CorporateLiveWire

BANKRUPTCY & RESTRUCTURING 2019

VIRTUAL ROUND TABLE

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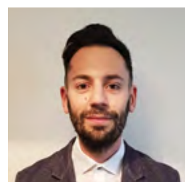
Introduction & Contents

In this roundtable, we are joined by five experts from around the world to learn more about recent regulatory changes and industry trends in bankruptcy & restructuring. Our chosen experts discuss the 'retail apocalypse' and outline which other industries and sectors are at risk. They identify what measures a company must take for a successful implementation of cross-border restructuring and insolvencies. We also discover how the bankruptcy landscape is shifting in China as a result of a more welcoming environment for foreign investment.



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Editor In Chief

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Meet The Experts

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Norman Kinel is a partner in the Restructuring & Insolvency Practice Group of Squire Patton Boggs, based in its New York City office. He is also National Chair of the firm's Creditors' Committee Practice. With more than three decades of experience as a bankruptcy practitioner, Norman has successfully represented and litigated on behalf of clients in some of the nation's largest and most intricate bankruptcy cases, involving numerous industries. Norman's clients value his responsiveness to their needs and his tenacity in pursuing dynamic strategies to protect and maximize their interests.

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Karol Tatara is a lecturer of bankruptcy law for attorney-at-law's trainee programme organized by Krakow District Chamber of Attorney's –at-law, he is also a Vice-president of the Insolvency Law Committee of Allerhand Institute, a member of INSOL Europe and Pro-dean of the Polish Chamber of Insolvency Practitioners. Karol Tatara is an expert of the World Bank within Doing Business report and takes part in the legislative process.

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Richard H. Golubow is a founder and the managing partner of Winthrop Couchot Golubow Hollander, LLP, a financial restructuring, insolvency and bankruptcy law firm located in Newport Beach, California. Mr. Golubow has extensive experience in the areas of bankruptcy, out-of-court workouts, distressed asset sales, UCC foreclosure sales, and general assignments. His diverse client base includes representation of debtors, creditors, creditor committees, trustees, assignees for the benefit of creditors, and asset purchasers in a wide range of industries. Mr. Golubow has also been retained and designated as a bankruptcy law expert on several occasions.

Mr. Golubow has been honored as the recipient of financial restructuring awards by several leading financial publications and organisations, including a perennial selection as "AV Preeminent" (5 out of 5) Peer Rating, Martindale-Hubbell's highest peer recognition, Best Lawyers in America® in the fields of Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law, a 2017 M&A Advisor "Deal of the Year" Award, and a perennial selection as a Southern California "Super Lawyer", including a 2017 and 2018 "Top 50 Orange County Super Lawyer." The awards collectively recognise success and excellence, expertise, service, achievement and innovation as chosen by industry peers. Mr. Golubow is a member of the International Network of Boutique and Independent Law Firms, an invitation only network of lawyers from boutique law firms with the highest level of knowledge, experience, reputation and credentials comparable or superior to lawyers at the highest-ranking full-service law firms.

Meet The Experts

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Andreas Sticher began his professional career at Helbing Management Consulting, which focuses on strategy and turnaround projects in the SME sector. He ended up as Senior Manager leading projects out of banking pool situations. Afterwards he changed his function to Corporate Development Manager and worked at LISEGA AG. He was responsible for the design and implementation of programs and measures to address the growth jump of the consortium. After three years, he moved to England into the management of the subsidiary LISEGA Ltd. He took responsibility for the further development of corporate strategy, organisation and order handling processes.

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Xiuchao Yin is a senior partner at Dentons with experience in lawsuits, mediation, bankruptcy reorganization, and mergers & acquisitions. Having studied engineering, economics and law, and having worked in government and finance before his career in law, Xiuchao has high level organizational skills and a strong focus which enable him to engage in large-scale projects in a systematic and ordered fashion.

Q1. Can you outline the current bankruptcy and restructuring landscape in your jurisdiction?

Norman Kinel

Kinel: We have recently seen a bit of an uptick in business bankruptcy filings, although many believe that a "wave" of filings will soon be arriving in a number of particularly vulnerable industries. There is constant talk of a recession in the U.S.—which by historical standards is long overdue—and given all of the current political uncertainty, both here and abroad, the economy is certainly at risk. Debt maturities are rapidly approaching for many over-leveraged companies and the willingness of lenders to further "kick the can down the road" will at some point come to an end. So I think that many of us in the restructuring world are optimistically pessimistic.

Xiuchao Yin

Yin: The Law of the People's Republic of China on Enterprise Bankruptcy (For Trial Implementation) was the first bankruptcy law in China when it was enacted in 1986. At that time it had no specific provisions to cross-border insolvency. The Court historically adopted territorialism through which the extraterritorial applications for recognition of foreign judgments' laws were refused and it is not allowed for a foreign representative to claim a foreigner's assets located in China.[1]

In 2006, the Enterprise Bankruptcy Law ("EBL") was enacted in China, to some extent filling the blank of legislation of cross-border insolvency. Article 5 of EBL governs the framework for PRC Court to recognise and enforce foreign bankruptcy judgments. It provides that if a judgment or ruling made by a foreign court has taken effect and involved the debtor's assets within the territories of China, and an application on recognition and enforcement is made to PRC Court, the court shall examine the application pursuant to international treaty that has concluded and accede to by China or the principle of reciprocity. The court will make a ruling on recognition and enforcement if the application does not violate or impair the following rules:

1. The basic principles of PRC laws;
2. The national sovereignty, security and public interests;
3. The legal rights and interest of the creditor within the territory of PRC.[2]

Andreas Sticher

Sticher: Restructuring and turnaround projects have always been implemented only once a company began to see negative earnings or even experience a real fundamental financial crisis. This way of thinking is unrealistic in times of volatile markets, aggressive competitors or investors, electric vehicles and digital change. After all, even established companies that are (still) seeing good earnings now face the challenge of securing their existing success while managing the transition to new business models and structures.

Waiting is often the beginning of the end – at least at a corporate level. And most corporate executives know this too, as many of them have already had painful experiences with it. More than 70% of top managers have had to place their company or division on a new footing. This is one of the results of the Staufen "Restructuring" study, for which 244 board members and managing directors were surveyed.

1. Charles D Booth, ELG Tyler, Ludwig Ng, Terry Kan, 4th,The Hong Kong Corporate Insolvency Manual
2. Article 5,Enterprise Bankruptcy Law of the People's Republic of China

> *"There is constant talk of a recession in the U.S.—which by historical standards is long overdue—and given all of the current political uncertainty, both here and abroad, the economy is certainly at risk."*
> *- Norman Kinel -*

Richard H. Golubow

Golubow: Bankruptcy filings reached their peak in the year ending September 2010, when nearly 1.6 million bankruptcies were filed. This was followed by a national trend of declining bankruptcy filings in 2011 and has continued into 2019. According to the Administrative Office of the U.S. Court, for the 12-month period ending on 30 June 2019, overall bankruptcy filings fell 0.3%. Specifically, the total number of bankruptcy filings was 773,361, compared with 775,578 cases in the year ending June 2018. Non-business bankruptcy filings fell by 0.3%, which is the smallest percentage change since March 2011. Meanwhile, business filings rose by 1.1%, which marks just the third time since 2010 that business bankruptcies increased over a 12-month period. Major national retailers were among the many business bankruptcies filed in the first half of 2019. Retail bankruptcies will continue to maintain a visible presence in the restructuring landscape.

Karol Tatara

Tatara: In Poland, the bankruptcy and restructuring landscape provides very interesting tools for business restructuring, as well as for investment in distressed-assets.

One of the most important is pre-pack; a prepackaged liquidation (administration) which is beneficial for all interested parties – the debtor, creditors, investor as well as the economy, the judiciary and the trustee. Pre-pack allows the debtor to sell distressed assets – enterprise as a going concern, organised part of an enterprise or important assets.

During pre-pack procedure, the Court – after recognising bankruptcy petition filed together with motion to approve sell-purchase conditions –decision declares bankruptcy and approves sell-purchase conditions of the pre-pack. Procedure should be fast, however there exist couple of safeguards, in particular the possibility to appoint an interim court supervisor and appeal Court's decision – by each creditor.

There are also four new restructuring proceedings: proceeding to approve the arrangement, accelerated arrangement proceeding, arrangement proceeding and remedial proceedings. In our view, the most interesting development is the option to proceed to approve the arrangement, because of tax benefits and low court involvement – making this procedure the most expeditive.

In addition to abovementioned, there is also possibility to carry on liquidation bankruptcy in traditional manner (not the pre-pack sale), aiming to cease insolvent company's existence once all assets are liquidated, and to satisfy creditors up to possible levels (usually not in total).

Bankruptcy matters concern also subject of liability of members of the board. Failing to file bankruptcy petition within the right timeframe may be a subject to penalty and civil liability – towards creditors of the insolvent company.

Q2. Have there been any recent regulatory changes or interesting developments?

Norman Kinel

Kinel: On 23 August 2019, President Trump signed into law several bankruptcy law changes: the Family Farmer Relief Act, the Honoring American Veterans in Extreme Need (HAVEN) Act and the Small Business Reorganization Act ("SBRA").

The SBRA, which will become effective on 19 February 2020, will allow small businesses with aggregate liabilities that do not exceed $2,725,625 the ability to elect to file as a debtor under subchapter V of chapter 11 of the United States Bankruptcy Code, which is intended to provide for a speedy and more cost-effective chapter 11 bankruptcy proceeding. This legislation came about because the overwhelming majority of small businesses were unable to reorganise under chapter 11 and instead, wound up having their cases converted to chapter 7 liquidations. Other small business were simply not filing at all due to the significant cost of a chapter 11 proceeding, as well as the requirement that in order to confirm a reorganisation plan they could only retain their equity interest if they either paid all of their creditors in full or contributed significant "new value" to the business, which generally means a material cash infusion which they are unlikely to be able to provide.

Under the SBRA, the process is streamlined. Prior to the plan confirmation hearing, the company needs to attend only one bankruptcy court status conference to apprise the court of the progress the company has made toward reaching an agreement with its creditors. Moreover, presumptively, no Official Committee of Unsecured Creditors will be appointed, saving the debtor the fees and expenses of the professionals routinely hired by official committees. Throughout the plan of reorganisation payment period (which lasts between three to five years), a "standing trustee" is appointed to oversee the case, whose duties will be limited and will not include operating the business. The standing trustee will only be permitted to review the company's financial condition and business operations, report any fraud or misconduct and ensure that distributions are made in accordance with the company's plan of reorganisation. Although payment periods to creditors will last years, the time from filing a bankruptcy petition to confirmation of a plan of reorganisation can be as short as 90 days under the SBRA.

Under the SBRA a plan can provide one of two options for the repayment of the company's creditors: (a) it can identify "disposable income" that is not used to pay the company's necessary expenses and explain how it will be distributed; or (b) it can provide for the distribution of some or all of the company's property, so long as it can be demonstrated that such property "is not less" than the projected disposable income that would otherwise be paid to creditors. If the company can demonstrate its ability to fulfil either of these options, and assuming the plan does not discriminate unfairly among similarly situated creditors, then the plan is likely to be held to be "fair and equitable" and be confirmed. Thus, aside from the cost-savings, the key benefit to business owners under the SBRA is that they have the ability to retain their equity interest in their company provided that they comply with the terms of the plan.

Xiuchao Yin

Yin: The Supreme People's Court issued Notice of the Supreme People's Court on the Promulgation of the Minutes of the National Court Work Meeting on Bankruptcy Trials in March 2019, in which it formulates cross-border jurisdiction, the principle of reciprocity and principle provision of promotion of international bankruptcy cooperation.[1] It encourages the court to accede to and advance the negotiation and conclusion of international treaties, providing legal review basis for recognition and enforcement of foreign judgments and increasing the possibilities and opportunities to recognise and enforce the judgments on cross-border bankruptcy. Moreover, it breakout limits set in EBL and explores the new approaches to apply to reciprocity principles to strengthen cooperation with foreign courts and the administrator. The PRC court may proactively recognise and enforce foreign judgments rather than based on the first recognition and enforcement of PRC's by foreign courts. It tends to flexibly apply to the principle of reciprocity and take a more open and friendly attitude towards the recognition and enforcement of foreign judgment.

1. Notice of the Supreme People's Court on the Promulgation of the Minutes of the National Court Work Meeting on Bankruptcy Trials

The government of China pays increasing attention to actively promote foreign investment and protect the lawful rights and interests of foreign investors. The Foreign Investment Law of the People's Republic of China has been adopted at the Second Session of the Thirteen National People's Congress on 15 March 2019 and will be implemented from 1 January 2020. The foreign investment law adopts a management system of pre-establishment national treatment and negative list[2] for foreign investment, under which foreign investors outside the negative list will be granted national treatment.[3]

Foreign investors will enjoy more convenience in foreign direct investment and merger and acquisitions, circumnavigating the complex requirements of Law of the People's Republic of China on Sino-foreign Equity Joint Ventures, Law of the People's Republic of China on Sino-foreign Co-operative Enterprises, and Law of the People's Republic of China on Wholly Foreign-owned Enterprises. The organisation of the foreign-funded enterprise refers to The Company Law of the People's Republic of China, making the management and governance of the domestic-funded company and the foreign-funded company more equal and granting foreign-funded companies greater freedom and protection on business operation.

Richard H. Golubow

Golubow: The federal government, with the assistance and guidance of the National Bankruptcy Conference, American Bankruptcy Institute and National Conference of Bankruptcy Judges, drafted a new law called the Small Business Reorganization Act of 2019 ("SBRA"), which will go into effect on 19 February 2020. The SBRA makes Chapter 11 bankruptcy more accessible and less expensive for small businesses by establishing a process for small business debtors under Chapter 11 that is similar to the bankruptcy process under Chapter 12 for family farmers and Chapter 13 for individuals.

The SBRA creates new subchapter V of Chapter 11 of the Bankruptcy Code specifically for small business debtors, which are defined as "a person in a commercial or business activity with less than $2,725,625 in non-contingent secured and unsecured debt." A small business debtor must elect to proceed under subchapter V of chapter 11. The SBRA's material revisions to Chapter 11 include the following: (1) a trustee will be appointed to oversee the plan confirmation process and claims distribution, but will not operate the business; (2) A debtor is required to file a plan of reorganisation within 90 days of the petition date, and only the debtor can file a plan. The debtor is not required to file a disclosure statement, and no creditors' committee will be appointed unless the court orders otherwise; (3) There is no requirement that the debtor's equity holders provide new value to retain their equity interest in the debtor even if creditors are not paid in full; (4) The requirements for plan confirmation include: (i) the plan does not discriminate unfairly; (ii) the plan is fair and equitable, and (iii) the plan provides that all of the debtor's projected disposable income will be applied to plan payments for the next three to five years or the value of property to be distributed under the plan is not less than the projected disposable income of the debtor for the next three to five years; and (5) a small business debtor will no longer need to pay all administrative expense claims on the effective date of the plan. Instead, a small business debtor may pay administrative expense claims over the term of the plan.

2. The negative list refers to the access of foreign investments in specific field specified by the State is treated with special administrative measures.
3. <Foreign Investment Law of the People's Republic of China>

> *"The PRC court may proactively recognise and enforce foreign judgments rather than based on the first recognition and enforcement of PRC's by foreign courts."*
> *- Xiuchao Yin -*

Q3. How has the bankruptcy & restructuring landscape altered in the United States since the *Marblegate Asset Management LLC v Education Management Corp* ruling in the Second Circuit?

Richard H. Golubow

Golubow: By way of background, the Trust Indenture Act of 1939 ("TIA") is a law that prohibits bond issues valued over $5 million from being offered for sale without a formal written agreement (i.e. an indenture). Both the bond issuer and the bondholder must sign the indenture, which must disclose fully the specifics of the bond issue. The TIA also requires that a trustee be appointed for all bond issues so that the rights of bondholders are not compromised. Now 80 years old, the TIA was almost repealed in 1995 on the grounds that it had been eclipsed by market development because the market required indenture provisions more stringent than the TIA did. Section 316(b) of the TIA protects minority bondholders by prohibiting a majority from agreeing to modify the bondholder's right to receive payment without the consent of each minority bondholder.

In 2014, for-profit education company Education Management Corp. ("EDMC"), through an out-of-court exchange offer, restructured approximately $1.3 billion in secured debt and $217 million in unsecured notes issued by EDMC's subsidiaries. Bankruptcy was not a viable option for EDMC because of its status as a federally funded higher education provider. This wrinkle put added pressure on EDMC to follow through on a successful out-of-court restructuring. Two noteholders, the "Marblegate" parties, sued to enjoin the exchange offer, alleging that it violated section 316(b) by effectively depriving them of the practical ability to collect on the notes because although the transaction did not amend the unsecured notes' payment terms (or the indenture), they were left with nothing but claims against the EDMC subsidiaries, which at that point had no assets.

The district court ruled in Marblegate's favour and concluded that section 316(b) provides "broad protection against non-consensual debt restructuring" and prohibits such restructuring transactions if they adversely impact a noteholder's practical ability to be repaid.

However, in a split decision, the U.S. Court of Appeals for the Second Circuit reversed the district court. The panel ruled that an out-of-court debt restructuring which impaired the practical ability of noteholders to be repaid did not violate section 316(b), because it did not amend an indenture's "core payment terms."

As a result, the bankruptcy and restructuring landscape in the United States has not been dramatically altered. Rather, for matters pending within the Second Circuit and jurisdictions that adopt this decision, the effect has been to narrow considerably the grounds for attacking out-of-court restructurings based on a violation of section 316(b). Companies pursuing an out-of-court restructuring involving an exchange offer or consent solicitation of outstanding bonds that does not amend the indenture or core payment terms can proceed with confidence that Marblegate works in their favour.

In contrast, and as stated by the majority in Marblegate, dissenting bondholders are not powerless going forward because noteholders can require specific protective indenture covenants that will avoid an out-of-court restructuring like the one in Marblegate. Accordingly, indenture trustees should also evaluate the actions that will protect and preserve such legal remedies to collect payment of outstanding principal and interest.

> *"The TIA also requires that a trustee be appointed for all bond issues so that the rights of bondholders are not compromised. Now 80 years old, the TIA was almost repealed in 1995 on the grounds that it had been eclipsed by market development because the market required indenture provisions more stringent than the TIA did."*
> *- Richard H. Golubow -*

Q4. Which sectors are currently at highest risk of bankruptcy?

Norman Kinel

Kinel: Many, including retail, oil and gas and agriculture.

It has been reported that at least 34 oil-and-gas companies have filed for bankruptcy so far this year, including EP Energy Corp., the largest U.S. energy bankruptcy since 2016, with $4.6 billion in debt. Other recent large filings include Sanchez Energy Corp. and Halcón Resources Corp.

According to Fitch Ratings, energy companies with junk-rated bonds were defaulting at a rate of 5.7% as of August, the highest level since 2017, which is a key indicator of the industry's financial distress. The current financial strain in this sector is likely to intensify as many companies that took on debt after the oil slump of 2016 face large debt maturities in the next four years. According to S&P, as of July, about $9 billion was set to mature throughout the remainder of 2019, but about $137 billion will be due between 2020 and 2022. Many companies in this sector financed their growth by taking on significant debt with the expectation that higher oil prices would allow them to service it. However, even though oil prices today are around $60 per barrel—as opposed to a low of around $30 a barrel in 2016—many of these companies are still unable to meet their debt obligations. Thus, unlike in 2016—during which approximately 70 U.S. and Canadian oil-and-gas companies filed for bankruptcy—the current round of bankruptcies has not been caused by a collapse in crude prices.

Retail similarly continues to face a very gloomy outlook, with the number of bankruptcies in this sector continuing to increase. In fact, the phrase "retail apocalypse" has now become part of our vernacular. It has been reported that there were more store closures in the first half of 2019 than all of last year, with Forever 21 being the latest large U.S. retailer to sink. Others this year have included Payless ShoeSource and Charlotte Russe.

A recent noteworthy development in retail insolvencies is that the largest mall owner in the U.S.—Simon Property Group—has indicated that it may continue to invest in distressed companies where it believes that it may be "worth doing it." Simon Property teamed up approximately three years ago with General Growth Properties (now owned by Brookfield Property Partners) to buy the assets of teen apparel retailer Aeropostale out of bankruptcy. It has been widely reported that Simon— which has been listed among Forever 21's largest creditors—may be considering a similar transaction for Forever 21 as Aeropostale, with respect to which deal Simon claims to have made "a ton of money."

Andreas Sticher

Sticher: If you ask board of directors about possible threats, they first note the risks of a monoculture, namely the dependency on individual regions and markets (46%), customers (39%) or suppliers (33%). Mechanical and plant engineering has a particularly hard time in this respect: 65% of companies are focused on individual markets. Here, the strong influence of many providers' business models in this sector is evident. Either they manufacture individually developed single units with special-purpose engineering or can only manage a few projects at the same time as a plant manufacturer.

Richard H. Golubow

Golubow: The retail industry continues to face the greatest risk of bankruptcy. The clothing company Gymboree filed for bankruptcy in January 2019 and has since closed hundreds of stores. In August 2019, family-dining chain Perkins & Marie Callender's and luxury retailer Barneys New York filed their respective bankruptcies. In September 2019, fast fashion behemoth Forever 21 filed for bankruptcy with plans to close more than 200 stores worldwide and negotiate rent concessions with landlords as part of its chapter 11 restructuring as it struggles to compete in the clothing retail environment.

Q4. Which sectors are currently at highest risk of bankruptcy?

Karol Tatara

Tatara: Many construction companies are at the brink of insolvency, because of the crisis on the market, which resembles the situation from around 2012, where approximately 800 construction companies went bankrupt.

Also, due to the change in consumers' habits and lifestyle, traditional (not digital) press and media should prepare for possible insolvency. People are reading (in paper form) less and less, thus publishers can face a difficult time.

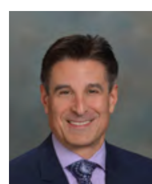
Q5. What challenges and opportunities currently exist within the retail industry?

Richard H. Golubow

Golubow: Within the retail industry there are opportunities to repurpose vacated spaces, and in particular those left bare by empty box stores. Seasonal businesses are a long-established but temporary solution for property managers and real estate investors. Communal work spaces is a growing concept, although arguably it continues to be dominated by pioneer WeWork. Challenges include finding a sustainable substitute for former retailers, and ones that can at least match the prior rental income from the previous tenant.

In addition, subscription-based services for everything from vitamins (e.g. care/of and ritual) to razors (e.g. Harry's and Dollar Shave Club) may continue to compete for market share. Ultimately, though, Amazon has yet to show signs of slowing down, and as a result of a robust online marketplace, the retail industry is likely to keep languishing.

Q6. What additional due diligence considerations need to be factored in when acquiring a company that is in administration or are experiencing cash flow pressures regardless of the sector?


Richard H. Golubow

Golubow: As suggested by the high-profile bankruptcies discussed above, a company would be wise to enquire into any pending lawsuits or potential claims that can be asserted against the company to be acquired, and whether or to what extent successor liability might be an issue. Due diligence considerations also include a careful analysis of the executory contracts entered into by the company. In particular, a company should account for the health of all counter-parties to its contracts, as some may be experiencing their own financial difficulties.

Q7. What can we learn from recent surge in high profile bankruptcies and restructurings?

Norman Kinel

Kinel: Unlike many of the pure balance sheet restructurings which we have seen in the oil and gas industry, among others, a number of recent high profile U.S. bankruptcies have stemmed from onslaughts of litigation, or actual litigation losses, as well as outright fraud.

A very recent example of a litigation-fuelled bankruptcy filing is Purdue Pharma, which filed for chapter 11 protection on 15 September. Purdue manufactures, sells and distributes various opioid pain medications, including OxyContin, and has been the target of over 2,600 civil actions pending in various state and federal courts. Purdue stated in its initial filings that it commenced its chapter 11 proceedings to "resolve the [opioid] litigation rationally," to "halt the destruction of value and runaway costs," and to "finalise and implement" a settlement contemplating "more than $10 billion of value to address the opioid crisis." The proposed settlement "would transfer the entirety of Purdue's value to a post-emergence vehicle for the benefit of claimants and the American public, while continued litigation would only serve to divert massive resources – that could otherwise benefit the American people – to lawyers and professionals." The Purdue filing followed that of fellow opioid manufacturer Insys, which filed for chapter 11 in June, sold its assets and is no longer operating.

On the fraud front, the Woodbridge Group of Cos. Chapter 11 proceedings stemmed from what was alleged to have been a $1.3 billion Ponzi scheme. The Woodbridge companies entered bankruptcy when the company ran out of money to pay investors' dividend and interest payments. The company's CEO was accused of defrauding more than 8,400 investors and ultimately pled guilty to mail fraud, wire fraud and tax evasion. As many in the restructuring world often say—albeit somewhat facetiously—when the economy is doing well and filings decrease, one can always count on fraud for new business.

Another significant new development is the effect of the ongoing trade war with China on various companies. At least one steel manufacturer–Bayou Steel BD Holdings, LLC—recently filed chapter 11 after unexpectedly announcing that it was shutting down its operations, citing "unforeseen business circumstances" and a lack of financing. However, it was widely reported that the trade war with China was at least partly responsible for the abrupt shut down.

Andreas Sticher

Sticher: Restructuring and turnaround projects have always been implemented only once a company began to see negative earnings or even experience a real fundamental financial crisis. This way of thinking is unrealistic in times of volatile markets, aggressive competitors or investors, electric vehicles and digital change.

Q7. What can we learn from recent surge in high profile bankruptcies and restructurings?

Richard H. Golubow

Golubow: Two of this year's high-profile bankruptcies stand out for the fact that they each involve a multitude of lawsuits and clashes with government regulators or state agencies.

First, utility giant PG&E filed for bankruptcy in January 2019 in the wake of mounting lawsuits in relation to devastating Northern California wildfires. Since filing, PG&E has proposed to pay billions of dollars to settle most insurance claims from the wine country fires in 2017 and the Camp Fire in 2018, and to settle claims of local governments and agencies affected by the 2015 Butte Fire, the 2017 North Bay Fires and the Camp Fire. Even if the Court approves such settlements, PG&E still faces a large group of individual plaintiffs who have cases pending in federal and state court. Moreover, PG&E must also deal with California regulators who must vote to approve the utility's reorganisation plan. Meanwhile, a group of noteholders have recently expressed their willingness to invest $29.2 billion into PG&E as part of a proposed reorganisation plan, which major shareholders are opposing in favour of PG&E's own reorganisation plan.

Second, OxyContin maker Purdue Pharma LP caved to pressure from more than 2,600 lawsuits alleging the company helped fuel the deadly U.S. opioid epidemic, and filed for bankruptcy in September 2019. As with PG&E, the parties are numerous and the plaintiffs have also waged contentious legal battles over responsibility for the continuing public health crisis. Cities, counties, and states are seeking billions of dollars in damages and have questioned Purdue's proposed settlement offer. Among other reasons, certain states argue that the amount the Sackler family (owners of Purdue) would have to pay is not commensurate with the bulk of the company's profits that they have accumulated. Moreover, at least one state attorney general alleges that the Sackler family was trying to hide assets to further avoid paying.

Both these high-profile bankruptcies highlight for practitioners the involvement of government entities or agencies and the possibility that they will seek certain exemptions afforded by the bankruptcy code or rules that allow them to pursue their legal actions because they're being brought to enforce public health and safety laws. Nevertheless, even if these kinds of debtors are able to obtain a breathing spell from litigation, they should be prepared to address each of the constituencies that are bound to group together, whether insurance companies, individual plaintiffs, or regulators for a specific industry. Each of these parties will no doubt want to avoid costly litigation if possible, and to that end may be amenable to the bankruptcy court approving an agreed upon settlement sooner than would be the case in other civil courts. In the case of PG&E, there's a potential for noteholders to invest billions and create trusts to compensate victims, and similarly, for Purdue, the Sackler family is supposed to pay their share. Thus, the recent surge of these kinds of high-profile bankruptcies or restructurings also emphasizes the demand for equity interest holders to fund a plan, and any settlements contemplated therein.

Karol Tatara

Tatara: The most important lesson from well-known bankruptcies is, in our view, the role of the management and right decisions with regard to early warning symptoms of possible insolvency or threat of insolvency.

"As with PG&E, the parties are numerous and the plaintiffs have also waged contentious legal battles over responsibility for the continuing public health crisis. Cities, counties, and states are seeking billions of dollars in damages and have questioned Purdue's proposed settlement offer."
- Richard H. Golubow -

Q8. In our 2019 *Bankruptcy & Restructuring Expert Guide*, we highlighted the growing trend towards restructuring in Germany. Can you talk us through the reasons for restructuring?

Andreas Sticher

Sticher: A review of refurbishments reveals that economic downturns (33%) and intensified price wars (29%) were among the most important reasons for the difficulties, but that many crisis triggers were actually homemade. Lack of market or customer orientation (26%), management errors (25%), sales problems (22%) and strategic mistakes (22%) have led to economic problems. Given these factors, many respondents are critical of the companies they currently manage. Around one-third view their own company as strongly or even very vulnerable to crisis. Only a fifth believes that a crisis would only affect them minimally or not at all.

Economic conditions and industry specifics are difficult to influence; but companies can still provide for themselves – through predictive restructuring. The aim is not to react to a crisis in the future when it may already be too late, but rather to recognise early indicators and quickly react to them. To achieve this, companies need to think of restructuring more broadly and always in combination with agile organisation, digitisation and leadership excellence. This is the only way to ensure sustainability in the transformation process.

A very crucial point: The management and corporate culture must promote the ability to change in all areas. Because a learning organisation can anticipate changes if an early warning system is used. They are less susceptible to disruptions and are can manage crises with a plan in advance.

Q9. What strategies exist for successful implementation of cross-border restructuring and insolvencies?

Norman Kinel

Kinel: There have been several development intended to ease and facilitate the coordination of parallel insolvency proceedings commenced in different countries.

In 2016, the Judicial Insolvency Network (the "JIN") developed *Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters* (the "Guidelines") in order "to improve the efficiency and effectiveness of cross-border insolvency proceedings and to enhance coordination and cooperation among courts under whose supervision such proceedings are being conducted." The objective of the Guidelines was to improve efficiency in complex cases by minimising litigation, time, and expense for the benefit of all stakeholders.

The Guidelines were noteworthy because for the first time a common framework was adopted by courts. Previously, to the extent there was any communication at all between the courts presiding over "parallel" cross-border proceedings, it was largely on an ad hoc basis, often resulting in significant delay and uncertainty and on occasion, even conflicting rulings from the different courts. The Guidelines have now been adopted in some form or implemented in numerous courts, including courts in the U.S., the United Kingdom, Singapore, Australia, The Netherlands, South Korea, Canada, Bermuda and the Eastern Caribbean.

More recently, on 25 July 2019, the JIN announced its adoption of the Modalities of Court-to-Court Communication (the "Modalities"), which "apply to direct communications (written or oral) between courts in specific cases of cross-border proceedings relating to insolvency or adjustment of debt opened in more than one jurisdiction." The Modalities address such matters as who will coordinate communications between the courts ("Facilitators"), procedures for an "Initiating Judge" to contact the "Receiving Judge," communication between Facilitators to establish appropriate arrangements for the communication between the courts without the participation of the parties or their counsel and direct communication between courts if they wish to bypass the use of Facilitators.

The Modalities have already been adopted on an interim basis by the U.S. Bankruptcy Court for the District of Delaware and it is anticipated that other courts will do so as well in the near term.

Q9. What strategies exist for successful implementation of cross-border restructuring and insolvencies?

Xiuchao Yin

Yin: Cross-border bankruptcy, as an important indicator in *Doing Business*, has received significant attention from the Chinese government. The first Beijing Bankruptcy Court has been established on 30 January 2019 with an additional purpose to include cross-border bankruptcy cases. It indicates that Chinese court advances the acceptance of cross-border bankruptcy cases and attaches great significance on the issue of cross-border bankruptcy.

In addition, Chinese lawyers are making active efforts to participate in cross-border cases. They could provide legal service for foreign clients base on the professional understanding of Chinese bankruptcy laws and rich experience of handling legal affairs involving foreign interests. They also play a significant role in communicating with the court and searching for potential investors to solve relative issues in cross-border procedures in China.

China has taken an increasingly friendly attitude to foreign investment and recognition and enforcement of cross-border bankruptcy cases. It is also taking active efforts to search for and solve problems arising from practice, and we expect the greater cooperation with foreign states on relative issues of cross-border bankruptcy.

Richard H. Golubow

Golubow: In order to successfully implement a cross-border restructuring, a debtor should be prepared to meet all the requirements for Chapter 15 recognition that a United States bankruptcy court must consider, including the requirement under 11 U.S.C. §109(a) that a debtor have property in the United States before filing a petition under Chapter 15. In addition, a bankruptcy court will consider rules regarding the appointment of a foreign representative under 11 U.S.C. § 101(24) and 1515(a), as well as whether a foreign proceeding is collective under 11 U.S.C. §101(23).

In the case of *In re PT Bakrie Telecom Tbk, 601 B.R. 707* (Bankr. S.D.N.Y. 2019), PT Bakrie ("BTEL"), an Indonesian telecommunications company faced a motion for summary judgment filed by certain noteholders. Ultimately, the bankruptcy court denied the motion, and in its ruling, concluded that the U.S. property requirement had been satisfied.

To wit, a note indenture subject to New York law with a New York forum selection clause met the "nominal amount of property" requirement. The bankruptcy court also held that the mere fact a foreign proceeding has concluded does not prevent the later appointment of a foreign representative, in part, because the policy underlying Chapter 15 does not support a categorical restriction against such an appointment due to delay.

As to the third requirement, the bankruptcy court was not persuaded by the noteholders' argument that it should refuse to recognise the foreign proceeding because it was not collective. The bankruptcy court took note of evidence that (1) the noteholders and indenture trustee were able to present their views to the administrators and the foreign court, (2) Indonesian law provided additional procedural and substantive safeguards, and (3) BTEL's plan restructured claims of different kinds of creditors.

Together, the bankruptcy court suggested that the foreign proceeding was collective. Because this case involved summary judgment, the result was not a ruling on the merits. Nevertheless, the case provides insights into strategies such as identifying nominal amounts of property in the U.S., planning the timing of the appointment of a representative to coincide with or predate the foreign proceeding, and ensuring that there is evidence of a proceeding being collective within the meaning of the Bankruptcy Code. Satisfying these three requirements make the implementation of cross-border restructuring more likely to succeed.

Q10. What key trends do you expect to see over the coming year and in an ideal world what would you like to see implemented or changed?

Norman Kinel

Kinel: Recently we have seen the introduction of the so-called "One Day Pre-Pack." A pre-pack is a case where the plan of reorganisation is negotiated, circulated and voted upon before the bankruptcy case is even filed. Although pre-packs have been used for some time now, the time from filing until confirmation of a typical pre-pack was generally in the 30-60 day range. However, so far in 2019 there have been two pre-packaged cases confirmed in less than 24 hours: *In re FullBeauty Brands Holding Corp.* (S.D.N.Y.) and *In re Sungard Availability Services Capital, Inc.* (S.D.N.Y.) and several other prepacks have been confirmed on an extremely expedited basis, including *In re Roust Corporation* (2016) (S.D.N.Y.) (seven days) and *In re Blue Bird Body Company* (2006) (D. Nev.) (32 hours).

The Office of the United States Trustee—which is a party-in-interest in all bankruptcy proceedings, with certain oversight responsibilities—has objected to these highly expedited prepacks on the basis of inadequate notice, with the primary issue being whether the required notice periods (28 days' notice for both a hearing on approval of a disclosure statement and on plan confirmation) can begin to run pre-filing. Since the applicable rules do not specifically state that these notice periods must begin to run post-filing, several courts have allowed these cases to be confirmed in as little as a day. The benefit of these highly expedited proceedings is the saving of the administrative costs of longer chapter 11 proceedings (including the costs associated with appointing a creditors' committee and its retained professionals), while the detriment is the possibility that notice was insufficient and that one or more creditors may have been denied due process.

In terms of change that I would like to see in the coming year, I believe that more deference must be given to Official Committees of Unsecured Creditors and the constituencies which they represent. I regularly represent unsecured creditor committees and I see that far too many bankruptcy cases are filed at the instigation and for the sole benefit of senior lenders, who are effectively using chapter 11 as a federal foreclosure process. That was not the intended purpose of chapter 11. In today's bankruptcy world, chapter 11 has turned into "chapter 363," where secured creditors dominate these cases and are often prepared to acquire all of the estates value for themselves in a 363 sale through a "credit bid," frequently leaving the estate either close to, or in fact, administratively insolvent. In these cases, the only hope for unsecured creditors is for a committee to use whatever leverage it can muster to try and obtain a small return for its constituency from the only available source—the debtor's senior secured creditor. However, unsecured creditors have ever fewer protections as a result of some recent court rulings and stand virtually no chance of any recovery on their claims in many of these cases. I do not believe that this outcome is what the drafters of the Bankruptcy Code intended, undoubtedly because they could have never envisioned that the majority of large chapter 11 cases would someday be nothing more than 363 liquidations—for the sole benefit of secured creditors.

Richard H. Golubow

Golubow: I expect the trend in retail bankruptcies to continue as a result of stagnant sales during the upcoming holiday shopping season. This inhospitable climate for luxury retailers in particular is likely to carry on as private equity firms and hedge funds can only do so much to combat the dominance of ecommerce.

In an ideal world, United States federal law would be amended to legalise cannabis use and sale, which would allow bankruptcy court protection for those that use cannabis or sell. The legalised cannabis industry in the United States continues to expand, with annual sales projected to hit $10 billion. By the end of 2018, 33 states had passed laws legalising cannabis for medical use of some nature with 10 of those states, including California, legalising cannabis for recreational use. While consumers may benefit from the resultant ease of access to cannabis products, cannabis-related businesses find themselves with hampered access to the protections normally available to them under the United States Bankruptcy Code.

Q10. What key trends do you expect to see over the coming year and in an ideal world what would you like to see implemented or changed?

Richard H. Golubow

Almost uniformly, bankruptcy courts have dismissed bankruptcies for cannabis-related debtors, including cannabis growers, their landlords and suppliers whose income was, in whole or in part, derived from legal marijuana businesses. These courts have held that although cannabis use may be legal in a majority of the states, the possession, use or sale of cannabis is still illegal under the federal Controlled Substances Act, and the bankruptcy courts cannot provide relief to debtors who are violating federal law.

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