



THE CHAPTER 11 SURGE: WHERE ARE WE HEADED

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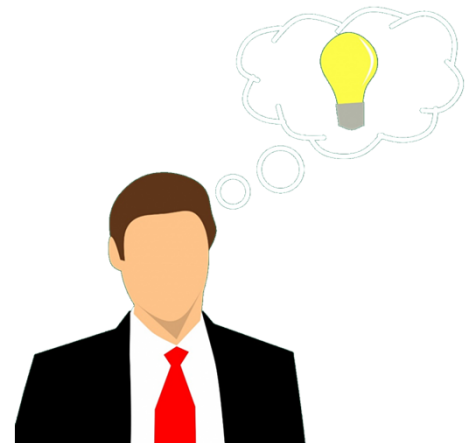


CAUSES FOR SURGE IN CHAPTER 11 BANKRUPTCY FILINGS IN 2023?



Multiple factors simultaneously putting pressure on the global economy are driving a significant uptick in Chapter 11s in 2023, including, among others:

- End of business stimulus programs
- Rising interest rates
- Persistent inflation (supplier and consumer)
- Energy and commodity price volatility
- Soaring commercial real estate vacancies and defaults
- Continued supply chain disruptions
- Labor shortages and rising labor costs
- Incremental leverage incurred during 2020-2022
- Upcoming debt wall maturity risk/increased refinancing risk
- U.S. commercial bank failures (Silicon Valley, Signature, First Republic)
- Federal government shutdown standoffs
- Geopolitical tensions
- **Recession risk**



| SURGE IN CHAPTER 11 FILINGS IN 2023



- Accelerated Chapter 11 Filings In 2023 through August 31, 2023
 - Approximately **68% increase** in commercial chapter 11 filings in first half of 2023 vs. same period in 2022
 - 71% increase in commercial chapter 11 filings in July 2023 vs. July 2022
 - 54% increase in commercial chapter 11 filings in August 2023 vs. August 2022
 - Approximately **55% increase** in Subchapter V filings in first half of 2023 vs. same period in 2022
 - 61% increase in Subchapter V filings in July 2023 vs. July 2022
 - 43% increase in Subchapter V filings in August 2023 vs. August 2022



* EPIQ bankruptcy

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| LARGEST CHAPTER 11 FILINGS 2023



Name of Debtor	Economic Sector
SVB Financial Group (Silicon Valley Bank)	Financials
Diamond Sports Group	Communications Services
Avaya Inc.	Information Technology
Serta Simmons Bedding LLC	Consumer Discretionary - Furnishings
Party City Holdco Inc.	Consumer Discretionary - Retail
Bed Bath & Beyond	Consumer Discretionary - Retail

LARGEST CHAPTER 11 FILINGS BY PRIMARY SECTOR 2023



Economic Sector	Number of Filings
Consumer Discretionary	48
Industrials	45
Health Care	39
Financial Services	26
Consumer Staples	14
Energy	14
Information Technology	11
Communication Services	7
Materials	5
Real Estate	4
Utilities	3

Compiled August 1, 2023
S&P Global Market Intelligence

LEADING VENUES FOR LARGE CHAPTER 11 FILINGS – FIRST HALF 2023



- Largest Chapter 11 Filing Venues
 - U.S. Bankruptcy Court, District of Delaware
 - U.S. Bankruptcy Court, Southern District of Texas
 - U.S. Bankruptcy Court, Southern District of New York
 - U.S. Bankruptcy Court, New Jersey
 - New hot spot of megacase filings
 - Examples: Bed Bath & Beyond, David's Bridal, LTL Management I and II



* Bloomberg Law – News

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A DIZZYING PACE: SPEEDIER CHAPTER 11 CASES



- Chapter 11: Faster process is now the norm
 - Prepackaged Plans
 - Prearranged Plans
 - Asset Sales** are no longer just a fallback
 - True restructuring – fix operational issues *and* deleverage the balance sheet is **now the exception**



PREPACKAGED VS. PRE-NEGOTIATED CHAPTER 11 PLANS



Prepackaged ("Prepack")	Prenegotiated
Plan has been solicited in advance and accepted by voting classes	Plan Support Agreement (PSA) has been negotiated with certain classes
Confirmation occurs very quickly – sometimes 60-90 days post-filing <i>Belk</i> : Drive-through chapter 11 (in and out of bankruptcy in 24 hours!)	Plan still needs to be filed and votes solicited – may take months or years <i>Caesars</i> : Took <i>nearly two years</i>
Trade claims typically paid in full after confirmation or per their terms	No certainty as to treatment of trade claims – typically impaired , sometimes severely. Critical vendors may be treated better.
Pre-filing vote solicitation provides (near) certainty that impaired, objecting classes will be crammed down	No certainty as to how any creditors besides the PSA parties will vote – objecting creditors may hijack process
Typically no creditors' committee	Almost always a creditors' committee
Minimal risk of administrative insolvency	Risk of administrative insolvency
Preference claims <i>usually</i> waived	No certainty re: preference waiver
Minimal operational disruption	Risk of significant operational disruption

| SECTION 363 SALES



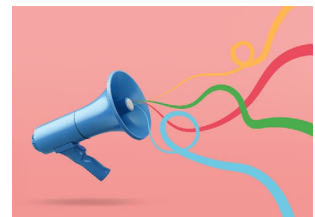
- Debtor Uses Bankruptcy Code Section 363 to Sell Assets
 - Entire business, specific assets / business lines, GOB sales
- Sales Under Section 363 Allow the Buyer to Obtain Court Approval To Purchase a Set of Specific Assets Free and Clear of Liens, Claims and Encumbrances Faster Than Through A Reorganization Plan
 - Bankruptcy sale process is public, benefitting debtor and creditors, and the sale is subject to higher and better offers, auction, court approval
 - “Higher and better” contemplates not only the purchase price, but other factors: form and terms of APA, form of consideration, ability to close, continued employment (preserving jobs) vs. liquidation
- Credit Bid: Ability of a secured lender to bid with its secured claim instead of new cash – up to 100% of the par amount of its debt (!)
 - Often part of a loan-to-own strategy
 - Can deter competitive bidding
- Increased Frequency of Structured Dismissals as Exit Strategy in Administrative Insolvency Cases
 - Chapter 7 conversion risk – Armstrong Flooring



| SALE CASES IN MEDIA INDUSTRY



- iMedia Brands
 - Filed chapter 11 in Delaware on June 28, 2023
 - Global media company – owns and operates 4 TV networks and several affiliates
 - Going concern sale to IVMedia LLC, subsidiary of Innovation Ventures
- Vice Media
 - Filed chapter 11 in Southern District of New York on May 15, 2023
 - Global media company focusing on news and culture targeting largely global youth audiences
 - Going concern sale to affiliate of Debtor's secured lender via credit bid
- MediaMath
 - Filed Chapter 11 in Delaware on June 30, 2023
 - Digital advertising technology company
 - Going concern sale to digital advertising company – Infillion



MEGA PRE-ARRANGED CHAPTER 11 PLAN CASE IN MEDIA INDUSTRY



- Diamond Sports Group
 - Filed chapter 11 in Southern District of Texas
 - Sports Broadcasting Company
 - Owns and operates regional sports networks and also holds interest in Chicago Cubs marquee and New York Yankees YES network



MEGA PRE-ARRANGED CHAPTER 11 PLAN CASE IN MEDIA INDUSTRY



- Diamond Sports Group Filed a Pre-arranged Chapter 11 Plan
 - According to the Restructuring Support Agreement (RSA), first lien debt unimpaired; second lien to get 92% of reorganized equity; and third lien debt and unsecured note holders to get 5% of reorganized equity and warrants
 - At inception of case, RSA was supported by 34% of first lienholders, 69% of second lienholders and 57% of unsecured noteholders
 - Plan milestones include
 - October 6, 2023 order approving disclosure statement
 - December 1, 2023 confirmation of plan
 - December 31, 2023 consummation of plan
 - Exclusive period for Debtors to file and solicit chapter 11 plan extended to September 30, 2023 and November 29, 2023, respectively
 - Court recently approved mediation of plan issues
 - Southern District of Texas bankruptcy judges Marvin Isgur and David Jones appointed as mediators to oversee creditor negotiations

| FREEFALL CHAPTER 11 CASES



- Debtor files a chapter 11 petition without any pre-negotiated restructuring terms with any key stakeholders
- May pursue a reorganization plan (difficult and expensive process without a Restructuring Support Agreement), a sale, or both in parallel
- May try to use chapter 11 as leverage to negotiate with an uncooperative lender or major creditor constituency
- **Risky move** and the strategy of last resort for debtors with operating businesses but significant creditor factions that are unwilling to cooperate in restructuring efforts

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INCREASED FREQUENCY OF REPEAT BANKRUPTCIES



- Debtors Filing for Bankruptcy a Second Time (Chapter 22) or Third Time (Chapter 33) or More Following Failed Initial Chapter 11 Case
- Through April 30, 2023, Piling Up At Fastest Rate Since 2009
 - Already tops the tally for all of 2021 and 2022
 - Spate of repeat bankruptcies has been eclipsed only once since 2000
 - Repeat bankruptcies “piled up at faster rate since Great Recession”



** Bloomberg Law – BankruptcyData*

| REPEAT BANKRUPTCIES



- Examples
 - David's Bridal – biggest wedding retailer in U.S.
 - Catalina Marketing – maker of well-known coupons
 - Tuesday Morning – discount retailer
 - Avaya – telecommunications company
 - INAP – data firm
 - Monitronics International – home security and alarm company
- Explanation
 - Debtor did not get enough debt off its balance sheet in the first chapter 11
 - Debtor did not shed unprofitable parts of its business and/or unprofitable contracts in first case
 - Debtor did not fix operational issues in first case



MALLINCKRODT RECENT CHAPTER 22 FILING



- Mallinckrodt Filed its First Chapter 11 Case in Delaware on October 12, 2020
- Mallinckrodt Emerged From its First Chapter 11 In June 2022 With a Chapter 11 Plan that Provided *Inter Alia*
 - Commitment to pay \$1.275 billion into a trust to settle opioid claims/litigations
 - Reduced debt by \$1.5 billion
 - Plan approved in part based upon proof of Mallinckrodt's "feasibility"
- Causes for Mallinckrodt Failed First Chapter 11 Case/Plan
 - Lagging sales of its flagship product Acthar gel and other products
 - Strong competition
 - Overblown projections
 - Raid rise of interest rates on variable rate debt



MALLINCKRODT RECENT CHAPTER 22 FILING



- Second Chapter 11 Filing By Mallinckrodt on August 28, 2023 in Delaware
 - Assets-\$5.107 billion
 - Liabilities-\$3.512 billion
- Pre-packaged Chapter 11 Plan Based on Restructuring Support Agreement Providing *Inter Alia*
 - \$250 million payment made on August 24, 2023 to opioid trust created under first plan, which supports the prepack
 - After taking into account \$450 million payment to the trust prior to the second chapter 11 filing, opioid creditors will receive a total of \$700 million, a 45% discount, plus additional consideration
 - First lien debt (88% support plan) reduced from \$2.86 billion from \$1.65 billion through debt equity swap that will leave first lienholders with approximately 92% of reorganized debtors' equity
 - Second lien debt (86% support plan) zeroed out in exchange for approximately 7.4% of reorganized debtors' equity
 - All other claims including trade debt not impaired

MALLINCKRODT RECENT CHAPTER 22 FILING



- Plan timeline
 - September 14 voting deadline
 - September 22 plan disclosure statement objection deadline
 - October 3 Combined hearing on approval of disclosure statement and plan
 - Anticipated emergence from chapter 11 (again) in 4th quarter 2023



CREDITORS' COMMITTEES – OVERVIEW



- Bankruptcy Code Provides for Creditors' Committee in Chapter 11 Cases
- Committee Members Are Given a Seat at the Table to Determine the Debtor's Future Business Operations
- Committee Acts as Fiduciary for Unsecured Creditors, and as Watchdog, Consultant, and Negotiator Re: Key Case Issues
- The Committee Can Select its own Counsel and Financial Advisors, and these Professionals are Paid By Debtor/Estate (not Committee Members Themselves)
- Goals
 - Restructure business
 - Maximize distributions to unsecured creditors
 - Retain healthier customer
 - Minimize or eliminate preference risk



CREDITORS' COMMITTEES – VIRTUAL FORMATION PROCESS



- United States Trustee Sends Questionnaire and Notice of Committee Organizational Meeting to Largest Unsecured Creditors
- If You Wish to Serve, it is Important to Promptly Respond to the Questionnaire Sent by the United States Trustee or Otherwise Make Your Interest Known to the United States Trustee
- U.S. Trustee Selects Members of Creditors' Committee
 - Since the pandemic, selection process has been conducted virtually
 - The Committee may consist of different types of claimants, such as trade, landlord, tort, employee, and others to promote diversity
 - The Committee discusses initial administrative matters, including retention of professionals



| CREDITORS' COMMITTEE – POWERS



- Negotiate/Litigate Issues Regarding Chapter 11 Financing/Use of Cash Collateral
- Investigate Debtor's Acts and Financial Affairs
- Consult with the Debtor Concerning Administration of the Case
- Request Appointment of a Chapter 11 Trustee or Examiner if There is Debtor Misconduct
- Active Involvement in 363 Sale of Business/Assets
 - Seeks to encourage competitive bidding
- Formulate/Negotiate Chapter 11 Plan
- Pursue causes of action that provide recovery to GUCs
 - Lien challenge and other claims vs. lender
 - Preference and other avoidance claims against insiders
 - Claims against directors and officers



SUBCHAPTER V SMALL BUSINESS CASES



- Enacted as Part of Small Business Reorganization Act of 2019 (SBRA) which took effect on February 19, 2020
 - Purpose is to reduce costs and increase efficiency
 - Permitted any business with maximum aggregate debt of \$2,725,625 to file as a small business; increased to \$3,024,725 on April 1, 2022
- Per CARES Act, the Maximum Aggregate Debt Limit for Small Businesses (Excluding Affiliates/Insiders) Increased to \$7,500,000, Not Less Than 50% From the Debtor's Commercial or Business Activities
 - The Bankruptcy Threshold Adjustment and Technical Corrections Act preserved \$7.5 million eligibility threshold with 2 year sunset on June 21, 2024



| SMALL BUSINESS FILING TREND



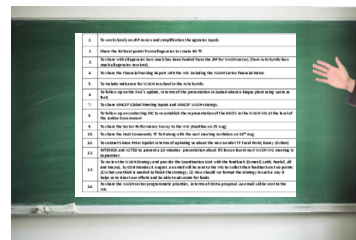
- Explanation for Small Business Bankruptcy Filing Growth -
 - Credit crunch
 - High interest rates
 - Bank collapses, including SVB, and threat of more bank failures
 - Smaller and regional banks are critical to small and medium sized businesses as these banks hold 40% of loans and debts of these companies (Per UBS)



| SALIENT SUBCHAPTER V PROVISIONS



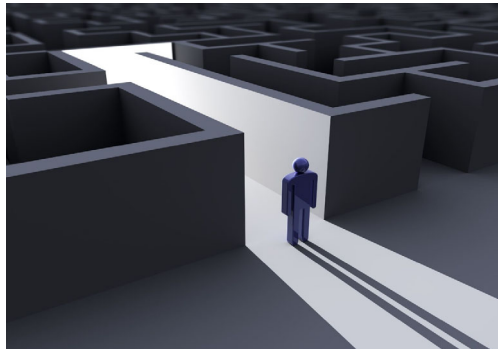
- No Quarterly United States Trustee Fees
- No Creditors' Committee Unless Court Otherwise Approves for Cause
- Subchapter V Trustee
 - Main role – to facilitate the Debtor's plan
 - Powers murky
 - May be granted investigative duties for cause (requires court approval)
- Debtor Has Sole Right to File Plan
 - Short deadline – within 90 days of filing date unless extended “due to circumstances for which debtor should not justly be held accountable
- No separate disclosure statement – some of that content may be included in plan
- Plan Must Include:
 - Projections showing debtor's ability to make plan payments
 - Future income as necessary to effectuate plan



SUBCHAPTER V PLAN CONFIRMATION PROCESS



- Plan May Be Confirmed Via Cramdown Even if Rejected By All Impaired Classes of Creditors
- No Absolute Priority Rule
 - Equityholders can retain their interests even if unsecured creditors are not paid in full so long as debtor contributes all of its projected disposable income over 3-5 year period
- Risk of Deferred Payment of Administrative Claims Following Confirmation Over Plan Term



| HOW IS SUBCHAPTER V FARING?



- Subchapter V Cases Represent a Significant Percentage of All Chapter 11 Filings
- Largest Number of Subchapter V filings in Eleventh, Ninth, and Fifth Circuits (in descending order)
- Industries Where Subchapter V Has Been More Widely Utilized:
 - Retail
 - Construction
 - Health care
 - Hotel/Lodging/Hospitality
 - Restaurants/Bars
 - Trucking/Transportation
 - Hospitality
- Subchapter V Cases Appear to be Working as Intended Based on Preliminary Data
 - Subchapter V Debtors confirming plans more quickly and at higher rate than pre-SBRA
 - Improved confirmed plan success rate, at least so far

A TWO-MINUTE PREFERENCE REFRESHER: WHAT IS A PREFERENCE?



Elements of a Preferential Transfer	Practical Considerations
A transfer of property of the estate	Typically but not always a payment – check, wire, etc.
to or for the benefit of a creditor,	
on account of an antecedent debt ,	No debt, no preference – cash in advance/ prepayments are not preferences at all
made while the debtor was insolvent ,	
on or within 90 days before the filing of the petition (one year for insiders)	Presumption of insolvency for transfers within 90 days is rebuttable with evidence
that enables the creditor to receive more than it would in a hypothetical chapter 7 liquidation where the transfer was not made and the creditor received payment according to the Bankruptcy Code	If you did not fare better than if the allegedly preferential transfer had not been made, the debtor filed chapter 7, and you were paid pursuant to the Bankruptcy Code, no preference (i.e., less than 100% recovery under plan)

A TWO-MINUTE PREFERENCE REFRESHER: COMMON DEFENSES



Defense	Description
Contemporaneous Exchange of New Value	<i>Payment was intended to be, and was, a substantially contemporaneous exchange of new value</i>
Subsequent New Value	<i>Creditor provided new value – extensions of credit – to the debtor after receiving the preferential transfer</i>
Ordinary Course of Business	<i>Transfer was payment of a debt incurred in the ordinary course of business or financial affairs of the debtor and creditor, and</i> <ul style="list-style-type: none"> <i>Made in the ordinary course of business or financial affairs of the debtor and the creditor (subjective test), <u>or</u></i> <i>Made according to ordinary business terms (objective test).</i>

I PREFERENCE TRENDS



- When a Chapter 11 Wave Occurs, Bankruptcy Code's Two Year Statute of Limitations for Commencing Preference Actions Often Results in A Wave of Preference Actions During the Following Two Years

- There has been a downward trend in preference actions as a result of slowdown in chapter 11 filings in 2021 and 2022
- That partially explains the slowdown in preference actions in 2023



ADDITIONAL REASONS FOR REDUCED PREFERENCE ACTIONS



- Fewer Debtors and Liquidating Trusts/Fiduciaries Commencing Preference Actions
 - Preference waiver in confirmed chapter 11 plans
 - Sales of preference actions and buyer's agreement not to sue
- Trustee's "Reasonable Due Diligence" Obligation Recently Enacted Might Be Discouraging Trustees from Pursuing Certain Preference Claims
- Anticipated Future Uptick in Preference Actions Based on Chapter 11 Filing Surge in 2023 Expected to Continue in 2024





| QUESTIONS



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Education

University of Pennsylvania Law School (J.D. 1980)

Wharton School of Finance and Business (M.B.A. 1980)

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With more than 40 years of experience in the bankruptcy and insolvency field, Bruce is a recognized leader nationwide in trade creditor rights and the representation of trade creditors in bankruptcy and other legal matters. He has represented trade and other unsecured creditors, unsecured creditors' committees, secured creditors, and other interested parties in many of the larger Chapter 11 cases that have been filed. Bruce also handles letters of credit, guarantees, security, consignment, bailment, tolling, and other agreements and legal credit issues for the credit departments of institutional clients.

Among his various legal recognitions, Bruce received the Top Hat Award in 2011, a prestigious annual award honoring extraordinary executives and professionals in the credit industry. He was co-chair of the Avoiding Powers Committee that worked with the American Bankruptcy Institute's (ABI) Commission to Study the Reform of Chapter 11, participated in ABI's Great Debates at their 2010 Annual Spring Meeting—arguing against repeal of the special BAPCPA protections for goods providers and commercial lessors—and was a panelist for a session sponsored by ABI. He is a frequent presenter at industry conferences throughout the country, as well as a prolific author regarding bankruptcy and creditors' rights topics in various legal and trade publications.

Bruce is a co-author of "Trade Creditor's Risk-Mitigation Tools and Remedies Manual," published by ABI in 2019. He has also contributed to **ABI Journal** and is a former member of ABI's Board of Directors and former co-chair of ABI's Unsecured Trade Creditors Committee.



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ANDREW BEHLMANN

Andrew leverages his background in corporate finance and management to approach restructuring problems, both in and out of court, from a practical, results-oriented perspective. With a focus on building consensus among multiple parties that have competing priorities, Andrew is equally at home both in and out of the courtroom, and he has a track record of turning financial distress into positive business outcomes. Clients value his counsel in complex Chapter 11 cases, where he represents debtors, creditors' committees, purchasers, and investors.

Andrew writes and speaks frequently about bankruptcy matters and financial issues. Before becoming a lawyer, he worked in senior financial management at a midsize, privately held company.





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