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NEW RULES OF DEFAULT SERVICING FOR MORTGAGES SECURED BY eNOTES

In the past two decades, eMortgages have moved from an emerging technology to an established component of the mortgage ecosystem. Despite their prevalence, judicial guidance and enforcement precedent remain limited for addressing electronic mortgage transactions. This article examines the legal framework governing eMortgages, including an analysis of recent judicial decisions demonstrating flaws in existing default servicing processes and procedures, and proposes practical measures for realizing the efficiency and certainty that the eMortgage regime provides if properly integrated throughout the entire mortgage ecosystem.

By Adam M. Swanson and Alexa Marie J. Derkasch *

The National Conference of Commissioners on Uniform State Laws approved the Uniform Electronic Transactions Act ("UETA") 27 years ago in 1999.[1] The following year, Congress passed the Electronic Signatures in Global Commerce Act ("ESIGN" and collectively with UETA, "Acts"), which serves as the federal counterpart to UETA.[2] By creating the concept of a "transferable record" as an electronic equivalent of a negotiable instrument, the Acts established an entirely new regime for mortgage lending.[3]

Within a few years, electronic records in mortgage lending gained initial acceptance in the secondary market when the Federal National Mortgage Association ("Fannie Mae") purchased its first eMortgage[4] in 2003.[5] Yet, despite being touted as a means to create

[1] "Uniform Electronic Transactions Act" (PDF), *last retrieved August 3, 2025.*

[2] 15 U.S.C. § 7001 (Pub.L.106-229, Title I, § 101, June 30, 2000, 114 Stat. 464).

[3] UETA and E-Sign embrace electronic transactions more broadly than just mortgage lending, but the focus of this Article is mortgage lending.

[4] In this Article, an "eMortgage" refers to a mortgage secured by an "eNote."

[5] Why You Need a Digital Ready Secondary Market Ecosystem, Wolters Kluwer, September 21, 2021.

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operational efficiencies in the mortgage ecosystem, widespread adoption of eMortgage still remains anomalous in mortgage and servicing portfolios. Until now.

On March 10, 2026, ICE Mortgage Technology, a leading provider of eMortgage solutions, announced that "[t]he digital transformation of the mortgage industry is no longer a prediction for the future — it's the operational reality of today."[6] The announcement coincided with a significant milestone: ICE Mortgage Technology's MERS® eRegistry had officially surpassed three million registered eNotes, indicating the maturation of the digital mortgage industry and the growing adoption of eMortgages. This achievement is particularly noteworthy because many investors in the secondary market, including Fannie Mae, require the use of the MERS® eRegistry.

Although eMortgages now represent a growing share of mortgage lending and servicing portfolios, judicial guidance and enforcement precedent remain limited. As disputes involving eMortgages increasingly reach the courts, litigators and default mortgage servicers face the challenge of presenting these transactions within existing legal frameworks while educating courts on the legal and technological features that distinguish eMortgages. This challenge is heightened by the judiciary's continued familiarity with mortgage servicing litigation arising from the Great Recession, which provides limited precedent for addressing electronic mortgage transactions.

HISTORY COMPELS PRESENT ACTION

In the early 2000s, much of the mortgage ecosystem operated under the mistaken premise that the note follows the mortgage. However, the law has long recognized the exact opposite principle: the mortgage follows the note. Nevertheless, the industry ecosystem proceeded with processes and procedures built on the opposite assumption, primarily in the residential mortgage space. Decisions like *Bank of New York v. Silverberg*[7] reminded the industry that, "once a promissory note is tendered to and accepted by an assignee, the mortgage passes as an incident to the note." In other words, an assignment of mortgage, standing alone, was insufficient to establish the legal basis for enforcing a mortgage many had relied on.

To remedy this systemic flaw, many investors and servicers began the process of indorsing notes that had been transferred in the secondary market without indorsement and, therefore, had not been properly negotiated under the Uniform Commercial Code ("UCC"). These remediation efforts became a crisis unto itself when deposition transcripts of mortgage servicing employees, most notably Cynthia Riley[8] and Michele Sjolander,[9] leaked this information. Those revelations became part of the infamous "robo-signing crises" that led to a $25 billion agreement with the U.S. Department of Justice.[10]

Reflecting on outcomes from the Great Recession compels lessons. One of the more enduring is that proper investment in the enforcement of a defaulted mortgage is essential, and that is even more true given the proliferation of eMortgages in the mortgage ecosystem and the new regime created by the Acts.

A NEW FORECLOSURE REGIME UNDER THE ACTS

UETA and ESIGN are new regimes with a whole new vernacular. Both start with the simple pronouncement that a record or signature may not be denied legal effect or enforceability solely because it is in electronic form.[11] Section 16 of UETA and Section 7021 of ESIGN create the "transferable record," defined as "an electronic record that: (1) would be a note under [Article 3 of the Uniform Commercial Code] or a document under [Article 7 of the Uniform Commercial Code] if the electronic record were in writing and (2) the issuer of the electronic record expressly has agreed is a transferable record."[12]

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[6] Gardner, Harry: 3 Million eNotes: a Historic Milestone for the Digital Mortgage Ecosystem (March 10, 2026).

[7] 86 A.D.3d 274 (2nd Dept. 2011).

[8] Deposition of Cindy Riley (1/15/2013) in the matter of *JP Morgan Chase Bank, N.A. v. Eduardo Orozco*, Case No. 09-29997 CA (11) (Fla. Cir. Ct., 11th Jud. Dist.) (last visited 8/5/2026).

[9] Deposition of Michele Sjolander (1/25/2012) in the matter of *Clinton E. Kirby v. Bank of America*, Case No. 2:09-CV-00182-DCB-JMR (So. Dist. Miss.) (last visited 8/5/2026).

[10] Federal Government and State Attorneys General Reach $25 Billion Agreement with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses (Feb. 9, 2012).

[11] UETA § 7.

[12] 15 U.S.C. § 7021(a)(1)(C) includes an additional requirement that the transferable record "relates to a loan secured by real property." The functional difference, therefore, is that UETA allows an unsecured debt to be a transferable record.

Notably, it is clear that the Acts do not replace the UCC. Instead, they complement it by substituting the "negotiable instrument" with a "transferable record," and the concept of "possession" and "holder" status with "control" and "controller" status. In this way, the Acts engraft their requirements into the UCC.

To accomplish this new scheme, Section 16(d) of UETA provides that "a person having control of a transferable record" is the "holder" under the UCC and "has the same rights and defenses as a holder of an equivalent record or writing under" the UCC. The Acts make clear that "[d]elivery, possession, and indorsement are not required to obtain or exercise any of the rights" established under Section 16.

THE eMORTGAGE FRAMEWORK, PART 1: THE "ELECTRONIC" TRANSFERABLE RECORD

There are three foundational elements of this new construct, two of which distinguish a transferable record from a traditional paper negotiable instrument.

First, a transferable record must be an "electronic record." An electronic record is defined as, "a record created, generated, sent, communicated, received, or stored by electronic means." In turn, a "record" under the Acts means "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." Thus, an eNote is not simply a paper note that is signed by "*/s/ Issuer*" and then scanned, but rather the data, stored by electronic means, is capable of being retrieved in a perceivable format.

Second, a transferable record must be one that would qualify as a negotiable instrument under the UCC if it were in writing. This is well established under the UCC. Under UCC Section 3-104, a "negotiable instrument" is:

> an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the order, if it: (1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder; (2) is payable on demand or at a definite time; and (3) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor."

Consequently, obligations like a reverse mortgage[13] and home equity line of credit[14] cannot be a "transferable record."

Third, the issuer must expressly agree that a transferable record *is* a transferable record. This is accomplished by the inclusion of an express agreement in the eNote. As the commentary to Section 16 of UETA explains, this requirement prevents a paper negotiable instrument from later being converted to an eNote. This would not be possible "because the issuer would not be the issuer, in such a case, of an electronic record."[15]

THE eMORTGAGE FRAMEWORK, PART 2: THE CONTROL OF THE TRANSFERABLE RECORD

Once it is established that the mortgage loan is an eMortgage, that is, because it is secured by an eNote, or "transferable record," the next issue is how it is enforced. UETA Section 16(d) answers that question by providing that "control" of the transferable record confers holder status under the UCC. Subsections (b) and (c) provide that:

> (b) A person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred.
>
> (c) A system satisfies subsection (b), and a person is deemed to have control of a transferable record, if the transferable record is created, stored, and assigned in such a manner that:
>
> — (1) a single authoritative copy of the transferable record exists which is unique, identifiable, and, except as otherwise provided in paragraphs (4), (5), and (6), unalterable;
>
> — (2) the authoritative copy identifies the person asserting control as:

[13] *OneWest Bank, N.A. v. FMCDH Realty, Inc.*, 165 A.D.3d 128 (2nd Dept. 2018).

[14] *Demakis v. SunTrust Bank*, 312 So. 3d 1015 (Fla. Dist. Ct. App. 2021).

[15] UETA § 16, comment 2.

- (A) the person to which the transferable record was issued; or

- (B) if the authoritative copy indicates that the transferable record has been transferred, the person to which the transferable record was most recently transferred;

- (3) the authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;

- (4) copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;

- (5) each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

- (6) any revision of the authoritative copy is readily identifiable as authorized or unauthorized.

Subsection (b) creates a general rule that a person has control if a system "employed for evidencing the transfer of interests in the transferable record reliably establishes" the person as being in control. Subsection (c) creates a safe harbor and list of strict requirements.[16]

The requirements focus on an "authoritative copy." Yet, the Acts do not have a delineated definition of "authoritative copy." The text of Subsection (c)(1) reveals that an authoritative copy must be a singular copy of the transferable record that is "unique, identifiable, and, except as otherwise provided in paragraphs (4), (5), and (6), unalterable." This reflects the reality of transmitting electronic files. Unlike paper notes, which bear a single "wet ink" signature, the transmission of an electronic file necessarily requires the creation of a new copy. Thus, the Acts require that there be a singular copy designated as the "authoritative copy" that is unique, identifiable, and unalterable. The requirements that the copy be unique and identifiable may be accomplished through technology, by process, or agreement. For example, by coding or assigning a control number and storing the electronic record within a specific environment. The "unalterable" requirement should not be interpreted literally because sub-subsection (6) of the safe harbor permits revisions, provided they are "identifiable as authorized or unauthorized." In other words, "unalterable" really means unchangeable without identification.

The other parts of the safe harbor concerning authoritative copies require that (1) the authoritative copy identify the person asserting control; (2) the authoritative copy is communicated to and maintained by the person in control or its custodian; (3) revisions that add or change the assignee can only be made with the consent of the person asserting control; (4) each copy is readily identifiable as a copy that is not the authoritative copy; and (5) any revision to the authoritative copy is identifiable as authorized or unauthorized.

An important feature is that the authoritative copy somehow be tied to a method of identifying the party in control. The Acts do not restrict how this may be accomplished. The authoritative copy itself may contain this information, or it may be associated with a method for tracking control, such as an agreement within the eNote to use an eRegistry for that purpose. Another important feature of the safe harbor is that copies of the authoritative copy, as well as copies of those copies, are identifiable as such. The Acts do not provide a specific method to accomplish this either, but some methods have used labeling or tagging and encryption technologies, or included an agreement within the eNote that the authoritative copy be stored only in one designated place, such that any copy stored elsewhere is not the "authoritative copy."

The mortgage industry has built infrastructure to meet these requirements. As a practical matter, much of these requirements will be met by using eRegistry and eVault services, such as MERS® eRegistry. The drafters of UETA acknowledged this, observing that "control requirements may be satisfied through the use of a trusted third-party registry system." However, recent history has taught that proper preparation includes counsel being able to *explain* how such a system meets these requirements in litigation.

THE eMORTGAGE FRAMEWORK, PART 3: THE ACCESS TO THE TRANSFERABLE RECORD

An important requirement for the mortgage industry to consider is Section 16(f) of UETA. Under Section 16(f), "if requested by the person against which enforcement is sought, the person seeking to enforce the transferable record shall provide reasonable proof that the person is in control of the transferable record." This brings to life the "show me the note" refrain of borrowers during the Great Recession. The question for the industry then becomes, how?

[16] UETA § 16, comment 3.

The text provides that proof may include access to the authoritative copy and "related business records" sufficient to review the terms and establish the identity of the person having control. Most certainly during enforcement proceedings, the borrower is unlikely to agree that "reasonable proof" was ever supplied, but some form of compliance must be established. Fortunately, the Acts do not provide a consequence for failing to supply reasonable proof of control and, in most instances, the eRegistry report and a copy of the authoritative copy through the third-party registry service ought to be sufficient.

REPORTED OUTCOMES

Even though the Acts have been in force for a quarter of a century, there is little more than a handful of reported decisions. Even among those decisions, very few provide meaningful analysis or guidance, and several demonstrate how the industry's professionals themselves have already been confounded by eNotes.

One such case is *Good v. Wells Fargo*[17] from the Indiana Appellate Court, in which Wells Fargo sought to enforce an eNote as assignee. On summary judgment, Wells Fargo submitted an affidavit stating that it, "directly or through an agent, has possession of the Promissory Note at issue in the plaintiff's cause of action. Wells Fargo Bank, N.A., is either the original payee of the Promissory Note or the Promissory Note has been duly indorsed." While the affidavit also asserted control of the eNote, it was accompanied by a certificate from an employee referring to the eNote as a business record. The trial court granted summary judgment, but the appellate court reversed.

The appellate court observed that Wells Fargo's evidence did not suggest that Wells Fargo maintained the "authoritative copy" and, even assuming it had, there was no record of transfer as described by the terms of the eNote itself. The terms of the eNote provided that the only authoritative copy is the copy that is within the control of the person identified as the Note Holder in the Note Holder Registry. Wells Fargo gave no evidence of any registry and, therefore, failed to establish control on summary judgment.

Two years later, a Florida District Court of Appeals issued an opinion in *Rivera v. Wells Fargo Bank, N.A.*,[18] affirming the grant of final judgment on an eNote. In *Rivera*, the evidence established that the bank was acting as servicer for Fannie Mae and described the bank's practices and systems used for the receipt and storage of authoritative copies of electronic records and protection against alteration. Additional evidence from the MERS® eRegistry system demonstrated that Fannie Mae was transferee and designated as in control of the eNote, while the foreclosing bank was custodian of the authoritative copy. The court found that Fannie Mae was controller of the transferable record and, therefore, holder under the UCC. Under Florida law, the bank had standing to enforce the eNote as authorized representative of Fannie Mae.

Around the same time as *Rivera*, New York's Appellate Division, Second Department reversed the dismissal of an eNote foreclosure suit in *New York Community Bank v. McClendon*.[19] The trial court dismissed on the basis that the foreclosing bank did not have standing. On appeal, the bank provided a copy of the eNote and a transfer history report designating it as controller. The court noted that, by its terms, the eNote qualified as a transferable record and that control, and, therefore, holder status, could be established because "a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred." The court concluded that the terms of the eNote and the transfer history report were sufficient to defeat the borrower's dismissal motion. *McClendon* may provide comfort on a pleadings-based dismissal motion, but the court did not describe *why* the transfer history report was reliable.

A more recent decision in *Bank of New York Mellon v. Carpenter*[20] highlights the importance of adopting proper default servicing procedures. The facts at a trial on the issue of standing established that the eNote had been originated by AmTrust Bank ("AmTrust"). The mortgage was then transferred to the FDIC as receiver and to Nationstar by written assignment dated September 26, 2011. The eRegistry and eNote transfer history reflected Nationstar as having control, and, therefore, status as holder of the eNote, from October 30, 2013. This seems to be where enforcement under the eNote regime got bollixed. Neither plaintiff nor its servicer was ever reflected as controller in the eRegistry, but obtained a written assignment of mortgage to plaintiff dated December 9, 2013, and then executed an assignment to non-party, Windsor, dated June 23, 2017. The eRegistry, however, continued to reflect Nationstar as controller until the eNote was converted to physical

[17] 18 N.E.3d 618 (Ind. Ct. App. 2014).

[18] 189 So. 3d 323 (Fla. 4th DCA 2016).

[19] 138 A.D. 3d 805 (2nd Dept. 2016).

[20] 86 Misc.3d 1229(A) (Sup. Ct. Qns. Cty. June 16, 2025).

paper on or about July 7, 2020. The court concluded that the plaintiff failed to establish itself as controller and, therefore, holder because the eRegistry continued to reflect Nationstar as controller at the time the foreclosure suit was commenced.

AVOIDING ADVERSE eNOTE OUTCOMES

Decisions like *Good* and *Carpenter* reveal flaws in existing default servicing processes and procedures. In both cases, it seemed the servicers and foreclosure counsel failed to realize they were enforcing an eNote and tried to use the traditional enforcement mechanisms applicable to paper negotiable instruments. For example, in *Good*, the *pro forma summary judgment* affidavits created material issues of fact, and in *Carpenter*, obtaining written assignments of the mortgage without giving proper notice to the eRegistry of a transfer of control precluded enforcement of an eNote at trial. *Rivera* and *McClendon* demonstrate that enforcement of eNotes is achievable if the servicing industry is vigilant.

The first step is implementing a mechanism to identify an eNote *before* making a referral to counsel to commence foreclosure proceedings. Once identified, the following preliminary steps should be taken pre-filing:

1. Locate a copy of the mortgage and locate where the "Authoritative Copy" of the eNote is stored.

2. Obtain an eRegistry record identifying the current "controller," i.e., the plaintiff in many jurisdictions.

3. Obtain the "transfer history" from the eRegistry showing transfers of control.

4. A certificate of authenticity may be needed to accompany the copy of the eNote with the complaint, establishing that it is an exact copy of the "Authoritative Copy."

5. Clearly communicate to foreclosure counsel that this is an eNote and, therefore, *pro forma* pleadings and forms may be inappropriate. For example, a *pro forma* allegation that plaintiff has possession of the original promissory note indorsed in blank may create a material issue of fact later in the case.

6. Ensure the allegations of the complaint track eNote enforcement:

    a) The "controller" should be the named plaintiff where standing is established as holder in the jurisdiction.

    b) Include an express allegation that the note is an eNote.

    c) Include an express allegation that the borrower executed and delivered an eNote to the original controller.

    d) Include an express allegation that the borrower expressly agreed that the note was a transferable record, making reference to the specific provision of the eNote.

    e) Annex a printed image of the "Authoritative Copy" of the eNote with a certificate of authenticity.

The value of the eMortgage regime will be realized only when eNotes and eMortgages are properly integrated throughout the entire mortgage ecosystem, culminating in effective judicial enforcement. Giving proper attention to defaulted eNotes and eMortgages as they cycle through the default servicing portfolio will reduce litigation costs for investors, servicers, and banks, while ensuring the regime delivers its intended benefits. ■

EVOLUTIONARY RESTRUCTURING TRENDS IN CANADA AND THE UNITED STATES

As restructuring options proliferate on both sides of the border, companies with U.S. and Canadian touchpoints have more choices than ever for managing financial distress. This article examines the evolving relationship between chapter 11 of the U.S. Bankruptcy Code and Canada's Companies' Creditors Arrangement Act ("CCAA"), highlighting the key procedural, strategic, and economic considerations that influence forum selection in cross-border restructurings. It also explores the growing use of out-of-court alternatives, liability management transactions, and innovative restructuring techniques, such as reverse vesting orders and the Texas Two-Step. Through recent restructuring cases, including Nortel Networks, Toys "R" Us Canada, Just Energy, and Coach USA, the article illustrates how relevant debtors are increasingly leveraging a range of U.S. and Canadian tools to achieve restructuring objectives in an evolving market.

By Natalie Renner, Marisa A. Sotomayor, and J. Eric Wise *

North American corporate restructuring continues to evolve. For decades, chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1532, served as the gold standard, default forum for cross-border restructurings involving U.S. and Canadian businesses. The framework provided by chapter 11, including the debtor-protective automatic stay and the creditor-favorable committee participation and plan approval rights, allows for a comparably efficient debt restructuring while preserving the debtor's ability to continue business operations. As out-of-court alternatives in the United States have become more popular — particularly liability management exercises, but also Uniform Commercial Code foreclosures, assignments for the benefit of creditors ("ABC"), and receiverships — so has the possibility for exploring other insolvency proceedings including proceedings in Canada. Today, practitioners recognize that Canadian proceedings, particularly those under the *Companies' Creditors Arrangement Act*[1] ("CCAA") may be a competing alternative given the right facts and circumstances. The choice between regimes now turns on which forum best fits the circumstances, with a view towards efficiency, predictability, and value maximization.

THE U.S. RESTRUCTURING FRAMEWORK

The long-dominant United States federal insolvency regime offers three formal insolvency proceedings: chapter 7 liquidates; no debtor-in-possession status, no ongoing business: chapter 11 allows both liquidation and restructuring; the debtor stays in charge and keeps operating; chapter 15 lets U.S. courts recognize foreign proceedings when those foreign entities sit at the center of main interests, or COMI.

Chapter 11's draw lies in what it offers: a single forum for disputes; the automatic stay, halting creditors from taking action; clear sale processes; plans built on like treatment for like creditors; and a discharge giving the debtor a fresh start. Key players include the debtor-in-possession (akin to a trustee), the United States Trustee, an official committee of unsecured creditors, and the court — where all interested parties may be heard.

However, chapter 11 also brings burdens. Timelines can be years long. Fees in big cases may run into tens of millions of dollars. Litigation postures have become more intense, with bold creditor moves and hard-to-predict rulings. These facts might mean chapter 11 is not the right answer for all debtors, but also weigh in the forum-choice reckoning.

[1] Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

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THE CANADIAN ALTERNATIVE

Canada offers its own robust restructuring tools. Proposals under the *Bankruptcy and Insolvency Act*[2] ("BIA") allow restructuring with the debtor in charge. The CCAA offers the most room to move, fitting both liquidation and restructuring, while the debtor stays at the helm. Receivership handles wind-downs and sales. Bankruptcy liquidates similar to a chapter 7; no debtor-in-possession status; no ongoing business. These tools match their U.S. counterparts in depth, reach, and convenience.

Essential players include the debtor, the court, monitors and trustees, employees and pensioners, secured and unsecured creditors, landlords, and directors and officers. A court-appointed monitor is an independent insolvency professional that supervises and reports on the debtor company's restructuring process — a distinctive Canadian feature — and acts as an impartial officer of the court and provides transparency to the court, creditors, and other stakeholders.

COMPARING CCAA AND CHAPTER 11

Key differences shape forum choice between the U.S. and Canada. For example, both regimes let existing management run the business, but CCAA adds monitor oversight where chapter 11 leaves oversight to an adversarial process via the courtroom.

Creditor committees work differently. Chapter 11 typically mandates at least one unsecured creditor committee, adding cost and complexity to the proceedings. In some CCAA proceedings, stakeholders form committees *ad hoc*, cutting administrative burden. The U.S. doctrine of adequate protection guarding creditor interests in collateral against diminution in value, asset sales, and priming liens has no Canadian equivalent, though Canadian courts do weigh similar concerns.

A significant structural difference also exists: cram-down power. A bankruptcy court in chapter 11 may use section 1129(b) of the Bankruptcy Code to confirm a plan over dissenting creditor classes if the plan is fair and equitable, an important way forward when consensus cannot be obtained. The CCAA process lacks this power, and every affected class must approve the plan by the applicable voting thresholds. This difference cuts both ways: cram-down enables deal certainty when holdouts threaten value, while mandatory class approval promotes negotiated solutions and buy-in from all stakeholders.

CROSS-BORDER RESTRUCTURING STRATEGIES

Companies operating in both the U.S. and Canada face three options, each a legitimate choice depending on the circumstances. No option is presumptively correct; the right choice depends on where the debtor's operations center, what relief the restructuring requires, and which regime's procedures best serve the transaction's goals.

- First, parallel CCAA and chapter 11 cases; separate but coordinated proceedings for each jurisdiction's entities.
- Second, a CCAA proceeding as the main case with chapter 15 recognition in the United States; viable when Canada is the debtor's COMI.
- Third, chapter 11 as the main case with CCAA recognition for Canadian entities.

Recent cross-border cases illustrate these approaches in action. Nortel Networks (2009)[3] remains the landmark example: parallel CCAA and chapter 11 proceedings for one of history's largest technology insolvencies, with complex allocation disputes between Canadian and U.S. estates that took years to resolve. Target Canada (2015)[4] used the CCAA to wind down Target Corporation's Canadian subsidiary while coordinating with the U.S. parent. Toys "R" Us Canada (2017–2018)[5] ran a CCAA proceeding parallel to the U.S. chapter 11 case. Just Energy (2021)[6] filed concurrent CCAA and chapter 11 proceedings to restructure its cross-border energy operations. Coach USA, Inc., the largest North American ground transportation company (2024),[7] used

[2] Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

[3] U.S.: *In re Nortel Networks, Inc.*, Case No. 09-10138 (KG) (Bankr. D. Del.) and Canada: *Nortel Networks Corporation (Re)*, 2009 CanLII 39492 (ONSC).

[4] Canada: *Target Canada Co. (Re)*, 2015 ONSC 303 (no U.S. companion case).

[5] U.S.: *In re Toys "R" Us, Inc.*, Case No. 17-34665 (KLP) (Bankr. E.D. Va.) and Canada: *Toys "R" Us (Canada) Ltd. (Re)*, 2017 ONSC 5571.

[6] U.S.: *In re Just Energy Group Inc.*, Case No. 21-30823 (MI) (Bankr. S.D. Tex.) and Canada: *Just Energy Group Inc. (Re)*, 2021 ONSC 1793.

[7] U.S.: *In re Coach USA, Inc., et al.*, Case No. 24-11258 (MFW) (Bankr. D. Del.) and Canada: *Coach USA (Canada CCAA Recognition)*, 2024 ONSC 4342.

a recognition proceeding to manage Canadian subsidiaries Coach Canada and Megabus Canada and other Canadian assets. Each case demanded careful forum selection based on the debtor's operational footprint and restructuring objectives.

The key insight: in a U.S./Canada cross-border situation, Canadian proceedings now merit consideration on equal footing with chapter 11. Where cost, timeline, or litigation risk weigh heavily, a CCAA case with chapter 15 recognition may offer advantages, such as lower professional and advisor fees, faster resolution, and a less adversarial culture. Where cram-down power, robust creditor remedies, or established precedent matter more, chapter 11 may be a better instrument.

OUT-OF-COURT ALTERNATIVES IN THE UNITED STATES

Chapter 11's cost and uncertainty also fuel interest in U.S. out-of-court alternatives. Three options exist. All three share critical limitations: no automatic stay, no contract assignment without consent, no free-and-clear sale. These constraints push parties back to formal proceedings — whether in the United States or Canada, depending on the circumstances.

- Article 9-620 foreclosure lets a secured creditor take collateral in satisfaction of debt if no other secured party objects; it discharges subordinate liens but offers no free-and-clear sale or contract assignment.
- An ABC transfers control to an assignee who marshals assets and pays creditors.
- Dissolution lets stockholders vote to wind up, with the board controlling timing.

INSOLVENCY ALTERNATIVES IN CANADA; PLANS OF ARRANGEMENT

Canadian companies can restructure outside formal insolvency proceedings through a plan of arrangement — a court-supervised corporate procedure governed by the corporation's incorporating statute, most commonly the *Canada Business Corporations Act* or the *Business Corporations Act* (Ontario). A plan of arrangement is not the same as a plan of compromise under the CCAA or a proposal under the BIA. Rather, it is a corporate-law mechanism used to reorganize the corporation's capital, securities, assets, or business. There are four main steps: enter an arrangement agreement; obtain an interim order; affected security holders or other stakeholders vote on the arrangement in the manner prescribed by the interim order, a process that typically takes 45 to 90 days; and the corporation returns to court for a final order approving the arrangement, granted following a fairness hearing.

Corporate plans of arrangement offer tangible advantages: no insolvency stigma, retained control, avoided defaults, reduced court supervision, broad relief including debt compromise and releases, and lower cost than chapter 11 or CCAA. But drawbacks also exist: limited precedent, limited oversight, less flexibility, less predictability, and the need for voting agreements.

LIABILITY MANAGEMENT TRANSACTIONS

Liability management transactions have grown as an out-of-court strategy in the U.S. In these transactions, a borrower and favored lenders act together to benefit themselves at others' expense: priming transactions, drop-down financings, uptier exchanges. Serta Simmons Bedding illustrates the pattern. In 2020, Serta executed an uptier transaction that subordinated non-participating lenders, triggering years of litigation before the company filed chapter 11 in 2023. TriMark USA followed a similar path in 2021, using a drop-down financing to move collateral beyond non-participating lenders' reach — again sparking litigation. These cases show both the power and the risk of aggressive liability management.

The U.S. market's high volume of institutional lending, varied and abundant market participants, and appetite for "paper" encourage these tactics. Lenders expect aggression and accept transactions that hurt rivals. Canada differs sharply. The market is significantly smaller, favoring clubbed financing arrangements. Fewer lenders mean greater reputational stakes; aggressive moves carry lasting consequences. Canadian borrowers also shy from litigation risk and reputational harm.

INNOVATIVE RESTRUCTURING TECHNIQUES: REVERSE VESTING ORDERS AND THE TEXAS TWO-STEP

Practitioners on both sides of the border have devised ways to separate good assets from bad liabilities. In Canada, the reverse vesting order has gained traction. A traditional vesting order transfers assets to a purchaser free and clear. The reverse vesting order flips the structure: the purchaser buys the debtor's shares and keeps the valuable assets, such as inventory, employees, contracts, leases, name, goodwill, while liabilities stay with a company — colloquially known as "GarbageCo" —that winds down. Industries using this tool include

retail, waste management, energy, construction, entertainment, education, oil and gas, mining, and cannabis.

The U.S. counterpart — aptly named the "Texas Two-Step" — uses — uses a divisional merger. Step one: the debtor relocates to Texas (or Delaware) and splits into two entities. "GoodCo" holds assets; "LiabilityCo" holds tort or other claims. Step two: LiabilityCo files chapter 11 while GoodCo operates free of bankruptcy. The logic mirrors the Canadian reverse vesting order, but the Texas Two-Step has sparked controversy, especially in mass tort cases where the debtor is solvent. The use of a channeling injunction and releases is a broad use of the court's bankruptcy power, and critics maintain the outcome may be unfair to tort claimants. However, the Texas Two-Step has benefits even for tort claimants. By creating a pool of settlement money to pay claims, tort creditors can achieve certainty and quicker results than multiple forum litigation and years of waiting on payment of claims. In any event, the U.S. circuits are split and the issue may arrive at the United States Supreme Court.

CONCLUSION

The evolution of the restructuring practice in North America proceeds, not toward survival of the fittest, but instead to sound practical solutions in a changing macro environment. As debtors and their advisors seek to maximize recoveries, manage risk, and preserve going-concern value, both United States and Canadian bankruptcy and insolvency proceedings offer options and tradeoffs for cross-border restructuring. Sophisticated advisors should evaluate both countries' regimes on the merits and help clients in selecting the forum that best serves the transaction. ■

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