunity to cure a default under a confirmed plan. If a creditor fails to observe the terms of a confirmed plan by attempting to bring a claim against the debtor or through breach of the automatic stay, the court can levy significant sanctions on the creditor, including costs, damages and punitive damages.

6.17 Receive or Retain Any Ownership or Other Property

According to Section 101 of Title 11 of the USBC an equity security holder holds an equity security of the debtor. A share in a corporation, an interest of a limited partner in a limited partnership, or a right to purchase, sell, or subscribe to a share, security, or interest of a share in a corporation or an interest in a limited partnership are some of the examples of this equity; see 11 U.S.C. § 101(16)-(17). An equity security holder may vote on the reorganisation plan and then resort to file a proof of interest, rather than a proof of claim which is deemed filed for any interest that appears in the debtor's schedules, unless it is "scheduled as disputed, contingent, or unliquidated"; see 11 U.S.C. § 1111.

7. Statutory Insolvency and Liquidation Proceedings

7.1 Types of Statutory Voluntary and Involuntary Insolvency and Liquidation Proceedings

The USBC provides all the rescue/reorganisation procedures available in Puerto Rico. The main insolvency procedures in Puerto Rico are as detailed below.

Chapter 7 Liquidation

Generally, this is the simplest and quickest bankruptcy petition. To qualify for relief under Chapter 7 of the USBC, the debtor may be an individual, a partnership, or a corporation or other business entity. The bankruptcy trustee gathers and sells the debtor's non-exempt assets and uses the proceeds of these assets to pay holders of claims (creditors) in accordance with the provisions of the USBC. Part of the debtor's property may be subject to liens and mortgages that pledge the property to other creditors. In addition, the USBC will allow the debtor to keep certain 'exempt' property, but a trustee will liquidate the debtor's remaining assets.

A Chapter 7 begins with a filing of a petition with the bankruptcy court. In addition, the debtor must also file:

- schedules of assets and liabilities;
- a schedule of current income and expenditures;
- a statement of financial affairs;
- a schedule of executory contracts and unexpired leases; and
- a copy of the tax return or transcripts for the most recent tax year as well as tax returns filed during the case.

If the debtor's income is less than 150% of the poverty level (as defined in the USBC), and the debtor is unable to pay the Chapter 7 fees even in installments, the court may waive the requirement that the fees be paid. In order to complete the Official Bankruptcy Forms that make up the petition, statement of financial affairs, and schedules, the debtor must provide the following information:

- a list of all creditors and the amount and nature of their claims;
- the source, amount, and frequency of the debtor's income;
- a list of all of the debtor's property; and
- a detailed list of the debtor's monthly living expenses (ie, food, clothing, shelter, utilities, taxes, transportation, medicine, etc).

Because a Chapter 7 discharge is subject to many exceptions, debtors should consult with legal counsel before filing to discuss the scope of the discharge. The court may deny the debtor a discharge if it finds that the debtor: failed to keep or produce adequate books or financial records; failed to explain satisfactorily any loss of assets; committed a bankruptcy crime such as perjury; failed to obey a lawful order of the bankruptcy court; fraudulently transferred, concealed, or destroyed property that would have become property of the estate; or failed to complete an approved instructional course concerning financial management. See 11 U.S.C. § 727; Fed. R. Bankr. P. 4005.

The court may revoke a Chapter 7 discharge on the request of the trustee, a creditor, or the US trustee if the discharge was obtained through fraud by the debtor, if the debtor acquired property that is the property of the estate and knowingly and fraudulently failed to report the acquisition of such property or to surrender the property to the trustee, or if the debtor (without a satisfactory explanation) makes a material misstatement or fails to provide documents or other information in connection with an audit of the debtor's case.

Chapter 11 Reorganisation

This Chapter permits reorganisation under the bankruptcy laws of the United States. In most instances the debtor remains in control of its business operations as a debtor-in-possession, and is subject to the oversight and jurisdiction of the court. Chapter 11 affords the debtor-in-possession a number of mechanisms to restructure its business. A debtor-

in-possession can acquire financing and loans on favourable terms by giving new lenders first priority on the business' earnings. The court may also permit the debtor-in-possession to reject and cancel contracts. Debtors are also protected from other litigation against the business through the imposition of an automatic stay.

An individual cannot file under Chapter 11 or any other chapter if, during the preceding 180 days, a prior bankruptcy petition was dismissed due to the debtor's wilful failure to appear before the court or comply with orders of the court, or was voluntarily dismissed after creditors sought relief from the bankruptcy court to recover property upon which they hold liens.

A Chapter 11 case begins with the filing of a petition with the bankruptcy court serving the area where the debtor has a domicile or residence. A petition may be a voluntary petition, which is filed by the debtor, or it may be an involuntary petition, which is filed by creditors that meet certain requirements. Unless the court orders otherwise, the debtor also must file with the court:

- schedules of assets and liabilities;
- a schedule of current income and expenditures;
- a schedule of executory contracts and unexpired leases; and
- a statement of financial affairs.

Generally, the debtor must file with the court a written disclosure statement and a plan of reorganisation. The disclosure statement is a document that must contain information concerning the assets, liabilities, and business affairs of the debtor sufficient to enable a creditor to make an informed judgement about the debtor's plan of reorganisation.

The US trustee plays a major role in monitoring the progress of a Chapter 11 case and supervising its administration. The US trustee is responsible for monitoring the debtor-in-possession's operation of the business and the submission of operating reports and fees. The US trustee also imposes certain requirements on the debtor-in-possession concerning matters such as reporting its monthly income and operating expenses, establishing new bank accounts, and paying current employee withholding and other taxes. Although the appointment of a case trustee is a rarity in a Chapter 11 case, a party in interest or the US trustee can request the appointment of a case trustee or examiner at any time prior to confirmation in a Chapter 11 case.

As previously mentioned, the debtors are also protected from other litigation against the business through the imposition of an automatic stay. Thus, all collection efforts and litigation, foreclosures, and repossessions of property are stayed and may not be pursued by the creditors on any debt or claim that arose before the filing of the bankruptcy petition. Under specific circumstances, the secured creditor can obtain an order from the court granting relief from the automatic stay.

Chapter 12 Family Farmer Bankruptcy or Family Fisherman Bankruptcy

This chapter allows the debtor to file a reorganisation plan that allows the debtor to retain its assets while repaying creditors all or a portion of their debts over a set period of time. However, Chapter 12 of the USBC provides for a middle ground between the short timeframe and limited powers of Chapter 13 and the longer time frame and broader powers provided in Chapter 11. The debtors propose a repayment plan to make instalments to creditors over three to five years. Generally, the plan may not provide for payments over a period that is longer than three years, unless the court, 'for cause', approves a longer period, but the court may not approve a period that is longer than five years (see 11 USC § 1222(c)).

A Chapter 12 is tailored to meet the economic realities of family farmers and family fishermen. Under the USBC, 'family farmers' and 'family fishermen' fall into two categories: either (i) an individual or individual and spouse, or (ii) a corporation or partnership.

A Chapter 12 case begins by filing a petition with the bankruptcy court serving the area where the individual lives or where the corporation or partnership debtor has its principal place of business or principal assets. Unless the court orders otherwise, the debtor also shall file with the court:

- schedules of assets and liabilities;
- a schedule of current income and expenditures;
- a schedule of executory contracts and unexpired leases; and
- a statement of financial affairs.

When a Chapter 12 petition is filed, an impartial trustee is appointed to administer the case. In some districts, the US trustee appoints a standing trustee to serve in all Chapter 12 cases. Filing the petition under Chapter 12 automatically stays (stops) most collection actions against the debtor or the debtor's property. Filing the petition does not, however, stay certain types of actions listed under 11 U.S.C. § 362(b). Chapter 12 also contains a special automatic stay provision that protects co-debtors.

Between 21 and 35 days after the petition is filed, the Chapter 12 trustee will hold a meeting of creditors. If the Chapter 12 trustee or bankruptcy administrator schedules the meeting at a place that does not have regular US trustee or bankruptcy administrator staffing, the meeting may be held no more than 60 days after the debtor files. The debtor must file a plan of repayment with the petition or within 90 days after filing the petition. If the court confirms the plan, the Chapter 12 trustee will distribute funds received in accordance with the terms of the plan. If the court does not confirm the plan,

the debtor may file a modified plan in accordance with 11 U.S.C. § 1223.

A debtor cannot file under Chapter 12 (or any other chapter) if during the preceding 180 days a prior bankruptcy petition was dismissed due to the debtor's wilful failure to appear before the court or comply with orders of the court or was voluntarily dismissed after creditors sought relief from the bankruptcy court to recover property upon which they hold liens.

A Chapter 12 plan usually lasts three to five years. It must provide for full payment of all priority claims, unless a priority creditor agrees to different treatment of the claim or, in the case of a domestic support obligation, unless the debtor contributes all disposable income to a five-year plan. One of the features of Chapter 12 is that payments to secured creditors can sometimes continue longer than the three-to-five-year period of the plan.

The debtor will receive a discharge after completing all payments under the Chapter 12 plan as long as the debtor certifies (if applicable) that all domestic support obligations that became due before making such certification have been paid. The discharge has the effect of releasing the debtor from all debts provided for by the plan allowed under Section 503 or disallowed under Section 502, with limited exceptions.

Certain categories of debts are not discharged in Chapter 12 proceedings. Those categories include:

- debts for alimony and child support;
- money obtained through filing false financial statements;
- debts for wilful and malicious injury to person or property;
- debts for death or personal injury caused by the debtor's operation of a motor vehicle while the debtor was intoxicated; and
- debts from fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny.

Chapter 13 Individual Debt Adjustment

This chapter is also known as a 'wage earner's plan'. It enables individuals with regular income to develop a plan to repay all or part of their debts. Chapter 13 offers individuals a number of advantages over liquidation under Chapter 7. Most significantly, Chapter 13 offers individuals an opportunity to save their homes from foreclosure. Under this chapter, debtors propose a repayment plan to make instalments to creditors over three to five years. If the debtor's current monthly income is less than the applicable state median, the plan will be for three years unless the court approves a longer period 'for cause.' If the debtor's current monthly income is greater than the applicable state median, the plan generally must have a length of five years. During this time the law forbids creditors from starting or continuing collection efforts.

Any individual, even if self-employed or operating an unincorporated business, is eligible for Chapter 13 relief as long as the individual's unsecured debts are less than USD394,725 and secured debts are less than USD1,184,200.

A Chapter 13 case begins by filing a petition with the bankruptcy court serving the area where the debtor has a domicile or residence. Unless the court orders otherwise, the debtor must also file with the court:

- schedules of assets and liabilities;
- a schedule of current income and expenditures;
- a schedule of executory contracts and unexpired leases;
- a statement of financial affairs;
- a certificate of credit counselling and a copy of any debt repayment plan developed through credit counselling;
- evidence of payment from employers, if any, received 60 days before filing;
- a statement of monthly net income and any anticipated increase in income or expenses after filing;
- a record of any interest the debtor has in federal or state qualified education or tuition accounts; and
- a copy of the tax return or transcripts for the most recent tax year as well as tax returns filed during the case.

When an individual files a Chapter 13 petition, an impartial trustee is appointed to administer the case. In some districts, the US trustee or bankruptcy administrator appoints a standing trustee to serve in all Chapter 13 cases in accordance with 28 U.S.C. § 586(b). Filing the petition under Chapter 13 automatically stays most collection actions against the debtor or the debtor's property as previously explained in Chapter 12.

Between 21 and 50 days after the debtor files the Chapter 13 petition, the Chapter 13 trustee will hold a meeting of creditors. After the meeting of creditors, the debtor, the Chapter 13 trustee, and those creditors who wish to attend will come to court for a hearing on the debtor's Chapter 13 repayment plan. The debtor must file a repayment plan with the petition or within 14 days after the petition is filed. The plan must pay priority claims in full unless a particular priority creditor agrees to different treatment of the claim or, in the case of a domestic support obligation, unless the debtor contributes all disposable income. The plan need not pay unsecured claims in full as long as it provides that the debtor will pay all projected disposable income over an 'applicable commitment period,' and as long as unsecured creditors receive at least as much under the plan as they would receive if the debtor's assets were liquidated under Chapter 7. Within 30 days after filing the bankruptcy case, even if the plan has not yet been approved by the court, the debtor must start making plan payments to the trustee. No later than 45 days after the meeting of creditors, the bankruptcy judge must hold a confirmation hearing and decide whether the plan is feasible and meets the standards for confirmation set forth

in the USBC. If the court confirms the plan, the Chapter 13 trustee will distribute funds received under the plan "as soon as is practicable."

A Chapter 13 debtor is entitled to a discharge upon completion of all payments under the Chapter 13 plan so long as the debtor:

- certifies (if applicable) that all domestic support obligations that became due prior to making such certification have been paid;
- has not received a discharge in a prior case filed within a certain time frame (two years for prior Chapter 13 cases and four years for prior Chapter 7, 11 and 12 cases); and
- has completed an approved course in financial management.

After confirmation of a plan, circumstances may arise that prevent the debtor from completing the plan. In such situations, the debtor may ask the court to grant a 'hardship discharge.'

7.2 Distressed Disposals as Part of Insolvency/ Liquidation Proceedings

According to Title 11 of the United States code "[t]he debtor-in-possession may use, sell, or lease property of the estate in the ordinary course of its business, without prior approval, unless the court orders otherwise"; 11 U.S.C. § 363(c). Therefore, if the intended sale or use is outside the ordinary course of its business for obtaining the necessary transactional collateral, the debtor must obtain permission from the court. See above, **6. 8 Asset Disposition and Related Procedures**.

7.3 Implications of Failure to Observe the Terms of an Agreed or Statutory Plan

A debtor's failure to observe the terms of a confirmed plan or its inability to substantially consummate a confirmed plan constitutes grounds for dismissal or conversion. The bankruptcy court may give the debtor the opportunity to cure a default under a confirmed plan. If a creditor fails to observe the terms of a confirmed plan by attempting to bring a claim against the debtor or breach of the automatic stay, the court can levy significant sanctions on the creditor, including costs, damages and punitive damages.

7.4 Investment or Loan of Priority New Money

Under Section 364 of the USBC, the bankruptcy court can allow a debtor to obtain post-petition financing outside the ordinary course of its business with court approval. The lender of new money may be granted a 'super-priority' claim by the court with priority over all other administrative and general unsecured claims. See **6.2 Position of the Company During Procedures** and **6.10 Availability of Priority New Money**.

7.5 Insolvency Proceedings to Liquidate a Corporate Group on a Combined Basis

A corporate liquidating plan is permissible under Chapter 11. Chapter 11 often allows a debtor-in-possession to liquidate the business under more economically advantageous circumstances and permits the creditors to take a more active role in the liquidation of assets and distribution of proceeds than a Chapter 7 liquidation. If Chapter 11 is not adequate for a particular debtor given the higher costs of such a petition or for other circumstances, such a debtor should file for a petition under Chapter 7.

7.6 Organisation of Creditors

In a Chapter 7, creditors may elect a committee of not fewer than three, and not more than eleven, creditors, each of whom holds an allowable unsecured claim of a kind entitled to distribution; see 11 U.S.C. § 705. This committee may consult with the trustee in connection with the administration of the estate, make recommendations to the trustee, and submit to the court or trustee any question affecting the administration of the estate. In a Chapter 11, the US trustee shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or equity security holders as the US trustee deems appropriate; see 11 U.S.C. § 1102.

7.7 Conditions Applied to the Use of or Sale of Assets

A debtor-in-possession is not able to use 'cash collateral' without the consent of the secured party or authorisation by the court. The court must first examine whether the interest of the secured party is adequately protected; see 11 U.S.C. § 363. Section 363 defines cash collateral as: "cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents, whenever acquired, in which the estate and an entity other than the estate have an interest". This collateral includes any products, proceeds, offspring, profits, or rents of property and the charges, fees, accounts or payments for the use or occupancy of the facilities in the business subject to a creditor's security interest.

Under Section 363 of the United States USBC the secured creditors are entitled to receive additional protection when cash collateral is used. The debtor-in-possession, before utilising any of the cash collateral, must file a motion requesting an order from the court authorising its usage. "Pending consent of the secured creditor or court authorisation for the debtor-in-possession's use of cash collateral, the debtor-in-possession must segregate and account for all cash collateral in its possession"; see 11 U.S.C. § 363(c)(4). To provide the adequate protection of the interested creditor a party with an interest in property being used may request that the court prohibit or condition this use to the extent necessary to protect the value of the creditor's interest in the property. "The debtor may make periodic or lump-sum cash payments, or provide an additional or replacement lien that will result in

the creditor's property interest being adequately protected"; see 11 U.S.C. § 361. However, if and when the Chapter 11 debtor needs operating capital, it may be able to obtain it from a lender by giving the lender a court-approved 'super priority' over other unsecured creditors or a lien on property of the estate; see 11 U.S.C. § 364.

8. International/Cross-border Issues and Processes

8.1 Recognition or Other Relief in Connection with Foreign Restructuring or Insolvency Proceedings

There is a mechanism to provide recognition or other relief in connection with proceedings in another country and that is Chapter 15. The purpose of this chapter is to provide effective mechanisms for dealing with insolvency cases involving debtors, assets, claimants, and other parties of interest involving more than one country. One of the most important goals of Chapter 15 is to promote co-operation and communication between US courts and parties of interest with foreign courts and parties of interest in cross-border cases.

A Chapter 15 case is ancillary to a primary proceeding brought in another country, typically the debtor's home country. As an alternative, the debtor or a creditor may commence a full Chapter 7 or Chapter 11 case in the United States if the assets in the United States are sufficiently complex to merit a domestic bankruptcy case. In addition, under Chapter 15 a court may authorise a trustee or other entity (including an examiner) to act in a foreign country on behalf of a US bankruptcy estate under 11 U.S.C. § 1505.

8.2 Protocols or Other Arrangements with Foreign Courts

A case is commenced under Chapter 15 by the filing of a petition for recognition of a 'foreign proceeding' by a 'foreign representative'. Chapter 15 gives the foreign representative the right of direct access to US courts for this purpose. The petition must be accompanied by documents showing the existence of the foreign proceeding and the appointment and authority of the foreign representative. After notice and a hearing, the court is authorised to issue an order recognising the foreign proceeding as either a 'foreign main proceeding' (a proceeding pending in a country where the debtor's centre of main interests are located) or a 'foreign non-main proceeding' (a proceeding pending in a country where the debtor has an establishment, but not its centre of main interests). Immediately upon the recognition of a foreign main proceeding, the automatic stay and selected other provisions of the USBC take effect within the United States as stated in 11 U.S.C. § 1520. The foreign representative is also authorised to operate the debtor's business in the ordinary course – ie, the US court is authorised to issue preliminary relief as soon as the petition for recognition is filed.

8.3 Rules, Standards and Guidelines to Determine the Paramountcy of Law

The purpose of Chapter 15 is to harmonise international/cross-border procedures in the USA. Because a Chapter 15 case is ancillary to a primary proceeding brought in another country, typically, US courts will respect the decisions and procedures of foreign jurisdictions and tribunals so long as they are not "manifestly contrary to the public policy of the United States"; see 11 U.S.C. § 1506.

8.4 Foreign Creditors

Once recognised, a foreign representative may seek additional relief from the bankruptcy court or from other state and federal courts and is authorised to bring a full (as opposed to ancillary) bankruptcy case. Chapter 15 also gives foreign creditors the right to participate in US bankruptcy cases and it prohibits discrimination against foreign creditors. If a full bankruptcy case is initiated by a foreign representative (when there is a foreign main proceeding pending in another country), bankruptcy court jurisdiction is generally limited to the debtor's assets that are located in the United States.

9. Trustees/Receivers/Statutory Officers

9.1 Types of Statutory Officers Appointed in Proceedings

Trustee

A trustee is appointed under a Chapter 7, Chapter 12, and Chapter 13 case. The trustees are appointed from a panel of trustees as qualified to serve as such by the US trustee. The role of the trustee will vary, depending on the bankruptcy chapter. Creditors may subsequently elect a different person to serve as trustee. The US trustee also monitors and oversees Chapter 11 proceedings.

Debtor-in-possession

In a Chapter 11, the USBC authorises the debtor to continue to operate its business and administer its own affairs as a debtor-in-possession. In circumstances of fraud, dishonesty, incompetence or gross mismanagement, a Chapter 11 trustee may be appointed by court order.

Federal bankruptcy judge

Federal bankruptcy court judges preside over cases under the USBC and are appointed by the court of appeals of the United States for the circuit in which such district is located; see 28 U.S. Code § 152.

Receiver

Receivers are appointed by state law to liquidate an insolvent business when a creditor or shareholder successfully requests a receivership in state court.

Creditors' committee
The fundamental objective is to protect the interest of the unsecured creditors. The committee consists of the seven largest unsecured claims' creditors who are appointed by the US trustee.

9.2 Statutory Roles, Rights and Responsibilities of Officers

Trustee
The role of a trustee is to act as the representative of the estate. In Chapter 7 proceedings, the trustee replaces the debtor's management, controls its property, administers the bankruptcy case, and liquidates the bankruptcy estate. The Chapter 7 trustee collects estate property, investigates the financial affairs of the debtor, litigates or settles debtor litigation claims against third parties, and may object to claims filed by creditors. A Chapter 7 trustee has the right to employ, with bankruptcy court approval, attorneys and other professionals. A trustee has the capacity to sue and be sued. In Chapter 12 and Chapter 13, the trustee's role is mostly one of distribution and oversight.

Debtor-in-possession
In a Chapter 11 case, a debtor-in-possession remains in possession of its assets, manages its properties, and continues to run its business. The debtor-in-possession has statutory duties under the USBC and shall have all the rights and powers, other than the right to compensation, and shall perform all the functions and duties, subject to exception, of the appointment of a trustee; see 11 U.S.C.A. § 1107.

Federal Bankruptcy judge
Federal bankruptcy court judges approve all debtor transactions that are outside the ordinary course of business, issue orders authorising the employment of professionals, decide contested matters, adjudicate litigated issues, and ultimately decide whether liquidation or reorganisation plan are in compliance with the USBC and may be confirmed.

Receiver
A receiver's authority is governed by applicable state law and court orders. Per Rule 56.6 of Puerto Rico's Rules of Civil Procedure, unless otherwise ordered by the court, a receiver shall proceed in accordance with the rules for the judicial administration of estates. The court may require that the receiver furnishes a bond to secure strict compliance with his duties, and, in that case, the receiver shall not take office until the bond has been approved; see R. 32 L.P.R.A. App. III, § 56.6.

Creditors' committee
The committee (i) investigates the debtor's conduct and the operation of the business, (ii) consults with the debtor in position regarding strategies for administrating the case, (iii) and directly participates in the creation of the plan. A creditors' committee can even hire specialised professionals or attorneys to assist in the performance of the committees' duties. Their role in the process can become a very important safeguard for the proper management of the struggling business and the reorganisation of the debtor-in-possession's affairs.

Examiner
An examiner may be appointed in a Chapter 11 to investigate specific matters related to the debtor as ordered by the bankruptcy court, including pre-bankruptcy transactions, debtor claims against third parties, and fraud, dishonestly, incompetence, misconduct, mismanagement, or irregularity in the management of the debtor by current or former management.

9.3 Selection of Statutory Officers

United States trustee
The US trustee is appointed by the President of the United States.

Trustee
A Chapter 7 trustee is appointed by the US trustee. However, the USBC allows creditors to elect a different trustee at the statutory meeting of creditors required by the USBC per Section 341. In a Chapter 11 case, the US trustee typically selects and appoints the Chapter 11 trustee subject to final court approval. Section 1104(a) of the USBC provides that any time between the filing of the bankruptcy case and before confirmation of a Chapter 11 plan, a court is empowered to appoint a Chapter 11 trustee; see 11 U.S.C.A. § 1104(a). Moreover, unless the court, on request of a party in interest and after notice and a hearing, orders otherwise, the trustee may operate the debtor's business; see 11 U.S.C.A. § 1108.

Federal bankruptcy Judge
A US bankruptcy judge is a judicial officer of the U.S. District Court appointed by the majority of judges of the U.S. Court of Appeals to exercise jurisdiction over bankruptcy matters. Bankruptcy judges are appointed for 14-year terms.

Receiver
A receiver is appointed by court order. Per Rule 56.6 of Puerto Rico's Rules of Civil Procedure, no receiver shall be appointed unless it is established that no other provisional remedy would be effective to secure satisfaction of the judgment; see R. 32 L.P.R.A. App. III, § 56.6.

Creditors' committee
Section 1102 gives the US trustee authority to appoint members of an unsecured creditors' committee in Chapter 11 cases; see 11 U.S.C. § 1102. In a Chapter 7, creditors may elect a committee of no fewer than three and not more than 11 creditors, each of whom holds an allowable unsecured claim of a kind entitled to distribution; see 11 U.S.C. § 705.

Examiner
The appointment of an examiner is permitted by Section 1104 of the USBC; see 11 U.S.C. § 1104. Appointment of an examiner may be ordered by the court after notice and a hearing, upon the request of a party in interest or the US trustee.

9.4 Interaction of Statutory Officers with Company Management
See above, **9.2 Statutory Roles, Rights and Responsibilities of Officers**.

9.5 Restrictions on Serving as a Statutory Officer
Trustee
A person may serve as a trustee if such person is an individual that is competent to perform the duties of a trustee and resides or has an office in the judicial district within which the case is pending, or in any judicial district adjacent to such district, or is a corporation authorised by such corporation's charter or bylaws to act as a trustee, having an office in at least one of such districts; see 11 U.S.C.A. § 321. A person that has served as an examiner in the case at bar may not serve as a trustee.

Receivers
State law receivers are appointed by state courts. Per Rule 56.6 of Puerto Rico's Rules of Civil Procedure, no party, or its attorney, or person interested in the action shall be appointed receiver therein, without the written consent of the affected parties filed with the court; see R. 32 L.P.R.A. App. III, § 56.6.

Creditors' committee
Generally, in a Chapter 11, an official unsecured creditors' committee consists of unsecured creditors, willing to serve, that hold the largest unsecured claims against the debtor. In a Chapter 7, official creditor committee members are selected differently but must be creditors with allowable unsecured claims against the debtor; see 11 U.S.C. § 705.

Examiner
There are no statutory requirements to serve as an examiner.

10. Advisers and Their Roles

10.1 Types of Professional Advisers
In Puerto Rico, bankruptcy cases may involve numerous professionals (ie, attorneys, accountants, financial advisers, and investment bankers) who advise and assist the financially distressed entity, company, its major stakeholders and other parties in interest.

The USBC requires that a debtor, an official creditors' committee, and bankruptcy trustees obtain court approval to retain professionals. When a debtor retains an attorney as its counsel, the USBC requires that the attorney meet certain requirements and disclose any potential conflicts. A professional retention application must include a declaration from said restructuring professionals disclosing their connections with the debtor and all other parties in interest. Professionals and debtor's counsel are compensated with payments from the debtor's estate and thus, the court must approve such compensations.

10.2 Authorisations Required for Professional Advisers
The USBC requires that a debtor, an official creditors' committee, and bankruptcy trustees obtain court approval to retain restructuring professionals.

Restructuring professionals hired by the debtor work with management and the debtor's counsel as a team to advance the debtor's objectives and for the benefit of the bankruptcy estate. Restructuring professionals retained by lenders or creditors provide assistance and owe duties to those who retain them.

10.3 Roles Typically Played by the Various Professional Advisers
Attorneys assist, advise and represent the debtor and/or the creditor in out-of-court restructurings and in in-court bankruptcy cases, providing advice on strategic alternatives and representing the debtor and/or the creditor in the negotiation and documentation of transactions and agreements, and in preparing and filing bankruptcy petitions and motions seeking court orders. Moreover, attorneys negotiate with lenders, creditors, and other parties in interest in litigation and settlement discussions.

Other restructuring professionals (ie, accountants, financial advisers, and investment bankers) work with management and bankruptcy counsel to advance the debtor and/or the creditor's goals. Their duties include the preparation of operating reports and schedules, and/or determining whether certain financial statements or other disclosures require auditing, as well as assisting in the formulation of reorganisation plans or liquidation analysis.

11. Mediations/Arbitrations

11.1 Use of Arbitration/Mediation in Restructuring/Insolvency Matters
There are no provisions in the local rules for the US Bankruptcy Court for the District of Puerto Rico regarding mediation. Notwithstanding, parties may request the court to mediate contested matters and the court has been amenable to such requests.

Regarding the arbitration process, the Supreme Court has held that courts are "generally obligated to enforce arbitra-

tion clauses absent a countervailing federal statute"; Shearson/Am. Express, Inc. v McMahon, 482 U.S. 220, 226 (1987). A party seeking to arbitrate a matter by virtue of a pre-petition arbitration clause, should seek relief from the automatic stay for a contested matter to be considered in arbitration.

11.2 Parties' Attitude to Arbitration/Mediation

See above, **11.1 Use of Arbitration/Mediation in Restructuring/Insolvency Matters**.

11.3 Mandatory Arbitration or Mediation

See above, **11.1 Use of Arbitration/Mediation in Restructuring/Insolvency Matters**. In our jurisdiction, mediation in bankruptcy is generally not mandatory. Arbitration will depend on the language of pre-petition agreements and on whether the court grants relief from stay for matters to be arbitrated.

11.4 Pre-insolvency Agreements to Arbitrate

See above, **11.1 Use of Arbitration/Mediation in Restructuring/Insolvency Matters**. The Supreme Court has held that courts are "generally obliged to enforce arbitration clauses absent a countervailing federal statute"; Shearson/Am. Express, Inc. v McMahon, 482 U.S. 220, 226 (1987).

11.5 Statutes That Govern Arbitrations and Mediations

See above, **11.1 Use of Arbitration/Mediation in Restructuring/Insolvency Matters**. The USBC does not have a stator provision governing arbitrations and/or mediations.

11.6 Appointment of Arbitrators/Mediators

See above, **11.1 Use of Arbitration/Mediation in Restructuring/Insolvency Matters**. The USBC does not have a stator provision governing arbitrations and/or mediations.

12. Duties and Personal Liability of Directors and Officers of Financially Troubled Companies

12.1 Duties of Officers and Directors of a Financially Distressed or Insolvent Company

In our jurisdiction directors and officers of a distressed company hold various fiduciary duties, including loyalty on behalf of the corporation taking into consideration the Business Judgment Rule which states that there is a presumption that in making a business decision the director of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the company.

Therefore, when a company is going through an insolvency proceeding the following responsibilities are undertaken by the company's directors, depending on the company's status.

Solvent corporations: directors owe fiduciary duties to the corporation and its respective shareholders.

Zone of insolvency: directors will continue to owe fiduciary duties to the corporation and its respective shareholders but not to its creditors when the company becomes distressed or finds itself at the risk of insolvency. Although there was a tendency holding that directors owe fiduciary duties to creditors when the corporation is facing insolvency, recent Delaware case law (which is highly persuasive in our jurisdiction) held that directors of a solvent corporation that is operating in the zone of insolvency owe their fiduciary duties to the corporation and its shareholders, and not creditors; see North American Catholic Educ. Programming Found, Inc. v Gheewalla, 2007 WL 1453705 (Del. 2007).

12.2 Direct Fiduciary Breach Claims

In the case that the corporation is insolvent, directors owe fiduciary duties to the corporation as if it were an enterprise, and the creditors are then permitted to bring any derivative suits on behalf of the corporation itself, but they may generally not bring direct causes of action against directors.

Directors and officers of the corporation may be held personally liable concerning certain actions which were taken or could be construed to prolong the life of a corporation to the detriment of its creditors, thereby creating a deeper insolvency of the corporation. In exceptional circumstances, directors and officers are held responsible only if their conduct during the course of business transactions rose to a level of gross negligence or wilful misconduct.

12.3 Chief Restructuring Officers

When companies in our jurisdiction find themselves in the midst of turmoil and the company's Chief Executive Officer ("CEO") has to take care of daily problems and cannot divert their attention to the company's reorganisation, a Chief Restructuring Officer ("CRO") can be hired to stabilise the business. In our jurisdiction a CRO reports directly to the company's CEO of the company's board of directors.

The CRO's responsibilities usually encompass the following:

- the creation of a business plan to demonstrate long-term viability;
- leading restructuring arrangements with the company's senior lenders and leading forbearance;
- aiding the company's administration in the equity and sale of transactions;
- aiding and negotiating with trade creditors to assure their continued support in the business, thereby stabilising such and increasing its value;
- assisting management in identifying possible improvement projects and methods for profits;
- identifying outside sources of capital and strategising;

- working with unsecured creditors in the creation of possible arrangements;
- safeguarding a stable cash flow during the process; and
- assisting in the negotiation of out-of-court settlements regarding a Chapter 11 bankruptcy filing.

12.4 Shadow Directorship
There is no concept of shadow directorship applicable in Puerto Rico.

12.5 Owner/Shareholder Liability
Whether owners/shareholders can be held personally liable for the debts of a business will depend on the business structure and whether they agreed to be personally responsible for any business debt. Owners/shareholders can also be held personally liable for the debts of a business by signing a personal guarantee.

13. Transfers/Transactions That May Be Set Aside

13.1 Grounds to Set Aside/Annul Transactions
The transactions based on preferences and fraudulent transfers prior to the insolvency process may be annulled in the jurisdiction of Puerto Rico under Section 547 and Section 548 of the USBC. These are also known as avoidance actions.

13.2 Look-back Period
A bankruptcy trustee or the debtor, depending on the chapter under which the petition is filed, carries the burden of proving all five elements of a preferential transfer; see 11 U.S.C. § 547(g). An ‘insider’ includes an “affiliate, or insider of an affiliate as if such affiliate were the debtor” under Section 101(31)(E). Section 101(2)(B) defines an ‘affiliate’ to include a “corporation 20% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote, 20% or more of the outstanding voting securities of the debtor.” For insiders, the preferential period extends up to one year before the date of the filing of the bankruptcy petition; see 11 U.S.C. § 547(b)(4)(B).

Section 547(c) provides nine separate affirmative defences that a creditor can assert to defeat a preference claim. Parties asserting these statutory defences must prove each element by a preponderance of evidence.

Section 550 of the USBC allows the trustee to avoid and recover any preference payments by filing an adversary proceeding against the creditor.

Fraudulent transfer law is one of the oldest forms of legal creditor protection. Under Section 548 of the USBC, the trustee may avoid any fraudulent or constructively fraudulent transfer of an interest of the debtor in property, made on or within two years before the filing of the bankruptcy petition; see 11. U.S.C. § 548. The court has established four circumstances in which a transfer could be constructively fraudulent and all require a lack of reasonably equivalent value in addition to a fragile financial state. Section 548(a)(1)(B) provides that a transfer is constructively fraudulent if the debtor voluntarily or involuntarily received less than a reasonably equivalent value in exchange for the transfer and:

- was insolvent on the date the transfer or obligation was made or became insolvent as a result of such transfer or obligation; or
- was engaged or was about to engage in a business or a transaction for which any property remaining with the debtor was an unreasonably small capital; or
- intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor’s ability to pay as such debts matured; or
- made such transfer or incurred such obligation to, or for the benefit of, an insider under an employment contract and not in the ordinary course of business.

For further details, see 11 USC § 548(a)(1)(B).

The party seeking to avoid a fraudulent transfer has the burden of proving each element by a preponderance of the evidence. See 11 U.S.C. § 548(a)(1).

The “reasonably equivalent value” inquiry is generally divided by courts into two parts: (i) whether the debtor received any value to the text of the note in the transaction; and (ii) if there was value, whether the value received was “reasonably equivalent” to what the debtor transferred; see 5 Collier on Bankruptcy paragraph 548.05[2][a]. Whether there was reasonably equivalent value depends on all the facts and circumstances of the case. Both direct and indirect benefits should be considered when comparing what was given with what was received. Additionally, an exact exchange is not necessary and the court must keep the equitable purposes of the statute firmly in mind, recognising that any significant disparity between the value received and the obligation assumed […] will have significantly harmed […] innocent creditors”; Rubin v Manufacturers Hanover Trust Co., 661 F.2d 979, 994 (2nd Cir. 1981).

The most common statutory defence is the Section 548(c) good-faith defence. The definition of ‘good faith’ in a Section 548(c) defence is amorphous and requires an in-depth investigation of the facts and circumstances underlying the transfer.

13.3 Claims to Set Aside or Annul Transactions
Avoidance claims belong to the bankruptcy estate and, generally, can only be brought by a debtor-in-possession or a trustee. As an exception, and with leave of court, creditors

may seek standing to bring avoidance actions on behalf of the debtor's estate.

Avoidance claims can be brought in both reorganisation and liquidation.

14. Intercompany Issues

14.1 Intercompany Claims and Obligations
Generally, the commencement of a bankruptcy proceeding under the USBC does not alter the treatment of valid intercompany claims. Because intercompany claims are claims against the debtor, they are entitled to pari passu treatment, with unaffiliated third-party claims having the same priority.

14.2 Off-set, Set-off or Reduction
Section 553 of the USBC preserves a creditor's set-off rights to the extent those rights exist under non-bankruptcy law. Intercompany claims are subject to set-off if the requirements of Section 553 are satisfied.

14.3 Priority Accorded Unsecured Intercompany Claims and Liabilities
Intercompany claims are entitled to the same distribution priority as third-party claims of the same priority. As such, if an intercompany claim is secured by a perfected pre-petition lien, it will be entitled to treatment as a secured claim; if an intercompany claim does not have a perfected pre-petition lien or security interest, it will be entitled to equal treatment with other unsecured third-party claims.

14.4 Subordination to the Rights of Third-party Creditors
Intercompany claims may be challenged and disallowed, avoided, recharacterised or subordinated to the rights of third-party creditors.

14.5 Liability of Parent Entities
Contractual relationships, such as commercial and financing agreements, may obligate a parent entity or affiliate for the liabilities of a related business entity, such as a direct or indirect subsidiary. Likewise, a parent company that has agreed to be a guarantor of a subsidiary's debts and/or other obligations is directly liable and/or responsible for the subsidiary's debts and/or other contractual liabilities. In the absence of contractual relationships, federal statutes may make a parent or affiliate liable for the actions of a subsidiary; see 17 C.F.R. § 230.405.

14.6 Precedents or Legal Doctrines That Allow Creditors to Ignore Legal Entity Decisions
Creditors may assert claims against affiliates of a related but separate entity by piercing the corporate veil of an insolvent company. Courts may pierce the corporate veil when a parent and its subsidiary, or an insolvent company and its owners/shareholders, have not acted as distinct entities, and have instead operated as one. This may apply when the now insolvent company was used as an alter ego. To pierce the corporate veil of an alter ego, a creditor must demonstrate that an entity exercised control beyond that which a parent entity, owner, shareholder, etc, should exercise over said company. Courts may also pierce the corporate veil under the agency theory. Piercing the corporate veil under said agency theory requires the creditor to show that the insolvent company had either actual or apparent authority to act on its parent's behalf.

14.7 Duties of Parent Companies
In our jurisdiction, a corporate parent may owe fiduciary duties to a financially troubled subsidiary under the General Corporations Act of 2009 and judicial precedent; see 14 L.P.R.A. § 3501 et seq. Creditors of an insolvent subsidiary corporation may have standing to assert derivative claims against a parent corporation for breach of fiduciary duty.

14.8 Ability of Parent Company to Retain Ownership/Control of Subsidiaries
In our jurisdiction, the relationship between a parent company shareholder and its subsidiary is determined by the General Corporations Act of 2009; see 14 L.P.R.A. § 3501 et seq. Corporate law shareholder rights continue during a bankruptcy case and shareholders generally retain control over the ordinary course of the business.

15. Trading Debt and Debt Securities

15.1 Limitations on Non-banks or Foreign Institutions
In Puerto Rico, there is no impediment for non-banks or other institutions to hold loans or bonds as a type of investment. Notwithstanding, Article 2.04 of the Puerto Rico Corporations Act of 2009 prohibits a business entity duly organised under this Act to be deemed empowered to (i) issue bills of exchange, notes or other titles for circulation as legal tender; or (ii) deal in the receipt of money deposits, or foreign currency. The Puerto Rico Corporations Act clarifies that corporations that have been created with the purpose of buying, selling or otherwise dealing with notes, checking account credits or other similar titles or for the purposes of lending money, accepting notes, checking account credits or other titles, as collateral, are not subject to the aforementioned prohibition.

15.2 Debt Trading Practices
The debt-trading practice in Puerto Rico can vary greatly. The typical debt trading is the securitisation of loans. This process is quite complex and requires vast documentation. The most important steps that need to be executed in this type of transaction are the execution of the purchase and assumption agreement and the endorsement of all notes.

The most common practice to transfer title is done through assignment. Through Act 21 of 2012, Puerto Rico adopted a slightly modified version of revised Article 9 of the Model Uniform Commercial Code in connection with secured transactions. Thus, security interest over certain types of personal property, such as equipment, are perfected by obtaining a security agreement from the debtor covering the relevant personal property, and filing a UCC-1 Financing Statement in the Office of Commercial Transactions at the Puerto Rico Department of State.

15.3 Loan Market Guidelines

In Puerto Rico there are no loan market guidelines such as the "LMA Guidelines – Transparency and the Use of Information."

15.4 Enforcement of Guidelines

In Puerto Rico there are no loan market guidelines such as the "LMA Guidelines – Transparency and the Use of Information."

15.5 Transfer Prohibition

Loan transfers are typically prohibited to the debtor, who must request the lenders consent in order to transfer. However, the lender is usually allowed to transfer its rights of the loan without requiring the consent of any other party.

15.6 Navigating Transfer Restrictions

Transfer restrictions generally apply to all transactions. Notwithstanding, Puerto Rico has a Trusts Act that governs the creation and establishment and administration of trusts.

16. The Importance of Valuations in the Restructuring and Insolvency Process

16.1 Role of Valuations in the Restructuring and Insolvency Market

During a bankruptcy or restructuring proceeding, business valuations and expert asset appraisals are beneficial to maintain transparency and assess a debtor's capacity to reorganise or maximise distribution, depending on the bankruptcy chapter under which the petition was filed. Whether liquidating assets under a Chapter 7 or Chapter 11 reorganisation, to liquidate assets the values of tangible assets (such as the company's equipment, land, machinery, equipment) and intangible assets (such as the intellectual property) should be valued. The debtor will provide the approximate value of its assets at the time of the filing of the bankruptcy petition, but if disputes arise regarding the valuation of certain assets, appraisals and valuations are crucial for the bankruptcy proceedings to continue and succeed.

16.2 Initiating Valuation

A debtor must disclose the approximate value of all of his assets at the beginning of a bankruptcy case. A creditor may utilise the services of a valuation expert if he believes that the collateral is being undervalued by the debtor. The various stakeholders will also present evidence – often by the same valuation expert – as to the feasibility of the proposed plan.

The Office of the US Trustee has stated that only appraisals conducted by a licensed appraiser under Puerto Rico law should be submitted to the court. Thus, opinions of value and appraisals must be performed by a duly licensed or certified appraiser.

Puerto Rico law defines a professional real estate appraiser as a "person who after proper investigation and study determines the value of real properties by using locally applicable theories, proceedings and approaches recognised by commentators, authorities and jurisprudence dealing with the subject, and locally applicable"; 20 LPRA §2301(a).

Moreover, Puerto Rico law typifies the unauthorised practice of the profession of appraiser as a misdemeanour, subject to a USD500 penalty or a six-month imprisonment or both; see 20 LPRA §2322. Thus, in Puerto Rico, appraisals must be strictly conducted by a person duly licensed to do so.

16.3 Jurisprudence Related to Valuations

According to Section 506(a) "[a]n allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff... is a secured claim to the extent of the value of such creditor's interest... and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim." See 11 USC § 506(a). "Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest" (id). See also in re Winthrop Old Farm Nurseries, Inc, 50 F.3d 72, 76 (1st Cir. 1995) ("We find that the bankruptcy court correctly interpreted § 506(a) as according it flexibility in choosing among possible standards of valuation").

Valuation disputes are common within the bankruptcy environment. Accordingly, valuation expert reports and expert testimony are also common within bankruptcy (Robert F. Reilly, Valuation Analyst Guidelines Related to Bankruptcy Expert Reports and Testimony, Am. Bankr. Inst. J., October 2010, 60). Many issues associated with valuation searches range from asset/collateral-related matters to the company's valuation as a whole, to the fairness of all the issues related to the company's valuation of securities and cash-flow streams.

In reaching valuation determinations, judges are placed in the difficult position of weighing and evaluating the validity of the assumptions used in the valuation, the credibility of competing expert opinions and the value of evidence. As such, bankruptcy courts are familiar with accepted business

valuations and asset appraisal methods commonly used by those professionals who provide such reports, opinions and testimony. See in re Ponce de Leon, 1403, Inc., 523 B.R. 349, 395 (Bankr. D.P.R. 2014) citing In re Grind Coffee & Nosh, LLC, 2011 WL 1301357 (Bankr. S.D. Miss. 2011) (the "[v]aluation of property is not an exact process and courts are often greeted with conflicting appraisal testimony, to which weight must be assigned depending upon the credibility assessments"); in re Iridium Operating LLC, 373 B.R. 283, 349 (Bankr. S.D.N.Y. 2007) (the reliability of expert valuation testimony applies to the weight accorded to that testimony as well as its admissibility). Hence, valuation jurisprudence is well developed in the USA.

It is up to the experts retained to determine the most appropriate valuation methodologies and theories to employ under the particular circumstances of the case. Generally, judicial or similar officers are not appointed by the bankruptcy court to render views on valuation. Moreover, there are no court-appointed or pre-approved valuation experts that must be used in bankruptcy cases. Typically, the parties select and retain their own valuation experts, who base their valuation testimony on complicated techniques that require substantial discretion. The selection of any such individual will depend on their experience with the type of valuation required, the property being valued and the relevant industry.

Valuation and the valuation methodologies used by parties and relied upon by the bankruptcy court depend greatly on the particular facts and circumstances of a case, including the context in which a valuation dispute arises, the nature of a company's business, its assets, industry norms and the reliability and availability of business projections (see in re Ponce de Leon, 1403, Inc., 523 B.R. at 392).

Valuation methodologies commonly used include comparable company analysis, precedent transaction analysis, discounted cash-flow analysis, capital-asset pricing model, weighted average cost of capital, asset-based approaches, cost-based approaches and estimates of past and future economic benefits. Appraisals from professional appraisers may also be used. Liquidation analyses are also used in valuation, such as the "best interests of creditors test" under Section 1129(a)(7) and 1325(a)(4) of the USBC (see 11 U.S.C. § 1325(a)(4); 11 U.S.C. § 1129(a)(7)).

Valuation methodologies typically undertaken in the USA include:

- discounted cash flow, which entails estimating the periodic cash flow that a company will generate over a discrete time period, determining the 'terminal value' of the company at the end of the period and discounting each of the cash flows and terminal value to determine the total value as of the relevant date;
- weighted average cost of capital, which is often determined as a company's rate of return; and
- comparable company analysis ('trading multiples' or 'peer group analysis' or 'equity comps' or 'public market multiples' analysis), which is a relative valuation method in which the current value of a business is compared to other similar businesses by looking at trading multiples.

See Hon. Christopher S. Sontchi, Valuation Methodologies: A Judge's View, 20 Am. Bankr. Inst. L. Rev. 1, 2 (2012); in re Genco Shipping & Trading Ltd, 513 B.R. 233, 254 (Bankr. S.D.N.Y. 2014) (use of the discounted cash flow analysis); Puerto Rico Tel. Co v Telecommunications Regulatory Bd. of Puerto Rico, 665 F.3d 309, 327 (1st Cir. 2011) (use of the weighted average cost of capital approach); Kaplan v First Hartford Corp., 603 F. Supp. 2d 195 (D. Me. 2009) (use of the income-based approach, discounted free cash flow analyses and combination of income capitalisation, comparable sales and cost); in re PWS Holding Corp, 228 F.3d 224, 233 (3d Cir. 2000) (the court approved examiners' use of three separate analyses: a comparable public company analysis, a comparable acquisitions analysis and a discounted cash-flow analysis).

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