Statement of Gerald P. Buccino
To The American Bankruptcy Institute Commission to Study the Reform of Chapter 11

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Thank you for the opportunity to address this Commission on such an important topic.

Personal Background

I have been a turnaround and restructuring professional since forming Buccino & Associates, Inc. in March, 1981.I have been a member of ABI for 25 years and served on ABI's Board of Directors from 1990-1999, and served as Vice-President—Endowment from 1995-1999. I am also a founding member of the Turnaround Management Association and served on TMA's Board of Directors from 1988-1995, and served as Vice-Chairman from 1989-1990 and as National Chairman of the Board of Directors from 1991-1992.

Over the past 31 years, my Firm and I have served as turnaround consultant and interim CEO to debtors facing operating and financial challenges. We have also served as CRO in bankruptcy settings. Our clients have ranged in size from $25 Million to $15 Billion in annual volume operating in a variety of industry settings—some closely held and a number publicly traded—and most, if not all, running out of time and capital. The majority of my work has been on behalf of debtors doing $1 Billion in annual volume and below.

Prior to 1981, I served in C-level positions for three large publically traded corporations; worked two years in M&A, and three years as a CPA with Deloitte.

Economic Landscape

As was the case when the Bankruptcy Reform Act of 1978 was enacted, we face challenging economic times. The need to improve the bankruptcy process is all the more important as you examine ways to allow operating companies the time to stay in business and preserve and improve employment opportunities. Key changes in 1978 included allowing the debtor, rather than a trustee, to remain in control of the business after the commencement of most Chapter 11 cases, while also having the exclusive right to propose a plan of reorganization during the first 120 days of the case. This period of exclusivity was routinely extended if the debtor showed progress in rehabilitating (fixing) its business and/or negotiating a plan of reorganization with its creditors. The Code also led to the growth of the restructuring industry by allowing professionals representing debtors and creditors to be paid fees that were commensurate with those charged for non-bankruptcy services. As a result, the profession of corporate insolvency professionals expanded from a small number of specialists and became a major practice area for some of the nation's largest law firms, accounting firms, and consulting firms, while also including major investment banks and restructuring firms.

Today's problems are even more daunting than those we faced in 1978. A slow-growth economy coupled with high unemployment and underemployment rates have led to a high number of business bankruptcy filings since the 2008 financial crisis compared to the number of annual bankruptcy filings prior to the passing of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. A matter of concern to many insolvency professionals is that Chapter 7 filings have become a larger share of total business bankruptcy filings during the past five years. These filings have grown from less than 60% of all business bankruptcy filings during all but one of the years between 2001 and 2005, to approximately 70% of business bankruptcy filings during the past three years. It appears that many debtors have simply lost hope of reorganizing their businesses. While BAPCPA may have sought to reduce the cost of bankruptcy by shortening the time period for developing a reorganization plan, it appears to have impaired the rehabilitative goal of bankruptcy by leaving insufficient time to rehabilitate or fix many bankruptcy businesses, given the new constraints in the amount of time that a debtor has to assume and assign leases and to propose a plan of reorganization.

Business Profile

In addressing needed changes in the current bankruptcy laws, we should be mindful that insolvency legislation should accommodate not only the needs of larger businesses, but the needs of middle market or smaller businesses where a good deal of our employment rests. According to the most recent data published by the U.S. Census Bureau, there are 27.3 Million businesses in the United States, of which 21.3 Million, or approximately 75%, are self-employed persons. Of the remaining 5.9 Million companies, three tenths of one percent (.3%) has more than 500 employees. Yet, it is the smaller 99.7% of the businesses that employ about half of the U.S. workforce, mostly in businesses with less than 100 employees. These smaller businesses with less than 500 employees represent half of the American workforce employed by businesses and contribute the majority of new jobs in the U.S. and present particular challenges for insolvency professionals. (Note: I currently am assisting a client that has less than 400 employees but will record revenue of approximately $480 Million this year-----not such a small company when you look at its revenue size.) They face many of the same problems, albeit on a smaller scale, as large companies, but they often lack the resources to recruit new management or hire experienced insolvency professionals. Their reorganization is also made more difficult by challenges that are common to smaller businesses, such as lack of proprietary products, customer concentration, vendor concentration, difficulty in raising capital, and relative insignificance to many of their lenders and creditors. While it might take the experienced turnaround professional only weeks to determine if the company is a candidate for turnaround and restructuring, the aforementioned circumstances make rehabilitation more challenging and time consuming.

Observations

If we wish to preserve smaller businesses that provide the majority of new jobs in our economy, bankruptcy legislation cannot be a one-size-fits-all process. Special needs of smaller businesses must be considered in drafting bankruptcy legislation that addresses issues such as the debtor's period of exclusivity, the amount of time to assume or assign leases, and the ability to raise capital. Over the past 31 years, I have assisted clients with over 25,000 employees in larger regional settings, but most often I have found myself in rural America assisting companies with 500 or less employees. In many instances, these companies operate in one or two locations and present a challenge to the local economy. We should not limit the economic loss of a failed company to only the unpaid creditors on the balance sheet. We must consider the devastating impact on a local economy when one of these smaller, but very important companies, shuts down. In addition to the obvious loss of payroll, there is the impact on other small businesses in the area as well as the loss of local tax revenue often resulting in reduced services to the community.

Since the financial crisis, the challenges to finance smaller businesses have been well documented, even for those that are making a profit. The challenge is far greater for those companies facing financial stress and for those seeking a DIP loan. Shareholders of smaller companies are also reluctant to lend money, even well documented and at reasonable interest rates, for fear that their loan might be treated as additional equity. Some file without a DIP loan in place, compelling management to spend inordinate amount of time to obtain capital or face liquidation.

On the other hand, large company bankruptcies are increasingly complex allowing for a variety of committees, some having differing interests and agenda. The time necessary to deal with these competing factions takes time and resources away from the intended goal of rehabilitating the debtor. In addition, we are confronted with claims trading which has resulted in more time and energy in dealing with these committees. We are also dealing with creditors that were not pre-petition supporters of the business and in some cases have no interest in the long-term outcome of the reorganization. In years past, it was common to have vendors as the principal unsecured creditors. They shipped product to the debtor, made their usual gross margin and were paid COD during the pendency of the Chapter 11. They clearly had more interest in the outcome of the reorganization of the debtor and were not in it for a short term gain. Dealing with these committees takes away from the time to rehabilitate the business. While it might be easier for a larger company to secure a DIP loan, the complexity of the process, the reporting obligations and the committee meetings to attend, all point to the need for additional time. In addition, it is very difficult for a large retail company to deal with the many issues before deciding to assume or reject non-residential real property leases.

Given the similar and differing challenges facing small and large business, I recommend the 18 month limitation on the exclusivity period to file a debtor plan be amended. By placing a time limit on exclusivity, I believe companies might be deferring the decision to seek protection, often to the detriment of their long-term health. I am also concerned that this time limit is causing us to be more focused on an exit strategy rather than a rehabilitative process which has led to more sale transactions, often prematurely. While I do not have data to support my opinion, selling a business before fixing its operation, likely yields lower recoveries to the constituencies that supported the company on a pre-petition basis. At a minimum, if we maintain the 18 month limitation to file a debtor plan, we should encourage that there be more flexibility when it can be satisfactorily demonstrated that progress is being made and that more time will provide an improved economic outcome.

I also suggest that the maximum time limit to assume or reject non-residential real property leases be amended. Since landlords are paid during the pendency of the case, why are we fixated on a time period of 210 days? I have been engaged as a turnaround professional in retail bankruptcies where there are hundreds of stores and markets to review. It is not just a matter of rejecting those leases that are above market and assuming those that are below market. The selection process is more complex. Markets must be reviewed, demographics examined, population trends, competitive locations and much more must be thoroughly reviewed if one is to select the correct locations to properly fix the business and give it the best opportunity to be a successful reorganization. Incurring high distribution costs to a remote location makes little sense even if the lease is below market. (Note: I recently served on the board of directors of a regional supermarket chain with 250 stores. It can take two years or more to study a new site as the investment can be high as some of these stores anticipate revenue of $100 Million or more. Clearly, there are a number of issues to be examined in addition to lease expenses. While I realize that assuming or rejecting a lease in a Chapter 11 setting has historical revenue and profits to examine as compared to examining a new site with no financial history, nonetheless, population trends, average income, customer profile, competition are a few of the important issues to carefully examine to insure a successful reorganization).

Summary

Again, I am grateful for the opportunity to address this commission. My remarks reflect a business person's view given the troubling trends of high unemployment and increasing business liquidations. The bankruptcy process should provide every company the opportunity for a "fresh start". Imposing deadlines might have their merits, but if they foster below market quick sales, liquidations, reduced competition, or reorganizations that are not successful, then these deadlines must be amended. Some companies that might not be worth buying are still worth saving.

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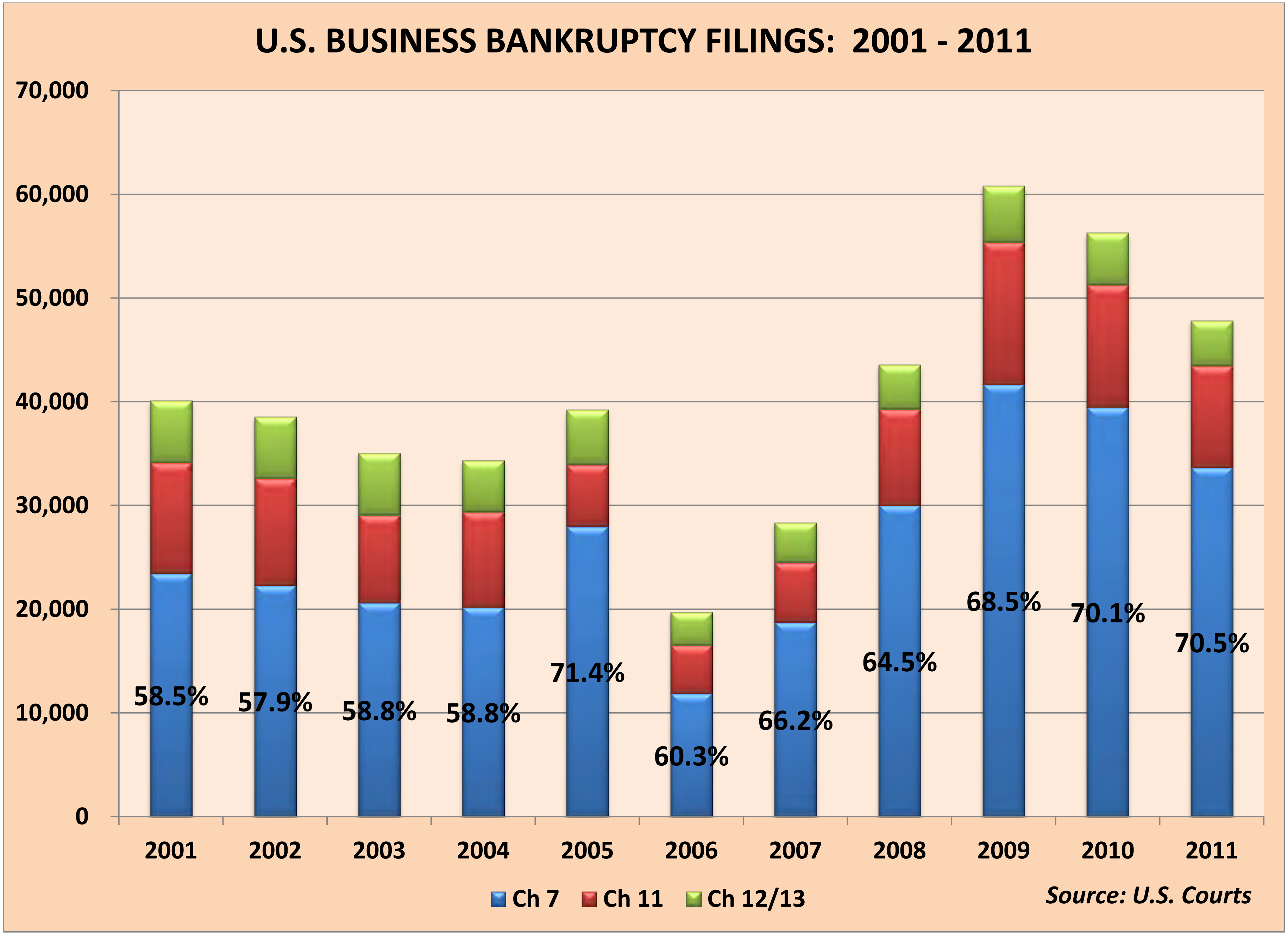
U.S. BUSINESS BANKRUPTCY FILINGS: 2001 - 2011
70,000
60,000
50,000
40,000
30,000
20,000
10,000
0
58.5%
57.9%
58.8%
58.8%
71.4%
60.3%
66.2%
64.5%
68.5%
70.1%
70.5%
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
Ch 7
Ch 11
Ch 12/13
Source: U.S. Courts