Written Submission to
ABI Commission to Study the Reform of Chapter 11

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I am the Practice Group Leader of the Financial Restructuring Group of Milbank, Tweed, Hadley & McCloy LLP. It is my pleasure and distinct honor to address the Commission in connection with its consideration of the role of official committees of unsecured creditors in chapter 11 cases.

Milbank frequently represents significant stakeholders in complex chapter 11 cases, including debtors-in-possession, statutory and ad hoc committees of creditors, agents for syndicated loans, and individual debt or equity holders. We have served as official creditors' committee counsel in many of the largest and most complex chapter 11 cases in history, such as Lehman Brothers, Enron, PG&E, Refco, Eastman Kodak, A&P Stores, Winn-Dixie, and Arcapita, among others. I have also worked opposite or alongside such committees as counsel for other stakeholders.

Based on my experience, official creditors' committees play a crucial role in chapter 11 cases. In this era of increased case participation by diverse sophisticated constituencies, each pursuing its own economic self-interest, the statutory creditors' committee's unique ability – and fiduciary responsibility – to advance and defend the best interests of unsecured creditors as a whole is of increasing, rather than diminishing, importance.

Commentators and practitioners have recently proposed various reforms to existing practices and procedures relating toofficial creditor committees. These proposals range from restrictions on the appointment and administration of official committees to more radical suggestions, such as the abolition of official creditors' committees. In my view, many of the assumptions underlying these suggestions are either ill-founded or unpersuasive. Many of the suggested reforms ignore the critical role that creditors' committees have played in maximizing value for unsecured creditors. Any reforms should be aimed at encouraging participation of diverse groups of creditors on official committees and making such participation less costly and less burdensome.

The Bankruptcy Code reflects a bargain that allows companies that file for chapter 11 relief to continue to manage their businesses, maintain their operations and presumably preserve as much value for stakeholders as possible. When first enacted in 1978, the concept of allowing management and the board to stay in place after the bankruptcy filing was novel and controversial. Traditionally, a court-appointed or similar representative would be put in place to take over operations and displace or oversee the board of directors. Congress tried a different tack in 1978 and it has worked exceptionally well. Many countries have adopted bankruptcy regimes similar to ours as a result of chapter 11's success in preserving value for stakeholders and promoting corporate rehabilitation. But the debtor-in-possession construct was only one pillar of the chapter 11 framework. The other was the mandatory appointment of a statutory committee of unsecured creditors. The official committee was intended to be

representative of the unsecured creditor class at large and was charged with fiduciary duties to maximize recoveries to unsecured creditors. The committee's performance of its duties and obligations serves as a counterweight to and a ratification of the debtor-in-possession's actions and decisions. The objective is to enable unsecured creditors to take comfort from the official committee's role in the case and ultimate support of particular transactions.

A creditors' committee often serves as a proxy for the unsecured creditor body as a whole. This allows for compromises to be reached through negotiation within a committee that would eliminate lengthy and costly litigation. In contrast to *ad hoc* committees whose members are typically unwilling to become restricted for long periods of time, the official committee, whose members are generally restricted for the duration of the case, are in the best position to effectively interact with the debtor-in-possession on all matters, routine and extraordinary, that will arise during the case. Whether with respect to a plan of reorganization, a sale of assets, employee incentive plans or any of the manifold other issues and actions that will surface, the official creditors committee will discuss, negotiate and finalize the terms of any such action before the public is aware of it and before, in most cases, any of the ad hoc committees will be willing to engage on the matter. Once a negotiated solution has been reached, it can be rolled out to other parties in the case for their review and comment.

There is no doubt that a typical debtor's capital structure may no longer resemble what it would have been in 1978, and suggestions have been made that this new reality somehow lessens either the necessity for, or effectiveness of, creditors' committees. The following trends have been cited as the culprits: (i) the rise of second lien debt; (ii) the increasing control of undersecured lenders in certain chapter 11 cases in; and (iii) the desire for certain creditors to own the company after emergence from chapter 11. These developments reinforce the need for, and confirm the critical role of, creditors' committees in large and complex chapter 11 cases.