

Rethinking Chapter 11

May 28-29, 2015

House Committee on the Judiciary

Hearing Room 2237

Rayburn House Office Building, 2nd floor

Washington, D.C.

(The front entrance of the Rayburn Building on Independence Ave. or side entrance on South Capitol St. will be most convenient)

This conference, organized by the National Bankruptcy Conference, brings together lawyers, judges, insolvency professionals, and academics under the Chatham House rule to discuss the fundamental challenges facing the law of corporate reorganizations. Particular attention will be paid to proposals from the National Bankruptcy Conference and the ABI Commission on Bankruptcy Reform.

Speakers

Hon. Thomas L. Ambro, Circuit Judge, United States Court of Appeals for the Third Circuit

Douglas G. Baird, University of Chicago Law School

Corinne Ball, Jones Day

Donald S. Bernstein, Davis Polk & Wardwell

Harlan Cherniak, KKR & Co. L.P.

Anthony J. Casey, University of Chicago Law School

Josiah M. Daniel III, Vinson & Elkins

Hon. Robert D. Drain, Bankruptcy Judge, Southern District of New York

Dennis F. Dunne, Milbank, Tweed, Hadley & McCloy

Marcia L. Goldstein, Weil, Gotshal & Manges

Alan W. Kornberg, Paul, Weiss, Rifkind, Wharton & Garrison
Richard B. Levin, Cravath, Swaine & Moore
Kenneth Liang, Oaktree Capital Management
Thomas Moers Mayer, Kramer Levin Naftalis & Frankel
Todd F. Maynes, Kirkland & Ellis
James E. Millstein, Millstein & Co.
Edward R. Morrison, Columbia Law School
Harold S. Novikoff, Wachtell, Lipton, Rosen & Katz
Isaac M. Pachulski, Pachulski Stang Ziehl & Jones
Hon. Pamela Pepper, District Judge, Eastern District of Wisconsin
Hon. Brendan L. Shannon, Bankruptcy Judge, District of Delaware
Catherine L. Steege, Jenner & Block
Nate Van Duzer, Fidelity Investments
Jane Lee Vris, Millstein & Co.
Hon. Eugene R. Wedoff, Bankruptcy Judge, Northern District of Illinois

Tentative Schedule

Thursday, May 28

10:00 - 10:15 *Introduction.*

Richard B. Levin

10:15 - 11:15 *Third-Party Oversight.* Chapter 11 relies upon the debtor in possession to shepherd the reorganization process. Apart from the appointment of an examiner or trustee, the Bankruptcy Code does not contemplate that any other third party will facilitate the process. The panel will discuss the possibility of giving parties the option of putting such a person in place with a role that is tailored to the circumstances of the particular case.

Harold S. Novikoff, Hon. Robert D. Drain, Ken Liang

Break

11:35 - 12:35 *Reorganization Value and Option Value.* Outside of bankruptcy, secured creditors receive only the foreclosure value of their collateral. Moreover, until a foreclosure actually takes place, the junior debt trades for a positive price—even when out of the money, junior debt has option value. Under existing law, secured creditors capture the value of the reorganization, while at the same time junior classes are cut off from the future possibilities of the firm. Whether this is an appropriate way to resolve the tension between junior and senior creditors, or whether instead, junior creditors should be entitled to retain option value when the firm is reorganized, is one of the most strongly debated issues in corporate reorganizations.

Donald S. Bernstein, Anthony J. Casey, James E. Millstein

Lunch

1:30 - 2:30 *Bargaining and Plan Negotiation.* Bargaining is the lifeblood of Chapter 11; the class-by-class plan vote is a key driver of the protection to which dissenters are entitled and the plan confirmation process; and the rules governing classification, voting (including the effect of limitations on voting in intercreditor agreements and RSAs), and the impact of voting on stakeholder entitlements are critical components of the framework within which the bargaining takes place. As the players in bankruptcy have changed over the years, the rules that govern this bargaining and voting process may need to change as well.

Thomas Moers Mayer, Isaac M. Pachulski, Hon. Eugene R. Wedoff

Break

2:50 – 3:50 *Corporate Groups.* Chapter 11 serves to rehabilitate businesses as a whole, but the Bankruptcy Code itself operates on legal entities. In the typical large reorganization, there is a group of related legal entities. Many have their own creditor constituencies, but cannot stand on their own as stand-alone businesses. What is interest of the business as a whole may not be in the interest of creditors of its discrete components, and recognizing rights against specific legal entities may be at odds with rehabilitating the business as a whole. Resolving this tension presents an important challenge for bankruptcy reform.

Marcia L. Goldstein, Todd F. Maynes, Hon. Brendan L. Shannon

Break

4:10 – 5:10 *Bankruptcy and the Trust Indenture Act.* The Trust Indenture Act sharply limits the ability of creditors to act collectively outside of bankruptcy. Some Chapter 11 reorganizations focus exclusively on restructuring debt that cannot be restructured outside of bankruptcy without unanimity. The operations of the business are untouched and the rights of trade and other noninvestment debt are entirely unaffected. Providing a simpler and easy path for such reorganizations in Chapter 11 is another possible avenue of bankruptcy reform.

*Harlan Cherniak Dennis F. Dunne, Alan W. Kornberg, Nate Van Duzer,
Jane Lee Vris*

Reception

6:00 – 7:30

Friday, May 29

9:00 – 10:00 *Small Business Bankruptcies.* The vast majority of Chapter 11s involve small businesses. Often the business itself is hard to separate from the person who owns and operates it. The stakes are so small that there is no active creditors' committee. Unpaid taxes often compose the largest portion of the unsecured debt. These present a special set of challenges for bankruptcy reform.

*Edward R. Morrison, Josiah M. Daniel III, Hon. Pamela Pepper,
Catherine L. Steege*

Break

10:20 – 11:20 *Absolute Priority.* The absolute priority rule remains the central organizing principle of the law of corporate reorganizations. Its exact contours, however, remain unclear. Gifting, cramdown interest rates, new value, and unfair discrimination are concepts that remain in flux. Making sense of these doctrines needs to be part of any comprehensive bankruptcy reform.

Hon. Thomas L. Ambro (moderator), Douglas G. Baird, Corinne Ball

Break

11:40 – 12:40 *Plenary Session.*

Richard B. Levin