

ABI COMMISSION TO STUDY THE REFORM OF CHAPTER 11

Monthly Meeting
February 29, 2012
New York, New York

MINUTES/SUMMARY

The ABI Commission held its regularly scheduled meeting on Wednesday, February 29, 2012, at the New York offices of Skadden, Arps, Slate, Meagher & Flom. The following individuals participated in the meeting: Geoffrey Berman, Donald Bernstein, Jack Butler, Babette Ceccotti, Sam Gerdano, Michelle Harner, Steven Hedberg, Robert Keach, Kenneth Klee, Richard Levin, James Markus, Harold Novikoff, James Sprayregan, Albert Togut, Clifford White, Bettina Whyte and Deborah Williamson. Robert Keach called the meeting to order at approximately 2:10 p.m., E.T. The meeting adjourned at approximately 4:15 p.m., E.T. The following matters were discussed during the course of the meeting:

Opening Remarks: Mr. Keach opened the meeting with a review of the agenda and an introduction of the newest members of the Commission, Don Bernstein and Steven Hedberg.

First Public Meeting: Mr. Gerdano reviewed the logistics of the first public meeting, which will be held on April 19, 2012 at 9:00 a.m., at the House Judiciary Hearing Room, Room 2237, Rayburn Office Building, U.S. House of Representatives. He noted that a bus will transport people between the ABI Annual Spring Meeting at the Gaylord National Resort and the public meeting, with the bus leaving at 8:00 a.m. Mr. Gerdano also explained that the meeting would be informational in nature and run approximately 60-90 minutes. The Commission discussed the general format of the meeting, including potential witnesses and statements by Commission members. The Commission agreed to defer further discussion of the details of the public meeting until the Commission's March 15th meeting. At the suggestion of Mr. Levin, the Commission also agreed to hold a closed working meeting after the public meeting on April 19th.¹

Grant Request: Mr. Keach next updated the Commission on the Commission's grant application to the ABI Anthony H.N. Schnelling Endowment Fund. He explained that Professor Harner was working on a draft of the grant application within the parameters previously approved by the Commission. He also noted that the funding for the project likely would be split between the Endowment Fund and the ABI general funds, in much the same manner as the costs of the 2009 Symposium had been funded.

Commission Website: Mr. Gerdano discussed the development of the Commission's website, which will be the public face of the Commission. He described the basic concept for the website

¹ Some members of the Commission are scheduled to participate in ABI's Executive Committee and Board of Directors' meetings and it was acknowledged that those individuals will not be able to participate in the closed working meeting.

and suggested that the initial content likely will include the Commission's mission statement, basic information about the project, bios for all Commission members, a press room and the list of study topics. He also noted that the website could evolve into a more intricate site including hyperlinks to relevant material, videos of public hearings and similar content.

Commission Database: As a follow up to the website discussion, Mr. Keach noted that a Commission research database was also in the development phase. This database would include resources from past Commissions, as well as relevant research collected by Commission members. The database will be available to Commission members and advisory committee members to facilitate their work on the study topics. The Commission then discussed the content of the database and whether the work of prior Commissions is still timely and relevant, ultimately concluding that those materials at least provide informative background. Mr. Togut encouraged all Commission members to consider contributing materials to the database.

Final Topics List: The Commission next turned its attention to finalizing the list of general study topics. Mr. Keach reviewed the list with the Commission, emphasizing that the identified subtopics are subject to change as the process moves forward. The Commission then engaged in a detailed discussion of the general study topics, considering other potential topics and the scope of the listed topics. During this discussion, the Commission revisited and confirmed its prior decisions on whether to include issues raised under the Dodd-Frank Act and in cross-border cases. Ms. Williamson also suggested adding a new topic to address valuation issues in chapter 11 cases, and a discussion ensued concerning that proposal. The Commission ultimately decided to add "The Role of Valuation in Chapter 11 Cases" to the general study topics list. With that addition, Mr. Keach asked for approval of the thirteen general study topics (i.e., the twelve study topics identified on the meeting agenda and the new valuation topic). The Commission unanimously approved the general study topics list.

The Commission then discussed the makeup and role of the Commissioner supervisory groups. The Commission decided that the supervisory groups would vet the subtopics under their assigned general topics and propose specific issues and questions to be researched and analyzed by the advisory committees. Professor Harner suggested using a template to streamline and promote uniformity in this vetting process. The Commission supported this suggestion and approved the following supervisory groups:

- i.** Financing: Miller/Novikoff/Keach
- ii.** Governance: Butler/Whyte/Bernstein
- iii.** Multiple Enterprises: Klee/Hedberg/Togut
- iv.** Safe Harbors: Bernstein/Keach
- v.** Executory Contracts: Williamson/Levin
- vi.** Administrative Claims: Sprayregen/Brandt
- vii.** Labor: Brandt/Ceccotti/Sprayregen
- viii.** Avoiding Powers: Berman/Butler
- ix.** Sales: Gonzalez/Klee/Baker
- x.** Plan Issues-Procedure & Structure: Levin/Millstein/Hedberg
- xi.** Plan Issues-Distributional: Miller/Ceccotti/Novikoff
- xii.** Bankruptcy Remote: Williamson/Baker

xiii. Valuation: Whyte/Millstein/Gonzalez

The Commission also considered the timing of initial assessments by the supervisory groups and commencing the work of the advisory committees. After a thoughtful discussion of these issues, the Commission agreed to move as quickly as possible to facilitate the initial assessments, but also recognized the potential value in staging these assessments and the work of the advisory committees based on, among other things, the makeup of the supervisory groups and the nature and complexity of the work requested of the advisory committees. The Commission asked the Executory Contracts and Governance supervisory groups to prepare their initial assessments for discussion at the March 15th meeting. The Commission will discuss the schedule for the remaining supervisory groups and other key project milestones at the March 15th meeting.

Structure of Advisory Committees: Mr. Keach then reviewed the basic composition of the advisory committees, with each committee including one judge (with the intention of having each of the circuits represented), at least one academic (who is anticipated to serve as reporter for the committee) and multiple professionals. The Commission then discussed the need to ensure balance and adequate representation of competing perspectives on each of the committees and explored different ways of accomplishing this objective. Ms. Williamson asked about the confidentiality of the work performed by the advisory committees, and Mr. Keach explained that the Commission will work with the advisory committees to encourage an open and thoughtful vetting process but maintain the integrity of works in progress until the Commission is prepared to issue its final report. Mr. Butler suggested using the Survey Monkey tool to solicit the input of the Commission members on the composition of each advisory committee. The Commission supported this proposal, and Professor Harner agreed to work with Mr. Keach and Mr. Togut to circulate such a survey and analyze the results for discussion at the March 15th meeting.

Scheduling and Milestones: Mr. Keach then opened a discussion on the projected timeline for the Commission's work. The Commission discussed the various aspects of the project and determined that it was premature to set a definitive timeline. The Commission also agreed, however, that setting some tentative deadlines would help facilitate completion of the project and that the project would benefit from coordinating some public meetings and Commission working meetings with events sponsored by other industry organizations, such as the National Conference of Bankruptcy Judges, Turnaround Management Association and the American College of Bankruptcy. Mr. Gerdano offered to compile a list of these organizations and their currently scheduled events.

Miscellaneous: Mr. Keach reminded the Commission that the next meeting was scheduled for March 15th from 1:00 to 5:00 p.m. at the Washington, D.C. offices of Latham and Watkins. The Commission then considered the need for an additional meeting before the first public meeting and scheduled such a meeting for Monday, April 2, 2012, at 2:00 p.m., E.T. Mr. Butler offered to host the meeting at Skadden Arps's offices, and the Commission asked Mr. Butler to look into facilitating the meetings via video conferencing among Skadden Arps's New York, Los Angeles and Washington, D.C. offices. Mr. Butler graciously agreed to do so. Ms. Williamson then asked if the Commission could work towards creating an omnibus meeting schedule, and Mr. Keach agreed that such an effort should be pursued at an upcoming meeting.