

The Convergence of Nonprofit Law and Bankruptcy Law
(Thursday, September 19th from 2:00 – 3:00 p.m. PT)

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Program Description: This presentation will go beyond the basics of a nonprofit bankruptcy that precludes an involuntary filing or conversion to chapter 7, but will take a deeper dive to consider several unique features (or pitfalls) of a nonprofit restructuring for consideration by both practitioners and the courts. For example, how does an organization's mission impact a court's review of the debtor's business judgment in assessing sales for substantially all assets?; how does a cramdown plan work for a nonprofit when there are no equity holders, and is the absolute priority rule even relevant?; do the fiduciary duties of a nonprofit board shift when the organization is insolvent?; and, how to successfully emerge from bankruptcy when there are competing nonapplicable laws impacting the nonprofit and its reorganization plan, including health care, energy, environmental, and exit financing.

1. WHAT IS A NON-PROFIT, SIZE AND ROLE OF NON-PROFITS, AND SCOPE OF FINANCIAL CHALLENGES

Black's Law Dictionary defines "Nonprofit" as "the term given to activities that don't lead to making a profit." "A non-profit organization is a group organized for purposes other than generating profit and in which no part of the organization's income is distributed to its members, directors, or officers."¹ Nonprofit entities are organized under state law. For federal tax purposes, an organization is exempt from taxation if it is organized and operated exclusively for religious, charitable, scientific, public safety, literary, educational, prevention of cruelty to children or animals, and/or to develop national or international sports.

Nearly two million nonprofits are registered with the Internal Revenue Service, with missions that vary from human services to educational or religious in nature. In total, nonprofits spend almost \$2 trillion annually and of that amount more than \$800 million is spent on employing more than 12 million people, which amounts to almost eight (8%) percent of the total U.S. labor force. Nonprofits contribute over 5% of the U.S. gross domestic product.

The National Center on Charitable Statistics reports that about 30 percent of all nonprofits close within 10 years of operations. PBS News Hour has estimated that the residual effects of the pandemic have placed more than a third of nonprofits in financial jeopardy. These financial challenges nonprofits face take the form of rising operating expenses, limited staff capacity, difficulty in retaining quality staff, and other market and industry-specific forces.

2. FIDUCIARY DUTIES

a. Generally

Like for-profit organizations, directors and officers of nonprofits have fiduciary duties—duties of care, loyalty and obedience. Those duties are established pursuant to applicable state law and viewed through the prism of the nonprofit's purpose or mission.

The duty of care generally requires the director or officer to actively participate and discharge the duties associated with their role and responsibilities while acting in the best interests of the organization. Directors and officers serving nonprofit organizations must act prudently and responsibly in their roles, ensuring they make informed decisions and exercising reasonable care in their actions. They must rely on appropriate processes, i.e. staying informed, conducting due diligence, and relying on the opinion of advisors, such as counsel, when necessary. Similar to for-profit organizations, officers and directors serving nonprofits must consider the financial health of their organization when taking action. However, the duty of care for nonprofit organizations requires that directors and officers also consider and factor in the charitable and tax-exempt purposes of the organization and the public good for which the organization operates.

The duty of loyalty centers around the internal motives, purposes, and goals of the nonprofit organizations' officers and directors. They must prioritize the interests of the entity to which they

¹ Cornell Law School, Legal Information Institute.

owe loyalty over their own personal interests or the interests of third parties. The duty of loyalty requires the director or officer to act with undivided loyalty so as to avoid using their role or interest to seek or obtain monetary gain for themselves or any related persons. Simply put, the duty of loyalty requires the director or officer to put the good of the nonprofit organization first and avoid engaging in transactions with the nonprofit corporation from which the director or officer or related party would benefit.

The duty of obedience is unique to non-profit organizations. Directors and officers of nonprofit organizations owe a duty to carry out the purpose and mission of the organization, as expressed in the governing legal documents, including the articles of organization, bylaws, and policies. That is most importantly, to carry out the nonprofit organization's mission and, in doing so, using the nonprofit's resources for lawful purposes and comply with laws that relate to the nonprofit organization and the way in which it conducts its activities.

b. Insolvency and Bankruptcy, and the Duties of Care, Loyalty and Obedience

When a nonprofit organization becomes insolvent, however, the directors and officers face potentially conflicting duties. Unlike their for-profit counterparts, nonprofit directors and officers do not owe a duty to shareholders to maximize value, so that duty does not readily translate into a duty that potentially encompasses creditors as with for-profit entities. It would be a drastic change to state unequivocally that a nonprofit directors' and officers' duty, when the nonprofit becomes insolvent, is to maximize value without regard to the nonprofit's mission. In fact, courts have held that nonprofit directors and officers are not required to abandon the nonprofit's mission and focus exclusively on maximizing value, but the directors and officers of an insolvent nonprofit may begin to owe an obligation that runs to the organization's creditors, requiring directors and officers to balance those interests when they may compete.

Directors and officers not required to disregard mission so as to maximize recovery of creditors. “[O]nce in bankruptcy, the directors and management owe fiduciary obligations to creditors to ensure that the pursuit of their philanthropic mission is not financed on the backs of creditors without their consent. . . . Nonetheless, the Debtors are not required to abandon their philanthropic mission.²

The interests of creditors and serving the mission of the nonprofit must be analyzed and taken into account in a reasonable way.³

² *In re W. Va. High Tech. Consortium Found.*, 2017 WL 1437067 (N.D. W. Va. April 21, 2017).

³ *In re HHH Choices Health Plan, LLC*, 554 B.R. 697, 704 (Bankr. S.D.N.Y. 2016) (where creditors are NOT being paid in full, there is no clear guidance in New York case law to determine the relative weight to give to the interests of creditors and to the mission of the not-for-profit corporation where those considerations, at least potentially, are in conflict, “But it cannot be the case that the Court is simply paralyzed if both objectives, paying creditors as much as possible and serving the mission of the corporation, cannot be met at the same time. So what weight is to be applied? The best I can discern from the case law is that all of these considerations are supposed to be taken into account and balanced in a reasonable way, and with no other requirement or particular weight to be applied.”).

Of note, sections 1106 and 1107 of Title 11 of the United States Code (the “Bankruptcy Code”) establish the rights, powers and duties of the trustee or debtor-in-possession. Commentators have noted that no provision of the bankruptcy code exists that specifically obligates a trustee or debtor-in-possession to maximize the value of the enterprise for the benefit of creditors.⁴

Courts have recognized that a non-profit’s duty to its charitable mission may be considered along with a debtor’s duties to its creditors.⁵

c. Recommendations for Advising Directors and Officers of an Insolvent Nonprofit

Existing law does not provide bright-line rules as to how directors and officers of an insolvent nonprofit should best address the tension between the mission and maximizing value. General guidance, however, can be drawn from existing law to assist directors and officers in managing situations or transactions that they may face.

The first steps of that assessment should often include (1) accurately assessing the cash position; (2) identifying expected short-term restricted and unrestricted pledges and grants and timing related to these; (3) identifying commitments and other liabilities and the timing related to these; (4) determining if the revenue stream is sufficient to cover expenses on a sustained basis; and (5) ensuring that the financial reporting system is adequately presenting the financial and business position.⁶

Cash flow plan: Courts have generally found that, as long as a struggling nonprofit is able to meet its current obligations to creditors, directors and officers can continue to prioritize the mission over long-term financial stability. When obligations to creditors cannot be satisfied, however, courts have looked to the interests of all parties involved, particularly the interests of creditors. In order to satisfy its fiduciary duties to the nonprofit itself and potentially to the creditors, a nonprofit’s board of directors and its officers need to have a plan to address the nonprofit’s financial distress. Maintaining the status quo, and thereby increasing the number of creditors and the size of their claims, may render directors and officers vulnerable to claims of inappropriate oversight. A prudent plan should include a process for immediate management of cash receipts and expenses and a strategy for returning the nonprofit to solvency or minimizing the negative impact on creditors. Where such a plan is not feasible, directors and officers should consider what strategic decisions may need to be explored and enacted, and what level of disclosure of the financials to creditors may be appropriate.

⁴ Dana Yankowitz Elliot & Evan C. Hollander, Navigating a Nonprofit Corporation through Bankruptcy, NONPROFIT QUARTERLY (Apr. 29, 2014), <https://nonprofitquarterly.org/nonprofit-corporation-navigating-through-bankruptcy>

⁵ See *In re United Healthcare Sys., Inc.*, 1997 WL 176574 (D.N.J. Mar. 26, 1997); *In re Brethren Care of South Bend, Inc.*, 98 B.R. 927 (Bankr. N.D. Ind. 1989); see also Jonathan Brown, *When Social Enterprises Fail*, 62 Vill. L. Rev. 27, 63 (2017), accessible at <https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=3338&context=vlr> (“Taken together, the BAPCPA nonprofit provisions expressly prioritize the states’ interests in subjecting dispositions of charitable assets to the oversight of attorney generals and other restrictions over the interests of creditors in disposing of assets in a manner resulting in the highest recovery on claims.”).

⁶ Robert Angar, *Putting the “Profit” Back in “Nonprofit,”* J. of Corp. Renewal (Jan./Feb. 2017).

Sale of assets: Directors and officers may face a direct conflict between mission and value when the nonprofit becomes insolvent and is forced to sell assets. The nonprofit may receive competing bids for the assets. A for-profit entity may submit a higher monetary bid for the assets because it will not continue the nonprofit's mission and a nonprofit entity may submit a lower bid on the assets with the intention of continuing the nonprofit's mission or a similar mission. Directors and officers who find themselves in the situation of evaluating competing bids for a nonprofit's assets when the nonprofit can no longer meet current obligations should document a comprehensive evaluation of all bids and the impact on all relevant stakeholders, including employees and those individuals who the nonprofit serves. Approving a sale based on the outcome of totality of the circumstances analysis best satisfies a director and officer's fiduciary duties.

Financial distress of a division: Directors and officers may also face competing duties when a division or one-arm of the nonprofit organization is financially distressed and causing the organization as a whole to suffer. When assessing the alternatives for addressing a failing division, directors and officers should be guided by process and assess the totality of the circumstances. When directors and officers base their decisions on solid information and maintain a record of those decisions and the information underlying them, courts have been willing, if not eager, to find that decisions were informed and satisfied the fiduciary duties to the nonprofit.

The insider transaction: As noted above, one of the duties that a director or officer owes to a nonprofit is the duty of loyalty—a director or officer cannot put his or her own interests above the interests of the nonprofit. This duty comes into play when a director or officer enters into a transaction with the nonprofit, particularly when that nonprofit is distressed. For example, the director or officer may lease space to or from the nonprofit or enter into a sale transaction with the nonprofit. If the nonprofit is insolvent, these transactions will be subject to great scrutiny. Moreover, the decision of another director or officer to approve (or failure to identify) a transaction that involves the insider director may also be subject to scrutiny. Most importantly, the transaction itself must be at fair market value. To ensure fair market value, directors and officers should obtain appropriate information concerning the value of the transaction, such as comparability data. Directors and officers should review this data and document the basis for their approval in advance of the transaction. Also, the directors and officers should consider instituting procedures laying out criteria and process to be used to review any potential transactions between an insider and the nonprofit.

Good process: One of the most common charges levied against directors or officers when an organization experiences financial distress is a failure of oversight. Officers are charged with overseeing the operations of the nonprofit, including its employees. The duty to oversee a nonprofit's management is part of a director's duty of care. Ordinarily prudent people overseeing an entity must monitor the financial health of the organization. The best approach for directors and officers is to ensure that they are receiving regular reports about the financial health and general operations of the nonprofit. The board meetings should include an opportunity to review and discuss the financial reports, with these processes documented in the board minutes.

Managing risk: Best efforts to meet the directors and officers' fiduciary duties cannot eliminate all risks. With that in mind, directors and officers should ensure that the nonprofit has an appropriate D&O policy in place. In addition, directors and officers should familiarize themselves

with the applicable state statute that may provide indemnification or potentially even immunity to the director or officer of a nonprofit in certain circumstances such as when the director or officer (a) serves without compensation, (b) has acted in good faith, (c) has acted within the scope of his or her responsibilities, and (d) has not engaged in willful or reckless misconduct.

3. PROPERTY OF THE ESTATE ISSUES

- a. Which assets may become property of the estate and for which purposes may they be used?

If a nonprofit organization (the “nonprofit debtor”) seeks protection under the Bankruptcy Code, an estate is created and section 541 of the Bankruptcy Code defines what constitutes property of the nonprofit debtor’s estate. The Supreme Court in *Butner v. United States*,⁷ however, has made clear that “[p]roperty interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.”⁸ Hence, the Bankruptcy Code defines what is the property of the nonprofit debtor’s estate, but it does not govern the property interests themselves.

Additionally, section 541 of the Bankruptcy Code carves out powers the nonprofit debtor may exercise solely for the benefit of another entity and property in which the nonprofit debtor holds only legal title but not an equitable interest.

i. How non-bankruptcy law carves out property from section 541:

State law establishes property rights when the nonprofit debtor seeks relief under the Bankruptcy Code. As such, property interests are essentially unchanged when the nonprofit debtor files a petition under the Bankruptcy Code. Stated differently, the nonprofit debtor’s postpetition property interests remain subject to prepetition restrictions.⁹ As noted in Section 2(b), *supra*, bankruptcy courts must weigh the interests of the creditor against the objectives of the nonprofit debtor in a reasonable way. In effectuating this balance, bankruptcy courts tend to protect the principal or corpus of nonprofit debtor donor-restricted endowment funds from creditors. Where applicable state law restricts the use of donated funds, the bankruptcy court will likely consider the funds to be excluded from property of the estate and therefore unavailable to pay creditors.¹⁰ However, the less stringent or formal the restrictions on a particular fund, the more likely it is that a bankruptcy court will view the nonprofit debtor as having control and find that the funds are property of the bankruptcy estate.¹¹

⁷ 440 U.S. 48 (1979).

⁸ 440 U.S. at 55.

⁹ See, e.g., Jack A. Eiferman and Martha J. Frahm, NONPROFITS IN TROUBLE: RECEIVERSHIPS AND BANKRUPTCY, NPO MA-CLE 17-1.

¹⁰ See *In re Parkview Hosp.*, 211 B.R. 619, 630 (Bankr. N.D. Ohio 1997).

¹¹ Ileana M. Hernandez et. al., *Assets Held by Charitable Organizations Are Safe from Claims of Creditors in Bankruptcy Cases . . . Or Are They?*, <https://www.manatt.com/insights/newsletters/non-profit-law/assets-held-by-charitable-organizations-are-safe-f> (last visited July 22, 2024) (discussing *In re Roman Catholic Archbishop of*

ii. *For what purposes may the property of the estate be used?*

As discussed in greater detail, *infra*, decisional law supports the proposition that a nonprofit debtor is not subject to the absolute priority rule.¹² In view of this exception, courts are more apt to keep assets that are donated to a nonprofit for a specific charitable purpose from disbursement to the non-profit organization's creditors.

Subject to the aforesaid, "property of the estate" in nonprofit debtor cases functions largely the same way as in for-profit bankruptcy cases, with the exception of certain sale restrictions discussed, *infra*, and those instances pertaining to nonprofit debtor donor-restricted funds, which would fall outside the definition of property the estate. To the extent that donors fail to specify uses for their donations, a nonprofit debtor will likely be successful in using those assets to fund a chapter 11 plan or benefit of creditor classes.

If the nonprofit debtor proposes a liquidating plan or voluntarily converts a chapter 11 case to a case under chapter 7, section 501(c)(3) of the Internal Revenue Code mandates that the nonprofit debtor must permanently commit residuary assets, if any, to tax-exempt purposes—including charitable, religious, educational, scientific, literary, testing for public safety, fostering national or international amateur sports competition, and preventing cruelty to children or animals—and prohibits the non-profit debtor's assets from being distributed to managers, officers or directors.¹³

b. Are charitable pledges enforceable?

Most jurisdictions hold that charitable pledges constitute enforceable obligations.¹⁴ The reasons supporting this conclusion, however, are varied and sometimes at odds.

Some courts have found consideration on the theory that the donee impliedly promises to use the promised gifts for charitable purposes. . . . Other cases have found consideration in

Portland in Oregon, 345 B.R. 686 (Bankr. D. Ore. 2006) and *In re Archdiocese of Milwaukee*, 483 B.R. 855 (Bankr. E.D. Wis. 2012)).

¹² See, e.g., *In re Henry Mayo Newhall Mem'l Hosp.*, 282 B.R. 444, 453 (B.A.P. 9th Cir. 2002) ("[T]he Hospital's nonprofit status puts creditors in an unusually disadvantaged negotiating position because they are not able to assert the Bankruptcy Code's absolute priority rule to block unacceptable plans...."); see also Amelia Rawls, Comment, *Applying the Absolute Priority Rule to Nonprofit Enterprises in Bankruptcy*, 118 Yale L.J. 1231, 1233-34 (2009); Pamela Foohey, *Chapter 11 Reorganization and the Fair and Equitable Standard: How the Absolute Priority Rule Applies to All Nonprofit Entities*, 86 St. John's L. Rev. 31, 85 (2012).

¹³ *Required Provisions for Organizing Documents*, IRS, <https://www.irs.gov/charities-non-profits/charitable-organizations/charity-required-provisions-for-organizing-documents> (last visited July 22, 2024); *Exempt Purposes – Internal Revenue Code Section 501(c)(3)*, IRS, <https://www.irs.gov/charities-non-profits/charitable-organizations/exempt-purposes-internal-revenue-code-section-501c3#:~:text=The%20exempt%20purposes%20set%20forth,cruelty%20to%20children%20or%20animals> (last visited July 22, 2024). See also *Summers v. Cherokee Child. & Fam. Servs., Inc.*, 112 S.W.3d 486, 501 (Tenn. Ct. App. 2002).

¹⁴ See generally Restatement (Second) of Contracts, Sec. 90 (1981); Annotation, "Consideration for subscription agreements," 115 A.L.R. 589 (1938); *Jewish Fed'n of Cent. New Jersey v. Barondess*, 560 A.2d 1353 (N.J. Super. 1989).

the purported exchange of promises between the subscribers. . . . Other cases have held that the subscription is an offer to a unilateral contract which is accepted by the charity's performance of the terms of the subscription. . . . [Still others] have tended to abandon the attempt to utilize traditional contract doctrines to sustain.¹⁵

By way of example, some courts have applied the doctrine of promissory estoppel as a mechanism to enforce a pledge, if the pledgor's actions caused the nonprofit organization to detrimentally rely on the pledge.¹⁶ This approach comes the closest of any approach to regarding charitable pledges as contracts—or, rather, quasi-contracts. This reasoning is backed by the idea that contract law should not “be disregarded or modified so as to bestow a preferred status upon charitable organizations and institutions.”¹⁷ Hence, Maryland will enforce a charitable pledge if the promisor should reasonably expect the promisee's action or forbearance and if it in fact induces the promisee's action or forbearance.¹⁸

Courts have also relied on public policy as the rationale for enforcing charitable pledges.¹⁹ This view does not perceive charitable pledges as contracts, and at least one court does not support viewing a charitable pledge as a contract for purposes of enforcement,²⁰ concluding that the Statute of Frauds—a valid affirmative defense under contract law—is not valid on the context of an action to enforce a pledge to a nonprofit organization.²¹

In any event, American courts traditionally view charitable pledges favorably, often holding in favor of non-profit organizations under a consideration-based analysis even where “the element of exchange was doubtful or nonexistent. Where recovery is rested on reliance in such cases, a probability of reliance is enough, and no effort is made to sort out mixed motives or to consider whether partial enforcement would be appropriate.”²² Such decisions may be based on the foreseeability and reasonableness of the nonprofit organization's actions after the pledge, as well as a consequential change of position. Alternatively, courts have reinforced their reasonings under this view by regarding the failure to procure the gift as the promisor's unjust enrichment.²³

4. INVOLUNTARY CONVERSION OF A NON-PROFIT DEBTOR IS NOT POSSIBLE

Bankruptcy Code section 1112(c) prohibits involuntary conversion of a chapter 11 case to a chapter 7 case if the debtor is a nonprofit entity.²⁴ Thus, a nonprofit debtor can veto conversion as

¹⁵ *Barondess*, 560 A.2d at 1353 (citing Williston, A Treatise on the Law of Contracts, Sec. 116 (3 Ed.1957)).

¹⁶ *Maryland Nat'l Bank v. Jewish Appeal Fed. Of Greater Washington, Inc.*, 286 Md. 274, 290 (1979).

¹⁷ *Id.* at 284

¹⁸ *Id.* at 281.

¹⁹ *Barondess*, 560 A.2d at 1354.

²⁰ *Id.* at 1354.

²¹ *Id.*

²² Restatement (Second) of Contracts § 90 (1981).

²³ *Id.*

²⁴ See 11 U.S.C. § 1112(c).

an alternative to confirmation, even when conversion would be in the best interest of the debtor's estate. In *In re Berwick Black Cattle Co.*,²⁵ the United States trustee unsuccessfully argued the nonprofit debtor cases should be converted, notwithstanding the prohibition under section 1112(c), because substantially all of the assets had already been sold and, according to the legislative history, the purpose of section 1112(c) is to prevent the involuntary liquidation of a nonprofit (or farmer) debtor's assets.²⁶ In rejecting this argument, the *Berwick* court reasoned that section 1112(c) is "clear and unambiguous" and "expresses no exception for cases where the debtor's assets have been sold off or where the debtor is no longer operating the same business enterprise or where he is acting out of self-interest."²⁷

Despite the prohibition against involuntary conversion, courts may dismiss a nonprofit debtor's case or appoint a chapter 11 trustee if cause has been established. For example, in *Berwick*, after selling substantially all assets, the debtors were unable to confirm a plan despite having obtained sufficient votes in favor of the plan.²⁸ The United States trustee and the committee of unsecured creditors sought to have a chapter 11 trustee appointed, and the debtor moved for dismissal.²⁹ Rather than appoint a chapter 11 trustee, the *Berwick* Court dismissed the cases, reasoning that, *inter alia*, appointing a chapter 11 trustee "would amount to a de facto conversion, a ploy that has been criticized and rejected in similar cases."³⁰

5. SALE ISSUES FOR NONPROFIT DEBTORS

a. The Intersection Between the Bankruptcy Code Sale Provisions and State Law.

i. Sections 363(d)(1) and 541(f) of the Bankruptcy Code.

Broadly speaking, the chapter 11 nonprofit debtor, as debtor-in-possession, generally has the exclusive authority sell estate property outside of a chapter 11 plan.³¹ Any sale under the Bankruptcy Code, however, must comply with state law, which may include an "appropriateness review" by a state attorney general. Specifically, Sections 363(d)(1) and 541(f) of the Bankruptcy Code, two of three provisions impacting nonprofit debtors which were adopted as part of the 2005 Bankruptcy Abuse Prevention and Consumer Act, may impact the sale of a nonprofit debtor's assets.³²

²⁵ 405 B.R. 907 (Bankr. C.D. Ill. 2009)

²⁶ *See id.* at 911.

²⁷ *Id.*

²⁸ *Id.* at 910.

²⁹ *Id.* at 910, 912.

³⁰ *Id.* at 914 (citing *Matter of Sinclair*, 870 F.2d 1340 (7th Cir. 1989) and *Matter of Sadler*, 935 F.2d 918 (7th Cir. 1991)); *but see In Erin Farms, Inc.*, 336 B.R. 600 (6th Cir. BAP 2005) (appointing a chapter 11 trustee, who was then permitted to convert the chapter 11 case to a case under chapter 7).

³¹ *See* 11 U.S.C. § 363. The term "generally" is used here insofar section 1104 of the Bankruptcy Code establishes that a chapter 11 trustee may be appointed in a nonprofit chapter 11 case. *See In re Woodlawn Cmty. Dev. Corp.*, 613 B.R. 671, 689 (N.D. Ill. 2020) ("Section 1104 does not distinguish between for-profit and nonprofit organizations").

³² Samuel R. Maizel et al., *Nonprofit Assets in Bankruptcy: What Do the Rules Really Mean?*, AM. BANKR. INST. J., Feb. 2024, at 28, 28.

Section 363(d)(1) of the Bankruptcy Code permits a nonprofit debtor to transfer property (1) “only in accordance with applicable nonbankruptcy law that governs the transfer of property by a debtor that is such a corporation or trust.”³³ “The provision is intended to restrict the use, sale or lease of a nonprofit entity’s property except in accordance with applicable nonbankruptcy law, so that a nonprofit debtor cannot escape supervision by its State’s Attorney General, who is given standing to appear and be heard on [these] issue[s].”³⁴ Thus, the Bankruptcy Code seemingly permits an additional layer of oversight—besides the oversight roles of the bankruptcy court and the office of the U.S. Trustee—regarding the sale of a nonprofit debtor’s assets. Notably, however, the applicability of such oversight “does not impair the jurisdiction of the bankruptcy courts to apply [state law] in particular cases, and the bankruptcy court is not required to defer to another forum.”³⁵

Similarly, section 541(f) of the Bankruptcy Code provides that nonprofit debtors may transfer assets “only under the same conditions as would apply if the debtor had not filed a case under this title.” This prevents “charitable type organizations in bankruptcy, such as hospitals,” from being “sold to profit-making, taxpaying entities without compliance with state law.”³⁶

At least one bankruptcy court has interpreted both sections 363(d)(1) and 541(f) as not prohibiting a nonprofit debtor from selling estate property “free and clear” of certain state-imposed regulatory conditions related to the sale, insofar as those regulatory conditions could impose certain monetary obligations on the buyer. In *In re Verity Health System of California, Inc.*,³⁷ the California Attorney General attempted to impose certain conditions on the sale of assets of a nonprofit debtor, which could have imposed an additional \$5 million in post-closing obligations on the purchaser of the assets. The California Attorney General was empowered by a state statute governing the sale of the assets of a nonprofit organization. The Debtor argued that the statutory obligations imposed by section 363(d)(1) of the Bankruptcy Code did not abrogate a nonprofit debtor’s “authority to sell free and clear of conditions that might be imposed on the sale outside of bankruptcy under the more specific provisions of section 363(f) . . . that are not limited by a nonprofit debtors’ general obligations under section 363(d)(1).”³⁸ The *Verity* court agreed, concluding that the free and clear provisions of section 363(f) permitted the sale “free and clear” of the regulatory burdens imposed by the California statute, because such regulatory burdens constituted “‘debt’ under the Bankruptcy Code’s broad definition of that term”.³⁹

The *Verity* court similarly concluded that nonprofit debtor had complied with the section “541(f)’s mandate. That is, ‘notwithstanding any other provisions’ of the Bankruptcy Code, [the nonprofit

³³ 11 U.S.C. § 363(d)(1).

³⁴ 3 Collier on Bankruptcy ¶ 363.04 (2024)

³⁵ *Id.*

³⁶ 5 Collier on Bankruptcy § 541.30.

³⁷ No. 2:18-BK-20151-ER, 2019 WL 5585007 (Bankr. C.D. Cal. Oct. 23, 2019), vacated, No. 2:18-BK-20151-ER, 2019 WL 6519342 (Bankr. C.D. Cal. Nov. 13, 2019).

³⁸ Samuel R. Maizel et al., *Nonprofit Assets in Bankruptcy: What Do the Rules Really Mean?*, AM. BANKR. INST. J., Feb. 2024, at 28.

³⁹ *Verity*, 2019 WL 5585007, at *19.

debtor] have sought to transfer the Hospitals in the same manner as the transfer would have occurred under applicable nonbankruptcy law. The [nonprofit debtor] submitted the transfer to the review of the Attorney General, paid for the expert healthcare impact statements required under the statute, and waited for 135 days for the Attorney General to review the transaction. The transfer has been subject to the same conditions that would have applied had the [nonprofit debtor] not sought bankruptcy protection”⁴⁰

ii. Complementary and Supportive Role of the States Attorneys General

The Revised Model Nonprofit Corporation Act (“RMNPCA”), which has been adopted in approximately 30 jurisdictions, also impacts the transfer of nonprofit debtor assets. Pursuant to the RMNPCA, state attorneys general are vested with broad authority to regulate and investigate nonprofit corporations “to protect the public interest.”⁴¹

Under the RMNPCA, nonprofit debtors are required to provide attorneys general with notice of all significant corporate transactions, including sale issues. This also functions to give attorneys general standing in these transactions.⁴² State laws differ as to the extent and conditions of attorney general involvement required—for instance, California specifically requires nonprofits that operate or control health facilities to obtain the state attorney general’s written consent to transfer its assets, while Tennessee requires nonprofits to provide the attorney general notice around the time they plan to dissolve.⁴³

State oversight can also vary greatly dependent on the where the nonprofit debtor is organized and doing business. For example, under Massachusetts law,⁴⁴ the commonwealth’s attorney general is obligated to enforce the due application of funds given or appropriated to public charities within the commonwealth and prevent breaches of trust in the administration thereof. Conversely, the Delaware attorney general does not possess a “charity oversight” function because it does not have a separate nonprofit corporations statute.⁴⁵ Note that when considering sales in the context of nonprofit debtors, their mission may be considered when evaluating competing bids. For example, in *In re HHH Choices Health Plan, LLC*, the bankruptcy court considered two bids for substantially all of the debtor’s assets and, after noting the financial issues were “pretty much a wash,” ultimately approved the bid that more closely aligned with the senior living center debtor’s mission.⁴⁶

⁴⁰ *Id.* at *21.

⁴¹ *Summers v. Cherokee Child. & Fam. Servs., Inc.*, 112 S.W.3d 486, 506–07 (Tenn. Ct. App. 2002) (citing Elizabeth A. Moody, *The Who, What, and How of the Revised Model Nonprofit Corporation Act*, 16 N. KY. L. REV. 251, 262, 265, 266, and 269 (1989)).

⁴² Moody, *The Who, What, and How of the Revised Model Nonprofit Corporation Act*, at 281–82.

⁴³ Cal. Corp. Code § 5914 (West); Tenn. Code Ann. § 48-64-103 (West). *See, e.g., In re Verity Health Sys. of California, Inc.*, 598 B.R. 283, 293 (Bankr. C.D. Cal. 2018); 43-FEB Am. Bankr. Inst. J. 28, 29 and *Summer*, 112 S.W.3d at 506.

⁴⁴ Mass. Gen. Laws c. 12 § 8.

⁴⁵ *See generally* Del. Code Ann. Tit. 8.

⁴⁶ 554 B.R. 697, 713 (Bankr. S.D.N.Y. 2016).

6. CONFIRMATION ISSUES PARTICULAR TO NON-PROFIT DEBTORS

The ultimate goal of good faith chapter 11 debtors is to have a chapter 11 plan confirmed. Although Chapter 11 plans may be confirmed over the objection of a class of creditors, practically all of the confirmation requirements under section 1129 must be satisfied when chapter 11 debtors lack the support of an impaired class of creditors.⁴⁷ However, certain confirmation requirements, including the absolute priority rule and the best interest of the creditors test, may not apply to non-profit debtors. Other requirements, while unquestionably applicable to non-profit entities, may present challenges or opportunities that are particular to nonprofit debtors.

1. Requirements that May Not Apply to Nonprofit Debtors

a. Absolute Priority Rule

The absolute priority rule under section 1129(b)(2) may present an issue for a nonprofit debtor requesting confirmation of a plan of reorganization over the objection of an objecting creditor. In general, Bankruptcy Code section 1129(b)(2) prohibits the distribution of estate property to any junior class of claims or interests over the objection of a senior class that has not been paid, in full, the allowed amount of the senior claim.⁴⁸ The purpose is to ensure that a dissenting class of creditors must be satisfied in full before any junior class can receive or retain any property under a plan. Accordingly, if a plan of reorganization proposes to permit a nonprofit debtor's member to maintain its interest in the debtor to continue to control the debtor post-confirmation but does not propose to pay all creditors in full, the nonprofit debtor may face an objection based on violation of the absolute priority rule. However, courts determining whether permitting existing members of nonprofit entities to retain control following confirmation amounts to retention of an equity interest in violation of the absolute priority rule, have held that the absolute priority rule either does not apply or has not been violated.⁴⁹ In short, the analysis hinges on whether retention of interests would result in the retention or receipt of economic benefits. Thus, the absolute priority rule should not be a hurdle to confirmation for most nonprofit debtors because many generate no profit and make no distributions or otherwise provide economic benefits to their members or interest holders. Bankruptcy courts may be guided by applicable state law, including statutes governing assets of the nonprofit, as well as whether members are entitled to receive economic benefits on account of their interests.

At least two bankruptcy courts in nonprofit healthcare cases have determined that the absolute priority rule is not violated merely because the plan provides for interest holders to retain their interests, and two circuit courts have determined that the absolute priority rule does not apply in cases of cooperative and union debtors.⁵⁰

⁴⁷ See 11 U.S.C. § 1129(b)(1).

⁴⁸ See 11 U.S.C. § 1129(b)(2)(B).

⁴⁹ See, e.g., *In re General Teamsters, Warehousemen & Helpers Union, Local 890*, 265 F.3d 869, 873 (9th Cir. 2001) (“The absolute priority rule is generally applied to for-profit corporations facing bankruptcy, where an equity owner seeks to retain property, often represented by stock.”).

⁵⁰ See *In re Whittaker Mem'l Hosp. Ass'n*, 149 B.R. 812 (Bankr. E.D. Va. 1993) (hospital case); *In re Independence Village Inc.*, 52 B.R. 715 (Bankr. E.D. Mich. 1985) (senior living case); *In re Wabash Valley Power Ass'n, Inc.*, 72

In *In re Wabash Valley Power Association, Inc.*, the seminal case on this issue, the debtor’s largest secured creditor argued that the proposed plan violated the absolute priority rule because it permitted members to retain certain “patronage capital accounts” for credits given to customers when rates exceeded the debtor’s actual costs; and the members would retain control over the reorganized entity.⁵¹ The Seventh Circuit rejected these arguments, holding generally that the members “do not hold equity interests in the cooperative” and therefore it is “impossible for them to retain any property ‘on account of’ such interests.”⁵² The Seventh Circuit also identified three components of an equity interest: control, profit share, and ownership of corporate assets. In *General Teamsters*, the Ninth Circuit considered the application of the absolute priority rule in the case of a nonprofit labor union, which was formed not for profit sharing but to create bargaining power for union members.⁵³ The Ninth Circuit found that the union held no equity interests because, among other things, the members could not “share in any profits . . . or control [the union’s] assets.”⁵⁴ Since *Wabash* and *General Teamsters* were decided, other bankruptcy have found the absolute priority rule does not apply to nonprofit entities by focusing their analyses on whether economic benefits could be gained by the members’ ability to control the board of directors.⁵⁵

b. Best Interest of Creditors Test

The best interests of creditors test generally requires that each nonconsenting, impaired creditor and interest holder receive a distribution under the plan that is at least as much as projected distributions would be to those creditors and interest holders in a liquidation of the debtor under chapter 7 of the Bankruptcy Code.⁵⁶ Because the Bankruptcy Code precludes a forced sale of a nonprofit entity’s assets, at least one debtor has argued, albeit unsuccessfully, that section 1129(a)(7) should not apply in nonprofit debtor cases because such cases cannot be involuntarily

F.3d 1305 (7th Cir. 1995) (cooperatives case); *In re General Teamsters, Warehousemen & Helpers Union, Local 890*, 265 F.3d 869 (9th Cir. 2001) (union case).

⁵¹ 72 F.3d at 1315.

⁵² *Id.*

⁵³ 265 F.3d at 874.

⁵⁴ *Id.* at 876.

⁵⁵ See, e.g., *In re Havre Aerie No. 166 Eagles*, 2013 WL 1164422, at *15 (Bankr. D. Mont. 2013) (“[T]he evidence shows that the Debtor is a non-profit and no evidence exists of present ownership or interests in the organization’s profits other than the Debtor.”); *In re Indian Nat. Finals Rodeo, Inc.*, 453 B.R. 387, 401 (Bankr. D. Mont. 2011) (overruling objection based on absolute priority rule because nonprofit organization had no shareholders, no members received dividends, and its board members and commissioners earned no salaries); *In re Save Our Springs (S.O.S.) Alliance, Inc.*, 388 B.R. 202, 245 (Bankr. W.D. Tex. 2008), aff’d, 632 F.3d 168 (5th Cir. 2011) (“SOS’s Plan does not provide for equity holders to receive or retain an interest, because the Debtor, as a non-profit organization, has no equity holders.”); *In re Henry Mayo Newhall Mem’l Hosp.*, 282 B.R. 444, 453 (B.A.P. 9th Cir. 2002) (noting that “the Hospital’s nonprofit status puts creditors in an unusually disadvantaged negotiating position because they are unable to assert the Bankruptcy Code’s absolute priority rule to block unacceptable plans that give value to junior interests before paying creditors in full.”); *In re Corcoran Hosp. Dist.*, 233 B.R. 449, 459 (Bankr. E.D. Cal. 1999) (explaining that the absolute priority rule “must be interpreted somewhat differently” with nonprofit chapter 11 debtors and finding that the hospital district had no equity interest holders and, thus, the hospital could continue to operate with residents holding interests not akin to shares held by shareholders of a for profit corporation).

⁵⁶ See 11 U.S.C. § 1129(a)(7).

converted from chapter 11 to chapter 7.⁵⁷ In other nonprofit chapter 11 cases, nonprofit debtors have argued that the best interest of creditors test should not have to be satisfied in order to have a plan confirmed.⁵⁸ In addition, practitioners should consider arguing that the best interest of creditors test does not apply because a nonprofit debtor may not be involuntarily forced into bankruptcy under Bankruptcy Code section 303. *See* 11 U.S.C. 303(a).

Even if section 1129(a)(7) applies in nonprofit chapter 11 cases, nonprofit debtors may be able to take advantage of regulatory restrictions on asset sales to satisfy the requirements of section 1129(a)(7). For example, California state law requires any nonprofit corporation that operates or controls a health facility to obtain written consent of the California Attorney General before entering into an agreement to, *inter alia*, sell, transfer, lease, exchange, option, convey, or otherwise dispose of its assets to a for-profit corporation or mutual benefit entity.⁵⁹ The requirement to notify and obtain consent from the Attorney General before selling assets will not only increase costs, but it will likely slow down the sale process, which would impact a debtor's ability to maximize value and, ultimately, distributions to creditors in a hypothetical chapter 7 scenario. In this situation, the liquidation value of a nonprofit debtor's assets would likely need to be reduced, which makes the best interest of creditors test an easier hurdle to overcome. With respect to the best interest of creditors test, a nonprofit debtor should also consider whether its assets are unique and, therefore, less marketable. For example, a temple owned by a religious nonprofit entity would likely have limited marketability, and certain assets may be subject to special restrictions such that they may be used only for a particular purpose.

2. *Requirements that Apply and May Present Challenges or Opportunities for Nonprofit Debtors*

a. Absolute Priority Rule

Additionally, the absolute priority rule has been litigated in liquidating nonprofit cases.⁶⁰ In such cases, the issue is not whether the absolute priority rule should apply because, for example, an existing controlling member is (or is not) retaining control following confirmation of a plan. Rather, the issue could be whether the absolute priority rule has been violated when a buyer, for its own business reasons, proposes that, in addition to the cash consideration to be distributed to the secured lender as proceeds of the lender's collateral, certain funds should be set aside or earmarked for and distributed to certain unsecured creditors. As in *Harborside* and *Friendship Village of Schaumburg*, in these situations, the secured lender could argue that such funds constitute proceeds of the lender's collateral that must be distributed to the secured lender because the lender has a deficiency claim and has not been paid in full on account of its secured claim.

⁵⁷ *See Boy Scouts of America and Delaware BSA, LLC*, 642 B.R. 504, 662–63 (Bankr. D. Del. 2022).

⁵⁸ *See In re Evangelical Retirement Homes of Greater Chicago d/b/a Friendship Village of Schaumburg*, No. 23-07541 (Bankr. N.D. Ill. June 17, 2024) (oral argument that the best interest of creditors test should not apply because, *inter alia*, the case could not be involuntarily converted).

⁵⁹ *See* Cal. Corp. Code § 5914.

⁶⁰ *See In re Amsterdam House Continuing Care Retirement Community, Inc. d/b/a The Harborside*, Case No. 23-70989 (Bankr. E.D.N.Y.) and *In re Evangelical Retirement Homes of Greater Chicago d/b/a Friendship Village of Schaumburg*, Case No. 23-07541 (Bankr. N.D. Ill.)

b. Feasibility

To obtain confirmation of a proposed chapter 11 plan, a debtor must show that its plan is feasible, which means that it is “not likely to be followed by . . . liquidation, or the need for further financial reorganization.”⁶¹ This requirement may present a challenge for nonprofit debtors that propose to rely on donations as a source of funding for the implementation of their chapter 11 plans.⁶² For such a debtor, the feasibility requirement will be especially difficult to satisfy if donors perceive that donations would be used to pay creditors rather than support the nonprofit’s charitable purpose or mission. If possible, to pass the feasibility test, the nonprofit debtor should present evidence to demonstrate: (i) donations have increased and will likely continue to increase and (ii) the existence of other sources of cashflow.⁶³

In *In re Tree of Life Church*,⁶⁴ the court applied a six-factor test to determine whether the plan offered a “reasonable assurance of success” and, as in *Indian National Finals Rodeo*, the debtor depended on tithes and offerings only in part because there were other income streams to support feasibility. The court, like the court in *Indian National Finals Rodeo*, found that the not-for-profit debtor’s plan was feasible even though it was depending, in part, on donations.

c. Sales and Bankruptcy Code section 1129(a)(16)

Under Bankruptcy Code section 1129(a)(16), a bankruptcy court cannot confirm a plan unless any transfer of property pursuant to the plan complies with applicable nonbankruptcy law.⁶⁵ Specifically, section 1129(a)(16) provides:

All transfers of property under the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.⁶⁶

Thus, whether a non-for-profit debtor sells its assets through a motion pursuant to Bankruptcy Code section 363 or under a chapter 11 plan, the debtor must comply with applicable nonbankruptcy law regarding the transfer of the assets being sold. As discussed above, state laws may impose restrictions on nonprofit entities wishing to sell their assets, which must be considered

⁶¹ See 11 U.S.C. § 1129(a)(11).

⁶² See *In re Save Our Springs (S.O.S.) Alliance Inc.*, 632 F.3d 168, 172-73 (5th Cir. 2011) (affirming decision denying confirmation because “voluntary pledges [from donors] alone are too speculative to provide evidence of [plan] feasibility”).

⁶³ See *In re Diocese of Camden, New Jersey*, 653 B.R. 309, 344 (Bankr. D. N.J. 2023) (“It is reasonable that as the lockdown ends and the fears associated with COVID subside, participation in Church services will increase as will donations. Further, the prior year’s income shows a steady increase in charitable donations by parishioners since COVID has largely passed, providing support for the reasonableness of future cash flow projections.”); *In re Indian Nat’l Finals Rodeo, Inc.*, 453 B.R. 387, 401 (Bankr. D. Mont. 2011) (finding the plan was feasible even though sponsorships and donations had declined due to aggressive collection efforts of creditor because (a) confirmation of the plan that barred such collection efforts would likely cause donations to increase and (b) ticket sales had increased and expenses could be reduced).

⁶⁴ 522 B.R. 849 (Bankr. D. S.C. 2015).

⁶⁵ See 11 U.S.C. § 1129(a)(16).

⁶⁶ *Id.*

and complied with in order for a nonprofit debtor to confirm a chapter 11 plan.⁶⁷ However, section 1129(a)(16) may not apply if the regulations at issue are not applicable to the proposed transfer.⁶⁸ In any event, practitioners may be able to propose a compromise that will allow nonprofit debtors to confirm chapter 11 plans notwithstanding technical violations of certain nonbankruptcy laws, especially if the nonbankruptcy law does not relate to the transfer of assets.

In *In re Life Care St. Johns, Inc.*,⁶⁹ the Bankruptcy Court confirmed a chapter 11 plan of reorganization of a continuing care retirement community debtor that was out of compliance with certain Florida state regulations. Specifically, Chapter 651 of the Florida Statutes require continuing care retirement communities to maintain certain reserves, including operating and renewal and replacement reserves, which must hold minimum amounts as set forth under the statutes.⁷⁰ Withdrawals from these reserve accounts are generally not permitted if such withdrawal would cause the community to have an insufficient balance, and a request for authority to withdraw must be accompanied by a plan for replenishing the account. At the outset of the case, over the Florida Office of Insurance Regulation's objection, the continuing care retirement community debtor was permitted to use certain of the reserve funds in accordance with the approved cash collateral budget to cover the administration costs of the chapter 11 case. Later, the debtor proposed a plan that provided for replenishment of the reserves over a period of 5 years. To permit the debtor to implement its plan without risk of having its certificate of authority revoked for failing to comply with applicable nonbankruptcy law, the confirmation order included the following injunction that enjoined governmental authorities, including the Florida Office of Insurance Regulation, from taking any action against the reorganized debtor with respect to the underfunded reserves.

Injunction Against Discriminatory Treatment. In addition to the foregoing, all government entities having regulatory authority over the Debtor or its licensure shall be enjoined and restrained on, from and after the Effective Date from terminating, revoking, suspending or refusing to renew the Debtor's or the Reorganized Debtor's license(s) or authority to conduct business as a continuing care retirement community or taking other enforcement actions against the Reorganized Debtor as a result of any act, actions or omissions preceding this Confirmation Order or as a result of the Reorganized Debtor's failure to maintain the reserves required by Chapter 651, Florida Statutes, on or after the Effective Date, so long as the Reorganized Debtor is (i) compliant with its obligations to replenish its reserve accounts in the manner set forth in the Plan, and (ii) has disclosed to new or prospective residents as an addendum to their Residence and Care Contracts a statement that the Reorganized Debtor does not presently maintain

⁶⁷ See *In re Diocese of Camden, New Jersey*, 653 B.R. 309 (Bankr. D. N.J. 2023) (plan could be confirmed because proposed transfers would be made in accordance with applicable non-bankruptcy law); *In re Claar Cellars LLC*, 623 B.R. 578 (Bankr. E.D. Wash. 2021) (plan could not be confirmed because proposed transfer did not comply with nonapplicable bankruptcy law).

⁶⁸ See, e.g., *In re Seasons Partners, LLC*, 439 B.R. 505 (Bankr. D. Ariz. 2010); *In re Machne Menachem, Inc.*, 371 B.R. 63 (Bankr. M.D. Pa. Sept. 6, 2006) (proposed transfer under plan proposed by non-profit debtor's former director was not a "voluntary transfer" and, therefore, was not subject to New York's Not-for-Profit Corporation Law).

⁶⁹ No. 13-04158-JAF, 2014 WL 983763 (Bankr. M.D. Fla. Feb. 28, 2014)

⁷⁰ See Fl. St. § 651.035.

the minimum liquid reserves contemplated by § 651.035, Florida Statutes, they relate to and are necessary to (i) allow applicable distributions pursuant to the Plan, (ii) permit the Bond Trustee to be compensated for fees and reimbursed for expenses including expenses of its professionals, assert its charging lien, enforce its indemnity and other rights and protections with respect to and pursuant to the Bond Documents, (iii) permit the Bond Trustee to appear in the Chapter 11 case, and (iv) permit the Bond Trustee to perform any functions that are necessary in connection with the foregoing clauses (i) through (iv). The Series 2014 Bonds shall be deemed issued and exchanged as of the Effective Date without presentment by the beneficial owners.

If the debtor's plan had been a liquidating plan that proposed to sell substantially all of its assets to a buyer who would have needed time to replenish the reserves, the debtor would likely have proposed that the plan should include a similar injunction with respect to Chapter 651 of the Florida Statutes. If the Florida Office of Insurance Regulation objected, the debtor could have considered arguing that the failure to comply with the statute did not give rise to a violation under section 1129(a)(16) because the applicable statute did not govern the transfer of assets.

APPENDIX

1. Not-for-Profits and the Bankruptcy Code

Not-for-profit organizations are not defined in the Bankruptcy Code. The Bankruptcy Code, however, references corporations that are “[n]ot a moneyed, business, or commercial corporation.” The following sections of the Bankruptcy Code may be implicated in chapter 11 cases of not-for-profits:

CODE SECTION	LANGUAGE
11 U.S.C. § 303(a)	“An involuntary case may be commenced . . . only against a person, except a farmer, family farmer or a corporation that is not a moneyed, business, or commercial corporation”
11 U.S.C. § 363(d)(1)	“The trustee may use, sell, or lease property under subsection (b) or (c) of this section—(1) in the case of a debtor that is a corporation or trust that is not a moneyed business, commercial corporation, or trust, only in accordance with nonbankruptcy law applicable to the transfer of property by a debtor that is such a corporation or trust.”
11 U.S.C. § 1112(c)	“The court may not convert a case under this chapter to a case under chapter 7 of this title if the debtor is . . . a corporation that is not a moneyed business, or commercial corporation, unless the debtor requests such conversion.”
11 U.S.C. § 1129(a)(16)	“All transfers of property under the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not moneyed business, commercial corporation or trust.”
11 U.S.C. § 541(f)	“Notwithstanding any other provision of this title, property that is held by a debtor that is a corporation described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code may be transferred to an entity that is not such a corporation, but only under the same conditions as would apply if the debtor had not filed a case under this title.”
11 U.S.C. § 544(b)(2)	“Paragraph (1) shall not apply to a transfer of a charitable contribution . . . that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.”
11 U.S.C. § 548(a)(2)	“A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B)”

2. Healthcare Businesses and the Bankruptcy Code

Additionally, there are sections in the Bankruptcy Code that apply to “health care businesses,” which are sometimes not-for-profits.

CODE SECTION	LANGUAGE
11 U.S.C. § 101(27a)	<p>“(27A) The term “health care business”— (A) means any public or private entity (without regard to whether that entity is organized for profit or not for profit) that is primarily engaged in offering to the general public facilities and services for—</p> <p>(i) the diagnosis or treatment of injury, deformity, or disease; and (ii) surgical, drug treatment, psychiatric, or obstetric care; and (B) includes—</p> <p>(i) any— (I) general or specialized hospital; (II) ancillary ambulatory, emergency, or surgical treatment facility; (III) hospice; (IV) home health agency; and (V) other health care institution that is similar to an entity referred to in subclause (I), (II), (III), or (IV); and (ii) any long-term care facility, including any— (I) skilled nursing facility; (II) intermediate care facility; (III) assisted living facility; (IV) home for the aged; (V) domiciliary care facility; and (VI) health care institution that is related to a facility referred to in subclause (I), (II), (III), (IV), or (V), if that institution is primarily engaged in offering room, board, laundry, or personal assistance with activities of daily living and incidentals to activities of daily living.”</p>
11 U.S.C. § 333(a)(1)	<p>“If the debtor in a case under chapter 7, 9, or 11 is a health care business, the court shall order, not later than 30 days after the commencement of the case, the appointment of an ombudsman to monitor the quality of patient care and to represent the interests of the patients of the health care business unless the court finds that the appointment of such ombudsman is not necessary for the protection of patients under the specific facts of the case.”</p>
11 U.S.C. § 351	<p>“If a health care business commences a case under chapter 7, 9, or 11, and the trustee does not have a sufficient amount of funds to pay for the storage of patient records in the manner required under applicable Federal or State law”</p>
11 U.S.C. § 503(b)(8)	<p>“After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including— (8) the actual, necessary costs and expenses of closing a health care business incurred by a trustee or by a Federal agency (as defined in section 551(1) of title 5) or a department or agency of a State or political subdivision thereof, including any cost or expense incurred”</p>

11 U.S.C. § 704(a)(12)	“The trustee shall— (12) use all reasonable and best efforts to transfer patients from a health care business that is in the process of being closed to an appropriate health care business that— (A) is in the vicinity of the health care business that is closing; (B) provides the patient with services that are substantially similar to those provided by the health care business that is in the process of being closed; and (C) maintains a reasonable quality of care.”
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