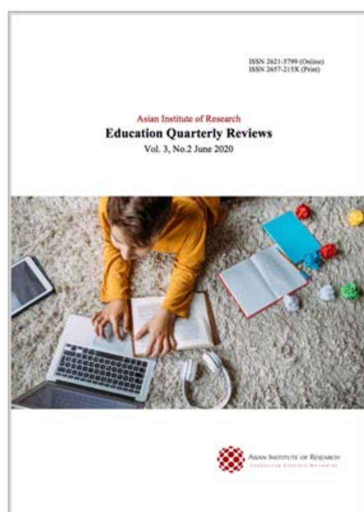

Education Quarterly Reviews

Hunter, Richard J. (Jr), Shannon, John H., Amoroso, Henry J., and Lozada, Hector R. (2020), To Declare or Not to Declare [Bankruptcy]: That May Be the Question, A Tale of Bankruptcy in Higher Education. In: *Education Quarterly Reviews*, Vol.3, No.2, 170-193.

ISSN 2621-5799

DOI: 10.31014/aior.1993.03.02.130

The online version of this article can be found at:
https://www.asianinstituteofresearch.org/

Published by:
The Asian Institute of Research

The *Education Quarterly Reviews* is an Open Access publication. It may be read, copied, and distributed free of charge according to the conditions of the Creative Commons Attribution 4.0 International license.

The Asian Institute of Research *Education Quarterly Reviews* is a peer-reviewed International Journal. The journal covers scholarly articles in the fields of education, linguistics, literature, educational theory, research, and methodologies, curriculum, elementary and secondary education, higher education, foreign language education, teaching and learning, teacher education, education of special groups, and other fields of study related to education. As the journal is Open Access, it ensures high visibility and the increase of citations for all research articles published. The *Education Quarterly Reviews* aims to facilitate scholarly work on recent theoretical and practical aspects of Education.

ASIAN INSTITUTE OF RESEARCH
Connecting Scholars Worldwide

ASIAN INSTITUTE OF RESEARCH
Connecting Scholars Worldwide

The Asian Institute of Research
Education Quarterly Reviews
Vol.3, No.2, 2020: 170-193
ISSN 2621-5799
Copyright © The Author(s). All Rights Reserved
DOI: 10.31014/aior.1993.03.02.130

To Declare or Not to Declare [Bankruptcy]: That May Be the Question,

A Tale of Bankruptcy in Higher Education

Richard J. Hunter, Jr[1], John H. Shannon[1], Henry J. Amoroso[1], Hector R. Lozada[1]

[1] Stillman School of Business, Seton Hall University

Correspondence: Richard J. Hunter, Jr., Seton Hall University, South Orange, N.J., USA
Phone: 908-285-8632; E-Mail: Hunterri@shu.edu

Abstract
This case study provides the background for a discussion of the bankruptcy of a composite non-profit corporation under Chapter 11 of the Bankruptcy Code, and the possible alternatives available to bankruptcy. Topics considered include: reorganizations, the selection of a bankruptcy trustee or an examiner, duties of a non-profit board, the automatic stay, aspects of the creation and confirmation of the bankruptcy plan, priority of creditors, termination of employment contracts for tenured and non-tenured faculty and those faculty represented by a union, at-will employment, and Title IX implications for any bankruptcy filing. The case study then turns to a discussion of options and perspectives available in the case that bankruptcy under Chapter 11 is not seen as a viable or practical alternative. Could the real target of restructuring and cost cutting be academic tenure?

Keywords: Bankruptcy, Reorganization, Examiner, Labor, Automatic Stay, Employment, Title IX

1. Introduction

Professor Richard Vedder (2020) provides a fitting, if not troubling, context to this case study:

> "… No one knows the precise financial damage that the COVID-19 pandemic will inflict on American colleges and universities. .. . Higher education is in for severe belt-tightening. State subsidy monies will likely decline… . Private gifts will decline, as will, in time, endowment income. Cutting costs is difficult for colleges, partly because some costs are fixed by long term obligations, most importantly tenure for faculty and often large interest payments on bonds incurred during a building spree over recent decades. Falling revenues but less rapidly falling costs means schools will be facing huge budget deficits."

Consider this scenario:

St. Swithen's College, a private denominational college located in Northern New Jersey, operated by the Swedish Diocese of New York, is experiencing a grave financial crisis in the wake of a national outbreak of measles. Richard Ekman, President of the non-profit Council of Independent Colleges, noted that "Roughly one third of those small colleges have cash reserves that would be depleted in less than half a year if they were not able to collect tuition and other revenue from enrolled students. If they had no income for six months, those schools would be in trouble" (Adams, 2020). St. Swithen's canceled all "on campus" classes during the spring 2020 semester and its student body of nearly 2,200 students took classes "on line."

The President's Cabinet of St. Swithen's has decided that it will not begin the fall 2020 semester on campus, but will continue to operate all classes "on line"—at least for the foreseeable future. Based on spring 2020 advanced course registrations, the President of St. Swithen's, Dr. Malcolm Neyland, son of the renowned Swedish actress Rose Neyland, has told the President's Cabinet that he expects to lose at least half of its incoming students for the fall (300 out of 550) and more than half (900 out of 1,650) of its normally returning students. President Neyland believes that most of these losses will be permanent. Stated Brown (2020): "Even if colleges can reopen in the fall, enrollments are likely to be down since many families have taken a huge financial hit and students may opt to delay college or to attend less expensive public or community colleges." [See Appendix I for the "Budget Pro Forma and Projections" given to the President's Cabinet at its emergency April meeting.]

The President's Cabinet has meet with the Board of Trustees of St. Swithen's and has decided to declare a "financial emergency," to take steps immediately to reduce costs and spending, and to possibly pursue bankruptcy reorganization under the United States Bankruptcy Code after discussing this possibility with its Acting University Counsel (see Hunter & Shannon, 2020), Dr. Graham Sorenson.

Before any final decisions will be made, the President contacts you, an old friend, who practices law in the bankruptcy field, to get a "fresh perspective" on these issues and has asked your opinion on several questions:

1. Is bankruptcy reorganization appropriate for an organization like St. Swithen's?
2. Would the filing of bankruptcy remove control of St. Swithen's from the Board to an "outsider"?
3. Would the filing of bankruptcy permit the Board to terminate academic programs that are no longer financially viable?
4. Would the filing of bankruptcy permit the Board to terminate all but its men's basketball program (the only program that is revenue-producing)?
5. Would the filing of bankruptcy permit the Board to restructure its employment contracts with its professional and administrative staff by reducing salaries or benefits such as contributions to its retirement plan or payments for medical insurance?
6. Would the filing of bankruptcy permit the Board to reduce faculty salaries and benefits, terminate its contracts for both non-tenured and even tenured faculty?
7. How long could this "austerity program" last?
8. Instead of filing for bankruptcy, what actions might be suggested to fill the gap in what may be a budget shortfall of over $8 million?

2. Bankruptcy Reorganization and St. Swithen's

One of the main objectives of Chapter 11 bankruptcy is to preserve St. Swithen's as a viable educational institution by creating a realistic payment plan for its debt (including interest payments on its bonding) or by creating a plan of reorganization that will be approved by the Bankruptcy Court. Coco (2019, p. 234) notes that "Chapter 11 of the Bankruptcy Code enables the reorganization of a corporation's finances and operations." Chapter 11 is typically used to reorganize a business, which may include a corporation, a sole proprietorship, or a partnership facing financial difficulty. Chapter 11 will allow St. Swithen's to repay or restructure its debt over a period of time. Chapter 11 may also be available for a category of businesses termed "non-profit" or "not-for-profit" (Rosenthal, 2017; see generally Huffman, 2020). Elliott and Hollander (2020) report that the nonprofit sector is an enormous contributor to the American economy, providing 5.5 percent of the nation's GDP and employing 13.7 million people.

Rosenthal (2017) notes that “non-profits can benefit from the bankruptcy process, either by restructuring debts and continuing to operate, or by providing a method to transfer valuable assets to another entity which can continue to make use of them.” St. Swithen’s College is organized under the joint “not-for-profit/non-profit” statute of the State of New Jersey. Many private colleges such as St. Swithen's are classified as either non-profits or not-for-profits depending upon the nomenclature adopted in the state in which they were organized and legally registered (see generally Chingos, 2017). [For the purposes of this discussion, St. Swithen’s will be called a non-profit.]

Generally, a non-profit organization works towards the promotion of commerce, science, art, or any similar purpose (see Trautman & Ford, 2018). In New Jersey, a non-profit may also operate a hospital or an educational institution. A non-profit like St. Swithen’s retains all profits to meet its objectives and mission, pays no income taxes, generally pays no local property taxes, and may accept tax-deductible donations from the public. St. Swithen's charges its students tuition and fees of $340 per academic credit or $10,200 per academic year; the 200 students who reside in the St. Swithen’s dormitories are charged an additional $2,000 per semester—the “cost basis” for these services. St. Swithen’s receives ancillary revenues from the operation of the bookstore and parking, as well as net revenues from athletics. (The Department of Athletics annually receives a direct non-budgetary contribution from the *Swithen Athletic Booster Fund* to cover the costs of its men’s basketball program.)

Then St. Swithen's, broadly speaking, expends the tuition money on the education of its students. St. Swithen's uses student tuition monies, as well as a regular contribution from the St. Swithen’s endowment fund, to pay the salaries and benefits of administrators, professors, instructors, and support staff, to provide co-curricular and intercollegiate activities, to conduct research, and to maintain its campus plant and facilities. More than 80% of St. Swithen’s students receive some form of federal financial aid from such programs as Pell Grants, Stafford Loans, PLUS Loans, and others. In addition to enrolling more than 2,200 students, St. Swithen’s currently employs 86 full and 28 part time faculty and other instructional persons, 40 administrators and staff, 30 clerical staff members, and 28 “other” support employees. St. Swithen’s campus houses two student dormitories (with housing for approximately 200 students), a College Library, a cafeteria, and a new student recreation center with a 1,500 seat basketball and multi-purpose arena.

St. Swithen’s has a modest endowment of $22 million, which earned 6.3% or approximately $1.386 million in 2019 ($250,000 kept “in reserve”), of which $1.136 million was used for operations, scholarships, etc. Similar to other educational institutions, St. Swithen’s endowment dropped by approximately 9% in the spring of 2020 (e.g., Shanes, 2020). In 2019-2020, St. Swithen’s projected a $3.366 million budget surplus. It expected to make a contribution of approximately $336,690 (as an assessment) to the Swedish Diocese. Preliminary projections for 2020-2021 indicate that the deficit could reach $8.611 million. In addition, the Board may decide whether it will follow the lead of other colleges and universities and offer a “partial refund” to students who were sent home because of the outbreak of the measles (e.g., Rimbach, 2020).

Non-profits can benefit from the bankruptcy process, either by restructuring debts and continuing to operate if that is a viable option, or by providing a method to transfer valuable assets to another entity which can continue to make use of them. For example, St. Swithen's might consider merging with another similar educational entity (for example, St. Pedro's College, located about 14 miles from St. Swithen's) or even becoming a state institution. However, there is a restriction on the ability of a non-profit entity transferring its property (Herman & Herman, 2019). Under Section 541(f) of the United States Bankruptcy Code (2019), a non-profit entity such as St. Swithen's can transfer property only to the same extent it could if no bankruptcy had been filed. Thus, in a college or university setting, an analysis of legal or any "donor restrictions" on the transfer of property owned by a non-profit would be is essential in assessing whether bankruptcy is a potential option (Lippman & Grimmer, 2017). (The fact that the Stockholm Association had placed its organizational archives at St. Swithen's and had erected a building to house the archives must be considered.) Unlike for-profit corporations, non-profits corporations cannot be forced into bankruptcy involuntarily.

However, in addition to being a college offering majors, minors, certificates, programs, and non-credit courses for its students and others, St. Swithen’s is also a *business*. In enacting Chapter 11 of the Bankruptcy Code, the United States Congress concluded that the value of a business like St. Swithen’s is potentially greater if it were reorganized

as a viable or "going concern" rather than the value of the sum of its individual units, schools, buildings, and physical plant if the business assets of St. Swithen's were to be sold off individually—that is, if a suitable buyer could even be found. It follows, then, that it may be more economically efficient to allow a besieged "business" like St. Swithen's College to continue running, shed some of its employees and even faculty that are deemed too redundant or no longer necessary, reduce expenses, and cancel or restructure some of its debts.

When St. Swithen's College determined that it was unable to service the debt it had acquired over the past three decades in building the university's plant and facilities (including a $15 million on campus-recreation center and basketball arena, two residence dormitories, and a student/community center), pay its creditors, and perhaps at some point the salaries of its faculty, administrators, and other employees, the Board of Trustees of St. Swithen's has decided that it would pursue filing a petition with the federal bankruptcy court for protection under Chapter 11 as one of its options.

Unlike Chapter 7, where St. Swithen's would cease its operations and a court-appointed trustee would sell off its assets and then distribute the proceeds to its creditors by filing for bankruptcy under Chapter 11, St. Swithen's could remain in control of its business operations as a "debtor- in- possession," subject to the oversight and jurisdiction of the bankruptcy court (see Shachmurove, 2019). In *In re Roth* (1992, p. 952, note 42), the 3rd Circuit noted: "The framework of section 363 is designed to allow a trustee (or debtor-in-possession) the flexibility to engage in ordinary transactions without unnecessary creditor and bankruptcy court oversight, while protecting creditors by giving them an opportunity to be heard when transactions are not ordinary."

The debtor-in-possession retains control of its "business" and manages its affairs until such time that a trustee is appointed to take control or until the case converts to a Chapter 7 liquidation (see generally Armstrong, 2019). A debtor-in-possession owes a fiduciary duty to the bankruptcy estate and has the powers and duties of a bankruptcy trustee, which include: accounting for all property, examining claims, objecting to claims, filing tax returns, and filing monthly operating reports as may be required by the Bankruptcy Court and the United States Trustee. A debtor-in-possession such as St. Swithen's would have the power to hire attorneys, accountants, brokers, or other professionals, subject to bankruptcy court approval. Should a debtor-in-possession fail to comply with the U.S. Trustee requirements, fail to comply with court orders, or fail to take appropriate steps to propose or submit a plan for confirmation, the U.S. Trustee, a creditor, or a "party in interest" may file a motion to appoint a case trustee, convert the case to a Chapter 7 liquidation, or dismiss the case (see Schlagel & Averch, 2020). In *Kapp v. Naturelle, Inc.* (1979, p. 33, note 158), the 8th Circuit noted: "The term 'party in interest' is not defined in the [Bankruptcy] Act. Courts construing the provision have reasoned that the interest must be a pecuniary interest in the estate to be distributed."

In order for St Swithen's to reorganize, the Board of Trustees as the governing body of St. Swithen's will be required to file a plan of reorganization, which must be confirmed by the bankruptcy court (Broude, 2020). A Chapter 11 debtor has 18 months to propose a reorganization plan before creditors are allowed to propose their own plans. Prior to the Bankruptcy Act, creditors were barred from making proposals indefinitely due to the debtor's ability to obtain extensions. If the court approves the reorganization plan offered by St. Swithen's and the creditors agree, then the plan can be confirmed. Section 1129 of the Bankruptcy Code requires the bankruptcy court to reach certain conclusions prior to its confirmation or approval of the plan. For example, the plan proposed by St. Swithen's must comply with all applicable laws and St. Swithen's must have proposed the plan "in good faith." In practical terms, St. Swithen's would have to demonstrate to the bankruptcy court that it will remain viable as an educational institution capable of meeting its financial obligations—even with a substantial portion of its student body no longer planning on returning. The bankruptcy court must also be convinced that the proposed plan will not be followed by the need for further reorganization or perhaps liquidation in the future.

3. An Overview of Issues Relating to the Possible Bankruptcy Reorganization of St. Swithen's

The Swedish Diocese of New York established St. Swithen's to carry out its stated mission of "educating the children of Swedish background and others in the liberal arts, stressing the contributions that Sweden has made to Western civilization and to Protestant theology." As such, the Swedish Diocese established a Charter for St.

Swithen's and registered the Charter with the State. The Diocese initially established a board of directors, more formally called the Board of Trustees, as the ultimate party responsible for the operation of St. Swithen's and the fulfillment of its mission, and a method for election of future members of the Board. When the finances of a non-profit corporation such as St. Swithen's raise concerns about its future viability, the directors are obligated to fulfill their fiduciary obligations as delineated under state law.

After the filing of a Chapter 11 case, a representative of the Office of the United States Trustee, which is a branch of the Department of Justice, will normally solicit "indications of interest" from any unsecured creditors in forming an official creditors' committee. In the case of St. Swithen's, bond holders and several individual creditors (including the builder of the on-campus recreational center and basketball arena who is still owed a considerable sum) might be consulted. (Because there are numerous "rumors" circulating on campus, that there will be a major reduction in both administrative and faculty positions, representatives from the Campus Life Council have been in contact with the Department of Justice seeking information about membership in a possible creditors' committee in order to protect their respective positions.) If, in the opinion of the Office of the United States Trustee, a sufficient level of interest is shown, a committee will be formed, which may retain legal and financial professionals—at the debtor’s expense.

During a Chapter 11 bankruptcy, St. Swithen's will be required to seek court approval, after providing its creditors with proper notice and the opportunity to object, before taking any action that is not in the debtor’s "ordinary course of business." Chapter 11 bankruptcy will also provide the creditors of St. Swithen's with certain remedies for addressing any alleged malfeasance on the part of the Board of Trustees or college administrators that are not ordinarily available, such as replacing the debtor-in-possession with a trustee or an examiner.

3.1 A Possible Examiner for St. Swithen’s?

US Legal (2020) reports that "An examiner is appointed to conduct an *investigation* of any allegations such as fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the current or former management of the debtor business."

Section 1104(c) of Chapter 11 provides for the appointment of an examiner if the bankruptcy court does not order the appointment of a Chapter 11 trustee (Fuller, 2005). Fuller (2005) notes that the “appointment is not a routine procedure for every Chapter 11 case. An examiner is probably not needed if no issue of fraud or mismanagement exists or if a committee can furnish sufficient information about the debtor’s transactions.”

The appointment of an examiner for St. Swithen's would be considered as an intermediate rather than a final step and is generally more economical than would be the appointment of a trustee (see Lipson, 2010). The following are circumstances where a bankruptcy court might appoint an examiner:

1. To mediate and help to solve any deadlock in negotiations concerning any plan;
2. If the debtor has failed to submit required financial statements during the pendency of the bankruptcy case; and
3. If the creditor finds that management in the case of a debtor-in-possession is incapable of carrying out their core management responsibilities.

Fuller (2005) further notes that “While the Code is largely silent on the credentials of an examiner, ‘a few examples of what a court must ‘find’ in an examiner are disinterestedness (see Section 101(14); *In re Big Rivers Elec. Corp.*, 2004), impartiality, the ability to meaningfully ‘review the books, records and transactions of the debtor,’ and the ability to fulfill the duties assigned” (see *In re Tighe Merchantile, Inc.* (1986). An examiner “may not have a ‘material adverse interest to any party to the bankruptcy ‘for any reason,’ either at the time of appointment or during the course of the bankruptcy” (*In re Big Rivers Elec. Corp.*, 2004). Fuller (2005) described the position of a bankruptcy examiner as “unique and has evolved over time” (citing Norton, 2004, **Section 79.23**). In *In re Baldwin v. United Corp.* (1984, 1985), the Ohio bankruptcy court described the position of a bankruptcy examiner as “unlike that of any other court-appointed officer” in that:

> “The court can mould an examiner’s duties to fit a particular case. The examiner can be ordered to simply investigate the debtor’s conduct, or the duties can be expanded to include prosecuting

> actions on the estate's behalf or mediation between the parties. This flexible role is specifically tailored to the needs of that case" (see also Zaretsky, 1993).

The appointment of an examiner provides several significant benefits to the parties in a case, which include:

> "First, the examiner can assist in an early determination of whether the debtor's business has a meaningful chance of reorganizing successfully. Second, an examiner's investigation can reduce the time and money that might have been later spent in investigation by multiple parties… . Third, an examiner's investigation can be concluded more quickly than another party's investigation, since the examiner is not "usually distracted by other aspects of reorganization… . Fourth, using an examiner can avoid disrupting the debtor's business since an examiner does not take control of the business as a trustee would. Finally, an examiner may be able to diffuse tensions between the parties in several ways including mediating plan negotiations or other disputes, assisting the debtor with management or reorganization issues, or performing other tasks that are best performed by a party unconnected with any of the constituencies of the case" (Fuller, 2005), citing *In re Baldwin United Corp.* (1984, 1985); Zaretsky, 1993).

The role of examiner in a Chapter 11 bankruptcy is generally more limited than that of a Chapter 11 trustee. However, the Chapter 11 examiner has the statutory powers to "investigate the acts, conduct, assets, liabilities, business operations, and financial condition of the debtor" (see Section 1104(c)), and in many ways functions as a "one person grand jury to investigate the pre-petition affairs of the debtor and to report his/her findings to the court" (Fuller, 2005). Fuller (2005) states "a court can order an examiner to run the debtor's business or otherwise control the reorganization, including filing the reorganization plan." Fuller (2005) adds, however, that "a court would not order an examiner to take control unless it was beyond a doubt absolutely necessary, because to allow an examiner such control would defeat one of the benefits of an examiner, which is not to disrupt the debtor's business."

Perhaps more importantly, the examiner is authorized to assess the potential of a Chapter 11 debtor for the continuance of the business. In this regard, the examiner is required to prepare a statement for the creditors' committee regarding any issues relating to "fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity of the management" (US Legal, 2020).

The compensation of an examiner must be "reasonable" and will be based on factors such as the time and labor involved; the uniqueness and complexity of the questions; and the experience, ability and reputation of the examiner (see Temin & Chovanes, 2020). If an examiner violates any of the prescribed duties under the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, or the common law, a court can order the disgorgement of all fees paid to the examiner and his or her law firm (*In re Big Rivers Elec. Corp.*, 2004) in addition to terminating the services of the examiner.

4. Fiduciary Duties of Nonprofit Corporate Boards (adapted from Elliott & Hollander, 2014)

Directors of non-profit corporations have fiduciary duties that to a large extent are coextensive to the fiduciary duties of for-profit corporate directors (Harrison & Murray, 2014). Price (2018) states that the three fiduciary responsibilities of all boards of directors include: "the duty of care, the duty of loyalty, and the duty of obedience as mandated by state and common law." Trautman and Ford (2018, p. 971) point out that some of the most important issues for consideration for the board of a non-profit "include, but are not limited to: (1) enterprise lifecycle stage, (2) extent to which certain experiences and skills are mission critical (detailed understanding of target culture, mission, stakeholder composition, and risk); (3) unique technology dependence (social media); and (4) the need for capacity expansion (fundraising)."

While a non-profit corporation does not have shareholders, a non-profit has certain "constituencies" whose interest must be protected in a bankruptcy besides those of traditional creditors (Goldschmid, 1998). "Constituencies" of St. Swithen's may include the faculty, administrators, and staff (and perhaps even alumni or members of the

sporting public who are fans of St. Swithen's athletics), as well as the students whose lives will be impacted by a Chapter 11 reorganization.

However, whereas the key duty of a for-profit director in a bankruptcy proceeding is to maximize the value of the enterprise, the fiduciary obligations of the board of a non-profit are to the non-profit corporation and to its stated purpose and mission.

A breach of duty by a fiduciary can result in a "derivative suit" being brought against the fiduciary party (Payne, 2019). As Payne (2019, p. 737) notes: "Because it is a fundamental principle of corporate governance that the directors of a corporation and not its shareholders manage the business and affairs of the corporation," the decision to sue or to refrain from litigating a claim on behalf of the corporation rests with the board of directors." At the same time, federal law and the non-profit laws of some states provide what is known as *qualified immunity* for uncompensated officers and directors of certain nonprofit organizations provided they have acted in "good faith" (see, e.g., 42 U.S.C. Section 14503(a); N.Y. Not-for-Profit Corp. Laws Section 720-a; California Corporation Code Section 5239(a)). State law generally outlines the nature and extent of these fiduciary duties. "Good faith" requires that fiduciaries must act "with a conscious regard for their responsibilities as fiduciaries."

5. Creditors' Rights

The creditors of an insolvent non-profit corporation exercise different rights than the creditors of an insolvent for-profit corporation (see Lipson, 2018). For example, unlike creditors of a for-profit corporation, creditors of a non-profit cannot place the nonprofit into bankruptcy by filing an *involuntary bankruptcy petition.* Section 303 prohibits creditors from filing an involuntary petition against a "corporation that is not a moneyed, business or commercial corporation." Similarly, creditors of a non-profit corporation may not compel a non-profit debtor to *convert* its case from Chapter 11 reorganization to a Chapter 7 liquidation. Section 1112(c) mirrors Section 303 and provides that a bankruptcy court cannot convert a case "if the debtor is … a corporation that is not a moneyed, business, or commercial corporation unless the debtor requests such conversion."

However, similar to creditors of for-profit corporations, creditors of a non-profit may seek the appointment of a Chapter 11 trustee to displace the management of a non-profit. If a trustee is appointed, the debtor's exclusive right to file the plan of reorganization, which is ordinarily in force for the first 120 days of the case, *automatically expires* and the trustee or any other "party-in-interest" may then file a Chapter 11 plan providing for the liquidation of the non-profit debtor. Further, while creditors of a bankrupt for-profit corporation can generally expect to receive the residual value of the assets of an insolvent for-profit corporation in a liquidation, courts have generally held that creditors of non-profits are not entitled to the residual value of the enterprise in bankruptcy (see *In re Wabash Power Association*, 1996).

The Bankruptcy Code places several restrictions on a non-profit debtor, which frequently prevent the debtor from maximizing the value of the business. These restrictions include:

i. a transfer of assets of a non-profit debtor must comply with whatever laws are applicable to the transfer of property by non-profits (Section 363(d));
ii. a non-profit debtor may transfer assets to a for-profit corporation only under the same conditions that would apply if the debtor had *not* filed a bankruptcy case (Section 541(f)); and
iii. all transfers of the property of a non-profit under a proposed plan must be made in accordance with applicable non-bankruptcy law that governs transfers of property by a nonprofit entity (Section 1129(a)(16)).

Elliott and Hollander (2014) note that "The legislative history of these three subsections evidences Congress's intent to keep in place state law restrictions on non-profits" and "restrict the authority of a trustee to use, sell, or lease property by a nonprofit corporation or a trust" (see also H.R. Rep. No. 109-31, pt. 1, at 145 (2005)).

6. What Are the Expected Features of St. Swithen's Chapter 11 Reorganization?

Of prime importance to the Board of Trustees of St. Swithen's will be its ability to operate the college as an on-going, viable business. However, under Chapter 11, the bankruptcy court may appoint a trustee "for cause" to operate the college if the court does not believe the current administration and Board will be able to meet this goal. The United States Trustee monitors the progress of a Chapter 11 bankruptcy case. The U.S. Trustee reviews the debtor's monthly operating reports, applications to employ professionals, motions for fees, and any plan or disclosure statement filed in the case. The U.S. Trustee conducts the initial debtor's conference and the 341 creditors' meeting (O'Neill, 2020) at the beginning of the case, where creditors may question the debtor concerning the debtor's conduct, assets, and the plans for reorganization (Schmidt, 2019). The U.S. Trustee also imposes requirements on a debtor such as filing of monthly operating reports, opening new debtor-in-possession bank accounts, and ensuring the payment of current employee's withholding and other taxes. During the pendency of the case, the debtor is required to pay a quarterly fee to the U.S. Trustee. The amount of the fee is based upon the disbursements made in the prior quarter and can add significant expense to a Chapter 11 case (Appelbaum, 2019; see 28 U.S.C. Section 1930(a)(6); U.S. Department of Justice, 2020).

As noted earlier, St. Swithen's, acting through its Board of Trustees and college administrators, may act as trustee during the period of its reorganization (Bragg, 2018). Chapter 11 will afford St. Swithen's, as the debtor-in-possession under Section 363, with a number of options in which it can restructure its business (see Cordry, 2020). St. Swithen's will be empowered to acquire new financing and loans on favorable terms by giving any new lenders first priority on the business's income or earnings. The bankruptcy court may also permit the debtor-in-possession to reject and cancel contracts. St. Swithen's will be protected from lawsuits and other litigation through the imposition of an *automatic stay* by the bankruptcy court. This is of prime importance to St. Swithen's, which has indicated that it would be terminating all of its intercollegiate athletic programs, including its women's basketball program—with the exception of its men's basketball program—and withdrawing from the "Little East" Athletic Conference. The Conference, made up of NICAA Division I schools, has indicted that it will be seeking a $300,000 "withdrawal" fee for such an action. In addition, several members of the women's basketball team have announced that they will be challenging the decision to terminate their program and would be filing a formal complaint with the Department of Justice on grounds that such a decision would violate Title IX.

6.1 The Stay and Further Actions

The website of U.S. Courts (2020) states that "the stay provides a breathing spell for the debtor, during which negotiations can take place to try to resolve the difficulties in the debtor's financial situation." During the period while the stay is in place, creditors of St. Swithen's are forbidden from initiating any collection attempts against St. Swithen's. Most litigation against the debtor is likewise suspended until the matter can be resolved in the bankruptcy court. The automatic stay also makes many any *post-petition* debt collection efforts void or voidable by the debtor.

6.2 The Plan

The creditors and other "interested parties" of St. Swithen's are entitled to be heard by the bankruptcy court. The bankruptcy court is ultimately responsible for determining whether the plan of reorganization proposed by the Board of Trustees for St. Swithen's complies with bankruptcy laws and whether it provides a viable option for the future.

While Chapter 11 is intended to reorganize St. Swithen's business, taking into account both assets and debts, Chapter 11 can also be used as a mechanism for its liquidation if the plan of reorganization is deemed as unrealistic or is not successful in its execution. Since St. Swithen's is largely dependent on tuition for its existence, it will be important to first stabilize its enrollments and then to recapture students who may have either not enrolled, who have chosen to pursue their education at other institutions, or who have chosen not attend college at all. St. Swithen's may "emerge" from a Chapter 11 bankruptcy within a few months or within several years, depending on the complexity of its bankruptcy. The bankruptcy plan is the primary way a debtor can accomplish this overarching purpose.

As the “debtor-in-possession,” St. Swithen’s will have the first opportunity to propose a plan during a period of exclusivity of 120 days from the date of filing for Chapter 11 before any other party “in interest” may propose a plan (see Lubben, 2019, Chapter 17). “The contents of the plan must include a classification of claims and must specify how each class of claims will be treated under the plan (Section 1123). Creditors whose claims are ‘impaired,” i.e., those whose contractual rights are to be modified or who will be paid less than the full value of their claims under the plan, vote on the plan by ballot” (Section 1126). Besides traditional financial creditors, St. Swithen’s will have to take into account the interests of its students, many of whom are attending the college on a combination of federal and state scholarships and financial aid.

The Board of Trustees of St. Swithen’s has indicated that it intends to file a plan with the bankruptcy court. In addition, representatives of the Faculty Life Council, the main body on campus representing the interests of St. Swithen’s faculty, had initially indicated that it intended to file a plan as a “party in interest” in order to assure that “faculty rights, benefits, and other prerogatives” are adequately addressed in any plan of reorganization. As it turned out, the faculty was unable to agree upon a rival plan—thus, the only plan proposed was from the Board of Trustees.

6.3 Confirmation of the Plan

Bank (2019, p. 54) notes that “There is often significant uncertainty over how a judge will rule or whether a debtor can obtain confirmation of its plan. Confirmation is a potentially grueling process.” In order to proceed to the confirmation hearing, St. Swithen’s is required to file a *disclosure statement* (Meyer, 2020) within 60 days of filing for Chapter 11 bankruptcy. The written disclosure statement must contain “information on assets, liabilities and business affairs of the debtor sufficient to enable a creditor to make an informed judgment about the debtor’s plan of reorganization” (Section 1125).

Once the disclosure statement is approved by the bankruptcy court, the plan proponent is required to solicit votes from the various classes of creditors. Solicitation is the technical process by which creditors vote on the proposed confirmation plan. This process of solicitation can be complex, especially if creditors fail or refuse to vote—which then might require the Board of Trustees to modify or change the plan in order to gain approval.

If the bankruptcy court approves the reorganization plan and the creditors agree (Coco, 2019), the plan proposed by the Board of Trustees of St. Swithen’s will now move to the confirmation stage (Lubben, 2019, Chapter 20) “to determine whether to confirm the plan” (Section 1128).

Generally, the plan must be “fair and equitable” and not discriminate against a class of creditors. Members of the faculty are concerned about the 20% “across the board” salary cut in the plan proposed by the Trustees, the immediate hiring freeze imposed, and the “stopping of the tenure clock” for all untenured faculty. However, it might be helpful to know that the plan also proposes a similar 20% across the board salary cut for administrators and staff (with the exception of the basketball coach), an administrative and staff hiring freeze, and a 20% overall reduction in number of administrators and staff. If at least one *class* of creditors objects and votes against the plan, the plan may nonetheless be confirmed if the requirements of what is known as “cramdown” are met (Wong, 2010; Lubben, 2019, Chapter 17).

Upon confirmation of the plan, the plan becomes binding on all parties and identifies how the debts and other obligations of St. Swithen’s will be addressed, and how St. Swithen’s will be operated during the duration of the plan. Should a plan *not* be confirmed, the bankruptcy court may either *convert the case to a liquidation* under Chapter 7, or, if in the best interests of the creditors and St. Swithen’s, the case may be dismissed resulting in a return to the *status quo* before bankruptcy. If the case is dismissed, St. Swithen’s may look to other strategies not involving bankruptcy in order to move ahead—such as a composition of creditors agreement (see *In re Bricksin,* 2006) or perhaps a non-bankruptcy merger with an institution similar to St. Swithen’s.

Under some circumstances, creditors or the United States Trustee can request the bankruptcy court to convert the case into a liquidation under Chapter 7, or appoint a trustee to manage St. Swithen’s, if either of these actions are deemed to be in the best interest of the creditors. It also might be in the best interests of a debtor-in-possession

such as St. Swithen's to liquidate under Chapter 11, a process in which the administration and Board of Trustees may be able to negotiate a merger with another college or university, or gain a higher price for certain of its academic divisions (for example, its business school or its nursing program), or other assets than a Chapter 7 liquidation would likely achieve.

7. Priority of St. Swithen's Creditors

Bankruptcy reorganization filings under Chapter 11 follow the same priority order as other bankruptcy chapters. The priority structure is defined primarily by Section 507 of the Bankruptcy Code (Strub & Reisner, 2020). As a general rule, administrative expenses which include the actual and necessary expenses of preserving the bankruptcy estate and the cost of litigating the Chapter 11 case will be paid first. This would include salaries of faculty, administrators, and staff at St. Swithen's who have continued to work during the process. The claims of any secured creditors who have a security interest in any specific property will be addressed before the claims of any unsecured creditors. Unsecured creditors' claims are prioritized by Section 507. For example, the claims of suppliers of products or services to St. Swithen's may be paid before other unsecured creditors are paid. It should be noted that each priority level must be paid *in full* before the next lower priority level may receive payment

8. Labor Issues

Will the Board of Trustees and administration of St. Swithen's be permitted to make changes to employees' terms and conditions of employment—most especially relating to salary and benefits—in order to permit St. Swithen's to remain in operation? In deciding whether or not to file for bankruptcy reorganization under Chapter 11, St. Swithen's is especially concerned about the cost of its academic and non-academic payroll. After filing a Chapter 11 petition, a St. Swithen's has determined that a reduction of labor costs would be necessary for a successful reorganization.

St. Swithen's employees fall into several categories: tenured faculty and non-tenured faculty; staff; and "other" non-academic employees. There are no "unions" for faculty at St. Swithen's, which operates under the *Yeshiva Principle* of "shared university governance" (Olson, 2009; Amsler & Borukova, 2019) where faculty act in consort with the administration to manage the affairs of the college or university (see contra, Hunter & Shannon, 2015). As noted by Methner (2019, p. 406): "It also reflects faculty interests. If a university is upholding the academic norm of shared governance, then all of its community standards should reflect input or approval to the extent its shared governance system requires it." Faculty and the administration at St. Swithen's are governed by a "*Shared Governance Guide*" which deals with issues such as initial appointments, promotion and tenure, faculty ranks, dismissals, and other matters.

Untenured faculty serve under an initial contract and a "letter of appointment" which delineates their terms and conditions of employment, as well as laying out the requirements for granting tenure should they reach that stage in the process. The provisions of that initial contract and letter of appointment will apply until the decision on tenure is made if the faculty member has been previously renewed.

The Shared Governance Guide prescribes specific steps that must be followed if a tenure-track faculty member will not be continued *before* they reach tenure. After reaching tenure, however, faculty of St. Swithen's generally do not sign any further faculty teaching contracts, but under the St. Swithen's Shared Governance Guide, faculty can expect continued employment unless specified conditions are met which would justify their non-renewal. Other faculty (term employees, instructors, and adjunct professors) and all staff, with the exception of certain high university officials such as the President, members of the President's Cabinet, the men's basketball coach and Athletics Director, and academic Deans, typically receive one to three-year contracts of employment. At the conclusion of the contract period, absent special circumstances (relating to public policy (Smith v. Safety-Kleen Sys., 2019), the theory of an implied contract (Smith v. Shaw's Supermarkets, Inc., 2020), the implied covenant of good faith and fair dealing (Cejka v. Vectrus Sys. Corp., 2018), employer retaliation (Lucio v. Fern at Tenth LLC, 2019), or promissory estoppel (Cathcart v. Micale, 2019) (generally Heyman, 2019; National Conference of State Legislators (NCSL), 2019) these employees serve under what are termed as "at-will" employment regulations,

meaning that either party can terminate the relationship at any time, with or without advanced notice, for any reason or for no reason (Willborn, et al. , 2012; Lindblad, 2017; National Conference of State Legislators (NCSL), 2019). The status of employment-at-will:

> "also means that an employer can change the terms of the employment relationship with no notice and no consequence. For example, an employer can alter wages, terminate benefits, or reduce paid time off. In its unadulterated form, the U.S. at-will rule leaves employees vulnerable to arbitrary and sudden dismissal, a limited or on-call work schedule depending on the employer's needs, and unannounced cuts in pay and benefits" (National Conference of State Legislatures (NCSL), 2008).

In cases relating to employment-at-will contracts, St. Swithen's would have the right to alter any existing terms and conditions of employment and to implement a "reduction in force," provided that is carries out policies in a nondiscriminatory manner and in compliance with any notice to which it may have been obligated to give under the Shared Governance Guide or an individual employment contract. If St. Swithen's employs other staff (for example, maintenance or clerical workers), who belong to a union, the procedures outlined below under Section 1113 would apply, especially if the Board determines that the compensation and benefits package contained in the collective bargaining agreement exceeds comparable compensation and benefits for employees not employed at St. Swithen's.

As noted above, it might be an entirely different situation regarding tenured faculty members. In order to vitiate tenure, St. Swithen's would, in most likelihood, have to rely on provisions of its Shared Governance Guide. (For general informational purposes, we have quoted from the Faculty Guide of Seton Hall University (2020). Any similarity between St. Swithen's College and Seton Hall University is purely coincidental and unintentional.) The St. Swithen's Shared Governance Guide stipulates the conditions under which the employment of a tenured faculty member can be terminated:

> "Adequate cause for a dismissal shall be related directly and substantially to the fitness of the faculty member in his/her professional capacity as a teacher or researcher. The burden of proof that adequate cause exists rests with the university. Such a termination shall not be used to restrain a faculty member in the exercise of academic freedom or other rights of American citizens."
>
> "Dismissal proceedings may be instituted only for one or more of the following reasons:
> 1. teaching incompetence;
> 2. continued neglect of scheduled academic duties in spite of written warnings;
> 3. serious violation of the rights and freedoms of fellow faculty members, administrators, or students;
> 4. conviction of a crime directly related to the faculty member's fitness to practice his/her profession;
> 5. falsification of credentials or academic experience;
> 6. loss of required professional licensure;
> 7. serious act or acts of academic dishonesty."
>
> "Terminations of Tenured Appointments by the University:
> a. Termination of tenured appointments by the university, other than dismissal for cause, shall occur only from one or both of the following two circumstances:
> 1. A decision to reduce or terminate a program or a faculty position through program review procedures initially undertaken by the faculty of the college or unit.
> 2. A decision to reduce or terminate a program or a faculty position because of unforeseen, severe, drastic, or emergency institutional situations."

However, there is a provision in the Shared Governance Guide that specifically relates to *salaries and benefits.* The Shared Governance Guide states:

> "An appointment with tenure means that a full-time faculty member has the right to university employment each and every fall and spring semester until retirement without reduction in rank

> and without termination except as provided for in articles … . *Furthermore, a tenured faculty member shall not have his/her salary or benefits reduced unless a general reduction in salaries and benefits for all faculty members is necessary because of financial exigency.*"

8.1 What If St. Swithen's Faculty Had a Union? Rejection of a Collective Bargaining Agreement

Pasquale, Siegel, and Lee (2015, p. 113) note that "A debtor seeking to reorganize will, during the course of its bankruptcy case, often seek to reject unfavorable contracts in order to ensure that the debtor obtains the fresh start that the chapter 11 process is intended to provide." What if St. Swithen's faculty had a labor union?

As a general rule, when employees are represented by a union and are covered by a collective bargaining agreement, an entity such as St. Swithen's (or the Chapter 11 trustee, if one if one has been appointed) that continues to operate its business in Chapter 11 may either assume or reject that agreement, subject to bankruptcy court approval, and provided certain requirements are met (generally Spizman & Kane, 1990). In many cases, rejecting an executory employment contract may be considered essential to a Chapter 11 reorganization, since rejection may release St. Swithen's from burdensome salary and other obligations that could impede its successful reorganization.

However, the process of rejecting a collective bargaining agreement is more cumbersome than it is for other executory contracts (adapted from Association of Flight Attendants (AFA), 2004). To reject a collective bargaining agreement, the debtor must comply with certain stringent requirements of Section 1113 of the Code which requires a debtor to follow "rigorous substantive and procedural requirements before a court will approve a debtor's motion to reject a CBA" (Pasquale, Siegel & Lee, 2015, p. 122).

Section 1113 was added to the Bankruptcy Code partially in response to a decision of the United States Supreme Court in *NLRB v. Bildisco* (1984), where the Supreme Court held that a collective bargaining agreement is "ultimately an executory contract that may be rejected pursuant to Section 365(a) of the Bankruptcy Code," which provides that "the trustee, subject to the court's approval, may assume or reject any executor contract … of the debtor." Is the right to reject a collective bargaining agreement absolute? In affirming the decision of the Third Circuit, the United States Supreme Court stated, however issued an important caveat:

> "Given the favored status Congress has accorded collective bargaining agreements, a debtor-in-possession has to meet a more stringent test than the usual business judgment rule to obtain rejection… The debtor-in-possession is required to show not only that the collective-bargaining agreement is burdensome to the estate, but also that the equities balance in favor of rejection."

Professor West (1986, p. 105) noted that:

> "In brief, the section does four things: (1) it specifies that the collective bargaining agreement remains in effect and cannot be unilaterally terminated by the employer during bankruptcy; (2) on the other hand, it allows the bankruptcy court to approve interim changes pending a ruling on rejection; (3) it sets up a new bargaining procedure under which the employer must propose, prior to filing an application for rejection, necessary modifications to the collective bargaining agreement; and (4) it adopts, with two preconditions and a slight change in wording, the "balance of the equities" standard for rejection of the collective bargaining agreement. Each of these four areas will be examined in terms of its meaning under the new law and in terms of the impact on the employer's obligation under the NLRA."

Section 1113 allows the debtor to modify or reject a collective bargaining agreement in two different ways: Section 1113(c) and Section 1113(e) in which Congress "imposed the procedural and substantive safeguards of § 1113," to ensure that "when the NLRA yields to the Bankruptcy Code, it does so only for reasons that will permit the debtor to stay in business" (Cedrone, 2019, p. 87).

8.1.2 Section 1113(c) Motion Review

Section 1113(c) applies in cases where debtor seeks to reject a collective bargaining agreement or reach a consensual agreement with the union to put in place long-term or permanent modifications to the contract. As

noted in the *United Airlines* bankruptcy by Judge Eugene Wedoff, where the bankruptcy court ruled that United Airlines may "default on its pension obligations and turn over control of its pension funds to a federal agency that is already swamped by corporate pension defaults" (Martin, 2005):

> "… the power of the Court in a situation like this is really very limited ... the only power the Court has is to either grant or deny a motion by the debtor to reject a collective bargaining agreement. It's an all or nothing proposition. The parties themselves have the opportunity to create solutions of considerably more subtlety and appropriateness for the case" (Association of Flight Attendants (AFA), 2004; see also Seltzer & Ciantra, 2007).

Section 1113(c) provides the following parameters:

1. "Prior to filing to reject a Contract, the debtor must make a proposal to the Union that details all of the modifications "necessary" to restructure while also assuring that all creditors and affected parties are treated "fairly and equitably."
2. The debtor must provide the Union with relevant information necessary to evaluate the debtor's proposal.
3. Both parties are required to meet, at a reasonable time, to confer in "good faith" in an attempt to reach mutual agreement on modifications to the Contract."

Once the debtor officially files a Section 1113(c) motion with the court, a hearing will be scheduled to occur within 14 days after the filing date unless the parties mutually agree to a later date or the court determines that there is a need to extend the hearing date according to the circumstances of the case. The bankruptcy judge will make a ruling on the motion within 30-days of the hearing. Discussions between the company and the union may continue in an effort to work toward a consensual agreement up to the date of the court ruling (see Nave, 1985).
Absent a consensual agreement and assuming the debtor has met the parameters listed above, the court will approve the rejection of the contract if:

1. "the Union has refused to accept such proposal without "good cause" (as determined by the court including the parameters listed above); and
2. the court determines that the concessions of other constituencies in the bankruptcy [are] commensurate to those made by labor."

8.1.3 Section 1113(e) Motion Review

Section 1113(e) allows a debtor to ask the court for temporary or interim relief on an emergency basis. The debtor must show that the changes sought are "essential to the continuation of the debtor's business" or needed "to avoid irreparable damage" to the debtor. The full text of Section 1113(e) provides:

> "If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot."

Unlike the bankruptcy code under Section 1113(c), the court has more latitude to determine the application of changes to a collective bargaining agreement (see also Cameron, 1994).

8.2 But They Don't….

As previously noted, unionization of the faculty is highly unlikely at St. Swithen's in light of the United States Supreme Court decision in *NLRB v. Yeshiva University* (1980), which determined whether certain faculty are "managerial" employees under the National Labor Relations Act (1935, as amended), and thus precluded from joining a union. In *Yeshiva*, the Supreme Court held in the context of religious colleges and universities that faculty are *managerial employees* if they exercise "collegial" authority collectively with administration in a wide range academic matters. The Supreme Court held that faculty are managerial employees if:

- they *participate in decision-making* about academic programs (such as the university's curricular offerings and requirements for graduation), enrollment management, finances, academic policy (such as university grading policy) and personnel policy and decisions, with greater weight to the first three areas;
- they *actually control* (have authority to decide matters and evidence shows they in fact exercise it) or *make effective recommendations* (the university administration almost always follows their recommendations) over these areas;
- the faculty members fit in the university's structure as *decision-makers* rather than, for example, members of a committee that makes recommendations not followed by university administrators; and
- the faculty have relatively *high standing at the university,* for example they are tenured or tenure-eligible rather than non-tenured and contingent (*NLRB v. Yeshiva University*, 1980).

In 2014, however, the National Labor Relations Board in *Pacific Lutheran University* (2014) rejected the university's claim that it was exempt from board oversight merely because it was a religious institution (Flaherty, 2019) and announced a new two part standard (Parker & Park, 2015) for determining the managerial status of faculty members. The new standard went beyond "participation" and "recommendation" and the exercise of "collegial authority": (1) whether faculty have *decision-making authority* in academic programs, enrollment policies, finances, academic policies, and personnel policies; and (2) whether the faculty exercise *"actual control or effective recommendation"* over each of those areas (Fisher, Berman, Harper, & Ayers-Mann, 2019).

However, on March 11, 2019, "the Court of Appeals for the D.C. Circuit *denied enforcement* of the Board's unanimous application *Pacific Lutheran* to non-tenure track full- and part-time faculty at the University of Southern California's Roski School of Art and Design" (*USC v. NLRB,* 2019). On appeal to the D.C. Circuit, USC argued that the Board decision conflicted with the Supreme Court's *Yeshiva* decision in two ways. "First, USC argued broadly that *Pacific Lutheran*'s two-part standard also ran afoul of *Yeshiva*. The Court disagreed. While cautioning that the Board must be sensitive to the notion of collegial managerial authority, the D.C. Circuit concluded that the two-part standard for effective control did not necessarily contravene the Supreme Court's *Yeshiva* decision." Second, USC challenged the requirement that faculty subgroups must hold a "majority of seats on a committee in order to have effective control." The Court agreed with USC that this was inconsistent with *Yeshiva*. The D.C. Circuit reasoned that this aspect of *Pacific Lutheran* "failed to view faculty as a collective body of decision-makers and ignored the potential for commonality among faculty." The Court emphasized that *Yeshiva* did not focus on "whether one group outnumbered another, but on whether the subgroup was vested with managerial responsibility."Judge Tatel, who wrote the opinion, added that the NLRB decision "ignores the possibility that faculty subgroups, despite holding different status within the university, may share common interests and therefore effectively participate together as a body on some or all of the issues relevant to managerial status."

The Court remanded the case to the NLRB to reconsider its application of *Pacific Lutheran* in order to undertake a review "based on a standard more faithful to the Supreme Court's *Yeshiva* decision" (Fisher, Berman, Harper, & Ayers-Mann, 2019). The remand would give the newly-constituted Republican majority of the Board an opportunity to reconsider the *Pacific Lutheran* standard altogether.

When the question re-emerged once again before the D.C. Circuit on January 28, 2020, the Court of Appeals rejected the *Pacific Lutheran* framework, thus leaving its earlier *Yeshiva* decision intact. "The Court found that the Board improperly asserted authority over the school, which is properly exempt from the National Labor Relations Act (NLRA)" (Liebert Cassidy Whitmore, 2020). Was there a broader implication? Provost Michael Quick of USC added that the decision in the USC case "defends the principle that tenured and untenured faculty are partners in shared governance. The recent court decision affirms that principle" (Flaherty, 2019). *Yeshiva* would continue to be applied broadly to *all* faculty at private colleges and universities.

9. Athletics and Title 9 (adapted from NCAA, 2020)

As a part of its "cost savings efforts," St. Swithen's announced that it would terminate all of its athletic teams with the exception of men's basketball and would be withdrawing from the "Little East" Conference—in the face of threats that it would be responsible for $300,000 for renouncing its conference affiliation commitments. However, might St. Swithen's have a "Title IX" problem?

Title IX of the Education Amendments Act of 1972 (1972) is a federal law that states:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

St. Swithen's is a member of the National Intercollegiate Christian Athletic Association (NICAA). The NICAA is an association of Christian universities and denomination and Bible colleges in the United States whose mission is "the promotion and enhancement of intercollegiate athletic competition with a Christian perspective." The NICAA was formed in 1965. For the 2019–2020 season, the NICAA was composed of 93 members, 53 of which participate in Division I and 40 in Division II. St. Swithen's participates in their Division I, and currently supports 4 men's and 4 women's athletic teams and offers 5 basketball scholarships to athletes on both its men's and women's basketball teams.

If St. Swithen's decides to terminate its women's athletic teams, would such an action potentially be in violation of Title IX? Title IX applies to all educational institutions, both public and private, that receive federal funds. St. Swithen's is such an institution. In rejecting a decision of the Supreme Court in *Grove City College v. Bell* (1984), limiting Title IX only to those "programs" that received federal funding, the Congress enacted a law under which almost all private colleges and universities were required to comply with Title IX regulations because they receive federal funding directly or indirectly through federal financial aid programs accessed by their students. In fact, as noted, 80% of all students attending St. Swithen's will receive some form of federal financial aid (see the Civil Rights Restoration Act of 1987, 2012).

Athletics programs are considered "educational programs and activities." There are three basic parts of Title IX as it applies to athletics (U.S. Department of Education, 1996):

1. "Participation: Title IX requires that women and men be provided equitable opportunities to participate in sports. Title IX does not require institutions to offer identical sports but an equal opportunity to play;
2. Scholarships: Title IX requires that female and male student-athletes receive athletics scholarship dollars proportional to their participation (George, 1999); and
3. Other benefits: Title IX requires the equal treatment of female and male student-athletes in the provisions of: (a) equipment and supplies; (b) scheduling of games and practice times; (c) travel and daily allowance/per diem; (d) access to tutoring; (e) coaching, (f) locker rooms, practice and competitive facilities; (g) medical and training facilities and services; (h) housing and dining facilities and services; (i) publicity and promotions; (j) support services and (k) recruitment of student-athletes" (NCAA, 2020; see also *Biediger v. Quinnipiac University*, 2012; Hefferan, 2016).

An institution must meet all of the following requirements in order to be in compliance with Title IX: For participation requirements, institutions officials must meet one of the following three tests.

1. An institution may:

a. Provide participation opportunities for women and men that are substantially proportionate to their respective rates of enrollment of full-time undergraduate students;

b. Demonstrate a history and continuing practice of program expansion for the underrepresented sex;

c. fully and effectively accommodate the interests and abilities of the underrepresented sex (U.S. Department of Education, 1996); and,

2. Female and male student-athletes must receive athletics scholarship dollars proportional to their participation; and,

3. Equal treatment of female and male student-athletes in the eleven provisions as mentioned above (see *Cohen v. Brown University*, 1993; Buzuvis, 2006; Marshall-Freeman, 2017).

According to current guidelines, the only provision that requires that the same dollars be spent proportional to participation is *scholarships.* Otherwise, male and female student-athletes must receive equitable "treatment" and "benefits." Title IX does not require that each team receive *exactly* the same services and supplies. Rather, Title IX requires that the men's and women's program receive the *same level* of service, facilities, supplies and etc. Variations within the men and women's program are allowed, as long as the variations are justified.

St. Swithen's maintains that it should be allowed to discontinue all but men's basketball (including its women's basketball program, along with other women's teams), because its men's program is "revenue producing" and mostly "self-sustaining financially" and, in fact, frequently fills its 1,500-seat on-campus arena. [It should be noted however, that the *Swithen Athletic Booster Club*, an organization independent of the college, annually donates $750,000 towards the expenses of the men's basketball team—a situation that makes the program essentially "self-sustaining.] However, under guidelines issued by the Department of Justice, Office of Civil Rights (OCR), the basic philosophy underpinning Title IX (Brake, 2001) states that there cannot be an "economic justification" for non-equal treatment (see, e.g., the *Tower Amendment*, 1974). As a result, St. Swithen's cannot maintain that there are revenues or other considerations that mandate that certain sports receive better treatment or participation opportunities than other sports.

It does appear that St. Swithen's would **not** be precluded from terminating *all* of its athletic programs. Schools are not required to sponsor sports teams. However, if St. Swithen's decides to continue its men's basketball program with athletic scholarship offered to its players, it would be precluded from terminating its women's basketball program or terminating the scholarships for its women athletes on Title IX grounds. Whether the contribution from the *Swithen Athletic Booster Club* would have to be taken into account in determining Title IX compliance in other areas is another matter!

Concerning the second issue—St. Swithen's decision to withdraw from the "Little East Conference"—Vron (2010) notes that under Chapter 11, St. Swithen's would presumably be able to reject this affiliation contract. However, rejection of an executory contract (or an unexpired lease) pursuant to section 365 of the Bankruptcy Code does not rescind such contract or lease. Instead, rejection would constitute a *breach* of contract that would nonetheless relieve St. Swithen's from future performance under the affiliation agreement. As a result of the breach, the non-debtor party [the "Little East" Conference] can terminate the contract and would have no remaining obligations under the contract to St. Swithen's. Under these circumstances, the Conference is entitled to file an unsecured claim for any damages resulting from the rejection of the affiliation contract by the debtor or the Trustee. However, absent a Chapter 11 reorganization, where it might be possible to terminate its affiliation with the "Little East" Conference, this issue would be decided on the basis of its contractual (affiliation) obligation with the Conference. In either case, St. Swithen's should be prepared to take whatever action it feels is appropriate under the circumstances.

10. Wait! Not So Fast…

Concerning the challenges confronting higher education in the wake of the "Great Recession" of 2008-2009, Hueske (2013) wrote that "depressed tuition revenues, reduced federal and state funding, market volatility affecting endowments—are unlikely to abate in the short-term." In light of more recent developments surrounding the coronavirus outbreak in the spring of 2020—or in the case of St. Swithen's, where a pandemic measles outbreak takes place—colleges and universities have been placed under financial pressures which have led to the possibility that several institutions might consider seeking protection from creditors or fundamental restructuring of their institutions in order to weather the storm. In addition to cutting back course offerings and academic programs or evaluating the method by which courses are offered (i. e., expansion of on-line programs, hiring of more term and adjunct faculty), these restructuring efforts have included reducing faculty and administrative staff, cutting back sports programs, reducing faculty and staff benefits (most especially contributions to health and retirement plans),

renegotiating service contracts, cutting travel research support, and in some cases, taking a serious look at provisions relating to faculty tenure.

Hueske (2013) reports in the face of these challenges, some institutions have also "put themselves up for auction," and have sought "bankruptcy protection." Raising a caution, Hueske (2013) cited the case of *In re Lon Morris College* (2012) in which the Bankruptcy Court for the Eastern District of Texas held that *filing for bankruptcy* can result in "striping" a school of eligibility to participate in federal student loan and assistance programs such as Pell Grants, Stafford Loans, PLUS Loans, and others, leading to the "sudden liquidation and piecemeal auction" of Lon Morris and to the conclusion that filing Chapter 11 may not be a viable alternative for St. Swithen's.

In light of the ruling of the bankruptcy court, *Lon Morris* may serve as a warning to stressed and insolvent colleges and universities to carefully evaluate both their options and strategies in possibly pursuing a Chapter 11 reorganization filing.

10.1 The Lessons of Lon Morris (*In re Lon Morris College*, 2012; adapted from Hueske, 2013; Bruckner, 2017)
Ironically the rationale for the bankruptcy court's decision in *Lon Morris* did not relate to actions of traditional non-profit institutions of higher education; rather, the bankruptcy court was seemingly reacting to primarily private for-profit or "proprietary" institutions "exploiting their Title IV eligibility by aggressively recruiting and enrolling students into overhyped and underfunded programs," leaving hundreds of thousands of students with little or no training, no jobs, and significant debts that they could not possibly repay.

Partly in response, Congress amended the Higher Education Act (1965) to, among other things, "strip any institution of higher learning of its Title IV eligibility if such institution filed for bankruptcy protection" (see 20 U.S.C. Section 1002(a)(4)(A)). This amendment was intended to eliminate the use of the provisions of the bankruptcy laws, namely the *automatic stay*, in order to forestall any actions by the Department of Education against an unscrupulous institution. The *Lon Morris* court took note of *In re Betty Owen Schools, Inc.* (1996) where the bankruptcy court for the Southern District of New York had stated that "courts are bound by Congressional judgments that general bankruptcy policy give way to more specific policy considerations." In reference to the amendments to Section 1002(a)(4), Congress's specific intent to prevent institutions of higher education from seeking refuge in bankruptcy to avoid action by the Department of Education must override the general "fresh start" policy of Section 525(a) of the Bankruptcy Act.

Lon Morris College, a private junior college located southeast of Dallas, Texas, was founded in 1854. In 2008, Lon Morris experienced a substantial negative cash flow from reduced enrollment and increased "tuition receivables." When the college took steps to increase student enrollment in the hope of turning around its finances, ironically the increase in student enrollments necessitated the construction of new dormitory facilities, "which were financed by incurring even more debt." In July of 2012, after the college ran out of cash, and its president resigned, a chief restructuring officer sought Chapter 11 protection with the goal of continuing to operate Lon Morris while restructuring its debts. The restructuring officer indicated that Lon Morris would be seeking a financial partner to recapitalize or perhaps a party to acquire the school as a viable concern.

One month later, in August 2012, "the Department of Education notified Lon Morris that its eligibility for Title IV programs had been revoked due to the bankruptcy filing." Lon Morris responded by filing a motion seeking an injunction to forestall the Department's action under section 525(a) and seeking monetary damages. Lon Morris argued that "[b]ecause of the DOE's actions, Lon Morris' ability to sell itself as a going concern has been impaired and Lon Morris has lost value."

Shortly thereafter, on August 20, 2012, Judge Parker in the Eastern District of Texas issued a decision focusing on whether the Department of Education may properly revoke a bankrupt college or university's eligibility under Title IV by virtue of the institution's bankruptcy filing.
In his opinion, Judge Parker adhered to the reasoning of the court in *Betty Owen* (1996), holding that:

> "[I]t is a clearly expressed subsequent Congressional choice that the public policy supporting access to bankruptcy relief must necessarily yield in this limited instance to the public policy

> protecting students and their investment in their education, as well as protecting the vast sums of money that American taxpayers invest into higher education for its citizens through the availability of federally backed student loans."

While Judge Parker noted that the situation before him was "clearly distinguished from a fly-by-night, for profit, limited time venture, maybe by questionable entrepreneurs seeking to fleece the student loan system."
Upon affirming the Department of Education's revocation of Lon Morris' Title IV status, Lon Morris was no longer able to market itself as a "going" concern and concluded that the only available option was an orderly liquidation.

As noted in its disclosure statement relating to its liquidation, filed in October 2012:

> "The result of the Bankruptcy Court's decision was that the Debtor could not enroll a fall class. Students were dependent upon federal aid and would be unable to pay for their education; the Debtor would have no receipts and would be unable to pay faculty and operating expenses. The Debtor was forced on an emergency basis to transfer its students to other colleges and suspend the fall semester, while it continued to attempt to sell itself as a going concern, to no avail. After discussions and meetings with secured lenders, the Debtor proposed an auction process with a sale confirmed through a plan of reorganization that permits the Debtor to dispose of its assets."

The plan of liquidation for Lon Morris was confirmed on February 12, 2013, and the sale of the college's property and assets through an auction was approved (Harper, 2012). The auction of Lon Morris College property was concluded with major purchases by the Jacksonville Independent School District and an office supply company in a multi-day auction that raised nearly $2.2 million.

11. Conclusion

What might be the lesson of *Lon Morris*? Before St. Swithen's takes the step of filing for Chapter 11 reorganization, the Board of Trustees should consider the consequences. If St. Swithen's *were to lose its Title IV eligibility immediately upon filing,* it would seriously endanger its ability to continue in operation as a "going" or viable concern. Additionally, St. Swithen's might lose substantial value to any investors or other parties who may have expressed an interest in a merger or some other arrangement through a 363 sale or otherwise.

If St. Swithen's would be precluded from seeking reorganization through a Chapter 11 filing, what actions might be possible and are there other restrictions that might be imposed on these possible actions? How can St. Swithen's continue in operation amidst these practical and financial limitations? Because the faculty of St. Swithen's is not unionized and are not covered by a collective bargaining agreement, protections under Section 1113 would not be available to them. By declaring a "financial emergency," St. Swithen's would have great latitude to effect changes in employee's salaries and benefits—and perhaps moving forward, even to the system of tenure—such as no longer offering tenure as an employment option for non-tenured and "future" faculty hires. Removing tenure from currently tenured faculty is quite another matter.

Would the faculty at St. Swithen's have *any* recourse in the event that modifications of their faculty contracts are deemed as either unfair or unreasonably burdensome? Faculty can insist that they are "at the table" when difficult decisions are taken; faculty can insist that the provisions of the Shared Governance Guide are strictly adhered to in deciding whether to terminate the contracts of any of its teaching staff (for example, eliminating or sharply reducing adjunct faculty) (Higer, 2020) or change faculty status with reference to tenure; faculty can insist that they be represented on the Board of Trustees in recognition and furtherance of the principle of "shared governance"; faculty can insist that any cost savings be equally born by all "constituencies" of the college; and faculty should insist that a complete review of administrative structures and salaries at St. Swithen's is undertaken. One additional possibility exists: if all else fails, faculty can engage in concerted actions such as informational picketing or seeking to voice their viewpoints in the local media; or in the extreme, the faculty could call a strike—perhaps further crippling the ability of St. Swithen's to emerge from its financial crisis—a result that none of the parties desires.

APPENDIX I

BUGET PRO FORMA AND PROJECTIONS: PREPARED FOR THE PRESIDENT'S CABINET MEETING
(CONFIDENTIAL): FOR DISCUSSION PURPOSES ONLY (UNAUDITED)

2019-2020 Budget	2020-2021 Budget
ACTUAL	**PROJECTED**
REVENUES	**REVENUES**
TUITION:	TUITION:
2200 students times $10,200 = 22,440,000	1000 students times $10,200 - $10,200,000
Less Discounted tuition (10%) = 2,244,000	Less Discounted tuition (10%) = $1,020,000.
TOTAL TUITION: $20,196,000	TOTAL TUITION = $9,180,000
Dormitory and Cafeteria Fees = $800,000	Dormitory and Cafeteria Fees = $800,000
Net Ancillary Income:	Net Ancillary Income:
Parking = $200,000	Parking = $80,000
Book Store = $80,000	Book Store = $40,000
Athletics = $80,000	Athletics = $40,000
Total Net Ancillary Income = $360,000	Total Net Ancillary Income = $160,000
Net Income from the Endowment = $1,136,000	Net Income from the Endowment = 0
TOTAL EXPECTED REVENUES = $22,492,000	**TOTAL EXPECTED REVENUES = $10,140,000**
EXPENSES:	**EXPENSES:**
Full time Faculty Salaries and Benefits = $10,203,000*	Full time faculty Sals and Benefits = $10,203,000
Part Time Faculty = $168,000*	Part Time Faculty = $168,000
Administrative Salaries and Benefits = $4,180,000*	Admin. Sals and Benefits = $4,180,000,
Clerical Salaries and Benefits = $990,000*	Clerical Sals and Benefits = $990,000
"Other" Salaries and Benefits = $800,000*	"Other" Salaries and Benefits = $800,000
TOTAL SALARIES AND BENEFITS = $16,341,000	**TOTAL SALS AND BENEFITS = $16,341,000**
BUDGET EXPENSES (OTHER)	BUDGET EXPENSES (OTHER)
Maintenance, Utilities, etc. = $1,400,000	Maintenance, Utilities, etc. = $1,400,000
Debt Service = $480,000	Debt Service = $480,000
Supplies = $78,000	Supplies = $78,000
Travel = $90,000	Travel = $90,000
Publicity, other = $60,000	Publicity, other = $60,000
Athletics (net) = $302,000*	Athletics (net) = $302,000
TOTAL OTHER EXPENSES = $2,410,000	TOTAL OTHER EXPENSES = $2,410,000
TOTAL EXPENSES = $18,751,000	**TOTAL EXPENSES = $18,751,000**
EXPECTED BUDGET SURPLUS = $3,741,000	**TOTAL BUDGET DEFICIT = ($8,611.000)**
LESS DIOCESE CONTRIBUTION = $374,100	$0
SURPLUS = $3,366,900	**POTENTIAL DEFICIT = ($8,611,000)**

* Notes
Faculty Salaries: Average of $105,000 plus 10% benefits
Adjunct Salaries at $3,000 per course
Administrative Salaries: Average of $95,000 plus 10% benefits
Clerical Salaries: $30,000 including benefits
Other Salaries: $26,000 including benefits
Discounted tuition includes scholarships offered directly by St. Swithen's
Athletics: Combined budgets for all sports (does not include a $750,000 yearly non-budgetary contribution from the *Swithen Athletic Booster Fund*, separately administered, for the men's basketball team)
Debt service includes interest payments on all past and current bonding obligations

References

Adams, S. (2020). Boston university is first to announce it may postpone opening its campus until January 2021. *Forbes* (April 14, 2020). Retrieved: https://www.forbes.com/sites/susanadams/2020/04/13/boston-university-is-first-to-announce-it-may-postpone-its-fall-term-until-january-2021/

Amsler, J.B., & Boruvka, E. (2019). Teaching democracy through practice: collaborative governance on campus. *Journal of Dispute Resolution,* 2019: 73-109.

Applebaum, A.S. (2019). The new hidden cost of chapter 11. *American Bankruptcy Institute Journal*, 38(3): 32-33.

Armstrong, C. (2019). What happens when a company files chapter 11 bankruptcy? *The Balance Careers.com* (August 9, 2019). Retrieved: https://www.thebalancecareers.com/what-to-do-when-your-company-files-chapter-11-bankruptcy-316247

Association of Flight Attendants (AFA). 2004). What is section 1113 anyway? *Jump Seat News.com* (November 5, 2004). Retrieved: https://jumpseatnews.com/2004/11/what-is-section-1113-anyway (last visited April 15, 2020).

Bank, J.W. (2019). Representing a business in a workout or bankruptcy. Michigan Bar Journal, 98: 52-54.

Bragg, S. (2018). Debtor in possession. Accounting Tools (June 4, 2018). Retrieved: https://www.accountingtools.com/articles/2018/6/4/debtor-in-possession

Brake, D. (2001). The struggle for sex equality in sport and the theory behind Title IX. University of Michigan Journal of Law Reform, 34: 13-149.

Broude, R.F. (2020). Reorganizations under chapter 11 of the bankruptcy code. Eagan, Minn.: Law Journal Press.

Bruckner, M. (2017). Why can't colleges declare bankruptcy? HBCU's would benefit greatly from chapter 11 reorganization. New York Daily News (March 30, 2017). Retrieved: https://www.nydailynews.com/opinion/colleges-declare-bankruptcy-article-1.3013855

Buzuvis, E.E. (2006). Survey says… A critical analysis of the new Title IX policy and a proposal for reform. Iowa Law Review, 91: 821-886.

Cameron, C.D. (1994). How "necessary" became the mother of rejection: an empirical look at the fate of collective bargaining agreements on the tenth anniversary of bankruptcy code section 1113(c). *Santa Clara Law Review*, 34: 841-943.

Cedrone, M.J. (2019). Supreme silence and precedential pragmatism: *King v. Burwell* and statutory interpretation in the federal courts of appeals. *Marquette Law Review*, 103: 43-109.

Chingos, M.M. (2017). Don't forget private, non-profit colleges. *Economic Studies* (Evidence Speaks Reports), 2(9): 1-9.

Coco, D. (2019). Third-party bankruptcy releases: an analysis of consent through the lenses of due process and contract law. *Fordham Law Review*, 88: 231-265.

Cordry, K. (2020). Affairs of state, textualism, originalism and the code: arguments for a heretical view of section 363. *American Bankruptcy Institute Journal*, 39(2): 20-29.

Elliott, D.Y., & Hollander, E.C. (2014). Navigating a nonprofit corporation through bankruptcy. *Non-Profit Quarterly* (April 29, 2014). Retrieved: https://nonprofitquarterly.org/nonprofit-corporation-navigating-through-bankruptcy/

Fisher, R., Berman, J., Harper, S., & Ayers-Mann, J. (2019). D.C. Circuit denies enforcement of NLRB's decision applying Pacific Lutheran standard. *Employer Labor Relations.com* (March 18, 2019). Retrieved: https://www.employerlaborrelations.com/2019/03/18/d-c-circuit-denies-enforcement-of-nlrbs-decision-applying-pacific-lutheran-standard/

Fuller, K. (2005). Chapter 11 examiner when why what and how (Part 1). *American Bankruptcy Institute Journal* (March 2005). Retrieved: https://www.abi.org/abi-journal/chapter-11-examiner-when-why-what-and-how-part-i

George, B.G. (1999). Sports law in the 21st century: Title IX and the scholarship dilemma. *Marquette Sports Law Journal*, 9: 273-285.

Goldschmid, H.J. (1998). The fiduciary duties of nonprofit directors & officers: paradoxes, problems, and proposed reforms. *Journal of Corporate Law*, 234: 631-653.

Harper, Faith. (20120. Lon Morris to liquidate all of its assets through auctions. *Jacksonville Daily Progress* (October 5, 2012). Retrieved: https://www.jacksonvilleprogress.com/news/lon...

Harrison, Y., & Murray, V. (2014). *Guidelines for improving the effectiveness of boards of directors of nonprofit organizations*. Albany, N.Y.: Open SUNY.

Hefferan, J.J. (2016). A sporting chance: *Biediger v. Quinnipiac University* and what constitutes a sport for purposes of Title IX. *Marquette Sports Law Review*, 26: 583-670.

Herman, K.A., & Herman, J.A. (2019). Protecting retirement assets from creditors. *Journal of the Missouri Bar*, 75: 172-204.

Heyman, S.B. (2019). United States Supreme Court surveys: 2017 term digest *Reality Trust v. Somers*: Whistleblowers and corporate retaliation. *Roger Williams University Law Review*, 24: 78-103.
Higer, A.J. (2020). I teach at Rutgers and I don't know if I'll have a job this fall. N.J.com (April 24, 2020). Retrieved: https://www.nj.com/opinion/2020/04/i-teach-at-rutgers
Hueske, W. (2013). School's out forever: Lon Morris College, section 525(a), and revocation of Title IV eligibility for institutions of higher education in bankruptcy. *Weil Bankruptcy Blog* (April 9, 2013). Retrieved: https://business-finance-restructuring.weil.com/government/schools-out-forever-lon-morris-college-section-525a-and-revocation-of-title-iv-eligibility-for-institutions-of-higher-education-in-bankruptcy/
Huffman, A.E. (2020). Forgive and forget? An analysis of student loan forgiveness plans. *North Carolina Banking Institute*, 24: 449-478.
Hunter, R. J., & Shannon, J.H. (2015). Is it time to revisit the Yeshiva decision: the myth of "shared university governance." *International Review of Sciences and Humanities*, 9(1): 193-207.
Hunter, R.J., & Shannon, J.H. (2020). A primer on the role of the university's attorney. *Education Quarterly Reviews*, 2(4): 86-100.
Liebert Cassidy Whitmore. (2020). D.C. Circuit rejects NLRB's Pacific Lutheran test, reasserts Great Fall's exemption for determining NLRA exemption for religiously affiliated schools. *Lcwlegal.com* (March 4, 2020). Retrieved: https://www.lcwlegal.com/news/dc-circuit-rejects-NLRB's-Pacific-Lutheran-test
Lindblad, M. (2017). Advantages & disadvantages of at-will employment. *BIZFLUENT* (September 26, 2017). Retrieved: https://bizfluent.com/info-8533105-advantages-disadvantages-atwill-employmenthtml
Lippman, E., & Grimmer, T. (2017). Protecting donor restrictions on bequests. *The CPA Journal*, 87(4): 9-12.
Lipson, J.C. (2010). Understanding failure: examiners and the bankruptcy reorganization of large public companies. *American Bankruptcy Law Journal*, 84: 1-77.
Lipson, J.C. (2018). The secret life of priority: corporate reorganization after Jevic. *Washington Law Review,* 93: 631-783.
Lubben S. (2019). *American business bankruptcy: a primer* (Chapters 17 & 20). Northhampton, Mass.: Edward Elgar Publishing.
Marshall-Freeman, D., (2017). Title IX's three-prong test in athletics. *National School Boards Association.* Retrieved: *https://cdn-files.nsba.org/s3fs-public/09. MarshallFreeman Title IX 3 Prong Test.pdf*
Martin, P. (2005). Court approves termination of United Airlines pension plans. *World Socialist Web.org* (May 13, 2005). Retrieved: https://www.wsws.org/en/articles/2005/05/unit-m13.html
Methner, S.E. (2019). A Catholic university approach to campus speech: using constitutional academic freedom to hold the tension of free speech, inclusive diversity, and university identity. *University of St. Thomas Law Journal*, 15: 358-418.
Meyer, R.C. (2020). Legislative update, Small Business Reorganization Act arrives this month. *American Bankruptcy Institute Journal*, 39(2): 8-49.
National Conference of State Legislators (NCSL). (2019). The at-will presumption and exceptions to the rule. *NCSL.org* (September 21, 2019). Retrieved: http://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx
Nave, G.A. (1985). Collective bargaining agreements in bankruptcy proceedings: Congressional response to *Bildisco. University of Illinois Law Review,* 1985: 997-315.
NCAA. (2020). Title IX frequently asked questions. *NCAA.org.* Retrieved: http://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions (last visited April 14, 2020).
Norton, W.L. (2004). Norton bankruptcy law and practice, 4: Section 79.23. Eagan, Minn.: Thompson Reuters (Westlaw).
Olson, G.A. (2009). Exactly what is 'shared governance'? *Chronicle of Higher Education* (July 23, 2009). Retrieved: https://www.chronicle.com/article/Exactly-What-Is-*Shared/47065*
O'Neill, C. (2020). The meeting of creditors (341 hearing) is an important part of every chapter 7 and chapter 13 bankruptcy case. *All law.com* (updated). Retrieved: https://www.alllaw.com/articles/bankruptcy/what-expect-meeting-creditors-341-hearing.html (last visited April 19, 2020).
Parker, M. & Park, S. (2015). The impact of *Pacific Lutheran* on collective bargaining at catholic colleges and universities. *Journal of Collective Bargaining in the Academy* (*The Keep*)*,* 7(1): Article 3. Retrieved: http://thekeep.eiu/jcba/vol7/iss1/3
Pasquale, K., Siegel, J., & Lee, O. (2015). The rejection and modification of collective bargaining agreements pursuant to bankruptcy code section 1113. *Norton Annual Survey of Bankruptcy Law*: 113-159.
Payne, A.M. (2019). What the hack? Reexamining the duty of oversight in an age of data breaches. *Georgia Law Review,* 53: 727-769.
Price, N. (2018). The fiduciary responsibilities of a nonprofit board of directors. *Board Effect.com* (March 12, 2018). Retrieved: https://www.boardeffect.com/blog/fiduciary-responsibilities-nonprofit-board-directors/

Rimbach, J. (2020). NJ colleges will partially refund students sent home due to coronavirus.
Here's how it will work (March 27, 2020). Retrieved: https://www.msn.com/en-us/news/us/nj-colleges-will-partially-refund-students-sent-home-due-to-coronavirus-here-s-how-it-will-work/ar-BB11FRrL
Rosenthal, L. (2017). Yes, nonprofits sometimes do file bankruptcy. *For Purpose Law Group* (March 29, 2017). Retrieved: https://www.forpurposelaw.com.nonprofits-file-bankruptcy/
Schlagel, C., & Averch, C. (2020). Beauty is in the eye of the beholder: a bundle of rights theory of enforceability of chapter 11 voting assignments. *American Bankruptcy Institute Law Review*, 28: 1-38.
Schmidt, A. (2019). Litigator's perspective, is under oath enough? *American Bankruptcy Institute Journal*, 36(9): 18-58.
Seltzer, R.M., & Ciantra, T.N. (2007). The future of labor through the prism of bankruptcy: the return of government by the injunction in airline bankruptcies. *American Bankruptcy Institute Law Review,* 15: 499-535.
Seton Hall University. (2018). *Faculty Guide. Seton Hall University*. Retrieved: https://www.shu.edu/provost/upload/Faculty-Guide.pdf 12)
Shachmurove, A. (2019). Escape from pandemonium: Reconciling section 363(f) and section 365(h) in Qualitech's shadow and Spanish Peak's wake. *American Bankruptcy Institute Law Review*, 27: 181-263.
Shanes, A. (2020). Seton Hall's endowment drops 9% as outbreak takes financial toll on markets. (April 3, 2020). *North Jersey.com.* Retrieved: https://www.northjersey.com/story/news/coronavirus/2020/04/03/seton-halls-endowment-drops-9-coronavirus-outbreak-takes-toll/2945215001/
Spizman, L., & Kane, J. (1990). Chapter 11 bankruptcy and the termination of collective bargaining contracts. *Employee Responsibilities and Rights Journal*, 3(4): 277-284.
Strub, M.H., & Reisner, J.M. (2020). Section 507: a re-examination of the rules of property rights and post-petition gifting in bankruptcy. *Bankruptcy Institute Law Review*, 28: 93-134.
Temin, M.L., & Chovanes, M.B. (2020). Venue in small-value preference cases after SBRA: Congress should have amended 28 U.S.C. Section 1409(b). *American Bankruptcy Institute Journal,* 39(4): 38-84.
Trautman, L.J., & Ford, J. (2019). Nonprofit governance: the basics. *Akron Law Review,* 52(4): 971-1042.
United States Courts. (2020). *Chapter 11. Bankruptcy Basics.* Retrieved: https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics (last visited April 18, 2020).
U.S. Department of Education. (1996). Clarification of intercollegiate athletics policy guidance: the three-part test (January 16, 1996). Retrieved: https://www2.ed.gov/about/offices/list/ocr/docs/title9-qa-20100420.html (last visited April 15, 2020).
U.S. Department of Justice (2020). Change in chapter 11 quarterly fee payment processing time (April 1, 2020). Retrieved: https://www.justice.gov/ust/chapter-11-quarterly-fees (last visited April 15, 2020).
U.S. Legal (2020). The role of an examiner. *U.S. Legal.com.* Retrieved: https://bankruptcy.uslegal.com/chapter-11-bankruptcy/the-role-of-an-examiner/ (last visited April 16, 2020).
Vedder, R. (2020). Tenure is dying. *Forbes* (April 13, 20120. Retrieved: https://www.forbes.com/sites/richardvedder/2020/04/13/academic-tenure-rip1
Vron, V. (2010). Rejection of an executor contract does not relieve a debtor of assumed liabilities. *Weil Bankruptcy Blog* (December 22, 2010). Retrieved: https://business-finance-restructuring.weil.com/executory-contracts/update-to-rejection-of-an-executory-contract-does-not-relieve-a-debtor-of-assumed-liabilities/
West, M.S. (1986). Life after *Bildisco*: Section 1113 and the duty to bargain in good faith. *Ohio State Law Journal*, 47: 65-161.
Willborn, S., et al. (2012). *Employment law: Cases and Materials* (5th ed.). New York: Lexis-Nexis.
Wong, D. (2010). Chapter 11 bankruptcy cramdown and the contract rate approach. *Northwestern University Law Review*, 106(4): 1927-1958.
Zaretsky, B. (1993). Symposium on bankruptcy: Chapter 11 issues: trustees and examiners in chapter 11. *South Carolina Law Review*, 4: 907-962.

CASES

Biediger v. Quinnipiac University (2009). 616 F. Supp 2d 277 (United States District Court, District of Connecticut)
Cathcart v. Micale (2019). 402 F. Supp. 3d 110 (United States District Court, Eastern District of Pennsylvania)
Cejka v. Vectrus Sys. Corp. (2018). 2018 U.S. Dist. LEXIS 173599 (United States District Court, District of Colorado)
Cohen v. Brown University (1993). 991 F.2d 888 (United States Court of Appeals, 1st Circuit)
Grove City College v. Bell (1984). 465 U.S. 555 (United States Supreme Court)
In re Baldwin United Corp. (1984). 47 B.R. 898 (United States District Court, Southern District of Ohio)
In re Baldwin-United Corporation (1985). 57 B.R. 759 (United States District Court, Southern District of Ohio)
In re Betty Owen School, Inc. (1996). 195 B.R. 23 (United States Bankruptcy Court, Southern istrict of New York)
In re Big Rivers Elec. Corp. (2004). 355 F.3d 415 (United States Court of Appeals, 6th Circuit)
In re Bricksin (2006). 346 B.R. 497 (United States Bankruptcy Court, Northern District of California)
In re Lon Morris College (2012). Case No. 12-60557 (United States Bankruptcy Court, Eastern District of Texas)
In re Roth American Industries (1992). 975 F.2d 949 (United States Court of Appeals, 3rd Circuit)
In re Tighe Merchantile (1986). 62 B.R. 995 (United States Bankruptcy Court, Southern District of California)
In re Wabash Valley Power Ass'n. (1996). 72 F.3d 1305 (United States Court of Appeals, 7th Circuit)
Kapp v. Naturelle, Inc. (1979). 611 F.2d 703 (United States Court of Appeals, 8th Circuit)
Lucio v. Fern at Tenth LLC (2019). 2019 U.S. Dist. LEXIS 174330 (United States District Court, Southern District of Texas, Mcallen Division)
NLRB v. Bildisco (1984). 465 U.S. 513 (United States Supreme Court)
NLRB v. Pacific Lutheran University (2014). 19-RC-102521, 361 NLRB 1404. (National Labor Relations Board)
NLRB v. Yeshiva University (1980). 444 U.S. 672 (United States Supreme Court)
Smith v. Safety-Kleen Sys. (2019). 2019 U.S. Dist. LEXIS 23806 (United States District Court, Western District of Pennsylvania)
Smith v. Shaw's Supermarkets, Inc. (2020). 2020 U.S. App. LEXIS 12479 (United States Court of Appeals, 2nd Circuit)
USC v. NLRB (2019). No. 17-1149 (United States Court of Appeals, D.C. Circuit)

SELECT STATUTORY MATERIALS

Cal. Corp. Code Section 5239(a): No personal liability for certain volunteers
Civil Rights Restoration Act of 1987 (2012). 20 U.S.C. Section 1681.
Higher Education Act (1965). Pub. L. 89–329.
H.R. Rep. No. 109-31, pt. 1, at 145 (2005): Bankruptcy Abuse Prevention and Consumer Protection Act of 2005
National Labor Relations Act (1935, as amended). 29 U.S.C. Sections 151- 169.
N.Y. Not-for-Profit Corp. Law Section 720-a: No personal liability for certain volunteers
Title IX of the Educational Amendments (1972). 20 U.S.C. Â§1681 et seq.
Tower Amendment (1974). 120 Congressional Record 15: 322-323.
U.S. Code Title 11— BANKRUPTCY (The Bankruptcy Act, 2019)
1. CHAPTER 1—GENERAL PROVISIONS (§§ 101 – 112)
2. CHAPTER 3—CASE ADMINISTRATION (§§ 301 – 366)
3. CHAPTER 5—CREDITORS, THE DEBTOR, AND THE ESTATE (§§ 501 – 562)
4. CHAPTER 7—LIQUIDATION (§§ 701 – 784)
5. CHAPTER 9—ADJUSTMENT OF DEBTS OF A MUNICIPALITY (§§ 901 – 946)
6. CHAPTER 11—REORGANIZATION (§§ 1101 – 1195)

7. CHAPTER 12—ADJUSTMENT OF DEBTS OF A FAMILY FARMER OR FISHERMAN WITH REGULAR ANNUAL INCOME (§§ 1201 – 1232)
8. CHAPTER 13—ADJUSTMENT OF DEBTS OF AN INDIVIDUAL WITH REGULAR INCOME (§§ 1301 – 1330)
9. CHAPTER 15—ANCILLARY AND OTHER CROSS-BORDER CASES (§§ 1501 – 1532)

20 U.S.C. Section 1002(a)(4)(A): Title IV eligibility
28 U.S.C. Section 1930(a)(6): Bankruptcy fees.
42 U.S.C. Section 14503(a): Limitation on Liability for (Non-Profit) Volunteers