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# AMERICAN BANKRUPTCY INSTITUTE
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## Professional Compensation in Bankruptcy

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## I. Standards for Compensating Professionals in Bankruptcy

### A. Sections 330 and 328(a)

Professionals retained in bankruptcy cases may be compensated under sections 328 or section 330 of the Bankruptcy Code. These sections are mutually exclusive to one another, and a court "may not conduct a [section] 330 inquiry into the reasonableness of the fees and their benefit to the estate if the court already has approved the professional's employment under [section] 328." *See Friedman Enters. v. B.U.M Int'I Inc. (In re B.U.M. Int'l, Inc.)*, 229 F.3d 824, 829 (9th Cir. 2000); *see also In re Iron Horse Bicycle Co., LLC*, No. 809-71324-ast, 2010 Bankr. LEXIS 378, at *13-14 (Bankr. E.D.N.Y. Feb. 4, 2010) (noting that Second Circuit has deemed sections 328 and 330 to be "mutually exclusive") (citations omitted).

Section 330 of the Bankruptcy Code governs a professional's compensation if the engagement is not approved under section 328(a). *See Owens v. United States Tr. (In re Owens)*, No. CC-13-1252, 2014 Bankr. LEXIS 3346, at *6-7 (B.A.P. 9th Cir. Aug. 6, 2014). Section 330 provides that professionals may be compensated for "actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person," and may be reimbursed for "actual, necessary expenses." *See* 11 U.S.C. § 330(a)(1)(A)-(B). The bankruptcy court may, on its own motion or by motion of a party in interest, award less compensation to the professional that it requested, so long as that compensation is reasonable. 11 U.S.C. § 330(a)(2). Reasonableness is measured by weighing "all relevant factors," including time spent performing services and the amount to be charged for those services. 11 U.S.C. § 330(a)(3).

Under section 328 of the Bankruptcy Code, the trustee or a creditors committee may seek court approval to retain a professional on "on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis." 11 U.S.C. § 328(a).

Under the prior Bankruptcy Act, compensation agreements, including contingency fee arrangements, were not authorized, and courts were required to approve fees only if reasonable, taking into consideration conservation of the estate. *Official Committee of Fox Markets, Inc. v. Ely*, 337 F.2d 461, 468 (9th Cir. 1964). With the enactment of the Bankruptcy Code in 1978, Congress sought to incentivize professionals to work for estate fiduciaries, and furthered this goal

with section 328(a), which authorizes pre-approval of compensation agreements, a significant departure from pre-Code practice.

Pursuant to section 328(a), the reasonableness of a professional's compensation is decided on a prospective, rather than retrospective, basis. *See Riker, Danzig, Scherer, Hyland & Perretti v. Official Comm. of Unsecured Creditors (In re Smart World Techs., LLC)*, 552 F.3d 228, 232 (2d Cir. 2009) ("*Smart World*") ("[S]ection 328(a) permits a bankruptcy court to forgo a full post-hoc reasonableness inquiry …."); *In re High Voltage Eng'g Corp.*, 311 B.R. 320, 333 (Bankr. D. Mass 2004) (holding that bankruptcy court must determine reasonableness of professional's compensation before authorizing employment of professional). Once the terms of the professional's retention are approved by the court, the professional will be paid pursuant to the terms of the retention order unless "such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions." 11 U.S.C. § 328(a). A bankruptcy court may approve retention of a professional on terms different from those proposed by the professional in its application to satisfy the requirement of reasonableness under section 328(a). *See In re Fed. Mogul-Global, Inc.*, 348 F.3d 390, 397-98 (3d Cir. 2003).

Section 328(a)'s improvidence exception is a narrow one. *Smart World*, 552 F.3d at 234. "A court may not award a fee different from one that it has approved in a retention order unless it finds that the terms in the retention order were 'improvident in light of developments not capable of being anticipated at the time . . . .'" *Houlihan Lokey Howard & Zukin Capital v. High River Ltd. P'ship*, 369 B.R. 111, 117 fn.8 (S.D.N.Y. 2007) (quoting 11 U.S.C. § 328(a)). "This is a difficult requirement to meet, and courts rarely alter a fee award on these grounds." *Id.* (quoting *In re Yablon*, 136 B.R. 88, 92 (Bankr. S.D.N.Y. 1992)).

Few cases uphold the reduction on improvidence grounds of a professional's fee previously approved under section 328(a). *See e.g., In re Black Diamond Mining Co., LLC*, 2009 Bankr. LEXIS 3926, at *7-9 (Bankr. E.D. Ky. Dec. 11, 2009) (collapse of market for coal was not unforseeabale); *In re ARGOSE, Inc.*, 372 B.R. 705, 710 (Bankr. D. Del. 2007). "[T]he fact that contingency fees may appear excessive in retrospect is not a ground to reduce them because 'early success by counsel is always a possibility of capable of being anticipated.'" *Smart World*, 552 F.3d at 235 (quotation omitted.)

### B. Circumventing *Baker Botts v. ASARCO* With Section 328(a)?

In *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121, 135 (2015), the Supreme Court held that professionals retained in bankruptcy cases are not entitled to fees for time spent on defending their fee applications. According to the Court, section 330(a)(1) affords professionals reasonable compensation for "*services rendered by*" the professional. *Id*. at 128. When a professional is defending its own fees, it is not rendering "a service" to the estate. *Id*. at 129.

Certain professionals have sought to circumvent the *ASARCO* holding by requesting bankruptcy court approval of fees defense provisions in their engagement agreements pursuant to section 328(a). The bankruptcy court in *In re Boomerang Tube, Inc.*, 548 B.R. 69, 72 (Bankr. D. Del. 2016), rejected such a request by committee counsel. The court determined that "*ASARCO* prevents the Court from concluding that section 328 permits defense fees even if they were routinely allowed by the market in bankruptcy or non-bankruptcy contexts prior to that ruling." *Id*. at 78.

In *In re Hungry Horse, LLC*, 574 B.R. 740 (Bankr. D.N.M. 2017), however, the court disagreed with *Boomerang* and concluded "that the contract exception to the American Rule remains viable in bankruptcy cases." *Id*. at 747. According to the court, "a properly drafted fee defense provision could be a "reasonable term" under § 328(a), violating neither the letter nor spirit of ASARCO." *Id*. at 747-48. The *Hungry Horse* court noted that *ASARCO* was decided in the context of section 330(a) and did not address whether a "fees on fees" provision was a reasonable term of employment under section 328(a). *Id*. at 747. The court cautioned, however, that if the debtor's professionals seek and receive approval of a "fees on fees" provision, the committee's professionals should also receive similar protections. *Id*. at 748. *See also In re Nortel Networks Inc*., 2017 WL 932947 (Bankr. D. Del. 2017) (approved fees for fee dispute contained in Indenture Trustee engagement agreement, distinguishing *Boomerang* as the debtor was party to the indenture agreement).

## II. The Blackstone Protocol

Generally, investment bankers and financial advisors are compensated for their work under engagement agreements providing for fixed monthly fees and transaction fees earned upon consummation of a defined transaction. *See In re Relativity Fashion, LLC*, No. 15-11989 (MEW), 2016 Bankr. LEXIS 4339, *8 (Bankr. S.D.N.Y. Dec. 16, 2016). Their main form of compensation is through transaction fees. *Id.*

Although sections 328 and 330 have been said to be mutually exclusive, the United States Trustee has objected to retention applications under section 328(a), requesting that hybrid approach be utilized, frequently in connection with the retention of investment bankers and financial advisors. This hybrid approach is colloquially known as the "Blackstone Protocol".

The Blackstone Protocol gives the United States Trustee the right to object to a professional firm's fee application on all grounds including but not limited to the reasonableness standard provided for in section 330 of the Bankruptcy Code, even if the firm's retention is approved pursuant to section 328(a). *See In re Global Crossing, Ltd., et al.*, Case No. 02-40187 (REG), Interim Order Pursuant to §§ 327(a) and 328(a) Authorizing the Employment and Retention of the Blackstone Group, L.P. as Financial Advisor to the Debtors and Debtors-in-possession. The United States Trustee has also sought to apply the Blackstone Protocol to counsel retained on a contingency fee basis. *See e.g.*, *In re Aereo, Inc.*, Case No. 14-13200 (SHL), Dkt. No. 107 (order retaining Brown Rudnick LLP as Debtor's counsel at ¶ 5).

Before the development of the Blackstone Protocol, the United States Trustees would frequently object to professional retention applications that sought approval under section 328. These objections were mainly due to indemnification provisions in the retention applications. However, over time an arrangement with the United States Trustees and professionals developed where the United States Trustee would not object to the retention applications if the United States Trustee would be permitted to review compensation under section 330. Although the Blackstone Protocol developed as a solution to frequent objections to retention applications under section 328, the Bankruptcy Court in *Relativity Fashion* questioned the validity of the Blackstone Protocol.

In *Relativity Fashion*, a fee examiner objected to a transaction success fee provided for in the retention agreements of two investment banking firms. *Id*. at *2-3. The firms were retained pursuant to section 328(a). *Id*. at *21. Both retention orders contained Blackstone Protocol language enabling certain parties to object to the reasonableness of any proposed fees under section

330 of the Bankruptcy Code. *Id*. After the retention orders were entered, the court also partially approved a stipulation to hire a fee examiner. *Id.* at *22. The docketed application purported to give the fee examiner the right to object to proposed fees provided for in the retention order. *Id*.

Before addressing the fee examiner's right to object, the court discussed the Blackstone Protocol, stating that it was "not at all clear that Congress contemplated this kind of hybrid approach when it enacted Section 328(a)." *Id*. at *17. The court also cited the Second Circuit's *Smart World* decision where the court stated that sections 328 and 330 were "mutually exclusive," and a retention under section 328 foreclosed any fee analysis under section 330. *Id*. (citations omitted). The "best justification" for the Blackstone Protocol was that it could be considered "one of the approved terms of employment that is approved under Section 328(a)," and thus it is possible that allowing the United States Trustee to object would be permissible. *Id.* at *17-18. Because the Blackstone Protocol itself was not at issue in the case, the court did not rule whether its use was appropriate.

The court ultimately held that it did not have the authority to alter the retention agreements to give the fee examiner or any other party the right to object, and denied the objections to the transaction fees. *Id*. at *25, 34 ("Under the terms of Section 328(a) and under [existing precedent], I had no power to give anyone else the right to assert objections based on Section 330 standards.")

## III. "Other Professional Persons" Subject to Section 327(a) Retention

The Bankruptcy Code requires court approval for attorneys, accountants, appraisers, auctioneers and "other professional persons" who are employed to represent or assist the trustee or debtor in possession in carrying out their Bankruptcy Code duties. While the Bankruptcy Code specifically enumerates attorneys, accountants, appraisers and auctioneers as professionals who must be retained under section 327(a), it does not provide guidance on who is included in the catchall category "other professional persons", leaving the definition subject to court interpretation. If the entity to be engaged is not a "professional person", the disinterestedness requirements of section 327(a) are not necessary and the debtor may retain such person without court approval in the ordinary course of business under section 363(b), or with court approval, if such engagement is outside the ordinary course. *In re Nine West Holdings, Inc.*, 588 B.R. 678, 686 (Bankr. S.D.N.Y. 2018).

In *In re Metropolitan Hospital*, 119 B.R. 910 (Bankr. E.D. Pa. 1990), an often-cited case on whether section 327(a) applies to a professional, the bankruptcy court held that a specialized health care receivables collection agency was a professional requiring approval under section 327(a). *Id*. at 917. Relying on the history of section 327(a), the court adopted a broad definition of professional person as "someone with special knowledge and skill usually achieved through study and educational attainments whether or licensed or not" who assists "the trustee with the fulfillment of his or her official duties." *Id*. at 915-16. The court disagreed with *In re Seatrain Lines* and *In re Johns-Mansville Corp*., two earlier decisions from the Southern District of New York which limited professional retentions to those who exercise fiduciary duties and play a central role in the administration of the debtor's reorganization. *Id.* at 917-18 (citing *In re Seatrain Lines*, 13 B.R. 980, 981 (Bankr. S.D.N.Y. 1981) (holding that professional person is limited to persons in those occupations that play central role in administration of debtor's case); *In re Johns-Mansville Corp*., 60 B.R. 612, 619 (Bankr. S.D.N.Y. 1986) (stating that a professional within the meaning of section 327 is one intimately involved in the administration of the reorganization

process, for example someone who played a part in negotiating a plan, who is involved with disposing of or acquiring assets, or who interacts with creditors)).

In *In re First Merchants Acceptance Corp.*, 1997 WL 873551 (D. Del. Dec 17, 1997), the court relied on *Metropolitan Hospital* in similarly concluding that a debt collection consultant was a professional subject to section 327(a) retention. The court expanded on *Metropolitan Hospital*, examining six factors in its analysis, including:

(1) whether the entity controls or manages assets that are significant to the debtor's reorganization;

(2) whether the entity is involved in negotiating the terms of a plan;

(3) whether the employment is directly related to the type of work carried out by the debtor or to the routine maintenance of the debtor's business operations;

(4) whether the entity has discretion or autonomy to exercise professional judgment in some part of the administration of the debtor's estate;

(5) the extent of the entity's involvement in the administration of the debtor's estate; and

(6) whether the entity's services involve some degree of special knowledge or skill such that the entity can be considered a professional within the ordinary meaning of the term.

The court easily concluded that the debt collection agency was a professional subject to section 327(a) approval, concluding that the work to be performed required specialized skill and knowledge, and the debt collector had significant discretion and involvement in the management of debtor's receivables, which were vital to the debtor's reorganization efforts. *Id*. at *3.

The Delaware Bankruptcy Court recently applied *First Merchants* in the *In re Heritage Home Corp*. decision and determined that a retail liquidation consultant was not a professional requiring section 327(a) retention. *See In re Heritage Home Corp., LLC, et al.*, Case No. 18-11736 (KG), 2018 WL 4684802, *4 (Bankr. D. Del. Sept. 27, 2018).

The *Heritage Home* court distinguished *In re Borders Group, Inc.*, 453 B.R. 477 (Bankr. S.D.N.Y. 2011) where the bankruptcy court determined that any broker, auctioneer or liquidator hired by the retail debtor to sell de minimis assets would require retention under section 327(a). *Borders Group*, 453 B.R. at 485. The *Borders Group* court relied on the express language of section 327(a), which applies to "auctioneers". *Id*. (holding that brokers, auctioneers and liquidators hired by debtor to conduct de minimis asset sales fall within the definition of "auctioneers" under section 327(a)).

The *Heritage Home* court also relied on the decision in *In re Nine West Holdings, Inc.*, 588 B.R. 678 (Bankr. S.D.N.Y. 2018), in which the bankruptcy court, adhering to the "Jay Alix Protocol, determined that Alvarez & Marsal, a pre-petition crisis management consultant, was not a professional person within the meaning of section 327(a).

**IV. Retention of Restructuring Officers - The Jay Alix Protocol**

The Jay Alix Protocol represents a national policy adopted in 2004 by the United States Trustee, which allows for the retention of distressed management firms under section 363(b) on condition that the consultant complies with the terms of the Protocol. *See* https://www.justice.gov/sites/default/files/ust/legacy/2014/08/11/J_Alix_Protocol_Engagement.pdf. The Jay Alix Protocol was documented in the form of a settlement agreement between the U.S. Trustee and Jay Alix & Associates.

The Protocol was designed to prevent professionals from using section 363(b) to avoid the disclosure requirements of section 327(a) and requires the following:

(a) the firm to be retained must serve in only one capacity (*i.e.*, as either a financial advisor, crisis manager, claims agent, or investor);

(b) the firm's retention application must be filed under section 363 and the application must disclose the firm's relationships with interested parties and make other disclosures showing the firm is otherwise disinterested;

(c) the firm must file monthly staffing reports, which must be subject to Court review; and

(d) retention of persons furnished by the firm must be approved by and act under the direction of an independent board of directors.

For instance, bankruptcy courts routinely hold that prior court approval under section 327(a) is not necessary when debtors seek to employ distressed management consultants as officers and other senior level managers. *Nine West*, at 686 (citing cases). Engagement under section 363(b) requires appropriate notice, an opportunity to be heard and a finding by the court that the debtor has exercised reasonable business judgment. *Id*.

In *Nine West*, the United States Trustee objected to A&M's retention under section 363(b), arguing that A&M was a professional subject to the section 327(a) standards. A&M had been engaged approximately four years prior to the bankruptcy filing as a restructuring advisor and one of its members, Mr. Ralph Schipani, served as board member and an officer of certain debtors. Upon filing for chapter 11 relief, the debtors sought to retain A&M and install Mr. Schipani as Interim Chief Executive Officer to continue advising the debtors. A&M personnel were also engaged to provide certain chapter 11 services, such as working on the debtor's schedules, statement of financial affairs, monthly operating reports, claims analysis, debtor in possession financing and executory contract review.

The court followed *Seatrain* and adopted the strict standard for purposes of section 327(a), holding that A&M was not a professional for section 327(a) purposes since it did not play an intimate or central role in the administration of the debtors' bankruptcy cases. *Id.* at 693. The court agreed with the analysis in *In re Sage Crest II*, 2011 WL 134893 (D. Conn. Jan. 14, 2011) in which the court concluded "that 'officers responsible for the day-to-day business of the debtor stand in contrast to professionals hired for the *sole purpose* of reorganizing the debtor organization'." *Id.* (quoting *Sage Crest II,* at *7). Critical to the court's decision was A&M's role during the pre-petition and post-petition periods, which focused on "running the business" and supporting the

debtors' bankruptcy professionals, and was largely work that any officer or executive of a chapter 11 debtor would do in the ordinary course. *Id*. at 695.

According to the U.S. Trustee, A&M was not disinterested since Mr. Schipani served on the board of directors of one of the debtor entities within two years of the bankruptcy filing. *See* 11 U.S.C. § 101(14)(B) (a person is not a "disinterested person" if such person was a "director, officer, or employee of the debtor" within two years of the bankruptcy filing). Mr. Schipani resigned from his board positions approximately six months prior to the chapter 11 filings. *Nine West*, 588 B.R. at 685.

The bankruptcy court, however, maintained strict adherence to the Jay Alix Protocol. According to the court, the "one hat" rule, which requires that a firm serve the debtor in only one capacity, is designed to avoid the "inherent conflict" between an advisor's duty to a debtor and its own business interests where the advisory firm serves both as a financial advisor retained pursuant to section 327(a) and as a crisis manager with firm staff serving as officers of the debtor. While the Protocol prevents engagement of a financial advisor where any representative of the advisor serves or served as a director of the debtor or an affiliate within two years prior to the petition date, Jay Alix Protocol, n.3, the court held that Mr. Schipani's board service on two subsidiaries was "ministerial" and did not violate the terms of the Protocol. *Nine West*, 588 B.R. at 689. According to the court, the Protocol was not violated in a material way because Mr. Schipani did not serve on the parent boards responsible for approving the prepetition or postpetition retention or compensation of A&M. *Id*. The court concluded that the one of the main goals of the Protocol — avoiding undue influence by a director in the hiring of professionals — were not present in the case and that A&M complied with the core requirements of the Protocol. *Id*. at 689-90.

Proskauer

# Understanding the Common Interest Doctrine in Bankruptcy Cases

By: David M. Hillman, Michael T. Mervis and Javier F. Sosa[1]

## Introduction

The attorney-client privilege protects communications between attorneys and their clients, and the work product doctrine protects documents prepared by or for attorneys in anticipation of litigation. Privileged information shared with third parties generally waives the privilege. The common interest doctrine is an exception to this rule. Under it, the disclosure of otherwise privileged information to one or more third parties represented by separate counsel may not result in a waiver if those parties share a common a legal interest.

### A. Common Interest Doctrine Generally

As an initial matter, it is important to note that the common interest doctrine is not a free-standing privilege. Rather, it is an exception to the general rule that disclosure of privileged communications or work product to a third-party constitutes a waiver of privilege. *Shamis v. Ambassador Factors, Corp.*, 34 F. Supp. 2d 879, 893 (S.D.N.Y. 1999) ("The 'common interest' rule is a limited exception to the general rule that the attorney-client privilege is waived when a protected communication is disclosed to a third party outside the attorney-client relationship."). As such, application of the common interest doctrine requires an underlying attorney-client or work product privilege. *See Sokol v. Wyeth*, No. 07 Civ. 8442, 2008 WL 3166662, at *5 (S.D.N.Y. Aug. 4, 2008) ("If a communication is not protected by the attorney-client privilege or the attorney work product doctrine, the common interest privilege does not apply.").

The common interest doctrine protects communications made between attorneys when their respective clients share "a common legal interest." *In re Teleglobe Commc'ns*, 493 F.3d 345, 364 (3d Cir. 2007). Courts have generally upheld common interest privilege claims even where communications are made in the absence of attorneys so long as the communications are otherwise privileged. *See*, *e.g.*, *Gucci Am., Inc. v. Gucci*, No. 07 Civ. 6820, 2009 WL 8531026, at *1 (S.D.N.Y. Dec. 15, 2008) (noting that where "information that is otherwise privileged is shared between parties that have a common legal interest, the

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privilege is not forfeited even though no attorney either creates or receives that communication"); *In re Tribune Co.*, No 08-13141 (KJC), 2011 WL 386827, at *5-6 (Bankr. D. Del. Feb. 3, 2011) (noting that limiting common interest to attorney-prepared communications is "too restrictive" and holding that proper inquiry is "whether the subject matter of the communication at issue would be protected by the attorney-client or work product privilege but for its disclosure to a party with the common interest")[2]; *Reginald Martin Agency, Inc. v. Conseco Med. Ins. Co.*, 460 F.Supp.2d 915, 919 (S.D. Ind. 2006) (common-interest doctrine may prevent waiver of otherwise attorney-client privileged communications among parties even when counsel did not participate).

The existence of a "common legal interest" is highly fact-specific. In fact, one court has described the state of the law as "unsettled." *Leader Tech., Inc. v. Facebook, Inc.*, No. 08-862-JJF, 2010 WL 2545960, at *2 (D. Del. June 24, 2010). Courts differ in how they articulate the degree of commonality required to invoke the doctrine. In the Third Circuit, for example, the common legal interest need not be identical, but only "substantially similar." *See*, *e.g.*, *In re Teleglobe*, 493 F.3d at 365. In the First Circuit, identical or "nearly identical" legal interests are necessary to establish a common interest. *See*, *e.g.*, *F.D.I.C. v. Ogden Corp.*, 202 F.3d 454, 461 (1st Cir. 2000) ("The term 'common interest' typically entails an identical (or nearly identical) legal interest as opposed to a merely similar interest."); *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 390 F. Supp.3d 311, 327 (D.P.R. 2019) (holding that, for common interest to attach, parties were not required to prove that they have "nearly identical interests in all respects," so long as the parties shared some identical interests). The difference is subtle but potentially material.

### B. Is Pending or Anticipated Litigation Required?

The historical roots of the common interest privilege lie in criminal prosecutions against multiple co-defendants. *Chahoon v. Commonwealth*, 62 Va. 822 (1871). The doctrine (also known as the joint defense privilege) "allowed the attorneys of criminal co-defendants to share confidential information about

[2] The Third Circuit in *Tribune* rejected a common misreading of dicta in *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345 (3d Cir. 2007), which suggested that the common interest doctrine applied only to communications between attorneys. As the *Tribune* court noted, the formulation of the common interest doctrine came in the context of an interpretation of Delaware Rule of Evidence 502(b)(3) and was not intended to be a general statement of law. *See Tribune*, 2011 WL 386827, at *6, n.15. Moreover, the Third Circuit's interpretation of Delaware Rule of Evidence 502(b)(3) has been rejected by subsequent Delaware decisions. *See*, *e.g.*, *Rembrandt Techs., L.P. v. Harris Corp.*, C.A. No. 07C-09-059-JRS, 2009 WL 402332, at *8 (Del. Super. Ct. Feb. 12, 2009).

defense strategies without waiving the privilege as against third parties." *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 57 N.Y.3d 616, 625, (2016). In civil litigation, the common interest privilege was created because civil co-defendants commonly have the same objectives. *See In re LTV Sec. Litig.*, 89 F.R.D. 595, 604 (N.D. Tex. 1981).

State and federal courts, however, have not adopted a uniform view on the applicability of the common interest doctrine outside the context of a pending litigation (or an anticipated suit). New York, for example, requires that there be pending or anticipated litigation for the common interest privilege to apply. *Ambac Assurance Corp.*, 57 N.Y.3d at 631-32. Delaware, by comparison, codified its common interest privilege and does not require actual or pending litigation. Del. R. Evid. 502(b)(3). Federal courts are also split. A pending or anticipated litigation is not required, for example, in the Seventh Circuit, *United States v. BDO Seidman*, LLP, 492 F. 3d 806, 816 (7th Cir. 2007), whereas the Fifth Circuit requires litigation or a palpable threat of litigation to invoke the common interest doctrine. *In re Hardwood P-G, Inc.*, 403 B.R. 445, 459 (Bankr. W.D. Tex. 2009); *U.S. v. Newell*, 315 F.3d 510, 525 (5th Cir. 2002). In at least the Fifth Circuit, bankruptcy constitutes litigation for purposes of the common interest doctrine. *In re Hardwood P-G, Inc.*, 403 B.R. at 460.

### C. Which Law Applies?

Choice of law can be an important consideration because of substantive differences between state and federal law and laws of each Circuit. Many states have not established a specific choice of law doctrine regarding privilege. Others favor the approach in section 139 of the Restatement (Second) of Conflict of Laws ("Second Restatement"), which applies the law of the state with the "most significant relationship" to the communication at issue. Courts have held that the majority of states that do not explicitly follow the Second Restatement apply an interest-based analysis closely resembling the Second Restatement's approach. *See In re Yasmin*, No. 3:09-md-02100, 2011 WL 1375011, at *8 (S.D. Ill. Apr. 12, 2011) (surveying all fifty states and U.S. territories and concluding that most apply the Second Restatement's "most significant relationship" test or a similar analysis to choice of privilege law).

Federal courts, on the other hand, are governed by Rule 501 of the Federal Rules of Evidence ("FRE 501"). Under FRE 501, federal courts considering a claim of privilege apply federal common law to federal question claims or defenses but, when sitting in diversity, "state law governs privilege regarding a

claim or defense for which state law supplies the rule of decision." Thus, in a breach of contract case where the contract was governed by New York law, a federal court applied New York law to the parties' claims that certain communications were protected by the attorney-client and common interest privilege. *See HSH Nordbank AG New York Branch v. Swerdlow*, 259 F.R.D. 64, 70 n.6 (S.D.N.Y. 2009); *see also Argos Holdings Inc. v. Wilimgton Trust Nat'l Assoc.*, No. 18-cv-5773, 2019 WL 1397150, at *2-3 (S.D.N.Y. Mar. 28, 2019) (applying New York privilege law to attorney-client and common interest privilege claims because "this is a diversity action regarding a claim for which New York law supplies the rule of decision" for a transaction governed by New York law).

Some cases present mixed federal and state law questions. In these cases, federal courts must still apply state privilege law to claims and defenses governed by state law and federal common law to federal issues. *See, e.g.*, *Hunt v. Schauerhamer*, No. 2:15-cv-1, 2016 WL 75064, at *2 (D. Utah Jan. 6, 2016) (applying Utah privilege law in federal 1983 action where "discrete issue now before the court concerns the existence and interpretation of a settlement agreement" and "Utah law supplies the rule of decision on the issue"); *In re Superior Nat'l Ins. Gr.*, 518 B.R. 562, 566-67 (Bankr. C.D. Cal. 2014) (applying California privilege law to adversary proceeding in Chapter 11 bankruptcy where claims were all state law causes of action but noting that "[i]f any of the claims were governed by federal law, then federal law of privileges would govern the entire proceeding.").

Finally, federal courts must sometimes engage in a deeper choice of law analysis to determine *which* state's laws apply to a particular claim or defense, and thus the privilege claim, under FRE 501. In *Wellin v. Wellin*, 211 F. Supp. 3d 793 (D.S.C. 2016), a New York based client sought a protective order over communications made with her South Carolina based lawyers, and the issue before the court was whether to apply New York or South Carolina privilege law. The court noted that federal courts "tasked with applying state law must apply the forum state's choice of law rules," and so looked to South Carolina's choice of law rules to determine what privilege law applies. *Id.* at 800-01. Further complicating the court's analysis was the fact that South Carolina had not yet adopted a choice of law doctrine applicable to privilege issues. To resolve the issue, the court turned to the Second Restatement of Conflict of Laws as the "prevailing approach among states that have established a choice of law doctrine regarding privileges." Under Section 139 of the Second Restatement, courts consider where the communication "took place" or

"was received" to determine which state has the most significant relationship to the communication. Modern communications, however, are difficult to limit to one location. Here, the client, based in New York, called and emailed with her lawyers in South Carolina. Unable to assign a specific location to the calls or emails, the court instead considered "the state where the relationship between the parties was centered" and concluded that, even though the client was at all times in New York, the "relationship" with counsel was centered in South Carolina and South Carolina privilege law should apply. *Id.* at 805.

### D. Application of the Common Interest Doctrine in a Transactional Context

The common interest doctrine can apply in a transactional context, but the "interest" common to the parties must be predominantly *legal* in nature rather than commercial. *Compare Schaeffler v. U.S.*, 806 F.3d 34, 41 (2d Cir. 2015) (holding that common interest doctrine protected tax analyses prepared for a client company and shared with a consortium of lenders in the context of a corporate refinancing and restructuring transaction because the lenders and the company shared a common legal interest in the tax treatment of the transaction and such treatment would likely involve a "legal encounter with the IRS"); *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 115 F.R.D. 308, 309 (N.D. Cal. 1987) (holding disclosure by prospective seller of patent of legal opinion letter regarding the validity and possible infringement of patent was covered by the common interest privilege, even where one reason for disclosure was to persuade the prospective buyer, where buyer and seller faced likelihood of joint litigation over the patent); *with Corning Inc. v. SRU Biosystems, LLC*, 223 F.R.D. 189, 190 (D. Del. 2004) (holding that communications made during negotiations between two corporations were not privileged because they were made for the purpose of persuading one corporation to invest in the other); *TIFD III-E Inc. v. U.S.*, 223 F.R.D. 47, 50 (D. Conn. 2004) (holding that communications shared between parties entering into a transaction to form partnership were not covered by common interest privilege because they were exchanged in furtherance of a business goal, not a legal goal); *Katz v. AT&T Corp.*, 191 F.R.D. 433, 438 (E.D. Pa. 2000) (patent licensing company had to disclose documents relating to negotiation of sublicensing agreement because negotiating parties never shared a common legal interest until the sublicense agreement was signed).

The best way to understand these cases is to recall that, in the context of a single attorney-client relationship, business advice (as opposed to legal advice) is not protected. This same distinction applies in the context of the common interest doctrine. If the parties' common interest is predominantly business, then

the common interest doctrine does not protect communications among them. Conversely, if the common interest is predominantly legal, then the common interest doctrine will protect communications among the clients. The legal standard is easy to articulate, but application can be difficult because often times the distinction between legal and business interests are blurred.

### E. Application of the Common Interest Doctrine in the Bankruptcy Context

The common interest doctrine applies in bankruptcy, and often arises in context of plan confirmation discovery. In *In re Quigley Co.*, No. 04-15739 (SMB), 2009 WL 9034027, at *4 (Bankr. S.D.N.Y. Apr. 14, 2009), certain creditors opposing confirmation of the debtor's plan sought discovery of documents shared between the debtor and its non-debtor parent related to the negotiation and development of the plan. The objecting creditors argued that the debtors and non-debtor parent held divergent interests because the debtor (as a fiduciary to all creditors) was duty-bound to procure the largest possible contribution from its non-debtor parent to fund a trust to be established under the proposed plan. The non-debtor parent, on the other hand, owed no duties to the debtor or its creditors and wanted to minimize its contributions. Despite these differences, the bankruptcy court determined that the debtor and its non-debtor parent nevertheless had a common legal interest because they (i) were defendants in numerous prepetition asbestos suits, (ii) for decades had coordinated a joint defense, and (iii) had engaged in joint strategy to file and prosecute the plan, which would resolve their joint asbestos-related liabilities. As a result, "they share[d] a common interest and overall strategy geared toward the confirmation of [debtor's] plan" and the plan-related communications were therefore protected by the common interest doctrine. *Id*.

In *In re Leslie Controls*, 437 B.R. 493 (Bankr. D. Del. 2010), the Delaware bankruptcy court addressed a confirmation discovery dispute centered around privileged memoranda prepared by the debtor's counsel concerning strategies in anticipation of possible litigation in a bankruptcy case and/or subsequent insurance coverage litigation. The debtor shared the memoranda before its bankruptcy filing with counsel for an ad hoc committee of asbestos claimants and a proposed future claims representative in furtherance of developing a consensual plan of reorganization. The objecting insurers argued that the parties did not share a common interest with respect to insurance proceeds because, at the time the memoranda were shared prepetition, the parties were adversaries (at least until they reached agreement on a plan). The bankruptcy court rejected a *per se* rule that parties engaged in negotiations could never

share a common interest and opted instead for a case-by-case analysis. The bankruptcy court concluded that, notwithstanding ongoing plan negotiations and the fact that the parties had disparate interests in allocating the insurance pool, they shared a common interest in maximizing insurance coverage.

In *In re Tribune*, 2011 WL 386827 (Bankr. D. Del. Feb. 3, 2011), the Delaware bankruptcy court addressed discovery in the context of competing plans. Specifically, certain noteholders (who proposed a competing plan) sought discovery from the debtors, the creditors' committee and certain lenders with respect to their negotiation of an LBO-related litigation settlement in their own plan (the "DCL Plan"). The noteholders argued that the debtor and committee did not have a common legal interest with the lenders because (a) the debtor and the committee sought to maximize the payment from the lenders while (b) the lenders sought to pay as little as possible to resolve the litigation claims. The bankruptcy court disagreed and held that once the proponents of the DCL Plan agreed upon material terms of a settlement, they shared a common legal interest of obtaining approval of the settlement through plan confirmation.

Finally, in *Imerys Talc America, Inc.*, No. 19-10289, ECF No. 3004 (Bankr. Del. Feb. 23, 2021) (Letter Opinion), certain creditors sought discovery of plan-related communications (a) among the joint plan proponents (the debtors, the tort claimants committee and the future claimants representative and (b) between the debtor and its non-debtor parent. The Delaware bankruptcy court held that plan-related communications among the plan proponents and non-debtor parent after they reached an agreement on the plan's material terms were protected by the common-interest doctrine because, as of that date, the plan proponents shared "a common legal interest in confirming the Plan." The bankruptcy court, however, permitted discovery of communications between the debtor and its non-debtor parent before they reached agreement on a settlement to fund a plan trust. To reach this conclusion, the court distinguished *Quigley*, which applied the common interest doctrine to protect pre-plan communications between the debtor and its non-debtor parent. Unlike *Quigley*, there was no evidence in *Imerys* that the non-debtor parent and debtor were co-defendants in pre-bankruptcy asbestos suits or a decades-long coordinated defense. Thus, they had a commercial interest (as parent and subsidiary), but not a common legal interest. The bankruptcy court also found that the common-interest doctrine did not protect communications among the plan proponents regarding trust-distribution procedures ("TDPs") because TDPs address how a trust's assets will be distributed among claimants and, therefore, implicate adversity of interests among the plan

proponents rather than commonality. These distinctions illustrate that the determination of commonality is fact-specific and not a one-size-fits-all approach.

### F. When Does the Common Interest Doctrine Take Effect?

It is common in complex Chapter 11 cases for one-time adversaries to become allies during the course of the case. Where adversaries have become allies, a common interest privilege may apply to their communications at such time as a court determines the parties shared a common legal interest. Courts have varied in determining what that point of time should be, however. *See Tribune*, 2011 WL 386827, at *18 (finding common interest privilege attached to communications after court filing of term sheet setting forth material terms of agreement among previously adverse parties); *see also In re Leslie Controls*, 437 B.R. at 502-503 (holding common interest privilege attached to communications among debtor, committee and future claimants' representative because they shared common legal interest once they began working together to recover insurance proceeds for the estate, even though they remained adverse as to how to divide the proceeds); *In re Imerys Talc America, Inc.*, Case No. 19-10289, Dkt. 3004 at 8 (plan proponents shared a common legal interest upon reaching an agreement in principle on the material terms of Chapter 11 plan); *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, No. 17-04780, ECF No. 1652 (D.P.R. Oct. 10, 2019) (noting, in context of Rule 9019 motion to approve a settlement, that the settling parties maintained a common interest at the point of their written preliminary agreement even though it was not binding and the parties had not yet agreed on "all" material terms); *In re Almatis B.V.*, No. 10-12308, 2010 Bankr. LEXIS 6377 at *5 (Bankr. S.D.N.Y. June 21, 2010) (holding that common interest privilege arose among debtors, lenders and committee upon execution of plan support agreement).

In the transactional context, the common interest privilege may apply before the parties reach a final written agreement regarding the transaction and even if the parties never ultimately come to an agreement or pursue a joint enterprise. *See*, *e.g.*, *Katz v. AT&T Corp.*, 191 F.R.D. 433, 437-38 (E.D. Pa. 2000) (noting that common interest privilege may apply even if there is no final agreement or the parties do not ultimately pursue the enterprise over which they shared a common interest); *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 115 F.R.D. 308, 310 (N.D. Cal. 1987) (holding that common interest applied to communications in anticipation of litigation about proposed merger even though the parties did not ultimately merge and litigation never occurred).

### G. Must The Claimed Common Interest Be Memorialized?

There is no requirement that the parties have a final, formal agreement to advance a particular legal interest, but such an agreement or similar written markers aid in proving the existence of a common legal interest. *See*, *e.g.*, *Hunton & Williams v. U.S. Dep't of Justice*, 590 F.3d 272, 282 (4th Cir. 2010) (written agreement explained parties' shared interest in limiting scope of any injunction in pending litigation, and clearly manifested agreement to work together toward that end); *HSH Nordbank AG New York Branch v. Swerdlow*, 259 F.R.D. 64, 72, n.12 (S.D.N.Y. 2009) (noting that common interest doctrine may apply where a party has demonstrated the existence of an agreement to pursue a common legal strategy but the agreement need not be in writing); *In re Cherokee Simeon Venture I, LLC*, 2012 WL 12940975, at *2 (Bankr. D. Del. 2012) (holding that common interest does not require a formal written agreement and a "meeting of the minds is sufficient provided communications were given in confidence and the clients reasonably understood them to be so given."); *Longview Power, LLC et al. v. First American Title Ins. Co.*, No. 14-50369 (BLS) at *4 (Bankr. D. Del. Dec. 10, 2014) (Letter Ruling) (finding "common interest" markers on communications when sent were indicative of parties' intent at the time communication were made and supported argument that the parties were developing a common legal strategy, even in the absence of a formal common interest agreement).

### H. Burden of Proof

The party asserting the common interest privilege has the burden of first establishing the underlying claimed privilege and then establishing that the parties had the requisite shared legal interest. *See Waymo LLC v. Uber Technologies, Inc.*, 870 F.3d 1350, 1360 (Fed. Cir. 2017) ("[T]o invoke the common interest doctrine, a party first must demonstrate the elements of privilege and then must demonstrate that the communication was made in pursuit of common legal claims including common defenses."); *Acceleration Bay LLC v. Activision Blizzard, Inc.*, No. 16-cv-00453, at *2 (D. Del. Feb. 9, 2018) (noting that party asserting privilege had burden of establishing the elements of attorney-client privilege and elements of common interest privilege); The showing "must be based on competent evidence, usually through the admission of affidavits, deposition testimony or other admissible evidence." *Gulf Islands Leasing, Inc. v. Bombardier Capital, Inc.*, 215 F.R.D. 466, 472 (S.D.N.Y. 2003). As such, the "burden cannot be met by 'mere conclusory

or ipse dixit assertions' in unsworn motion papers authored by attorneys." *Id.* (citing *von Bulow by Auersperg v. von Bulow*, 811 F.2d 136, 146 (2d Cir. 1987)).

## I. Conclusion

While there are no bright line rules, parties who intend to assert the protection of the common interest doctrine should keep in mind the following:

- An underlying privilege must be established, *i.e.*, attorney-client privilege and/or work product doctrine;
- Parties must share a common legal, not just business, interest, and this legal interest may not be applied broadly, but rather decided on an issue-by-issue basis given the specifics of the parties' relationship;
- Which privilege law will apply, given the subtle but important differences between the laws of different circuits and different states;
- Depending on the applicable law, the common legal interest must be "nearly identical" or "substantially similar";
- Whether it is necessary for there to be pending or anticipated litigation depends on the applicable law;
- One-time adversaries can share common legal interests when they settle their dispute, but courts have varied in determining when the common interest arises;
- Although an executed common interest agreement is not required, written evidence, *e.g.*, marking communications and documents as being subject to a common legal interest, may support a finding of common interest privilege.

# UNCITRAL Model Law on Enterprise Group Insolvency

## Part A. Core provisions

## Chapter 1. General provisions

### Preamble

The purpose of this Law is to provide effective mechanisms to address cases of insolvency affecting the members of an enterprise group, in order to promote the objectives of:

(a) Cooperation between courts and other competent authorities of this State and foreign States involved in those cases;

(b) Cooperation between insolvency representatives appointed in this State and foreign States in those cases;

(c) Development of a group insolvency solution for the whole or part of an enterprise group and cross-border recognition and implementation of that solution in multiple States;

(d) Fair and efficient administration of insolvencies concerning enterprise group members that protects the interests of all creditors of those enterprise group members and other interested persons, including the debtors;

(e) Protection and maximization of the overall combined value of the assets and operations of enterprise group members affected by insolvency and of the enterprise group as a whole;

(f) Facilitation of the rescue of financially troubled enterprise groups, thereby protecting investment and preserving employment; and

(g) Adequate protection of the interests of the creditors of each enterprise group member participating in a group insolvency solution and of other interested persons.

### Article 1. Scope

1. This Law applies to enterprise groups where insolvency proceedings have commenced for one or more of its members, and addresses the conduct and administration of those insolvency proceedings and cooperation between those insolvency proceedings.

2. This Law does not apply to a proceeding concerning [*designate any types of entity, such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law*].

### Article 2. Definitions

For the purposes of this Law:

(a) "Enterprise" means any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law;

(b) "Enterprise group" means two or more enterprises that are interconnected by control or significant ownership;

(c) "Control" means the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise;

(d) "Enterprise group member" means an enterprise that forms part of an enterprise group;

(e) "Group representative" means a person or body, including one appointed on an interim basis, authorized to act as a representative of a planning proceeding;

(f) "Group insolvency solution" means a proposal or set of proposals developed in a planning proceeding for the reorganization, sale or liquidation of some or all of the assets and operations of one or more enterprise group members, with the goal of protecting, preserving, realizing or enhancing the overall combined value of those enterprise group members;

(g) "Planning proceeding" means a main proceeding commenced in respect of an enterprise group member provided:

(i) One or more other enterprise group members are participating in that main proceeding for the purpose of developing and implementing a group insolvency solution;

(ii) The enterprise group member subject to the main proceeding is likely to be a necessary and integral participant in that group insolvency solution; and

(iii) A group representative has been appointed;

Subject to the requirements of subparagraphs (g)(i) to (iii), the court may recognize as a planning proceeding a proceeding that has been approved by a court with jurisdiction over a main proceeding of an enterprise group member for the purpose of developing a group insolvency solution within the meaning of this Law;

(h) "Insolvency proceeding" means a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of an enterprise group member debtor are or were subject to control or supervision by a court or other competent authority for the purpose of reorganization or liquidation;

(i) "Insolvency representative" means a person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or liquidation of the enterprise group member debtor's assets or affairs or to act as a representative of the insolvency proceeding;

(j) "Main proceeding" means an insolvency proceeding taking place in the State where the enterprise group member debtor has the centre of its main interests;

(k) "Non-main proceeding" means an insolvency proceeding, other than a main proceeding, taking place in a State where the enterprise group member debtor has an establishment within the meaning of subparagraph (l) of this article; and

(l) "Establishment" means any place of operations where the enterprise group member debtor carries out a non-transitory economic activity with human means and goods or services.

**Article 3. International obligations of this State**

To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party

with one or more other States, the requirements of the treaty or agreement prevail.

**Article 4. Jurisdiction of the enacting State**

Where an enterprise group member has the centre of its main interests in this State, nothing in this Law is intended to:

(a) Limit the jurisdiction of the courts of this State with respect to that enterprise group member;

(b) Limit any process or procedure (including any permission, consent or approval) required in this State in respect of that enterprise group member's participation in a group insolvency solution being developed in another State;

(c) Limit the commencement of insolvency proceedings in this State, if required or requested; or

(d) Create an obligation to commence an insolvency proceeding in this State in respect of that enterprise group member when no such obligation exists.

**Article 5. Competent court or authority**

The functions referred to in this Law relating to the recognition of a foreign planning proceeding and cooperation with courts, insolvency representatives and any group representative appointed shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*].

**Article 6. Public policy exception**

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.

**Article 7. Interpretation**

In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

**Article 8. Additional assistance under other laws**

Nothing in this Law limits the power of a court or an insolvency representative to provide additional assistance to a group representative under other laws of this State.

## Chapter 2. Cooperation and coordination

**Article 9. Cooperation and direct communication between a court of this State and other courts, insolvency representatives and any group representative appointed**

1. In the matters referred to in article 1, the court shall cooperate to the maximum extent possible with other courts, insolvency representatives and any group representative appointed, either directly or through an insolvency representative appointed in this State or a person appointed to act at the direction of the court.

2. The court is entitled to communicate directly with, or to request information or assistance directly from, other courts, insolvency representatives or any group representative appointed.

**Article 10. Cooperation to the maximum extent possible under article 9**

For the purposes of article 9, cooperation to the maximum extent possible may be implemented by any appropriate means, including:

(a) Communication of information by any means considered appropriate by the court;

(b) Participation in communication with other courts, an insolvency representative or any group representative appointed;

(c) Coordination of the administration and supervision of the affairs of enterprise group members;

(d) Coordination of concurrent insolvency proceedings commenced with respect to enterprise group members;

(e) Appointment of a person or body to act at the direction of the court;

(f) Approval and implementation of agreements concerning the coordination of insolvency proceedings relating to two or more enterprise group members, including where a group insolvency solution is being developed;

(g) Cooperation among courts as to how to allocate and provide for the costs associated with cooperation and communication;

(h) Use of mediation or, with the consent of the parties, arbitration, to resolve disputes between enterprise group members concerning claims;

(i) Approval of the treatment and filing of claims between enterprise group members;

(j) Recognition of the cross-filing of claims by or on behalf of enterprise group members and their creditors; and

(k) [*The enacting State may wish to list additional forms or examples of cooperation*].

**Article 11. Limitation of the effect of communication under article 9**

1. With respect to communication under article 9, a court is entitled at all times to exercise its independent jurisdiction and authority with respect to matters presented to it and the conduct of the parties appearing before it.

2. Participation by a court in communication pursuant to article 9, paragraph 2, does not imply:

(a) A waiver or compromise by the court of any powers, responsibilities
or authority;

(b) A substantive determination of any matter before the court;

(c) A waiver by any of the parties of any of their substantive or procedural rights;

(d) A diminution of the effect of any of the orders made by the court;

(e) Submission to the jurisdiction of other courts participating in the communication; or

(f) Any limitation, extension or enlargement of the jurisdiction of the participating courts.

**Article 12. Coordination of hearings**

1. A court may conduct a hearing in coordination with another court.

2. The substantive and procedural rights of the parties and the jurisdiction of the court may be safeguarded by the parties reaching agreement on the conditions to govern the coordinated hearing and the court approving that agreement.

3. Notwithstanding the coordination of the hearing, the court remains responsible for reaching its own decision on the matters before it.

**Article 13. Cooperation and direct communication between a group representative, insolvency representatives and courts**

1. A group representative appointed in this State shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with other courts and insolvency representatives of other enterprise group members to facilitate the development and implementation of a group insolvency solution.

2. A group representative is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with or to request information or assistance directly from other courts and insolvency representatives of other enterprise group members.

**Article 14. Cooperation and direct communication between an insolvency representative appointed in this State, other courts, insolvency representatives of other group members and any group representative appointed**

1. An insolvency representative appointed in this State shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with other courts, insolvency representatives of other enterprise group members and any group representative appointed.

2. An insolvency representative appointed in this State is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with or to request information or assistance directly from other courts, insolvency representatives of other enterprise group members and any group representative appointed.

**Article 15. Cooperation to the maximum extent possible under articles 13 and 14**

For the purposes of article 13 and article 14, cooperation to the maximum extent possible may be implemented by any appropriate means, including:

(a) Sharing and disclosure of information concerning enterprise group members, provided appropriate arrangements are made to protect confidential information;

(b) Negotiation of agreements concerning the coordination of insolvency proceedings relating to two or more enterprise group members, including where a group insolvency solution is being developed;

(c) Allocation of responsibilities between an insolvency representative appointed in this State, insolvency representatives of other group members and any group representative appointed;

(d) Coordination of the administration and supervision of the affairs of the enterprise group members; and

(e) Coordination with respect to the development and implementation of a group insolvency solution, where applicable.

**Article 16. Authority to enter into agreements concerning the coordination of insolvency proceedings**

An insolvency representative and any group representative appointed may enter into an agreement concerning the coordination of insolvency proceedings relating to two or more enterprise group members, including where a group insolvency solution is being developed.

**Article 17. Appointment of a single or the same insolvency representative**

A court may coordinate with other courts with respect to the appointment and recognition of a single or the same insolvency representative to administer and coordinate insolvency proceedings concerning members of the same enterprise group.

**Article 18. Participation by enterprise group members in an insolvency proceeding commenced in this State**

1. Subject to paragraph 2, if an insolvency proceeding has commenced in this State with respect to an enterprise group member that has the centre of its main interests in this State, any other enterprise group member may participate in that insolvency proceeding for the purpose of facilitating cooperation and coordination under this Law, including developing and implementing a group insolvency solution.

2. An enterprise group member that has the centre of its main interests in another State may participate in an insolvency proceeding referred to in paragraph 1 unless a court in that other State prohibits it from so doing.

3. Participation by any other enterprise group member in an insolvency proceeding referred to in paragraph 1 is voluntary. An enterprise group member may commence its participation or opt out of participation at any stage of such a proceeding.

4. An enterprise group member participating in an insolvency proceeding referred to in paragraph 1 has the right to appear, make written submissions and be heard in that proceeding on matters affecting that enterprise group member's interests and to take part in the development and implementation of a group insolvency solution. The sole fact that an enterprise group member is participating in such a proceeding does not subject the enterprise group member to the jurisdiction of the courts of this State for any purpose unrelated to that participation.

5. A participating enterprise group member shall be notified of actions taken with respect to the development of a group insolvency solution.

## Chapter 3. Appointment of a group representative and relief available in a planning proceeding in this State

**Article 19. Appointment of a group representative and authority to seek relief**

1. When the requirements of article 2, subparagraphs (g)(i) and (ii), are met, the court may appoint a group representative. Upon that appointment,

a group representative shall seek to develop and implement a group insolvency solution.

2. To support the development and implementation of a group insolvency solution, a group representative is authorized to seek relief pursuant to this article and article 20 in this State.

3. A group representative is authorized to act in a foreign State on behalf of the planning proceeding and, in particular, to:

(a) Seek recognition of the planning proceeding and relief to support the development and implementation of a group insolvency solution;

(b) Seek to participate in a foreign proceeding relating to an enterprise group member participating in the planning proceeding; and

(c) Seek to participate in a foreign proceeding relating to an enterprise group member not participating in the planning proceeding.

**Article 20. Relief available to a planning proceeding**

1. To the extent needed to preserve the possibility of developing or implementing a group insolvency solution or to protect, preserve, realize or enhance the value of assets of an enterprise group member subject to or participating in a planning proceeding or the interests of the creditors of such an enterprise group member, the court, at the request of the group representative, may grant any appropriate relief, including:

(a) Staying execution against the assets of the enterprise group member;

(b) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member;

(c) Staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations, or liabilities of the enterprise group member;

(d) Entrusting the administration or realization of all or part of the assets of the enterprise group member located in this State to the group representative or another person designated by the court, in order to protect, preserve, realize or enhance the value of assets;

(e) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the assets, affairs, rights, obligations, or liabilities of the enterprise group member;

(f) Staying any insolvency proceeding concerning a participating enterprise group member;

(g) Approving arrangements concerning the funding of the enterprise group member and authorizing the provision of finance under those funding arrangements; and

(h) Granting any additional relief that may be available to an insolvency representative under the laws of this State.

2. Relief under this article may not be granted with respect to the assets and operations located in this State of any enterprise group member participating in a planning proceeding if that enterprise group member is not subject to an insolvency proceeding, unless an insolvency proceeding was not

commenced for the purpose of minimizing the commencement of insolvency proceedings in accordance with this Law.

3. With respect to the assets and operations located in this State of an enterprise group member that has the centre of its main interests in another State, relief under this article may only be granted if that relief does not interfere with the administration of insolvency proceedings taking place in that other State.

## Chapter 4. Recognition of a foreign planning proceeding and relief

### Article 21. Application for recognition of a foreign planning proceeding

1. A group representative may apply in this State for recognition of the foreign planning proceeding to which the group representative was appointed.

2. An application for recognition shall be accompanied by:

(a) A certified copy of the decision appointing the group representative; or

(b) A certificate from the foreign court affirming the appointment of the group representative; or

(c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence concerning the appointment of the group representative that is acceptable to the court.

3. An application for recognition shall also be accompanied by:

(a) A statement identifying each enterprise group member participating in the foreign planning proceeding;

(b) A statement identifying all members of the enterprise group and all insolvency proceedings that are known to the group representative that have been commenced in respect of enterprise group members participating in the foreign planning proceeding; and

(c) A statement to the effect that the enterprise group member subject to the foreign planning proceeding has the centre of its main interests in the State in which that planning proceeding is taking place and that that proceeding is likely to result in added overall combined value for the enterprise group members subject to or participating in that proceeding.

4. The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

5. The sole fact that an application pursuant to this Law is made to a court in this State by a group representative does not subject the group representative to the jurisdiction of the courts of this State for any purpose other than the application.

6. The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.

### Article 22. Provisional relief that may be granted upon application for recognition of a foreign planning proceeding

1. From the time of filing an application for recognition of a foreign planning proceeding until the application is decided upon, where relief is urgently needed to preserve the possibility of developing or implementing a

group insolvency solution or to protect, preserve, realize or enhance the value of assets of an enterprise group member subject to or participating in a planning proceeding or the interests of the creditors of such an enterprise group member, the court may, at the request of the group representative, grant relief of a provisional nature, including:

(a) Staying execution against the assets of the enterprise group member;

(b) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member;

(c) Staying any insolvency proceeding concerning the enterprise group member;

(d) Staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations, or liabilities of the enterprise group member;

(e) In order to protect, preserve, realize or enhance the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy, entrusting the administration or realization of all or part of the assets of the enterprise group member located in this State to an insolvency representative appointed in this State. Where that insolvency representative is not able to administer or realize all or part of the assets of the enterprise group member located in this State, the group representative or another person designated by the court may be entrusted with that task;

(f) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the assets, affairs, rights, obligations, or liabilities of the enterprise group member;

(g) Approving arrangements concerning the funding of the enterprise
group member and authorizing the provision of finance under those funding arrangements; and

(h) Granting any additional relief that may be available to an insolvency representative under the laws of this State.

2. [*Insert provisions of the enacting State relating to notice*.]

3. Unless extended under article 24, paragraph 1 (a), the relief granted under this article terminates when the application for recognition is decided upon.

4. Relief under this article may not be granted with respect to the assets and operations located in this State of any enterprise group member participating in a foreign planning proceeding if that enterprise group member is not subject to an insolvency proceeding, unless an insolvency proceeding was not commenced for the purpose of minimizing the commencement of insolvency proceedings in accordance with this Law.

5. The court may refuse to grant relief under this article if such relief would interfere with the administration of an insolvency proceeding taking place where an enterprise group member participating in the foreign planning proceeding has the centre of its main interests.

**Article 23. Recognition of a foreign planning proceeding**

1. A foreign planning proceeding shall be recognized if:

(a) The application meets the requirements of article 21, paragraphs 2 and 3;

(b) The proceeding is a planning proceeding within the meaning of article 2, subparagraph (g); and

(c) The application has been submitted to the court referred to in article 5.

2. An application for recognition of a foreign planning proceeding shall be decided upon at the earliest possible time.

3. Recognition may be modified or terminated if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

4. For the purposes of paragraph 3, the group representative shall inform the court of material changes in the status of the foreign planning proceeding or in the status of its own appointment occurring after the application for recognition is made, as well as changes that might bear upon the relief granted on the basis of recognition.

**Article 24. Relief that may be granted upon recognition of a foreign planning proceeding**

1. Upon recognition of a foreign planning proceeding, where necessary to preserve the possibility of developing or implementing a group insolvency solution or to protect, preserve, realize or enhance the value of assets of an enterprise group member subject to or participating in the foreign planning proceeding or the interests of the creditors of such an enterprise group member, the court, at the request of the group representative, may grant any appropriate relief, including:

(a) Extending any relief granted under article 22, paragraph 1;

(b) Staying execution against the assets of the enterprise group member;

(c) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member;

(d) Staying any insolvency proceeding concerning the enterprise group member;

(e) Staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations, or liabilities of the enterprise group member;

(f) In order to protect, preserve, realize or enhance the value of assets for the purpose of developing or implementing a group insolvency solution, entrusting the administration or realization of all or part of the assets of the enterprise group member located in this State to an insolvency representative appointed in this State. Where that insolvency representative is not able to administer or realize all or part of the assets of the enterprise group member located in this State, the group representative or another person designated by the court may be entrusted with that task;

(g) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the assets, affairs, rights, obligations, or liabilities of the enterprise group member;

(h) Approving arrangements concerning the funding of the enterprise
group member and authorizing the provision of finance under those funding arrangements; and

(i) Granting any additional relief that may be available to an insolvency representative under the laws of this State.

2. In order to protect, preserve, realize or enhance the value of assets for the purposes of developing or implementing a group insolvency solution, the distribution of all or part of the enterprise group member's assets located in this State may be entrusted to an insolvency representative appointed in this State. Where that insolvency representative is not able to distribute all or part of the assets of the enterprise group member located in this State, the group representative or another person designated by the court may be entrusted with that task.

3. Relief under this article may not be granted with respect to the assets and operations located in this State of any enterprise group member participating in a foreign planning proceeding if that enterprise group member is not subject to an insolvency proceeding, unless an insolvency proceeding was not commenced for the purpose of minimizing the commencement of insolvency proceedings in accordance with this Law.

4. The court may refuse to grant relief under this article if such relief would interfere with the administration of an insolvency proceeding taking place where an enterprise group member participating in the foreign planning proceeding has the centre of its main interests.

**Article 25. Participation of a group representative in proceedings in this State**

1. Upon recognition of a foreign planning proceeding, the group representative may participate in any proceeding concerning an enterprise group member that is participating in the foreign planning proceeding.

2. The court may approve participation by a group representative in any insolvency proceeding in this State concerning an enterprise group member that is not participating in the foreign planning proceeding.

**Article 26. Approval of a group insolvency solution**

1. Where a group insolvency solution affects an enterprise group member that has the centre of its main interests or an establishment in this State, the portion of the group insolvency solution affecting that enterprise group member shall have effect in this State once it has received any approvals and confirmations required in accordance with the law of this State.

2. A group representative is entitled to apply directly to a court in this State to be heard on issues related to approval and implementation of a group insolvency solution.

## Chapter 5. Protection of creditors and other interested persons

**Article 27. Protection of creditors and other interested persons**

1. In granting, denying, modifying or terminating relief under this Law, the court must be satisfied that the interests of the creditors of each enterprise group member subject to or participating in a planning proceeding

and other interested persons, including the enterprise group member subject to the relief to be granted, are adequately protected.

2. The court may subject relief granted under this Law to conditions it considers appropriate, including the provision of security.

3. The court may, at the request of the group representative or a person affected by relief granted under this Law, or at its own motion, modify or terminate such relief.

## Chapter 6. Treatment of foreign claims

### Article 28. Undertaking on the treatment of foreign claims: non-main proceedings

1. To minimize the commencement of non-main proceedings or facilitate the treatment of claims in an enterprise group insolvency, a claim that could be brought by a creditor of an enterprise group member in a non-main proceeding in another State may be treated in a main proceeding commenced in this State in accordance with the treatment it would be accorded in the non-main proceeding, provided:

(a) An undertaking to accord such treatment is given by the insolvency representative appointed in the main proceeding in this State. Where a group representative is appointed, the undertaking should be given jointly by the insolvency representative and the group representative;

(b) The undertaking meets the formal requirements, if any, of this State; and

(c) The court approves the treatment to be accorded in the main proceeding.

2. An undertaking given under paragraph 1 shall be enforceable and binding on the insolvency estate of the main proceeding.

### Article 29. Powers of the court of this State with respect to an undertaking under article 28

If an insolvency representative or a group representative from another State in which a main proceeding is pending has given an undertaking in accordance with article 28, a court in this State, may:

(a) Approve the treatment to be provided in the foreign main proceeding
to the claims that might otherwise be brought in a non-main proceeding in this
State; and

(b) Stay or decline to commence a non-main proceeding.

## Part B. Supplemental provisions

### Article 30. Undertaking on the treatment of foreign claims: main proceedings

To minimize the commencement of main proceedings or to facilitate the treatment of claims that could otherwise be brought by a creditor in an insolvency proceeding in another State, an insolvency representative of an enterprise group member or a group representative appointed in this State may undertake to accord to those claims the treatment in this State that they would have received in an insolvency proceeding in that other State and the

court in this State may approve that treatment. Such undertaking shall be subject to the formal requirements, if any, of this State and shall be enforceable and binding on the insolvency estate.

**Article 31. Powers of a court of this State with respect to an undertaking under article 30**

If an insolvency representative or a group representative from another State in which an insolvency proceeding is pending has given an undertaking under article 30, a court in this State may:

(a) Approve the treatment in the foreign insolvency proceeding of the claims that might otherwise be brought in a proceeding in this State; and

(b) Stay or decline to commence a main proceeding.

**Article 32. Additional relief**

1. If, upon recognition of a foreign planning proceeding, the court is satisfied that the interests of the creditors of affected enterprise group members would be adequately protected in that proceeding, particularly where an undertaking under article 28 or 30 has been given, the court, in addition to granting any relief described in article 24, may stay or decline to commence an insolvency proceeding in this State with respect to any enterprise group member participating in the foreign planning proceeding.

2. Notwithstanding article 26, if, upon submission of a proposed group insolvency solution by the group representative, the court is satisfied that the interests of the creditors of the affected enterprise group member are or will be adequately protected, the court may approve the relevant portion of the group insolvency solution and grant any relief described in article 24 that is necessary for implementation of the group insolvency solution.

April 6, 2022

MEMORANDUM

I believe it is time to consider adoption of the Model Law on Enterprise Groups ("MLEG") as an amendment to existing chapter 15, which is the U.S. adoption of the Model Law on Cross-Border Insolvency ("MLCBI").

The MLEG is itself overly cumbersome because it was drafted as a standalone law that repeats many of the provisions of the MLCBI, in some cases making minor, immaterial changes. The UNCITRAL Secretariat recently published a document that integrates the MLCBI with the MLEG and the Model Law on the Enforcement of Insolvency-Related Judgments ("MLIJ"). That compilation, sometimes called the "three-fer," has now been published on the UNCITRAL website at uncitral.un.org/en/texts/insolvency. It compounds the complexity by perpetuating immaterial changes, as the Secretariat believed it could not make any changes or omit any provisions in producing a consolidated version.

An amendment to chapter 15 that adopted the material provisions of the MLEG could be accomplished by the following few amendments:

1. We need only a few key definitions from Article 2 of the MLEG: "enterprise" and "enterprise group;" "control;" "enterprise group member;" "group representative;" "group insolvency solution;" and "planning proceeding."

2. We need Articles 18 and 19 of the MLEG providing for a "planning proceeding" and the appointment of a "group representative" in a case in the United States.

3. We need Articles 21 and 23 providing for recognition of a foreign planning proceeding, although this may be accomplished more simply by an amendment to sections 1515-1518 of chapter 15 providing for recognition of a foreign proceeding.

4. We need Articles 25 and 26 providing for participation of a group representative in proceedings in the United States and approval of a group insolvency solution.

5. We need Articles 28 through 32 of the MLEG providing that a foreign creditor can be treated in a proceeding in the United States in the manner it would receive in a foreign proceeding and that an undertaking may be provided to assure such treatment (the so-called virtual proceeding). The Model Law provides such treatment for foreign non-main proceedings and makes such treatment for foreign main proceedings a "supplemental provision," but I suggest there is no good reason for the differentiation. These provisions could be more simply adopted as an amendment to section 1513 providing for access of foreign creditors to a case under title 11.

Other conforming amendments could make other provisions of chapter 15 applicable to group proceedings by the addition of a word or two.

The foregoing amendments do not substantively change the law applicable to enterprise groups, but they point the way to greater consideration of group issues both in cross-border and in domestic cases. I believe they would be sufficiently non-controversial to obtain the support of all interested groups and passage in the current Congress. Adoption in the United States would be highly influential on other countries' consideration of this law. I look forward to our further discussion of this matter. Best personal regards.

Allan Gropper

# Faculty

**Gerard DiConza** is a partner in the Bankruptcy, Restructuring and Insolvency Litigation Group at Archer & Greiner in New York and has more than 25 years of experience in chapter 11 restructurings and representing estate fiduciaries in complex bankruptcy litigation. His clients include fiduciaries in litigation involving issues of fraud, alter ego, breach of fiduciary duties, bad faith, fraudulent and preferential transfers, debtors, creditors, purchasers, investors, committees and other parties in interest in bankruptcy and out-of-court restructurings. He also advises investment bankers, financial advisors and other professionals in connection with retention and payment issues. Following law school, Mr. DiConza clerked for Hon. Jeremiah E. Berk, U.S. Bankruptcy Judge for the Southern District of New York. He frequently speaks on bankruptcy topics and is currently a lecturer on restructurings at the New York University School of Professional Studies. He received his B.B.A. in 1991 from Hofstra University; his J.D. in 1994 from St. John's Law School, where he was editor-in-chief of the *ABI Law Review*; and his LL.M. in corporate law from New York University School of Law in 1998.

**Jonathan L. Flaxer** is a partner with Golenbock Eiseman Assor Bell & Peskoe LLP in New York and has devoted his legal career to his business bankruptcy practice. He represents chapter 11 debtors and trustees, creditors' committees, indenture trustees, distressed-debt investors, distressed-asset-acquirers and landlords. Mr. Flaxer also has led numerous successful out-of-court workouts. He is active in several professional organizations and writes and lectures on bankruptcy-related topics. Mr. Flaxer was recently appointed to serve as chapter 11 trustee in cases involving a law firm, a residential building and a large construction company. He is AV-rated by Martindale-Hubble, has has authored several articles, has testified before a congressional subcommittee on bankruptcy-related issues, and is a member of the panel of mediators for the U.S. Bankruptcy Court in the Southern District of New York. Mr. Flaxer is admitted to practice in the State of New York and before the U.S. District Courts for the Southern and Eastern Districts of New York, the U.S. Court of Appeals for the Second Circuit and the U.S. Supreme Court. He is a member of the New York City Bar Association's Task Force on Puerto Rico and Bankruptcy & Corporate Reorganization Committee. Mr. Flaxer received his B.A. in English literature from New York University and his J.D. from Brooklyn Law School, where he received the Cornelius W. Wickersham Constitutional Law Prize.

**Hon. Allan L. Gropper** is a former U.S. Bankruptcy Judge for the Southern District of New York, taking the bench on Oct. 4, 2000, and retiring on Jan. 9, 2015. Previously, he was a member of the law firm of White & Case and represented clients in connection with many of the nation's largest chapter 11 cases, including Manville Corp., Texaco, LTV Corp., Federated Department Stores/Allied Stores Corp., Maxwell Communications Corp., MGM, United States Lines, Pan American World Airways and Waterman Steamship Corp. He also was active in international insolvencies and restructurings and was located in the White & Case Hong Kong office during from 1999-2000. Judge Gropper presently serves as a consultant and expert witness in litigated matters and as an arbitrator and mediator. He is an adjunct professor of law at Fordham Law School, a member of the National Bankruptcy Conference and a Fellow of the American College of Bankruptcy. Judge Gropper is a member of the U.S. delegation to Working Group V (Insolvency Law) of the United Nations Commission on International Trade Law (UNCITRAL). He also is a member of the American Arbitration Association Roster of Neutrals. Judge Gropper has frequently lectured on bankruptcy-related issues

and has participated in educational sessions in several nations. He was a consultant to the European Bank for Reconstruction and Development and advised on the drafting of the first bankruptcy law adopted by the Russian Federation. Judge Gropper is a co-editor of the two-volume text *International Insolvency*, published in 2000. He graduated *cum laude* from Yale College in 1965 and from 1965-66 was a Fulbright tutor at Christ Church College in Kanpur, India. He received his J.D. *cum laude* from Harvard Law School in 1969.

**Laura R. Hall** is a partner in the Restructuring Group of Allen & Overy LLP in New York. Her cross-border bankruptcy practice focuses on assisting clients in navigating the intersection of domestic and foreign legal regimes. Ms. Hall's experience includes the representation of financial institutions, debtors, creditors and foreign representatives in state and federal courts at the trial and appellate levels. She also advises clients in distressed asset sales and out-of-court restructurings. From 2004-05, Mr. Hall clerked for Hon. Kenneth C. MacKenzie in the New Jersey Chancery Court. She is chair of the Federal Bar Council's Second Circuit Courts Committee, a Fellow of INSOL International and a member of IWIRC's New York network. She is also listed as a recommended lawyer in *Legal 500 USA*. Ms. Hall represents *pro bono* clients in immigration and family matters through Allen & Overy's partnership with Her Justice, for which she received a Commitment to Justice Award in 2019 and Allen & Overy received Firm Commitment Awards in 2018 and 2019. She received her A.B. *summa cum laude* and Phi Beta Kappa from Georgetown University in 2001 and her J.D. from Harvard Law School in 2004.

**David M. Hillman** is a partner with Proskauer Rose LLP in New York, co-head of its Private Credit Restructuring Group and a member of its Business Solutions, Governance, Restructuring & Bankruptcy Group. He has more than 25 years of experience with an emphasis on representing private credit lenders, private funds, sovereign wealth funds and other alternative lenders and distressed investors in special situations and restructurings both in and out of court, whether the lender is secured or unsecured, unitranche or structured preferred. Mr. Hillman has experience in every phase of restructuring and distressed investing, including credit bidding sales under § 363, debt-for-equity swaps, chapter 11 plans, out-of-court restructurings and foreclosures, and navigating intercreditor issues involving the relative rights of majority and minority lenders. He also litigates the issues facing private credit lenders, including issues involving plan confirmation, solvency, valuation, intercreditor disputes, financing and cash-collateral disputes, fraudulent transfers, equitable subordination, recharacterization, breach of fiduciary duty and similar disputes. Mr. Hillman was listed as a "leading individual" in bankruptcy/restructuring by *Chambers USA* and as a leader in his field by *New York Super Lawyers* as well. A member of ABI, he speaks frequently on bankruptcy-related topics, including recent decisions affecting secured creditor rights and preparing creditors for bankruptcy risks. Mr. Hillman received his B.A. *cum laude* from the State University of New York at Oneonta and his J.D. *cum laude* from Albany Law School, where he was associate editor of the *Albany Law Review*.

**Marc E. Hirschfield** is a partner with Royer Cooper Cohen Braunfeld LLC in New York and is an experienced bankruptcy and business lawyer who assists clients with insolvency and reorganization issues, and with all kinds of lending transactions. He regularly represent debtors, committees, DIP lenders, secured and unsecured creditors and acquirers of assets in both out-of-court workouts and bankruptcy cases. He is also an experienced mediator and is a member of the mediation panels in the Southern and Eastern Districts of New York and the District of Delaware. Mr. Hirschfield has been

recognized in *The Best Lawyers in America* for Bankruptcy Litigation since 2017 and in *Super Lawyers* since 2011, and he was listed in the 2021-14 editions of *Chambers USA*. He received his B.A. with honors and Phi Beta Kappa in 1989 from the State University of New York at Binghamton, and his J.D. *magna cum laude* in 1992 from the State University of New York at Buffalo School of Law, where he was editor of the *Buffalo Law Review* and a member of the Moot Court Board.

**Lorenzo Marinuzzi** is global co-chair of Morrison & Foerster LLP's Business Restructuring & Insolvency Group in New York and represents debtors, creditors and creditors' committees in complex bankruptcy cases, workouts and litigation. His cases have spanned the U.S. as well as countless industries, such as airline and cargo transportation, mortgage origination and servicing, retail, banking and finance, energy, oil and gas, and telecommunications. Mr. Marinuzzi has represented unsecured creditors' committees in numerous recent chapter 11 cases, including Windstream Holdings Inc., Cloud Peak Energy, Westmoreland Coal Co. Inc., The NORDAM Group Inc., Avaya Inc., Armstrong Energy Inc., 21st Century Oncology Holdings Inc., Peabody Energy Inc., Energy Future Holdings Corp. and UCI International Inc. He also recently represented Maxus Energy Corp. and HOVENSA LLC in their chapter 11 cases. Mr. Marinuzzi is listed as a leading lawyer in *Chambers USA* and has also been recommended by *The Legal 500 US*. He was also designated by *Turnarounds & Workouts* magazine as an Outstanding Restructuring Lawyer for his accomplishments in 2016 and 2017. Mr. Marinuzzi received his B.A. from Fordham University in 1993 and his J.D. from Fordham University School of Law in 1996, where he was a staff member of the *Fordham Urban Law Journal*.

**Daniel Polsky** is a managing director with Getzler Henrich & Associates LLC in New York and has 30 years of diversified restructuring experience, serving in advisory, expert and crisis/turnaround management roles. He has led many engagements in formal bankruptcy proceedings and out-of-court restructurings, and has advised unsecured creditors' committees, senior management of distressed businesses, bank lenders, private-equity investors and other parties-in-interest. Mr. Polsky has assisted clients in a wide variety of industries, including health care, retail, telecommunications, steel, transportation, professional services, manufacturing and distribution, among others. He has advised investors considering potential business/asset acquisitions and distressed businesses on disposition alternatives. A longtime creditors' rights practitioner, Mr. Polsky's experience includes devising case recovery and litigation strategies, developing plans of reorganization and capital structures, designing operational and strategic plans, and creating and implementing cost-reduction strategies. He has conducted various fraud and financial investigations, performed insolvency and liquidation analyses, prepared expert reports, and provided expert testimony in connection with numerous bankruptcy litigation and restructuring matters. Over the course of his restructuring career, Mr. Polsky has also provided quality and risk-management oversight, including conflict-resolution and risk-mitigation, engagement acceptance and documentation, service-line policy development, and complex client and technical matters. Prior to joining Getzler Henrich, Mr. Polsky served in a senior leadership role at a prominent global consulting firm. A member of ABI and the Turnaround Management Association, he received his Bachelor's degree from the University of Pennsylvania and his M.B.A. from New York University.