

PRESENTED AT

The University of Texas School of Law
50th Annual William W. Gibson, Jr. Mortgage Lending Institute

October 20-21, 2016, Cityplace Conference Center
Dallas, TX

ABI Bankruptcy Reform Commission

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I. INTRODUCTION

A robust, effective, and efficient bankruptcy system rebuilds companies, preserves jobs, and facilitates economic growth with dynamic financial markets and lower costs of capital. For more than 35 years, the U.S. Bankruptcy Code has served these purposes, and its innovative debtor in possession chapter 11 process, which allows a company to manage and direct its reorganization efforts, is emulated around the globe. As with any law or regulation, however, periodic review of U.S. bankruptcy laws is necessary to ensure their continued efficacy and relevance.

Whether by design or chance, efforts to review and assess U.S. business reorganization laws are undertaken approximately every 40 years. Such efforts have led to federal legislation effecting meaningful revisions to business reorganization laws in 1898, 1938, and 1978. It may be that four decades is the maximum amount of time that any financially driven regulation can remain relevant. Markets and financial products, as well as industry itself, often evolve far more quickly than the regulations intended to govern them. It may be that significant economic crises tend to occur cyclically and encourage reevaluation of the federal bankruptcy laws. Regardless, the general consensus among restructuring professionals is that the time has come once again to evaluate U.S. business reorganization laws. Accordingly, the American Bankruptcy Institute (the “*ABI*”) established the Commission to Study the Reform of Chapter 11 (the “*Commission*”) for this precise purpose.

The Commissioners are among the most prominent insolvency and restructuring practitioners in the United States, who have represented debtors, creditors, and other stakeholders, such as private equity investors, in the largest and most significant cases in U.S. history. The Commissioners included the Chair and former Chair of the influential National Bankruptcy Conference, the immediate past Chair and former President of the prestigious American College of Bankruptcy, two past Chairs of the New York City Bar Committee on Bankruptcy and Reorganization, the former Chief Restructuring Officer of the United States Treasury, a past Chair of the Turnaround Management Association, three prominent turnaround consultants, a past member of the National Bankruptcy Review Commission, a former Chief Bankruptcy Judge of the Southern District of New York, the two principal draftsmen of the 1978 Bankruptcy Code, several past members of the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States, the current President of INSOL International, the Director of the Executive Office for U.S. Trustees in the Department of Justice,¹ five past Presidents of the American Bankruptcy Institute, and nine current and former global heads of the bankruptcy departments at major U.S. law firms. The Commissioners and their full professional biographies, as well as that of the Reporter, are attached collectively at *Appendix A*.

In assembling those who would serve as Commissioners and as members of the topical advisory committees, special attention was paid to the fact that although large cases capture headlines, the overwhelming number of business bankruptcies are by small and medium-sized enterprises. Professionals with unique experiences in these kinds of cases lent their special expertise to the Commission process. As a result, the Report includes, among others, recommendations focused on small and medium-sized enterprises that will materially improve the Bankruptcy Code for stakeholders in this broad market.

¹ As a nonvoting member, Director Cliff White took no position on legislative proposals. Mr. White provided institutional perspectives and technical assistance on issues considered by the Commission.

I. INTRODUCTION

ABI COMMISSION TO STUDY THE REFORM OF CHAPTER 11

The Commission adopted a holistic and inclusive approach to its study and was guided by its mission statement, which reads:

In light of the expansion of the use of secured credit, the growth of distressed-debt markets and other externalities that have affected the effectiveness of the current Bankruptcy Code, the Commission will study and propose reforms to Chapter 11 and related statutory provisions that will better balance the goals of effectuating the effective reorganization of business debtors — with the attendant preservation and expansion of jobs — and the maximization and realization of asset values for all creditors and stakeholders.

In furtherance of its mission statement, the Commission undertook an in-depth three-year study process. The study focused exclusively on the resolution of financially distressed businesses under chapter 11 of the Bankruptcy Code.² This Report explains the components of the Commission's study process, summarizes the results of the study, and presents the Commission's resulting recommendations for reform in a series of principles organized generally by issue and sequence in the chapter 11 process.

Although the Commission designed its three-year process around concepts of inclusiveness, diversity of thought, leadership, and transparency, the Commission, working with the Commission's Reporter, Professor Michelle M. Harner, University of Maryland Francis King Carey School of Law, maintained exclusive control over the substance of the final Report. All decisions and recommendations set forth in the Report were made solely by the Commissioners in accordance with the voting procedures described herein. The Reporter worked closely with the Commissioners to draft the language of the recommended principles and the supporting narrative for each of those principles. Although the Reporter acted as the principal draftsman of the Report, the Commissioners reviewed and commented on various iterations of this Report to achieve this final product. The Commission voted unanimously to adopt this Report on December 1, 2014. During the three-year study and the drafting process, the Commission was assisted in its research by Leah Barteld Clague, Jennifer Ivey-Crickenberger, and Sabina Jacobs, as well as each of the Commission's advisory committees and their respective reporters. The Commission appreciates the assistance of all of these individuals, and acknowledges the substantial value added to this Report by the work of the advisory committees and the international working group.³

² The Commission did not address issues unique to the resolution of an individual debtor's financial distress under chapter 11. For a general discussion of these issues, see Section IX.C, *Individual Chapter 11 Cases*.

³ Additional information regarding the Commission's research assistants and the empiricists who assisted with research underlying the report are identified at **Appendix B**. Members of the advisory committees are listed at **Appendix C**, and members of the international working group are listed below, *infra* note 53. In addition, this Report also benefited from datasets made available to the Commission by New Generations, UCLA-LoPucki Bankruptcy Research Databases, and the Loan Syndications and Trading Association.

I. INTRODUCTION

Also available as part of the eCourse

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First appeared as part of the conference materials for the
50th Annual William W. Gibson, Jr. Mortgage Lending Institute session
"Bankruptcy in the Real Estate Sector"