

Behind Closed Doors: The Influence of Creditors in Business Reorganizations

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ABSTRACT

General corporate law delegates the power to manage a corporation to the board of directors. The board, in turn, acts as a fiduciary and generally owes its duties to the corporation and its shareholders. Many courts and commentators summarize the board's primary objective as maximizing shareholder wealth. Accordingly, one would expect a board's conduct to be governed largely by the interests of the corporation and its shareholders.

Yet anecdotal and increasing empirical evidence suggest that large creditors wield significant influence over their corporate debtors. Although this influence is most apparent when a corporation approaches insolvency, often the strength of the creditors' negotiating position is based on the terms of the pre-insolvency contract. Creditors typically obtain restrictive covenants and veto rights that allow them to assert control over various corporate actions. Nevertheless, the extent of creditor influence is hard to gauge accurately because it frequently materializes behind closed doors in negotiations between the corporation and creditors over refinancing terms, forbearance agreements, covenant waivers, or rescue financing.

This Article sheds some light on the nature and extent of creditor influence by examining creditor influence over corporate debtors and

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creditors' committees in chapter 11 reorganization cases. Specifically, the Article reports and analyzes data from an empirical survey of professionals and individual creditors participating in the chapter 11 process. In many respects, the data confirm what commentators have gleaned from the terms of creditors' contracts and activity documented on chapter 11 dockets: creditors are exerting greater influence over corporate decisions in the restructuring context.

INTRODUCTION

Chapter 11 of the U.S. Bankruptcy Code is the primary tool for restructuring the financial obligations of a distressed company in a single forum—the U.S. bankruptcy court. When a company files a chapter 11 case, it is subject to extensive disclosure requirements, including a detailed listing of its assets and liabilities, information regarding its financial affairs, and monthly operating reports.¹ All of these disclosures must be filed with the bankruptcy court and made available to the public. In addition, parties holding claims against, or interests in, the company may request information from the company, either informally or through a formal examination under § 343 of the Bankruptcy Code and Rule 2004 of the Federal Rules of Bankruptcy Procedure.² As a result, a debtor often is said to be “operating in a fishbowl” during the pendency of its chapter 11 case.³

Notably, these disclosure requirements generally apply only to the debtor, and they primarily concern the debtor's business operations and financial condition. They do not, for example, apply to the debtor's creditors or shareholders or necessarily describe discussions or negotia-

1. See, e.g., 11 U.S.C. § 301(a) (2006) (a bankruptcy case is commenced by filing a petition containing certain disclosures); FED. R. BANKR. P. 1007(a)–(b) (explaining disclosure schedules required to be filed in connection with a bankruptcy case, including schedules of assets and liabilities and statement of financial affairs); see also OFFICE OF THE U.S. TR., U.S. DEP'T OF JUSTICE, OPERATING GUIDELINES AND REPORTING REQUIREMENTS FOR DEBTORS IN POSSESSION AND TRUSTEES (Jan. 6, 2010), http://www.justice.gov/ust/r20/docs/general/ch11_guidelines.pdf (explaining monthly operating reports and other disclosures and documents that chapter 11 debtors must provide the U.S. trustee).

2. 11 U.S.C. § 343 (2006) (“The debtor shall appear and submit to examination under oath at the meeting of creditors under section 341(a) of this title.”); FED. R. BANKR. P. 2004(a) (“On motion of any party in interest, the court may order the examination of any entity.”).

3. See, e.g., *In re Alterra Healthcare Corp.*, 353 B.R. 66, 73 (Bankr. D. Del. 2006) (“During a Chapter 11 reorganization, a debtor's affairs are an open book and the debtor operates in a fish bowl.”); see also Alan S. Trust, *Bankruptcy as a Fish Bowl of Disclosure*, AM. BANKR. INST. J., Mar. 2010, at 48 (explaining the disclosures required of debtors in bankruptcy cases); Melanie Linder, *A Debtor's Tale*, FORBES, May 6, 2009, <http://www.forbes.com/forbes/2009/0525/050-entrepreneurs-business-mlea-should-you-declare-bankruptcy.html> (telling the story of one chapter 11 debtor's experiences with the extensive public disclosures in chapter 11).

tions among these parties.⁴ In fact, much of what transpires in a chapter 11 case happens “off-docket”—i.e., the parties stake their positions and negotiate potential resolutions to the case behind closed doors, disclosing only limited information to the bankruptcy court and other parties in interest and only on an as-needed or as-required basis.⁵

The delayed or selective disclosure of information concerning negotiations in a chapter 11 case may facilitate a consensual resolution to the case.⁶ Debtors often have multiple stakeholders with competing interests; with latitude to negotiate out of the public spotlight, debtors are able to understand their stakeholders’ real issues and motivations without the noise frequently associated with parties jockeying for position before the court. This type of off-docket activity is common in chapter 11 cases and has helped numerous debtors reorganize successfully.⁷ Yet as the

4. Creditors and equity holders typically file a proof of claim or interest and supporting documentation to verify their claims against and interests in the debtor’s bankruptcy estate. 11 U.S.C. § 501(a) (2006) (“A creditor or an indenture trustee may file a proof of claim. An equity holder may file a proof of interest.”); FED. R. BANKR. P. 3001 (explaining the components of a proof of claim or interest). No other affirmative disclosure is generally applicable to these parties. Notably, lawyers representing one or more creditors or other parties in interest in a chapter 11 case may have additional disclosure requirements pertaining to the claims and interests of their clients. *See* FED. R. BANKR. P. 2019(a) (providing in pertinent part that “every entity or committee representing more than one creditor or equity security holder and, unless otherwise directed by the court, every indenture trustee, shall file a verified statement setting forth” specific information concerning the creditor or equity security holder); *see also* Gary Ravert, *Rule 2019 Revisited*, LAW360.COM, Mar. 8, 2010, <http://www.mwe.com/info/pubs/Rule%202019%20Revisited.pdf> (explaining proposed revisions to Bankruptcy Rule 2019 to require even more extensive disclosure).

5. *See, e.g.*, William W. Bratton, *Berle & Means Reconsidered at the Century’s Turn*, 26 IOWA J. CORP. L. 737, 747 (2001) (explaining that the enactment of the Bankruptcy Code, which replaces the concept of a mandatory bankruptcy trustee with allowing the debtor to stay in control, “returns the locus of deal-making authority to the back room, removing judicially enforced absolute priority from the center of the reorganization system”); Anthony Baldo, *The Bankruptcy Routine*, DEAL MAG., Jan. 22, 2010, <http://www.thedeal.com/newsweekly/features/special-reports/the-bankruptcy-routine.php> (“The public face of bankruptcy has always belied what makes it work: backroom negotiation among an often dizzying number of participants.”); Jonathan Berke, *Hired Gun*, DEAL MAG., July 9, 2003, <http://www.brownrudnick.com/nr/pdf/Articles/07-09-03WeisfelnerHiredGunTheDeal.pdf> (“Backroom warfare is standard practice in bankruptcies . . .”). *But cf.* David A. Skeel, Jr., *The Past, Present & Future of Debtor-in-Possession Financing*, 25 CARDOZO L. REV. 1905, 1920 (2004) (“Bankruptcy cases are dominated by merger and acquisition activities, as Miller notes, and lengthy backroom negotiations play less and less of a role.”).

6. *See, e.g.*, Raymond T. Nimmer & Richard B. Feinberg, *Chapter 11 Business Governance: Fiduciary Duties, Business Judgment, Trustees and Exclusivity*, 6 BANKR. DEV. J. 1, 8 (1989) (“The intended norm is that the terms of reorganization are determined by agreement culminating in a consensual plan.”); Barbara J. Houser et al., *Plan Issues: Classification, Impairment, Subordination Agreement*, SE 71 A.L.I.-A.B.A. 397, 430 (Feb. 2000) (“Ideally, the plan is a product of negotiations and consensus among the debtor, creditors and interest holders.”).

7. *See, e.g.*, Debtors’ Omnibus Reply to Objection to Confirmation of Debtors’ Second Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code Dated August 2, 2010 (as amended), *In re Abitibowater, Inc.*, 2010 WL 4823839 (Bankr. D. Del. Sept. 21, 2010) (No. 09-11296(KJC)) (“As is common in large, successful Chapter 11 cases, the Plan embodies a global and integrated settlement of a multitude of intercompany and intercreditor issues (the ‘Global

parties and dynamics of chapter 11 cases change, the typical off-docket activity may produce unintended consequences.⁸

One such unintended consequence is a shift in control of the restructuring process from debtors to one or more creditors.⁹ Commentators have observed that creditors—particularly secured creditors—are exerting more control over debtors, including if and how the debtors reorganize in chapter 11.¹⁰ Secured creditors often obtain this position of influence through covenants and rights in their credit documents with debtors. These rights can be significant and can lead to a “loan to own” situation whereby the lender converts its debt into an ownership stake in the reorganized company.¹¹ The concern arises because creditors owe no duty to other stakeholders in the chapter 11 case, and their self-interested conduct may impair value to the direct detriment of junior stakeholders.

The scope of chapter 11 disclosures and the off-docket activity in chapter 11 cases also provide opportunities for unsecured creditors to influence the restructuring process. These parties can accumulate a deb-

Settlement’). . . . The Global Settlement results from extensive, protracted negotiations with all of the Company’s key constituents, including the Creditors Committee, the Ad Hoc Unsecured Noteholders Committee, the Backstop Parties, and other key stakeholders.”). For a general discussion of how companies reorganize successfully in chapter 11, see STUART C. GILSON & EDWARD I. ALTMAN, CREATING VALUE THROUGH CORPORATE RESTRUCTURING: CASE STUDIES IN BANKRUPTCIES, BUYOUTS, AND BREAKUPS 6, 85–479 (2010) (discussing various studies concerning chapter 11 reorganizations, including one finding “that most distressed large public companies are successfully reorganized, approximately half the time in Chapter 11 and half the time out of court,” and providing in-depth case studies of companies reorganizing under chapter 11).

8. See, e.g., Douglas G. Baird & Robert K. Rasmussen, *AntiBankruptcy*, 119 YALE L.J. 648 (2010) (providing a detailed analysis of the changing landscape in chapter 11 and drawing on cooperative game theory to explain the potential consequences).

9. Although off-docket negotiations are common in cases under the Bankruptcy Code, greater involvement by unregulated, private funds arguably has increased the strategic uses of this practice. See Jonathan C. Lipson, *The Shadow Bankruptcy System*, 89 B.U. L. REV. 1609 (2009) (exploring increasing influence by unregulated, private funds and describing the resulting process as a “shadow bankruptcy” system).

10. See, e.g., Douglas G. Baird & Robert K. Rasmussen, *Private Debt and the Missing Lever of Corporate Governance*, 154 U. PA. L. REV. 1209, 1226–28 (2006) (discussing increasing opportunities for creditor control in chapter 11 cases through the *Warnaco* chapter 11 case); Douglas Baird & Robert Rasmussen, *Chapter 11 at Twilight*, 56 STAN. L. REV. 673, 675 (2003); M. Todd Henderson, *Paying CEOs in Bankruptcy: Executive Compensation When Agency Costs Are Low*, 101 NW. U. L. REV. 1543, 1557–64 (2007); George W. Kuney, *Hijacking Chapter 11*, 21 EMORY BANKR. DEV. J. 19, 24–25 (2004); Harvey R. Miller, *Chapter 11 in Transition—From Boom to Bust and into the Future*, 81 AM. BANKR. L.J. 375, 387 (2007); Thomas E. Plank, *The Creditor in Possession Under the Bankruptcy Code: History, Text, and Policy*, 59 MD. L. REV. 253 (2000); David A. Skeel, Jr., *Creditors’ Ball: The “New” New Corporate Governance in Chapter 11*, 152 U. PA. L. REV. 917, 930–33 (2003).

11. See, e.g., David Peress & Thomas C. Prinzhorn, *Nontraditional Lenders and the Impact of Loan-to-Own Strategies on the Restructuring Process*, AM. BANKR. INST. J., Apr. 2006, at 48, 57–58.

tor's unsecured debt to obtain a seat at the negotiating table.¹² The debtor is rarely aware that the creditor is amassing a majority position, and the creditor typically has an agenda different from the debtor's other stakeholders. Because the creditor is not required to disclose its position, and because only select parties are privy to the debtor's restructuring negotiations, the creditor may be able to leverage the process to its distinct advantage.¹³ Again, the interests of junior stakeholders and the company itself may be harmed in the process.

The Bankruptcy Code contemplates a statutory committee of unsecured creditors (creditors' committees) as one of the parties at the negotiating table with the ability to monitor the activities of the debtor and its stakeholders.¹⁴ In theory, the creditors' committee should temper the influence of secured and unsecured creditors trying to use the chapter 11 process for their personal gain rather than for the benefit of the debtor and all of its stakeholders. In practice, however, creditors' committees also are vulnerable to the influence of certain creditors, leaving no objective check on the restructuring process.¹⁵

This Article contributes to the ongoing dialogue regarding governance and creditor influence in chapter 11 cases by presenting empirical survey data collected from professionals who work in these cases and creditors who serve on chapter 11 creditors' committees. Part I describes the methodology and basic components of the survey. Part II explains the key survey data, providing not only informative descriptive information but also several interesting analyses regarding potential motivations and characteristics underlying key survey responses. Part III concludes by considering the implications of the survey data in light of a related empirical study performed on 296 chapter 11 cases and encouraging more

12. See Michelle M. Harner, *The Corporate Governance and Public Policy Implications of Activist Distressed Debt Investing*, 77 *FORDHAM L. REV.* 703 (2008) (discussing strategies used by distressed debt investors, including the acquisition of a company's unsecured debt, to obtain control or at least some influence over the chapter 11 case).

13. See *id.*; see also Lipson, *supra* note 9.

14. 11 U.S.C. § 1102(a)(1) (2006) ("[T]he United States trustee shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or of equity security holders as the United States trustee deems appropriate."). For a discussion of the history and current role of creditors' committees in chapter 11 cases, see Michelle M. Harner, *The Search for an Unbiased Fiduciary in Corporate Reorganizations*, 86 *NOTRE DAME L. REV.* 101 (2010).

15. See, e.g., Carl A. Eklund & Lynn W. Roberts, *The Problem with Creditors' Committees in Chapter 11: How to Manage the Inherent Conflicts Without Loss of Function*, 5 *AM. BANKR. INST. L. REV.* 129, 129–30 (1997); Kurt F. Gwynne, *Intra-Committee Conflicts, Multiple Creditors' Committees, Altering Committee Membership and Other Alternatives for Ensuring Adequate Representation Under Section 1102 of the Bankruptcy Code*, 14 *AM. BANKR. INST. L. REV.* 109, 120–26 (2006); Mark J. Krudys, *Insider Trading by Members of Creditors' Committee—Actionable!*, 44 *DEPAUL L. REV.* 99 (1994); Lipson, *supra* note 9, at 1671–72.

research and discussion regarding the challenges created by, and the potential benefits of, the evolving role of creditors in chapter 11 cases.

I. PURPOSE AND SCOPE OF SURVEY

Chapter 11 of the Bankruptcy Code allows a company to file a bankruptcy case without losing control of its assets, business operations, or restructuring efforts. The company acts as a “debtor in possession” (DIP) in the chapter 11 case, which allows the company’s management to continue to make key decisions on behalf of the company and its stakeholders.¹⁶ The U.S. trustee oversees the administration of the case, and it appoints one or more committees of creditors and equity holders (such as the creditors’ committee) to monitor the debtor’s conduct and advocate the interests of the represented class of stakeholders in the case.¹⁷

Although the bankruptcy court presides over the chapter 11 case, and a debtor must obtain bankruptcy court approval of its plan of reorganization and most major transactions in the case, neither the bankruptcy court nor the U.S. trustee supervise the debtor’s day-to-day operations or its dealings with stakeholders.¹⁸ Thus, the bankruptcy court and U.S. trustee typically become aware of issues only after the debtor or stake-

16. 11 U.S.C. § 1101(1) (2006) (defining “debtor in possession” as the “debtor except when a person that has qualified under section 322 of this title is serving as trustee in the case”); *id.* § 1107(a) (providing that “a debtor in possession shall have all of the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties . . . of a trustee serving in a case under this Chapter”).

17. 28 U.S.C. § 586(a) (2006) (duties of U.S. trustee); Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 35 (1995) (explaining role of the U.S. trustee); *see also* 11 U.S.C. § 1102 (2006) (process for appointing committees in chapter 11 cases).

18. *See, e.g.*, 11 U.S.C. § 363 (2006) (allowing the debtor to enter into transactions in the ordinary course of business without bankruptcy court approval but requiring that approval for transactions outside of the ordinary course); Christopher W. Frost, *The Theory, Reality and Pragmatism of Corporate Governance in Bankruptcy Reorganizations*, 72 AM. BANKR. L.J. 103, 114 (1998); Harvey R. Miller & Shai Y. Waisman, *Does Chapter 11 Reorganization Remain a Viable Option for Distressed Businesses for the Twenty-First Century?*, 78 AM. BANKR. L.J. 153, 189 (2004) (explaining the limited power of bankruptcy court).

holder files a pleading.¹⁹ As a result, the role of the creditors' committee often is central to ensuring a fair and successful reorganization process.²⁰

In many cases, the creditors' committee and the debtor cooperate to restructure the debtor's financial obligations and, in some instances, business operations, in a manner consistent with the dual goals of the Bankruptcy Code—rehabilitating financially troubled companies and maximizing the returns to creditors.²¹ Yet in other cases, a single creditor or a small group of creditors influence the debtor or the creditors' committee—or both—in a manner that jeopardizes the debtor's restructuring efforts or potentially decreases the value available to all stakeholders.²² Unchecked creditor influence can lead to costly disputes among stakeholders, conflicts of interest, and self-dealing.

Anecdotal evidence suggests that creditor influence in chapter 11 cases is increasing, and several empirical studies confirm this trend.²³ The increasing influence of creditors raises interesting questions about the role and functions of the creditors' committee.²⁴ The survey presented in this Article, and the related empirical study described, are intended to provide some insight on these important questions.

A. Methodology

The survey targeted individuals frequently involved in chapter 11 cases; specifically, the survey targeted lawyers and financial advisers

19. See sources cited *supra* note 5 (discussing back room negotiations in chapter 11 cases); see also John Wm. Butler, Jr. et al., *Preserving State Corporate Governance Law In Chapter 11: Maximizing Value Through Traditional Fiduciaries*, 18 AM. BANKR. INST. L. REV. 337, 349 (2010) (“The most skilled bankruptcy judges are able to assume these functions without undue or cumbersome interference with the inevitable compromises that must be forged between the debtor and its stakeholders. In short, a bankruptcy judge functions most effectively when she provides guidance and keeps a case on track to avoid undue delay and event risk but refrains from becoming intimately involved in the administration of the Chapter 11 case before her as was routine under the former Act.”).

20. See, e.g., Butler et al., *supra* note 19 (explaining checks and balances provided on parties in chapter 11 in part by the creditors' committee).

21. See, e.g., Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 MICH. L. REV. 336, 371–73 (1993) (explaining two traditional goals of chapter 11).

22. See Harner, *supra* note 14, at Part III.

23. See, e.g., Kenneth M. Ayotte & Edward R. Morrison, *Creditor Control and Conflict in Chapter 11*, 1 J. LEGAL ANALYSIS 511 (2009); Jocelyn D. Evans & Corliss L. Green, *Marketing Strategy, Constituent Influence, and Resource Allocation: An Application of the Miles and Snow Typology to Closely Held Firms in Chapter 11*, J. BUS. RES., November 2000, at 225–31; Stuart C. Gilson & Michael R. Vetsuypens, *Creditor Control in Financially-Distressed Firms: Empirical Evidence*, 72 WASH. U. L.Q. 1005 (1994); Henderson, *supra* note 10. For a discussion of recent cases involving elements of creditor control, see Harner, *supra* note 14, at Part III.

24. See Michelle M. Harner & Jamie Marincic, *Committee Capture? An Empirical Analysis of the Role of Creditors' Committees in Business Reorganizations*, 64 VAND. L. REV. (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1679986.

who work in chapter 11 cases (professionals) and individuals who serve on creditors' committees either on behalf of themselves or their employers (committee members).²⁵ The survey collected information from these professionals and committee members regarding their experience with and their observations of the chapter 11 process. Essentially, the survey was intended to shed light on negotiations and other off-docket activities in chapter 11 cases.

The survey complements the results of an extensive empirical study regarding the role of creditors' committees in chapter 11 cases (case study).²⁶ The case study analyzed a database of 296 chapter 11 cases filed between 2002 and 2008 in six different jurisdictions (case database). The results of the case study are presented in a separate article and referenced throughout this Article as applicable.²⁷

The authors used the case database to identify professionals and committee members. They then investigated mailing and email addresses for these individuals, excluding those for whom no email address was available. From this refined list, 251 professionals and 213 committee members met eligibility criteria and were contacted. The number of targeted recipients was determined based on prior experiences with these types of business-related surveys and the minimum number of surveys necessary for an acceptable response rate—generally 20% in this context. Ultimately, 70 (28%) professionals and 43 (20%) committee members completed the survey.²⁸

B. Survey Design

The authors worked with the Bureau of Sociological Research at the University of Nebraska–Lincoln to design and administer the survey. The survey questions were developed to solicit relevant information based on objective choices, with the opportunity for respondents to explain certain responses in a narrative format. The professionals' survey contained thirty primary questions and the committee members' survey

25. The survey specifically asked respondents to identify their typical role in chapter 11 cases. See *infra* Part III.A, Appendices A, B.

26. See Harner & Marincic, *supra* note 24.

27. *Id.*

28. Of the 300 committee members sampled, 213 were deemed eligible for the survey. Of these 213 committee members, 48 began the survey resulting in a cooperation rate of 22.5%. Committee members completing less than half of the survey (n=5) were not included in the analytic sample resulting in a response rate of 20.2%. Of the 300 professionals sampled, 251 were deemed eligible for the survey. Of these 251 professionals, 77 began the survey resulting in a cooperation rate of 30.7%. Professionals completing less than half of the survey (n=7) were not included in the analytic sample resulting in a response rate of 27.9%. The results based on all survey respondents (including those classified as incomplete) do not differ meaningfully from those based on only the complete respondents.

contained thirty-four questions. The survey was web-based and included programmed skip patterns to minimize respondent error.²⁹

Both surveys asked respondents about the following: (1) their respective industries and extent of experience in chapter 11 cases; (2) the general approach of creditors' committees for evaluating and responding to major transactions in the chapter 11 case; (3) the extent and consequences of disputes among the debtor and creditors' committees and among the debtor and ad hoc committees; and (4) the extent and consequences of conflicts of interest held by and disputes among members of the committee. The committee members' survey also included questions regarding the role of professionals retained by the committee in the chapter 11 case. Copies of the committee members' survey and the professionals' survey are annexed at Appendices A and B.

II. KEY SURVEY DATA AND ANALYSES

The survey data provide a glimpse into the experiences of some individuals in the chapter 11 process.³⁰ Although the results do not provide a complete picture and are subject to the limitations typically applicable to this type of survey, they do complement the case study and the other current work on creditor influence. The survey data acknowledge some increase in creditor influence, explain common conflicts of interest among members of committees, and provide observations regarding the impact of these developments on value in chapter 11 cases.

A. General Types and Experiences of Respondents

The overwhelming majority of professionals were lawyers (95.7%), and they work in firms with more than 100 lawyers or financial advisers, as applicable (67.1%). Generally, these professionals primarily represented debtors (35.7%), creditors' committees (14.3%), or different parties depending on the case (10.2%). The majority of their cases involved assets of more than \$250 million (55.7%), with 14.3% involving more than \$1 billion in assets, based on the debtor's schedules of assets filed with the bankruptcy court.³¹

29. Skip patterns use respondents' previous responses to route them through the questionnaire so they only answer questions that are applicable to them.

30. Although the response rates for both surveys met industry standards, respondents may differ from nonrespondents (an empirical question to be investigated in a future study). Furthermore, due to the generally small sample sizes, generalizing conclusions are only preliminary; future studies should seek to replicate them.

31. Professionals indicated which jurisdiction most of their chapter 11 cases were filed. The distribution of responses is as follows: District of Delaware (45.7%), Southern District of New York (20%), Northern District of Illinois (14.3%), Central District of California (4.3%), Northern District of Ohio (4.3%), and District of Maryland (1.4%). Of the professionals, 4.3% served in some other

Although committee members represented a variety of interests, the majority came from manufacturing/distribution industries (32.6%) and financial industries (18.6%). In many chapter 11 cases, most committee members served on the creditors' committee (58.1%), an ad hoc committee (14%), or both (9.3%).³² The types and amounts of claims asserted by the committee members are set forth in Table 1.

jurisdiction (Chicago, Eastern Virginia, Western and Northern New York), and 5.7% of professionals did not specify a jurisdiction.

32. Committee members indicated which jurisdiction most of the chapter 11 cases were filed. The distribution of responses is as follows: District of Delaware (44.2%), Southern District of New York (16.3%), Central District of California (7%), Northern District of Illinois (4.7%), Northern District of Ohio (4.7%), and District of Maryland (2.3%). The remaining committee members reported as follows: 9.3% served in some other jurisdiction (Georgia and Pennsylvania), and 11.6% did not specify a jurisdiction.

Table 1
Type and amount of unsecured claim typically asserted against debtor

Type of Unsecured Claim	% (n)
Trade claim for goods provided to debtor	51.2 (22)
Bond or debenture claim	16.3 (7)
Loan claim	16.3 (7)
Trade claim for services provided to debtor	14.0 (6)
Real or personal property lease claims	9.3 (4)
Claims on behalf of the debtor's retirees	4.7 (2)
Claims on behalf of the debtor's employees	4.7 (2)
Average Size of Unsecured Claims	
Less than \$1 million	44.2 (19)
\$1 million to \$50 million	34.9 (15)
\$51 million to \$100 million	2.3 (1)
\$101 million to \$500 million	9.3 (4)
\$501 million or more	2.3 (1)

Interestingly, the majority of committee members (69.8%) reported participating as an individual creditor in the chapter 11 case, and approximately half of them (48.8%) retained legal counsel as individuals in such cases. Roughly one-third of the committee members (34.9%) have served on more than ten committees and have significant experience with chapter 11 cases.

B. General Committee Activities

A creditors' committee typically is appointed early in the chapter 11 case. It has the authority to, among other things, investigate the debtor's prepetition and postpetition activities, and review information relating to the debtor's business and plan of reorganization. It also has standing to oppose the debtor's proposed course of conduct or any action taken in the case by a party in interest. A creditors' committee can raise those objections informally with the party or formally by filing an objection to the related pleading pending before the bankruptcy court.

Both sample groups suggested that creditors' committees use a combination of formal and informal objections to articulate their position on various matters in the chapter 11 case.³³ They differed, however, on what type of matter received the most attention from creditors' committees. Professionals most frequently indicated that creditors' committees most commonly file formal and informal objections to debtor-in-possession financing motions (DIP financing) (72.1% and 40%, respectively), followed by motions to sell substantially all of the debtor's assets (sale motions) (14% and 24%, respectively). Committee members most frequently indicated that creditors' committees most commonly file formal and informal objections to sale motions (32.1% and 29.6%, respectively), DIP financing (21.4% and 14.8%, respectively), and the debtor's plan of reorganization based on valuation (17.9% and 18.5%, respectively). Both groups agreed that creditors' committees' objections to major transactions are resolved without court intervention (95.6% for professionals and 76.9% for committee members).³⁴ These data tend to support the notion that certain parties in the chapter 11 case can influence important, potentially value-allocating transactions by agreement and without the involvement of all affected parties or the bankruptcy court.

With respect to the activities of ad hoc committees, professionals and committee members agreed on some questions and disagreed on others.³⁵ For example, professionals most frequently indicated that objec-

33. Nearly half of professionals (46.4%) and committee members (51.3%) indicated that formal and informal objections are raised equally. A greater percentage of professionals (31.9%) than committee members (23.1%) indicated that the most common objections raised are informal. Lastly, 21.7% of professionals and 25.6% of committee members indicated that formal objections are most commonly raised.

34. Roughly one-third of professionals and committee members (36.2% and 33.3%, respectively) indicated that the majority of objections raised by the UCC are resolved without the need for a formal objection or court intervention, while about half of both groups (59.4% of professionals and 43.6% of committee members) indicated that a resolution is obtained after a formal objection but no court intervention. Finally, 4.3% of professionals and 23.1% of committee members indicated that both a formal objection and court intervention are often required for a resolution to be reached.

35. An "ad hoc" committee is a group of creditors or shareholders working together in the chapter 11 case, typically under common legal representation, that is not recognized as a statutory

tions filed by ad hoc committees are articulated formally and filed with the bankruptcy court (49.3%), whereas committee members most frequently indicated that ad hoc committees object informally (40.6%). Professionals mostly thought ad hoc committees are more likely to file formal objections to the debtor's plan of reorganization based on valuation concerns, while committee members felt that ad hoc committees formally object more often to sale motions.³⁶ The majority of both groups did agree that ad hoc objections generally are resolved without court intervention (70.5% for professionals and 81.3% for committee members), but professionals more frequently acknowledged ad hoc committee objections requiring formal resolution by the court than in the creditors' committee context (29.4% versus 4.3%). Again, a trend emerges of parties resolving significant matters in a chapter 11 case outside of the courtroom. That trend may be beneficial and produce results benefitting all stakeholders, or it may facilitate a reallocation of value away from parties not privy to the negotiations.

C. Disputes Among Debtors and Committees

In addition to how committees voice issues and concerns in chapter 11 cases, the survey sought to ascertain the likelihood of disagreement among debtors and committees and the impact, if any, of those disputes on case resolution. Not surprisingly, professionals and committee members had experience with cases in which a dispute over the debtor's plan of reorganization developed either among the debtor and the creditors' committee, the debtor and an ad hoc committee, or both. A greater percentage of professionals (42.6%) than committee members (20.5%) indicated having experience with both types of disputes.

A greater percentage of professionals than committee members noted experience with disputes among creditors' committees and debtors regarding the plan of reorganization (72.5% compared to 47.5%, respectively). As set forth in Table 2, both groups described amount of distribu-

committee under § 1102 of the Bankruptcy Code. Like creditors' committees, ad hoc committees can discuss their concerns regarding actions being taken by parties in the case with the relevant parties on an informal basis or a formal one by filing an objection.

36. Professionals most frequently indicated that ad hoc committees most commonly file formal objections to the debtor's plan based on valuation dispute (40.4%), while committee members most frequently indicated that formal objections to motions to sell substantially all of the debtor's assets were more common (44.4%). Professionals most frequently indicated that informal ad hoc committee objections address DIP financing motions and sale motions (30.3% of professionals selected each). Committee members most frequently indicated that informal ad hoc committee objections address the debtor's disclosure statement and the debtor's plan based on valuation dispute (19% of committee members selected each).

tions, whether the debtor reorganized or liquidated, and ownership of the reorganized debtor as the three most common reasons for disputes.

Table 2

Most common reason for dispute between debtor and UCC regarding restructuring plan

	Professionals	Committee Members
	% (n)	% (n)
Amount of distribution to creditors	61.7 (29)	42.1 (8)
Whether to reorganize, sell, or liquidate debtor	14.9 (7)	26.3 (5)
Who would own or control the reorganized debtor	10.6 (5)	10.5 (2)
Type of distribution (e.g., cash, notes, stock) to creditors	4.3 (2)	5.3 (1)
Identity of board of directors or management of reorganized debtor	2.1 (1)	—
Who would buy the debtor or its assets	—	5.3 (1)
Who would pursue post-confirmation claims and causes of action on debtor's behalf	2.1 (1)	5.3 (1)
Other	4.3 (2)	5.3 (1)
Total	47	19

The overwhelming majority of participants responding to this category of questions indicated that these types of disputes among debtors and creditors' committees are most frequently resolved by agreement of the parties (72.9% and 77.8%, respectively). Both groups also seemed to agree that such negotiations ultimately increase the returns to creditors (77.1% and 78.9%, respectively).

In the ad hoc committee context, a greater percentage of professionals than committee members reported experience with disputes among the debtor and an ad hoc committee regarding the debtor's plan of reorganization (52.2% and 27.5%, respectively). Table 3 shows both groups describing the three most common reasons for disputes as: (1) the amount of distributions; (2) whether the debtor reorganized or liquidated; and (3) ownership of the reorganized debtor.

Table 3
Most common reason for dispute between debtor and ad hoc committee regarding restructuring plan

	Professionals	Committee Members
	% (n)	% (n)
Amount of distribution to creditors	44.8 (13)	72.7 (8)
Whether to reorganize, sell, or liquidate debtor	17.2 (5)	9.1 (1)
Who would own or control the reorganized debtor	17.2 (5)	—
Type of distribution (e.g., cash, notes, stock) to creditors	10.3 (3)	9.1 (1)
Identity of board of directors or management of reorganized debtor	—	—
Who would buy the debtor or its assets	—	—
Who would pursue post-confirmation claims and causes of action on debtor's behalf	—	—
Other	10.3 (3)	9.1 (1)
Total	29	32

The majority of committee members suggested that disputes among the debtor and ad hoc committees are resolved by compromise (63.6%) and result in increased returns to creditors (63.6%). Professionals, however, provided slightly different responses. Although a majority of professionals (54.8%) observed these disputes being resolved by compromise, 38.7% suggested that they are resolved by the debtor confirming its plan of reorganization over the ad hoc committee's objection. Likewise, professionals were evenly divided as to whether these disputes increase returns to creditors (40.6%) or have no impact on those returns (43.8%). Accordingly, the overwhelming majority of respondents agree that, at worst, disagreement among parties in the chapter 11 case is a neutral event that neither increases nor decreases value.

D. Influence of Creditors

The survey also asked respondents their opinion on the influence of a single creditor or a small group of creditors over the debtor, the creditors' committee, and the chapter 11 case generally. Most respondents observed an increase in attempted creditor influence, and the majority of both groups believe that these attempts are successful (62.7% for professionals and 58.5% for committee members).

Specifically, the survey asked respondents to consider, based on their experiences during the past five years, whether creditors were exerting greater influence in chapter 11 cases. With respect to creditor influence over the debtor, 62.3% of professionals and 35% of committee members observed this increase. With respect to creditor influence over the creditors' committee, 40.9% of professionals and 41% of committee members observed an increase in the influence of single creditors and small groups of creditors. Table 4 details the ways in which respondents perceive creditor influence in chapter 11 cases.

Table 4
Ways in which individual creditors or small groups of creditors are asserting influence

	Professionals	Committee Members
	% (n)	% (n)
Seeking and obtaining appointments to the UCC	52.9 (37)	65.1 (28)
Providing DIP financing to the debtor	27.1 (19)	32.6 (14)
Buying large portions of the debtor's prepetition unsecured bond debt	42.9 (30)	25.6 (11)
Buying large portions of the debtor's prepetition unsecured bank debt	31.4 (22)	25.6 (11)
Buying large portions of the debtor's prepetition secured debt	34.3 (24)	20.9 (9)
Buying large portions of the debtor's prepetition unsecured trade debt	21.4 (15)	9.3 (4)
None of the above	10.0 (7)	9.3 (4)
Other	5.7 (4)	2.3 (1)

Notably, both groups thought the most common way creditors try to influence chapter 11 cases is by seeking a seat on the creditors' committee.³⁷

Committee members generally view creditor influence as increasing (45%) or having no impact (35%) on creditor returns. Professionals' res-

37. Fewer professionals than committee members (37.3% and 61%, respectively) reported that seeking and obtaining appointments to the creditors' committee is the most common method for individual creditors or small groups of creditors to assert influence. Professionals also cited creditors buying large portions of the debtor's prepetition secured debt (16.4%) and buying large portions of the debtor's prepetition unsecured bond debt (13.4%) as the next-most common methods for asserting influence. Among committee members, the next-most frequently cited method of creditor influence was creditors buying large portions of the debtor's prepetition unsecured bond debt (14.6%) and providing debtor-in-possession (i.e., postpetition) financing to the debtor (7.3%).

ponses were similarly divided on this subject, with more observing no recent impact on creditor returns (37.9%) rather than an increase (33.3%). These data are similar to those discussed *supra* Part II.C in that most respondents report no negative value consequences resulting from increased creditor influence.

E. Committee-Member Conflicts

Several high-profile cases have highlighted weaknesses in the committee structure itself, including conflicts of interest held by and disputes involving committee members. The survey data are consistent with these cases. A majority of professionals and committee members reported being involved in cases where a dispute developed among committee members (76.5% of professionals and 61.9% of committee members) or a member of the committee possessed a conflict of interest (67.6% of professionals and 52.4% of committee members).³⁸

Both groups listed the most common reason for committee-member disputes as a disagreement over the debtor's plan of reorganization where at least one member was motivated by self-interest.³⁹ For professionals, the second-most common dispute was committee disagreement over a major transaction where, similarly, at least one member was motivated by self-interest. The overwhelming majority of respondents agreed that these intra-committee disputes are resolved informally by the committee itself (90% for professionals and 88% for committee members). Table 5 details the number and percentage of respondents selecting each type of conflict of interest as most common.

38. A conflict of interest in this context may result from, among other things, the creditor holding an interest in more than one tranche of the debtor's debt, an equity interest in the debtor, or an interest in a competitor or affiliate of the debtor. A creditor's agenda may also conflict with the interests of other similarly situated creditors. For example, the creditor may want to convert its debt into equity when others believe that a sale of the debtor's assets to an independent third party will generate the most value for those creditors.

39. Over half of professionals and nearly half of committee members (57.1% and 45.8%, respectively) indicated that the most common reason that disputes arise among members of the UCC is member disagreement over the debtor's restructuring plan with at least one member motivated by self-interest. More professionals than committee members (34.7% over 12.5%) reported that disputes are a result of member disagreement over a significant event in the chapter 11 case.

Table 5
Most common type of conflict of interest

	Professionals	Committee Members
	% (n)	% (n)
Having an interest in or other relationship with a competitor of the debtor	24.4 (11)	30.0 (6)
Pursuing an ownership position in the debtor postpetition under either a proposed plan or sale	22.2 (10)	25.0 (5)
Holding secured debt in the debtor	20.0 (9)	15.0 (3)
Having operations that trade in the securities of the debtor	11.1 (5)	5.0 (1)
Holding an equity position in the debtor	2.2 (1)	15.0 (3)
Other	20.0 (9)	10.0 (2)
Total	45	20

Finally, 35% of committee members reported being involved in chapter 11 cases where they perceived the professionals of creditors' committees favoring or endorsing one member's position consistently over the opposition of other members of the committee.⁴⁰

F. Interesting Trends Among Data

The diversity of characteristics among survey respondents created small sampling cells that did not permit meaningful multivariate analysis.⁴¹ Nevertheless, the diversity of respondents and the richness of their answers did produce interesting trends in the data that emerged through

40. Of the fourteen committee members reporting such involvement, 64.3% reported that such cases represent 10% or less of their chapter 11 cases while 35.7% reported that such cases represent a larger range of 11%–50% of their chapter 11 cases.

41. Multivariate analysis involves the comparison of outcomes among groups while controlling for possible confounding factors.

cross-tabulation analysis.⁴² Specifically, we divided professionals into four groups: Debtor Professionals who represent debtors in a majority of their cases (35.7%); UCC Professionals who represent creditors' committees in a majority of their cases (14.3%); Creditor Professionals who represent ad hoc committees, DIP lenders, or individual creditors in a majority of their cases (10%); and Combination Professionals who represent some combination of the foregoing in their cases (40%). Similarly, we divided committee members into three groups: UCC Members who serve primarily on creditors' committees (71.4%); Ad Hoc Members who serve primarily on ad hoc committees (17.1%); and Combination Members who serve on both (11.4%).⁴³ We then analyzed the responses of individuals in each of these categories to a variety of the survey questions.

Although the majority of professionals indicated they have been involved in cases in which the debtor and the creditors' or ad hoc committee could not agree on a plan of reorganization, Creditor Professionals were less likely than the other groups to be involved in these cases. Fewer Creditor Professionals than other types of professionals noted experience with such conflict between the debtor and the creditors' committee (57.1%) and between the debtor and the ad hoc committee (28.6%) of their cases.⁴⁴

Notably, a different trend emerged with respect to the value impact of conflict between the debtor and the creditors' or ad hoc committee regarding a plan of reorganization. Here, Debtor Professionals reported less frequently than the other professionals that such conflict increases returns to creditors, with 47.1% reporting that such returns result from debtor/creditors' committee conflict and only 18.2% suggesting the same for debtor/ad hoc committee conflict.⁴⁵ These results may indicate that

42. Cross-tabulation analysis involves the comparison of categorical outcomes among categorical groups.

43. Note that five of the forty-three committee-member respondents did not indicate which type of committee they typically serve on and thus could not be included in these analyses. Furthermore, three of the forty-three committee-member respondents indicated some other typical committee and are also not included in these analyses. Therefore, these analyses are based on thirty-five of the forty-three committee members who completed the survey.

44. In all other professionals groups, a majority (76% of Debtor Professionals, 70% of UCC Professionals, and 74.1% of Combination Professionals) reported experience with cases involving disputes between the debtor and the creditors' committee over the plan of reorganization. Additionally, around half (56.5% of Debtor Professionals, 60% of UCC Professionals, and 51.9% of Combination Professionals) reported experience with cases involving disputes between the debtor and an ad hoc committee over the plan of reorganization.

45. By contrast, an overwhelming amount of the rest of professionals (100% of UCC Professionals, 100% of Creditor Professionals, and 90% of Combination Professionals) indicated that disputes between the debtor and the creditors' committee regarding the restructuring plan typically result in increased returns to creditors, and a majority of the rest of professionals (50% of UCC

client objectives affect a professional's perspective of conflict and tension in chapter 11 cases. For example, a disagreement between the debtor and the creditors' or ad hoc committee regarding the plan of reorganization may be resolved by the debtor modifying one or more provisions of the plan. The debtor may agree to the compromise to secure confirmation of the plan without strenuous objection by creditors but may not necessarily agree with the modification itself. The objecting parties, on the other hand, may see significant value in that modification.

Among non-Combination Professionals, Debtor Professionals more often noted an increase in the influence of creditors over the debtor in chapter 11 cases.⁴⁶ Creditor Professionals, however, most frequently noted this increase of creditor influence over the creditors' committee.⁴⁷ UCC Professionals were the least likely to report an increase of creditor influence over the creditors' committee. This result may suggest that outside perceptions of increased creditor influence over the creditors' committee are incorrect, or those working on behalf of the creditors' committee may be biased in their own perceptions.⁴⁸

All single representation categories responded fairly evenly about the value impact of creditor activities that influence matters in chapter 11 cases. For example, the vast majority of Debtor Professionals (70.9%), UCC Professionals (66.6%), and Creditor Professionals (100%) indicated that such activities either have no influence on returns or increase returns. Similarly, most Combination Professionals (66.6%) indicated that such activities either have no influence on returns or increase returns. Of the committee members, the Ad Hoc and Combination Members were more likely than UCC Members to report an increase in creditor influence over both the debtor and the creditors' committees in the past five years.⁴⁹ Still, 40% of UCC Members indicated that creditor activity seek-

Professionals, 50% of Creditor Professionals, and 53.8% of Combination Professionals) indicated that disputes between the debtor and the ad hoc committee regarding the restructuring plan typically result in such an increase.

46. Sixty-four percent of Debtor Professionals, 50% of UCC Professionals, 42.9% of Creditor Professionals, and 70.4% of Combination Professionals indicated that the influence of individual creditors or small groups of creditors over the debtor has increased in the last five years.

47. Thirty-nine point one percent of Debtor Professionals, 22.2% of UCC Professionals, 71.4% of Creditor Professionals, and 40.7% of Combination Professionals reported that the influence of individual creditors or small groups of creditors over the UCC has increased in the last five years.

48. As noted *supra* in Part I.E, 35% of committee members reported experience with creditors' committees' professionals favoring or endorsing one member's position consistently over the opposition of other members of the committee.

49. Twenty-eight percent of UCC Members, 66.7% of Ad Hoc Members, and 75% of Combination Members indicated that the influence of individual creditors or small groups of creditors over the debtor has increased in the last five years. Thirty point four percent of UCC Members, 66.7% of Ad Hoc Members, and 75% of Combination Members indicated that the influence of individual creditors or small groups of creditors over the UCC has increased in the last five years.

ing to influence matters in chapter 11 cases may increase ultimate returns to creditors. Ad Hoc Members were fairly evenly divided on this question, and 100% of Combination Members saw such activities as value enhancing. The slight disparity among UCC Members' experiences may relate to whether an individual creditor or small group of creditors is trying specifically to influence the conduct of the debtor or creditors' committee or, rather, is targeting the general outcome in the chapter 11 case. The latter scenario reflects instances in which UCC Members and other respondents suggested the potential for value enhancement.

When asked about disputes among committee members, both UCC Members and Combination Members selected "disagreement over the debtor's restructuring plan, with at least one member motivated by self-interest," more than any other response.⁵⁰ Ad Hoc Members were evenly divided among that response, disagreement over the plan with no member motivated by self-interest, and disagreement over the selection of professionals. Both Ad Hoc and Combination Members had the most experience with members of the creditors' committee holding "a conflict of interest relating to its other holdings in or affiliations with the debtor."⁵¹ The UCC Members were fairly evenly divided on this question, with 52% indicating such an experience.

Finally, we investigated whether the type of claim held by committee members influenced their responses. The committee members generally fall into three categories: Bond/Loan Members, who hold claims based on bond or loan obligations (22.5%); Service/Goods Members, who hold claims based on services or goods provided to the debtor (60%); and Other Members, who hold other types of claims against the debtor (17.5%). Three of the forty-three committee members did not indicate a claim type and, thus, could not be included in these analyses.

A greater percentage of Bond/Loan Members than Other Members noted increasing attempts by creditors to exert influence over the debtor, and they unanimously reported value enhancement resulting from those activities.⁵² The Bond/Loan Members also reported more experience with cases where disputes arose among members of the creditors' committee. Yet all three categories selected disagreement "over the debtor's restruc-

50. Thirty-seven point five percent of UCC Members and 100% of Combination Members indicated that disagreement over the debtor's restructuring plan with at least one member motivated by self-interest is the most common reason for disputes.

51. Most Ad Hoc Members (66.7%) and Combination Members (100%) indicated involvement in such a case.

52. Sixty-two point five percent of Bond/Loan Members, 29.2% of Trade/Service Members, and 28.6% of Other Members indicated that such activities have increased in the last five years. Interestingly, the case study data suggest that the presence of a financial institution on a creditors' committee significantly increases the likelihood that the debtor reorganizes rather than liquidates.

turing plan, with at least one member being motivated by self-interest,” as the most common reason for that dispute.⁵³ All three categories also were fairly evenly divided in their response concerning conflicts of interest held by members of the creditors’ committee.⁵⁴

In sum, the identity of a professional’s client, whether a committee member is more likely to serve on the creditors’ committee or some other committee, and the type of claim held by a committee member may affect a respondent’s perspective on the chapter 11 case. Aggregating these perspectives and identifying overall trends provide important information regarding the chapter 11 process because each of these perspectives typically is represented in a case. This exercise also informs our interpretation of the case study data and potential compositions of creditors’ committees.

III. POTENTIAL IMPLICATIONS OF DATA

The survey data suggest that creditors may be increasingly seeking to influence matters in chapter 11 cases.⁵⁵ The survey data also suggest, however, that greater creditor influence may not negatively affect value, at least as gauged by returns to creditors and the respondents’ observations of that value.⁵⁶ As discussed below, these data indirectly complement some of the key observations in the case study.

A. The Impact of More Creditor Influence

The phrase “creditor influence” often carries a negative connotation. It is used to describe a process whereby a creditor or small group of creditors tries to manipulate the chapter 11 process to its distinct advantage and, presumably, the disadvantage of other stakeholders.⁵⁷ Anecdot-

53. Eighty-eight point nine percent of Bond/Loan Members, 50% of Trade/Service Members, and 71.4% of Other Members reported involvement in such cases. Furthermore, 57.1% of those Bond/Loan Members, 36.4% of Trade/Service Members, and 40% of Other Members selected this response.

54. Fifty-five point six percent of Bond/Loan Members, 50% of Trade/Service Members, and 57.1% of Other Members reported involvement in cases in which a member of the UCC had a conflicting interest. Among Bond/Loan Members, responses about the most common type of conflicting interest were evenly divided among holding secured debt in the debtor; having an interest in or other relationship with a competitor of the debtor; or pursuing an ownership position in the debtor postpetition, either under a proposed plan or sale and some other type of conflict—one-fourth of respondents endorsed each. Among Trade/Service Members, the most frequently selected type of conflict was having an interest in or other relationship with a competitor of the debtor (36.4%). Finally, exactly half of Other Members selected pursuing an ownership position in the debtor postpetition either under a proposed plan or sale as the most common type of conflicting interest.

55. *See supra* Part II.C–D.

56. *Id.*

57. For example, concerns regarding greater influence by creditors who aggregate their claims as an ad hoc committee underlie the movement towards greater disclosures under Bankruptcy Rule

al evidence from recent cases supports this interpretation of creditor influence.⁵⁸

On the other hand, creditor participation—which encompasses many of the same characteristics as creditor influence—is often viewed in a more positive light. Creditor participation can discipline the debtor and provide greater representation to various classes of creditors.⁵⁹ In fact, the legislative history to § 1102 of the Bankruptcy Code suggests that Congress intended creditors’ committees for this purpose and perhaps even saw advantages to having multiple committees representing different classes of stakeholders.⁶⁰

The case study data provide some support for this notion of enhancing value through increased creditor participation, which can create a dynamic tension in the chapter 11 case.⁶¹ Specifically, the case study analyzed data by, among other things, comparing cases with just one appointed creditors’ committee to those in which either no committee was appointed or multiple committees (including more than one creditors’

2019. See *supra* note 4 and accompanying text; see also *In re* Washington Mut., Inc., 419 B.R. 271, 279 (Bankr. D. Del. 2009) (“[C]ollective action by creditors through the use of *ad hoc* committees or groups allows creditors to utilize other group members’ holdings to obtain a greater degree of influence in a bankruptcy case than single creditors acting alone. As such, the policies behind the disclosure requirements of Rule 2019 are as relevant today as they were 70 years ago.”); *In re* Nw. Airlines Corp., 363 B.R. 704, 705, 709 (Bankr. S.D.N.Y. 2007) (denying *ad hoc* committee’s motion to seal “information required by Rule 2019 that discloses the specifics of the purchases and sales of the Debtors’ securities made by Committee members” because, in part, “Rule 2019 is based on the premise that the other shareholders have a right to information as to Committee member purchases and sales so that they make an informed decision whether this Committee will represent their interests or whether they should consider forming a more broadly-based committee of their own”).

58. See Harner, *supra* note 14, at Part III.

59. See, e.g., Henderson, *supra* note 10, at 1563 (explaining ways in which chapter 11 assists creditors with monitoring a debtor’s management and observing that “[t]he costs of monitoring for investors decrease because of the powers they wield by statute, regulation, and contract, as well as through the more robust judicial oversight by the bankruptcy court”).

60. The legislative history provides, in relevant part:

There will be at least one committee in each case. Because unsecured creditors are normally the largest body of creditors and most in need of representation, the bill requires that there be a committee of unsecured creditors. . . . [T]he bill also provides for additional committees, with status equal to that of the unsecured creditors’ committee, when such additional committees are needed to represent various other interests in this case, including secured creditors, subordinated creditors, and equity security holders.

H.R. REP. NO. 95-595, at 235–36 (1977) (footnote omitted); see also Thomas Henry Coleman & David E. Woodruff, *Looking Out for Shareholders: The Role of the Equity Committee in Chapter 11 Reorganization Cases of Large Publicly Held Companies*, 68 AM. BANKR. L.J. 295, 316 n.107 (1996) (discussing role of equity holders’ committee and noting, “On the contrary, Chapter 11 is designed to allow full participation of all major constituencies in the reorganization process and to promote consensus among these constituencies through negotiations.”).

61. See, e.g., Harvey R. Miller, *The Changing Face of Chapter 11: A Reemergence of the Bankruptcy Judge as Producer, Director, and Sometimes Star of the Reorganization Passion Play*, 69 AM. BANKR. L.J. 431, 449 (1995) (discussing “dynamic tension” contemplated in the relationship between a debtor and the creditors’ committee).

committee, equity holders' committee, or ad hoc committee) were appointed.⁶² Cases with just one creditors' committee were significantly less likely to provide a return to unsecured creditors in excess of 50% of their claims and to involve a plan of reorganization for the debtor than the no-committee and multiple-committee cases.⁶³

In addition, the case study data show that conflicts among committee members and litigation among a committee and certain other parties in the chapter 11 case do not significantly impact value, as measured by returns to unsecured creditors and whether the debtor reorganized or liquidated.⁶⁴ Like the survey data, many of the cases in the case database included discernible conflicts of interest and litigation filed by or against the committee.⁶⁵ Nevertheless, other than increasing the cost and duration of the chapter 11 case, these characteristics did not increase or decrease value.

Accordingly, the case study data tend to support rejecting the two primary hypotheses underlying that study. These two hypotheses are: (1) a creditors' committee increases value in chapter 11 cases; and (2) creditor conflict decreases value in chapter 11 cases.⁶⁶ Similar to the case study, the survey study data also tend to support rejecting at least the second hypothesis regarding the value impact of conflict.⁶⁷

As described in Part II, survey respondents generally observed increases in returns to creditors when creditors were active in the chapter 11 case by either (1) disagreement among the creditors' or ad hoc committee and the debtor regarding the plan of reorganization; and (2) creditors trying to influence matters in the chapter 11 case.⁶⁸ Notably, the scope of conflicts and disputes in the survey study and the case study are not identical. The case study shows only reported and formal conflicts of interest and litigation represented by pleadings filed on the

62. Harner & Marincic, *supra* note 24 (manuscript at 23) (footnote omitted) (as updated on Dec. 7, 2010) (explaining that "143 cases (48.3%) involved at least one creditors' committee and 153 cases (51.7%) involved no creditors' committees. Of the cases with creditors' committees, 95.8% had one creditors' committee, 2.1% had two creditors' committees and 2.1% had three creditors' committees").

63. *Id.* (manuscript at 6). The regression analysis used to analyze the case study data included various potentially confounding variables in the models. *See id.* (manuscript at 28–29) (explaining control variables).

64. *See id.* (manuscript at 31–34).

65. For example, of cases in the case database involving creditors' committees, members of the creditors' committee held discernible potential conflicts of interest in 35% of those cases, and the creditors' committee filed an objection or other pleading against the debtor in 67% of those cases. *See id.*

66. *Id.* (manuscript at 35).

67. *Id.*

68. *See supra* Part II.C–D.

docket.⁶⁹ The survey study was a broader application of those terms because the survey asked respondents to consider not just formal disputes, but also conflicts and disputes that they were merely aware of.

Both the survey data and the case study data suggest that some cases of creditor influence may be more akin to more traditional creditor participation. Creditor participation is typically encouraged and thought to be beneficial to the chapter 11 process. The challenge, then, is to discern positive creditor participation from potentially negative creditor influence.

B. Creditor Influence Versus Creditor Participation

The case study shows that a committee structure that simulates multiple committee cases may be desirable.⁷⁰ Such a committee structure would be based off the different types of creditors involved in the chapter 11 case rather than the amount of creditors' claims. The study also suggests that courts and parties should be more open to multiple committee appointments when necessary.⁷¹ As discussed in the context of the case study, this approach ought to account for concerns regarding increased cost and decreased efficiency.⁷²

The survey data also supports exploring ways to encourage more creditor participation in the chapter 11 case. Nevertheless, given clear conflicts of interest, this approach also must account for undue creditor influence that might facilitate creditor self-dealing.⁷³ As noted in Part II, 91.8% of professionals and 58.3% of committee members indicated that the most common reason disputes arise among members of the creditors' committee is disagreement in committee matters involving at least one creditor being motivated by self-interest.⁷⁴ Likewise, the case study data show 35% of cases involving members of the creditors' committee with discernible conflicts of interest.⁷⁵ Admittedly, "self-interest" is not necessarily equivalent to "self-dealing," but it may evidence a likelihood of self-dealing if left unchecked.⁷⁶

69. See Harner & Marincic, *supra* note 24 (manuscript at 31) (discussing the off-docket nature of many conflicts of interest).

70. See *id.* (manuscript at 35–41).

71. *Id.*

72. *Id.*

73. See *supra* Part II.E.

74. These percentages are the combined results for the two responses based on member self-interest in this particular question in each survey. See *supra* note 39 and accompanying text.

75. Harner & Marincic, *supra* note 24 (manuscript at 31).

76. Self-dealing is usually a subset of a larger self-interest. See, e.g., *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1149–50 (Del. Ch. 1994) (“[I]n a classic self-dealing transaction, the fact that a director gained a direct and compelling benefit from the deal would support a strong inference that self-interest actually influenced his behavior”); *Eagar v. Burrows*, 2008 UT 42, ¶32, 191

Striking the appropriate balance between creditor participation and creditor influence will require continued cooperation and coordination among the key players in chapter 11 cases.⁷⁷ The debtor must communicate with the U.S. trustee in matters concerning both the composition of the creditors' committee and potential conflicts of interest. This type of discussion typically takes place at the beginning of the case and, in some cases, throughout.⁷⁸ Although a debtor can always approach the U.S. trustee (or, for that matter, the bankruptcy court) with a concern or issue involving the creditors' committee or a particular creditor, a quarterly meeting or report specifically addressing those issues may encourage a more meaningful dialogue.⁷⁹ The potential for disclosure through those ongoing reports also may curb any tendency for creditors to overreach, particularly those on the creditors' committee.

In addition, the appointment of a third-party neutral to serve as a case facilitator may provide both a meaningful check on the conduct of the debtor and its stakeholders, as well as facilitate more communication and disclosure among the parties.⁸⁰ Allowing the debtor to conduct discussions with key stakeholders behind closed doors may be required to promote full and frank discussions among the parties.⁸¹ But that environment also may promote self-dealing. Negotiations that include an outside party may discourage such transparency and destroy the safe environment that often fosters consensus.

P.3d 9, 16 (Utah 2008) (“Cases of self-dealing typically involve corporate fiduciaries or trustees of income-producing trusts in which the fiduciaries are charged with preserving and investing the property that they manage. In those contexts, transactions that place the fiduciary in a position inconsistent with the corporation or trust because of the fiduciary’s competing self-interest are prohibited as self-dealing.”) (footnote omitted). *Black’s Law Dictionary* defines “self-dealing” as “[p]articipation in a transaction that *benefits oneself* instead of another who is owed a fiduciary duty.” BLACK’S LAW DICTIONARY 1481 (9th ed. 2009) (emphasis added).

77. As discussed in the context of the case study, striking this balance also requires meaningful disclosures among the debtor, stakeholders, the bankruptcy court, and the U.S. trustee. See Harner & Marincic, *supra* note 24 (manuscript at 40). For a thoughtful discussion of using “positional disclosures” to develop a more level playing field, see Lipson, *supra* note 9, at 1668–76.

78. A debtor not only provides information to the U.S. trustee relating to potential committee members and issues in the case in its bankruptcy petition and related schedules, but it also typically is present at the creditors’ committee formation meeting and has an opportunity to meet both with the U.S. trustee and creditors at that meeting. See, e.g., Greg M. Zipes & Lisa L. Lambert, *Creditors’ Committee Formation Dynamics: Issues in the Real World*, 77 AM. BANKR. L.J. 229, 239 (2003); see also *Official Committees*, ABI BUS. REORGANIZATION COMMITTEE NEWS (Am. Bankr. Inst., Alexandria, Va.), July 2009, at 269, 269–70, available at <http://www.abiworld.org/committees/newsletters/busreorg/vol8num7/official.pdf>.

79. Likewise, the U.S. trustee can require similar reports or certifications from members of the creditors’ committee. See, e.g., *Official Committees*, *supra* note 78, at 269–70.

80. See Harner, *supra* note 14.

81. See *supra* note 5 and accompanying text.

At its core, the concept underlying chapter 11—bringing the debtor and all of its key stakeholders to the negotiating table to resolve the debtor’s financial distress—has significant value. It allows those with a vested interest in the debtor’s business and assets to propose and consider various alternatives for maximizing value in the case. Encouraging more parties to participate may enhance that dialogue by introducing additional and potentially different perspectives on value creation. The challenge is preserving a relatively level and fair playing field among the stakeholders so that all voices are heard.

Appendix A

The Role of Chapter 11 Committees Committee Members' Survey

This survey is part of an academic study of the role of creditors' committees in chapter 11 business bankruptcy cases, which is being conducted for research purposes by Michelle M. Harner, associate professor at the University of Maryland School of Law and adjunct associate professor at the University of Nebraska College of Law. The research objectives are (1) to assess the conduct of creditors' committees in chapter 11 cases and (2) to explore the dynamics among the creditors' committee, the debtor, and the debtor's other constituents. We are reviewing the case dockets in approximately 300 chapter 11 cases to examine the pleading activity of creditors' committees. We would like to supplement this hard data with insight, collected through a survey, regarding the activities of creditors' committees that are not reflected on the docket.

It is our understanding that you serve or have served as a committee member in business bankruptcy cases. We are contacting a sample of such individuals, asking them to complete this short (10- to 15-minute) survey about their experiences with chapter 11 creditors' committees. Your answers to the survey will be kept completely confidential and will be released and/or published only as summaries in which no individual's name or answers can be identified.

There are 49 questions in this survey.

NOTE ABOUT TERMS IN THIS SURVEY**1. FOR PURPOSES OF THIS SURVEY, PLEASE NOTE THE FOLLOWING:**

- The abbreviation “UCC” refers to any statutory or official committee of unsecured creditors appointed by the court or the United States trustee in a chapter 11 case.
- The term “ad hoc creditors’ committee” refers to a group of creditors that act collectively in a chapter 11 case but that are *not* part of a statutory or official committee appointed by the court or the United States trustee in the case.
- The word “informal” when used to describe a pleading or resolution means that a filing with the court was not made or that a court hearing was not necessary to resolve an issue.
- The word “formal” when used to describe a pleading or resolution means that a filing with the court was made or that a court hearing was necessary to resolve an issue.
- The term “company” refers to your corporation, partnership, institution, or employer, as applicable.
- The terms “you” and “your” refer to your personal experience and not that of your company.

COMMITTEE EXPERIENCE**2. What is your company’s industry?**

Please choose **only one** of the following:

- Financial
- Manufacturing
- Retail
- Service
- Government
- Real Estate
- Other, describe: _____

3. What type of committee do you typically serve on in chapter 11 cases?

Please choose **only one** of the following:

- The UCC in more than 50% of your cases
- An ad hoc creditors' committee in more than 50% of your cases
- Serve on both the UCC and ad hoc creditors' committees on fairly equal basis
- Other statutory committees (e.g., an equity holders' committee) in more than 50% of your cases
- Other ad hoc committees (e.g., an equity holders' committee) in more than 50% of your cases
- Other, describe: _____

4. What type of unsecured claim does your company typically assert against a debtor in a chapter 11 case?

Please choose **all** that apply:

- Bond or debenture claim
- Loan claim
- Trade claim for *services* provided to debtor
- Trade claim for *goods* provided to debtor
- Real or personal property lease claims
- Claims on behalf of the debtor's *retirees*
- Claims on behalf of the debtor's *employees*
- Other, describe:

5. What is the average size of total unsecured claims that your company asserts against any one debtor in a chapter 11 case?

Please choose **only one** of the following:

- Less than \$1 million
- \$1 million to \$50 million
- \$51 million to \$100 million
- \$101 million to \$500 million
- \$501 million or more

6. Do you retain professionals to represent your company in its individual capacity in the chapter 11 case?

Please choose **only one** of the following:

- Yes
- No

7. For about what percentage of your cases do you retain professionals to represent your company in its individual capacity in the chapter 11 case?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 6 (Do you retain professionals to represent your company in its individual capacity in the chapter 11 case?)

Please choose **only one** of the following:

- 10% or less
- 11–50%
- 51–75%
- More than 75%

8. Does your company participate in the chapter 11 case in its individual capacity while serving as a member of the UCC or an ad hoc creditors' committee?

Please choose **only one** of the following:

- Yes
- No

9. For about what percentage of its cases does your company participate in the chapter 11 case in its individual capacity while serving as a member of the UCC or an ad hoc creditors' committee?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 8 (Does your company participate in the chapter 11 case in its individual capacity while serving as a member of the UCC or an ad hoc creditors' committee?)

Please choose **only one** of the following:

- 10% or less
- 11–50%
- 51–75%
- More than 75%

10. Based on past experiences, on average, are the most common objections raised by the UCC in chapter 11 cases formal or informal objections?

Please choose **only one** of the following:

- Formal
- Informal
- Both formal and informal equally

11. Based on past experiences, on average, what is the most common type of FORMAL objection raised by the UCC in chapter 11 cases? An objection to the . . .

Only answer this question if the following conditions are met:

- * Answer was 'Both formal and informal equally' or 'Formal' at Question 10 (Based on past experiences, on average, are the most common objections raised by the UCC in chapter 11 cases formal or informal objections?)

Please choose **only one** of the following:

- Debtor-in-possession (i.e., postpetition) financing
- Sale of all or substantially all of the debtor's assets
- Debtor's disclosure statement
- Debtor's plan based on valuation dispute
- Debtor's plan based on non-valuation grounds
- Other, describe: _____

12. Based on past experiences, on average, what is the most common type of INFORMAL objection raised by the UCC in chapter 11 cases? An objection to the . . .

Only answer this question if the following conditions are met:

- * Answer was 'Both formal and informal equally' or 'Informal' at Question 10 (Based on past experiences, on average, are the most common objections raised by the UCC in chapter 11 cases formal or informal objections?)

Please choose **only one** of the following:

- Debtor-in-possession (i.e., postpetition) financing
- Sale of all or substantially all of the debtor's assets
- Debtor's disclosure statement
- Debtor's plan based on valuation dispute
- Debtor's plan based on non-valuation grounds
- Other, describe: _____

13. Based on past experiences, which of the following best describes how the majority of objections raised by the UCC are resolved?

Please choose **only one** of the following:

- The parties resolve the issue without the need for a formal objection or court intervention
- The parties resolve the issue after a formal objection, but without court intervention
- The parties resolve the issue only after a formal objection and court intervention

14. Based on past experiences, on average, are the most common objections raised by ad hoc creditors' committees in chapter 11 cases formal or informal objections?

Please choose **only one** of the following:

- Formal
- Informal
- Both formal and informal equally

15. Based on past experiences, on average, what is the most common type of FORMAL objection raised by ad hoc creditors' committees in chapter 11 cases? An objection to the . . .

Only answer this question if the following conditions are met:

- * Answer was 'Both formal and informal equally' or 'Formal' at Question 14 (Based on past experiences, on average, are the most common objections raised by ad hoc creditors' committees in chapter 11 cases formal or informal objections?)

Please choose **only one** of the following:

- Debtor-in-possession (i.e., postpetition) financing
- Sale of all or substantially all of the debtor's assets
- Debtor's disclosure statement
- Debtor's plan based on valuation dispute
- Debtor's plan based on non-valuation grounds
- Other, describe: _____

16. Based on past experiences, on average, what is the most common type of INFORMAL objection raised by ad hoc creditors' committees in chapter 11 cases? An objection to the . . .

Only answer this question if the following conditions are met:

- * Answer was 'Both formal and informal equally' or 'Informal' at Question 14 (Based on past experiences, on average, are the most common objections raised by ad hoc creditors' committees in chapter 11 cases formal or informal objections?)

Please choose **only one** of the following:

- Debtor-in-possession (i.e., postpetition) financing
- Sale of all or substantially all of the debtor's assets
- Debtor's disclosure statement
- Debtor's plan based on valuation dispute
- Debtor's plan based on non-valuation grounds
- Other, describe: _____

17. Based on past experiences, which of the following best describes how the majority of objections raised by ad hoc creditors' committees are resolved?

Please choose **only one** of the following:

- The parties resolve the issue without the need for a formal objection or court intervention
- The parties resolve the issue after a formal objection, but without court intervention
- The parties resolve the issue only after a formal objection and court intervention

18. Have you been involved in a chapter 11 case where the debtor and the UCC could not agree on a restructuring plan for the debtor?

Please choose **only one** of the following:

- Yes
- No

19. About what percentage of your chapter 11 cases were cases where the debtor and the UCC could not agree on a restructuring plan for the debtor?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 18 (Have you been involved in a chapter 11 case where the debtor and the UCC could not agree on a restructuring plan for the debtor?)

Please choose **only one** of the following:

- 10% or less
- 11–50%
- 51–75%
- More than 75%

20. Based on past experiences, which of the following best describes the most common reason that a debtor and the UCC cannot agree on a restructuring plan?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 18 (Have you been involved in a chapter 11 case where the debtor and the UCC could not agree on a restructuring plan for the debtor?)

Please choose **only one** of the following:

- Type of distribution (e.g., cash, notes, stock) to creditors
- Amount of distribution to creditors
- Whether to reorganize, sell, or liquidate debtor
- Who would own or control the reorganized debtor
- Who would buy the debtor or its assets
- Identity of board of directors or management of reorganized debtor
- Who would pursue post-confirmation claims and causes of action on debtor's behalf
- Other, describe: _____

21. Based on past experiences, how is conflict between the debtor and the UCC regarding the restructuring plan typically resolved?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 18 (Have you been involved in a chapter 11 case where the debtor and the UCC could not agree on a restructuring plan for the debtor?)

Please choose **only one** of the following:

- Debtor confirms its restructuring plan over the objection of the UCC
- Debtor confirms its restructuring plan after reaching a compromise with the UCC
- UCC proposes and confirms its own restructuring plan
- Debtor cedes to the position of the UCC
- UCC cedes to the position of the debtor
- Debtor elects or is forced to liquidate in chapter 11
- Debtor elects or is forced to convert its case to one under chapter 7
- Other, describe: _____

22. Based on past experiences, how does conflict between the debtor and the UCC regarding the restructuring plan typically impact returns (i.e., amount or value of distributions) to creditors?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 18 (Have you been involved in a chapter 11 case where the debtor and the UCC could not agree on a restructuring plan for the debtor?)

Please choose **only one** of the following:

- Decreases ultimate returns to creditors
- Increases ultimate returns to creditors
- No impact on ultimate returns to creditors

23. Have you been involved in a chapter 11 case where the debtor and an ad hoc creditors' committee could not agree on a restructuring plan for the debtor?

Please choose **only one** of the following:

- Yes
- No

24. About what percentage of your chapter 11 cases were cases where the debtor and an ad hoc creditors' committee could not agree on a restructuring plan for the debtor?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 23 (Have you been involved in a chapter 11 case where the debtor and an ad hoc creditors' committee could not agree on a restructuring plan for the debtor?)

Please choose **only one** of the following:

- 10% or less
- 11–50%
- 51–75%
- More than 75%

25. Based on past experiences, which of the following best describes the most common reason that a debtor and an ad hoc creditors' committee cannot agree on a restructuring plan?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 23 (Have you been involved in a chapter 11 case where the debtor and an ad hoc creditors' committee could not agree on a restructuring plan for the debtor?)

Please choose **only one** of the following:

- Type of distribution (e.g., cash, notes, stock) to creditors
- Amount of distribution to creditors
- Whether to reorganize, sell, or liquidate debtor
- Who would own or control the reorganized debtor
- Who would buy the debtor or its assets
- Identity of board of directors or management of reorganized debtor
- Who would pursue post-confirmation claims and causes of action on debtor's behalf
- Other, describe: _____

26. Based on past experiences, how is conflict between the debtor and an ad hoc creditors' committee regarding the restructuring plan typically resolved?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 23 (Have you been involved in a chapter 11 case where the debtor and an ad hoc creditors' committee could not agree on a restructuring plan for the debtor?)

Please choose **only one** of the following:

- Debtor confirms its restructuring plan over the objection of the committee
- Debtor confirms its restructuring plan after reaching a compromise with the committee
- The committee proposes and confirms its own restructuring plan
- Debtor cedes to the position of the committee
- The committee cedes to the position of the debtor
- Debtor elects or is forced to liquidate in chapter 11
- Debtor elects or is forced to convert its case to one under chapter 7
- Other, describe: _____

27. Based on past experiences, how does conflict between the debtor and an ad hoc creditors' committee regarding the restructuring plan typically impact returns (i.e., amount or value of distributions) to creditors?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 23 (Have you been involved in a chapter 11 case where the debtor and an ad hoc creditors' committee could not agree on a restructuring plan for the debtor?)

Please choose **only one** of the following:

- Decreases ultimate returns to creditors
- Increases ultimate returns to creditors
- No impact on ultimate returns to creditors

28. Based on past experiences, has the influence of individual creditors or small groups of creditors over the debtor increased in recent (i.e., last five years) chapter 11 cases?

Please choose **only one** of the following:

- Yes
- No

29. In about what percentage of your chapter 11 cases in the last five years have you seen individual creditors or small groups of creditors asserting more influence over debtors?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 28 (Based on past experiences, has the influence of individual creditors or small groups of creditors over the debtor increased in recent (i.e., last five years) chapter 11 cases?)

Please choose **only one** of the following:

- 10% or less
- 11–50%
- 51–75%
- More than 75%

30. Based on past experiences, has the influence of individual creditors or small groups of creditors over the UCC increased in recent (i.e., last five years) chapter 11 cases?

Please choose **only one** of the following:

- Yes
- No

31. In about what percentage of your chapter 11 cases in the last five years have you seen individual creditors or small groups of creditors asserting more influence over the UCC?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 30 (Based on past experiences, has the influence of individual creditors or small groups of creditors over the UCC increased in recent (i.e., last five years) chapter 11 cases?)

Please choose **only one** of the following:

- 10% or less
- 11–50%
- 51–75%
- More than 75%

32. Based on past experiences, how are individual creditors or small groups of creditors asserting influence in chapter 11 cases?

Please choose **all** that apply:

- Seeking and obtaining appointments to the UCC
- Buying large portions of the debtor's prepetition unsecured bank debt
- Buying large portions of the debtor's prepetition unsecured bond debt
- Buying large portions of the debtor's prepetition unsecured trade debt
- Buying large portions of the debtor's prepetition secured debt
- Providing debtor-in-possession (i.e., postpetition) financing to the debtor
- None of the above
- Other, describe: _____

33. Based on past experiences, what is the most common method for individual creditors or small groups of creditors to seek to assert influence in chapter 11 cases?

Please choose **only one** of the following:

- Seeking and obtaining appointments to the UCC
- Buying large portions of the debtor's prepetition unsecured bank debt
- Buying large portions of the debtor's prepetition unsecured bond debt
- Buying large portions of the debtor's prepetition unsecured trade debt
- Buying large portions of the debtor's prepetition secured debt
- Providing debtor-in-possession (i.e., postpetition) financing to the debtor
- None of the above
- Other, describe: _____

34. Based on past experiences, how do the activities of individual creditors or small groups of creditors trying to assert influence in chapter 11 cases typically impact returns (i.e., amount or value of distributions) to creditors?

Please choose **only one** of the following:

- Decreases ultimate returns to creditors
- Increases ultimate returns to creditors
- No impact on ultimate returns to creditors

35. Based on past experiences, are individual creditors or small groups of creditors successful in influencing the debtor's restructuring plan or other significant events in the chapter 11 case?

Please choose **only one** of the following:

- Yes
- No

36. Based on past experiences, in about what percentage of your chapter 11 cases have individual creditors or small groups of creditors been successful in influencing the debtor's restructuring plan or other significant events in the chapter 11 case?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 35 (Based on past experiences, are individual creditors or small groups of creditors successful in influencing the debtor's restructuring plan or other significant events in the chapter 11 case?)

Please choose **only one** of the following:

- 10% or less
- 11–50%
- 51–75%
- More than 75%

37. Have you been involved in a chapter 11 case where a dispute arose among members of the UCC regarding the debtor's restructuring plan or a significant event in the chapter 11 case?

Please choose **only one** of the following:

- Yes
- No

38. In about what percentage of your chapter 11 cases has a dispute arisen among members of the UCC regarding the debtor's restructuring plan or a significant event in the chapter 11 case?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 37 (Have you been involved in a chapter 11 case where a dispute arose among members of the UCC regarding the debtor's restructuring plan or a significant event in the chapter 11 case?)

Please choose **only one** of the following:

- 10% or less
- 11–50%
- 51–75%
- More than 75%

39. Based on past experiences, what is the most common result of disputes among members of the UCC?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 37 (Have you been involved in a chapter 11 case where a dispute arose among members of the UCC regarding the debtor's restructuring plan or a significant event in the chapter 11 case?)

Please choose **only one** of the following:

- The parties resolve the issue without the need for a formal objection or court intervention
- The parties resolve the issue after a formal objection, but without court intervention
- The parties resolve the issue only after a formal objection and court intervention

40. Based on past experiences, what is the most common reason that disputes arise among members of the UCC?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 37 (Have you been involved in a chapter 11 case where a dispute arose among members of the UCC regarding the debtor's restructuring plan or a significant event in the chapter 11 case?)

Please choose **only one** of the following:

- Members disagree over the debtor's restructuring plan, with at least one member motivated by self-interest
- Members disagree over the debtor's restructuring plan, with no members being motivated by self-interest
- Members disagree over a significant event in the debtor's chapter 11 case, with at least one member motivated by self-interest
- Members disagree over a significant event in the debtor's chapter 11 case, with no members motivated by self-interest
- Members disagree over selection of professionals
- Members disagree over UCC internal governance matters
- Not applicable
- Other, describe: _____

41. Have you been involved in a chapter 11 case where a member of the UCC had a conflict of interest relating to its other holdings in or affiliations with the debtor?

Please choose **only one** of the following:

- Yes
- No

42. About what percentage of your chapter 11 cases were cases where a member of the UCC had a conflict of interest relating to its other holdings in or affiliations with the debtor?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 41 (Have you been involved in a chapter 11 case where a member of the UCC had a conflict of interest relating to its other holdings in or affiliations with the debtor?)

Please choose **only one** of the following:

- 10% or less
- 11–50%
- 51–75%
- More than 75%

43. Based on past experiences, what is the most common conflict of interest for individual members of the UCC?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 41 (Have you been involved in a chapter 11 case where a member of the UCC had a conflict of interest relating to its other holdings in or affiliations with the debtor?)

Please choose **only one** of the following:

- Holding secured debt in the debtor
- Holding an equity position in the debtor
- Having operations that trade in the securities of the debtor
- Having an interest in or other relationship with a competitor of the debtor
- Pursuing an ownership position in the debtor postpetition either under a proposed plan or sale
- Not applicable
- Other, describe: _____

44. Based on past experiences, what is the most common method for addressing the conflicts of interest of individual members of the UCC?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 41 (Have you been involved in a chapter 11 case where a member of the UCC had a conflict of interest relating to its other holdings in or affiliations with the debtor?)

Please choose **only one** of the following:

- Member voluntarily resigns from the UCC
- Member is forced to resign from the UCC
- Member abstains from voting on matters before the UCC implicating conflict
- UCC seeks and obtains an order permitting continued trading activities with appropriate protections
- Not applicable

45. Have you been involved in a chapter 11 case as a UCC member where you perceived the UCC's professionals to favor or endorse one member's position consistently over the opposition of other UCC members?

Please choose **only one** of the following:

- Yes
- No

46. In about what percentage of your chapter 11 cases as a UCC member have you perceived the UCC's professionals to favor or endorse one member's position consistently over the opposition of other UCC members?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 45 (Have you been involved in a chapter 11 case as a UCC member where you perceived the UCC's professionals to favor or endorse one member's position consistently over the opposition of other UCC members?)

Please choose **only one** of the following:

- 10% or less
- 11–50%
- 51–75%
- More than 75%

47. In what jurisdiction are the majority of the chapter 11 cases in which you serve as a committee member filed?

Please choose **only one** of the following:

- Delaware
- Southern District of New York
- Northern District of Illinois
- Northern District of Ohio
- District of Maryland
- Central District of California
- Other, describe: _____

48. Approximately how many times have you served as a member of a UCC in a chapter 11 case?

Please choose **only one** of the following:

- 10 or less
- 11–25
- 26–50
- More than 50

49. Approximately how many times have you served as a member of an ad hoc creditors' committee in a chapter 11 case?

Please choose **only one** of the following:

- 10 or less
- 11–25
- 26–50
- More than 50

Thank you for completing this survey.

Appendix B

The Role of Chapter 11 Committees Professionals' Survey

This survey is part of an academic study of the role of creditors' committees in chapter 11 business bankruptcy cases, which is being conducted for research purposes by Michelle M. Harner, associate professor at the University of Maryland School of Law and adjunct associate professor at the University of Nebraska College of Law. The research objectives are (1) to assess the conduct of creditors' committees in chapter 11 cases and (2) to explore the dynamics among the creditors' committee, the debtor, and the debtor's other constituents. We are reviewing the case dockets in approximately 300 chapter 11 cases to examine the pleading activity of creditors' committees. We would like to supplement this hard data with insight, collected through a survey, regarding the activities of creditors' committees that are not reflected on the docket.

It is our understanding that you serve or have served as a professional in business bankruptcy cases. We are contacting a sample of such chapter 11 professionals, asking them to complete this short (10- to 15-minute) survey about their experiences with chapter 11 creditors' committees. Your answers to the survey will be kept completely confidential and will be released and/or published only as summaries in which no individual's name or answers can be identified.

There are 42 questions in this survey.

NOTE ABOUT TERMS IN THIS SURVEY**1. FOR PURPOSES OF THIS SURVEY, PLEASE NOTE THE FOLLOWING:**

- The abbreviation “UCC” refers to any statutory or official committee of unsecured creditors appointed by the court or the United States trustee in a chapter 11 case.
- The term “ad hoc creditors’ committee” refers to a group of creditors that act collectively in a chapter 11 case but that are *not* part of a statutory or official committee appointed by the court or the United States trustee in the case.
- The word “informal” when used to describe a pleading or resolution means that a filing with the court was not made or that a court hearing was not necessary to resolve an issue.
- The word “formal” when used to describe a pleading or resolution means that a filing with the court was made or that a court hearing was necessary to resolve an issue.
- The term “firm” refers to your firm, corporation, partnership, institution, or employer, as applicable.
- The terms “you” and “your” refer to your personal experience and not that of your firm.

PROFESSIONAL BACKGROUND AND COMMITTEE EXPERIENCE**2. What is your profession?**

Please choose **only one** of the following:

- Lawyer
- Financial Adviser
- Investment Banker
- Other, describe: _____

3. What is your primary role in chapter 11 cases?

Please choose **only one** of the following:

- Professional to the debtor in possession in more than 50% of your cases
- Professional to the UCC in more than 50% of your cases
- Professional to ad hoc creditors' committees in more than 50% of your cases
- Professional to debtor-in-possession lenders in more than 50% of your cases
- Professional to individual creditors in more than 50% of your cases
- No one type of representation consumes a majority of your practice in chapter 11
- Other, describe: _____

4. What is the average size of chapter 11 cases on which you work, based on debtor's assets?

Please choose **only one** of the following:

- Debtor's assets listed on schedules at \$250 million or less
- Debtor's assets listed on schedules between \$251 million and \$500 million
- Debtor's assets listed on schedules between \$501 million and \$1 billion
- Debtor's assets listed on schedules at more than \$1 billion

5. Based on past experiences, on average, are the most common objections raised by the UCC in chapter 11 cases formal or informal objections?

Please choose **only one** of the following:

- Formal
- Informal
- Both formal and informal equally

6. Based on past experiences, on average, what is the most common type of FORMAL objection raised by the UCC in chapter 11 cases? An objection to the . . .

Only answer this question if the following conditions are met:

- * Answer was 'Formal' or 'Both formal and informal equally' at Question 5 (Based on past experiences, on average, are the most common objections raised by the UCC in chapter 11 cases formal or informal objections?)

Please choose **only one** of the following:

- Debtor-in-possession (i.e., postpetition) financing
- Sale of all or substantially all of the debtor's assets
- Debtor's disclosure statement
- Debtor's plan based on valuation dispute
- Debtor's plan based on non-valuation grounds
- Other, describe: _____

7. Based on past experiences, on average, what is the most common type of INFORMAL objection raised by the UCC in chapter 11 cases? An objection to the . . .

Only answer this question if the following conditions are met:

- * Answer was 'Informal' or 'Both formal and informal equally' at Question 5 (Based on past experiences, on average, are the most common objections raised by the UCC in chapter 11 cases formal or informal objections?)

Please choose **only one** of the following:

- Debtor-in-possession (i.e., postpetition) financing
- Sale of all or substantially all of the debtor's assets
- Debtor's disclosure statement
- Debtor's plan based on valuation dispute
- Debtor's plan based on non-valuation grounds
- Other, describe: _____

8. Based on past experiences, which of the following best describes how the majority of objections raised by the UCC are resolved?

Please choose **only one** of the following:

- The parties resolve the issue without the need for a formal objection or court intervention
- The parties resolve the issue after a formal objection, but without court intervention
- The parties resolve the issue only after a formal objection and court intervention

9. Based on past experiences, on average, are the most common objections raised by ad hoc creditors' committees in chapter 11 cases formal or informal objections?

Please choose **only one** of the following:

- Formal
- Informal
- Both formal and informal equally

10. Based on past experiences, on average, what is the most common type of FORMAL objection raised by ad hoc creditors' committees in chapter 11 cases? An objection to the . . .

Only answer this question if the following conditions are met:

- * Answer was 'Formal' or 'Both formal and informal equally' at Question 9 (Based on past experiences, on average, are the most common objections raised by ad hoc creditors' committees in chapter 11 cases formal or informal objections?)

Please choose **only one** of the following:

- Debtor-in-possession (i.e., postpetition) financing
- Sale of all or substantially all of the debtor's assets
- Debtor's disclosure statement
- Debtor's plan based on valuation dispute
- Debtor's plan based on non-valuation grounds
- Other, describe: _____

11. Based on past experiences, on average, what is the most common type of INFORMAL objection raised by ad hoc creditors' committees in chapter 11 cases? An objection to the . . .

Only answer this question if the following conditions are met:

- * Answer was 'Informal' or 'Both formal and informal equally' at Question 9 (Based on past experiences, on average, are the most common objections raised by ad hoc creditors' committees in chapter 11 cases formal or informal objections?)

Please choose **only one** of the following:

- Debtor-in-possession (i.e., postpetition) financing
- Sale of all or substantially all of the debtor's assets
- Debtor's disclosure statement
- Debtor's plan based on valuation dispute
- Debtor's plan based on non-valuation grounds
- Other, describe: _____

12. Based on past experiences, which of the following best describes how the majority of objections raised by ad hoc creditors' committees are resolved?

Please choose **only one** of the following:

- The parties resolve the issue without the need for a formal objection or court intervention
- The parties resolve the issue after a formal objection, but without court intervention
- The parties resolve the issue only after a formal objection and court intervention

13. Have you been involved in a chapter 11 case where the debtor and the UCC could not agree on a restructuring plan for the debtor?

Please choose **only one** of the following:

- Yes
- No

14. About what percentage of your chapter 11 cases were cases where the debtor and the UCC could not agree on a restructuring plan for the debtor?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 13 (Have you been involved in a chapter 11 case where the debtor and the UCC could not agree on a restructuring plan for the debtor?)

Please choose **only one** of the following:

- 10% or less
- 11–50%
- 51–75%
- More than 75%

15. Based on past experiences, which of the following best describes the most common reason that a debtor and the UCC cannot agree on a restructuring plan?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 13 (Have you been involved in a chapter 11 case where the debtor and the UCC could not agree on a restructuring plan for the debtor?)

Please choose **only one** of the following:

- Type of distribution (e.g., cash, notes, stock) to creditors
- Amount of distribution to creditors
- Whether to reorganize, sell, or liquidate debtor
- Who would own or control the reorganized debtor
- Who would buy the debtor or its assets
- Identity of board of directors or management of reorganized debtor
- Who would pursue post-confirmation claims and causes of action on debtor's behalf
- Other, describe: _____

16. Based on past experiences, how is conflict between the debtor and the UCC regarding the restructuring plan typically resolved?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 13 (Have you been involved in a chapter 11 case where the debtor and the UCC could not agree on a restructuring plan for the debtor?)

Please choose **only one** of the following:

- Debtor confirms its restructuring plan over the objection of the UCC
- Debtor confirms its restructuring plan after reaching a compromise with the UCC
- UCC proposes and confirms its own restructuring plan
- Debtor cedes to the position of the UCC
- UCC cedes to the position of the debtor
- Debtor elects or is forced to liquidate in chapter 11
- Debtor elects or is forced to convert its case to one under chapter 7
- Other, describe: _____

17. Based on past experiences, how does conflict between the debtor and the UCC regarding the restructuring plan typically impact returns (i.e., amount or value of distributions) to creditors?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 13 (Have you been involved in a chapter 11 case where the debtor and the UCC could not agree on a restructuring plan for the debtor?)

Please choose **only one** of the following:

- Decreases ultimate returns to creditors
- Increases ultimate returns to creditors
- No impact on ultimate returns to creditors

18. Have you been involved in a chapter 11 case where the debtor and an ad hoc creditors' committee could not agree on a restructuring plan for the debtor?

Please choose **only one** of the following:

- Yes
- No

19. About what percentage of your chapter 11 cases were cases where the debtor and an ad hoc creditors' committee could not agree on a restructuring plan for the debtor?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 18 (Have you been involved in a chapter 11 case where the debtor and an ad hoc creditors' committee could not agree on a restructuring plan for the debtor?)

Please choose **only one** of the following:

- 10% or less
- 11–50%
- 51–75%
- More than 75%

20. Based on past experiences, which of the following best describes the most common reason that a debtor and an ad hoc creditors' committee cannot agree on a restructuring plan?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 18 (Have you been involved in a chapter 11 case where the debtor and an ad hoc creditors' committee could not agree on a restructuring plan for the debtor?)

Please choose **only one** of the following:

- Type of distribution (e.g., cash, notes, stock) to creditors
- Amount of distribution to creditors
- Whether to reorganize, sell, or liquidate debtor
- Who would own or control the reorganized debtor
- Who would buy the debtor or its assets
- Identity of board of directors or management of reorganized debtor
- Who would pursue post-confirmation claims and causes of action on debtor's behalf
- Other, describe: _____

21. Based on past experiences, how is conflict between the debtor and an ad hoc creditors' committee regarding the restructuring plan typically resolved?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 18 (Have you been involved in a chapter 11 case where the debtor and an ad hoc creditors' committee could not agree on a restructuring plan for the debtor?)

Please choose **only one** of the following:

- Debtor confirms its restructuring plan over the objection of the committee
- Debtor confirms its restructuring plan after reaching a compromise with the committee
- The committee proposes and confirms its own restructuring plan
- Debtor cedes to the position of the committee
- The committee cedes to the position of the debtor
- Debtor elects or is forced to liquidate in chapter 11
- Debtor elects or is forced to convert its case to one under chapter

22. Based on past experiences, how does conflict between the debtor and an ad hoc creditors' committee regarding the restructuring plan typically impact returns (i.e., amount or value of distributions) to creditors?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 18 (Have you been involved in a chapter 11 case where the debtor and an ad hoc creditors' committee could not agree on a restructuring plan for the debtor?)

Please choose **only one** of the following:

- Decreases ultimate returns to creditors
- Increases ultimate returns to creditors
- No impact on ultimate returns to creditors

23. Based on past experiences, has the influence of individual creditors or small groups of creditors over the debtor increased in recent (i.e., last five years) chapter 11 cases?

Please choose **only one** of the following:

- Yes
- No

24. In about what percentage of your chapter 11 cases in the last five years have you seen individual creditors or small groups of creditors asserting more influence over debtors?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 23 (Based on past experiences, has the influence of individual creditors or small groups of creditors over the debtor increased in recent (i.e., last five years) chapter 11 cases?)

Please choose **only one** of the following:

- 10% or less
- 11–50%
- 51–75%
- More than 75%

25. Based on past experiences, has the influence of individual creditors or small groups of creditors over the UCC increased in recent (i.e., last five years) chapter 11 cases?

Please choose **only one** of the following:

- Yes
- No

26. In about what percentage of your chapter 11 cases in the last five years have you seen individual creditors or small groups of creditors asserting more influence over the UCC?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 25 (Based on past experiences, has the influence of individual creditors or small groups of creditors over the UCC increased in recent (i.e., last five years) chapter 11 cases?)

Please choose **only one** of the following:

- 10% or less
- 11–50%
- 51–75%
- More than 75%

27. Based on past experiences, how are individual creditors or small groups of creditors asserting influence in chapter 11 cases?

Please choose **all** that apply:

- Seeking and obtaining appointments to the UCC
- Buying large portions of the debtor's prepetition unsecured bank debt
- Buying large portions of the debtor's prepetition unsecured bond debt
- Buying large portions of the debtor's prepetition unsecured trade debt
- Buying large portions of the debtor's prepetition secured debt
- Providing debtor-in-possession (i.e., postpetition) financing to the debtor
- None of the above
- Other, describe: _____

28. Based on past experiences, what is the most common method for individual creditors or small groups of creditors to seek to assert influence in chapter 11 cases?

Please choose **only one** of the following:

- Seeking and obtaining appointments to the UCC
- Buying large portions of the debtor's prepetition unsecured bank debt
- Buying large portions of the debtor's prepetition unsecured bond debt
- Buying large portions of the debtor's prepetition unsecured trade debt
- Buying large portions of the debtor's prepetition secured debt
- Providing debtor-in-possession (i.e., postpetition) financing to the debtor
- None of the above
- Other

29. Based on past experiences, how do the activities of individual creditors or small groups of creditors trying to assert influence in chapter 11 cases typically impact returns (i.e., amount or value of distributions) to creditors?

Please choose **only one** of the following:

- Decreases ultimate returns to creditors
- Increases ultimate returns to creditors
- No impact on ultimate returns to creditors

30. Based on past experiences, are individual creditors or small groups of creditors successful in influencing the debtor's restructuring plan or other significant events in the chapter 11 case?

Please choose **only one** of the following:

- Yes
- No

31. Based on past experiences, in about what percentage of your chapter 11 cases have individual creditors or small groups of creditors been successful in influencing the debtor's restructuring plan or other significant events in the chapter 11 case?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 30 (Based on past experiences, are individual creditors or small groups of creditors successful in influencing the debtor's restructuring plan or other significant events in the chapter 11 case?)

Please choose **only one** of the following:

- 10% or less
- 11–50%
- 51–75%
- More than 75%

32. Have you been involved in a chapter 11 case where a dispute arose among members of the UCC regarding the debtor's restructuring plan or a significant event in the chapter 11 case?

Please choose **only one** of the following:

- Yes
- No

33. In about what percentage of your chapter 11 cases has a dispute arisen among members of the UCC regarding the debtor's restructuring plan or a significant event in the chapter 11 case?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 32 (Have you been involved in a chapter 11 case where a dispute arose among members of the UCC regarding the debtor's restructuring plan or a significant event in the chapter 11 case?)

Please choose **only one** of the following:

- 10% or less
- 11–50%
- 51–75%
- More than 75%

34. Based on past experiences, what is the most common result of disputes among members of the UCC?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 32 (Have you been involved in a chapter 11 case where a dispute arose among members of the UCC regarding the debtor's restructuring plan or a significant event in the chapter 11 case?)

Please choose **only one** of the following:

- The parties resolve the issue without the need for a formal objection or court intervention
- The parties resolve the issue after a formal objection, but without court intervention
- The parties resolve the issue only after a formal objection and court intervention

35. Based on past experiences, what is the most common reason that disputes arise among members of the UCC?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 32 (Have you been involved in a chapter 11 case where a dispute arose among members of the UCC regarding the debtor's restructuring plan or a significant event in the chapter 11 case?)

Please choose **only one** of the following:

- Members disagree over the debtor's restructuring plan, with at least one member motivated by self-interest
- Members disagree over the debtor's restructuring plan, with no members being motivated by self-interest
- Members disagree over a significant event in the debtor's chapter 11 case, with at least one member motivated by self-interest
- Members disagree over a significant event in the debtor's chapter 11 case, with no members motivated by self-interest
- Members disagree over selection of professionals
- Members disagree over UCC internal governance matters
- Not applicable

36. Have you been involved in a chapter 11 case where a member of the UCC had a conflict of interest relating to its other holdings in or affiliations with the debtor?

Please choose **only one** of the following:

- Yes
- No

37. About what percentage of your chapter 11 cases were cases where a member of the UCC had a conflict of interest relating to its other holdings in or affiliations with the debtor?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 36 (Have you been involved in a chapter 11 case where a member of the UCC had a conflict of interest relating to its other holdings in or affiliations with the debtor?)

Please choose **only one** of the following:

- 10% or less
- 11–50%
- 51–75%
- More than 75%

38. Based on past experiences, what is the most common conflict of interest for individual members of the UCC?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 36 (Have you been involved in a chapter 11 case where a member of the UCC had a conflict of interest relating to its other holdings in or affiliations with the debtor?)

Please choose **only one** of the following:

- Holding secured debt in the debtor
- Holding an equity position in the debtor
- Having operations that trade in the securities of the debtor
- Having an interest in or other relationship with a competitor of the debtor
- Pursuing an ownership position in the debtor postpetition either under a proposed plan or sale
- Not applicable
- Other, describe: _____

39. Based on past experiences, what is the most common method for addressing the conflicts of interest of individual members of the UCC?

Only answer this question if the following conditions are met:

- * Answer was 'Yes' at Question 36 (Have you been involved in a chapter 11 case where a member of the UCC had a conflict of interest relating to its other holdings in or affiliations with the debtor?)

Please choose **only one** of the following:

- Member voluntarily resigns from the UCC
- Member is forced to resign from the UCC
- Member abstains from voting on matters before the UCC implicating conflict
- UCC seeks and obtains an order permitting continued trading activities with appropriate protections
- Not applicable

40. In what jurisdiction are the majority of the chapter 11 cases on which you work?

Please choose **only one** of the following:

- Delaware
- Southern District of New York
- Northern District of Illinois
- Northern District of Ohio
- District of Maryland
- Central District of California
- Other, describe: _____

41. On average, how many chapter 11 cases do you work on in any given year?

Please choose **only one** of the following:

- 10 or less
- 11–25
- 26–50
- More than 50

42. How many lawyers, advisers, or bankers, as applicable, work for your firm?

Please choose **only one** of the following:

- 50 or less
- 51–100
- 101–500
- More than 500

Thank you for completing this survey.