Thomas J. Salerno, Esq.
Squire Sanders (US) LLP

ABI Commission Testimony
The Wharton School, Philadelphia
Hunstman Hall, Room G-86
November 7, 2013

Thank you very much for inviting me to discuss certain aspects of Chapter 11 with you today.

I wanted to start by thanking the Commissioners and the American Bankruptcy Institute for organizing this. I think it's an extremely important, and perhaps long overdue, project. Specifically, I want to thank Michelle Harner and Sam Gerdano who are doing a masterful job of managing this complex process.

I am a member of the bar in Arizona (since 1982), and practice primarily bankruptcy law in Arizona, nationally and internationally. I am currently a partner in, and co-chair of, the International Restructuring Practice Group at Squire Sanders (US), LLP, resident in the firm's Phoenix office. I have served as President of the State Bar of Arizona Bankruptcy Section, was a Master of the Arizona Bankruptcy American Inn of Court, and also a current lawyer representative for the Ninth Circuit Judicial Conference. I have also served on the board of national organizations such as the American Bankruptcy Institute and the American Bankruptcy Board of Certification (both based in Washington, DC). Finally, I am a Fellow of the American College of Bankruptcy also based in Washington, DC. Finally, I am an adjunct professor at McGeorge School of Law (having taught *Comparative International Insolvency* in London, Salzburg and Sacramento), as well as the Sandra Day O'Connor School of Law at Arizona State University (where I teach *Bankruptcy Litigation* and *Advanced Chapter 11 Restructuring*).

My practice is broad based, having represented distressed companies (both mid-market and large public company entities), creditors in the restructuring process, committees, and acquirers of assets out of bankruptcy proceedings. I also have a broad perspective of insolvency and restructuring law, having assisted the Czech Republic in the landmark restructuring of its restructuring laws from 2001-2008.

I am a member of the Commission's Committee on Plan Process and Substance. I am honored and humbled to be part of this august group of judges, academics, financial advisors and experienced restructuring attorneys. The topics we have discussed have been identified and vetted as being areas for candid introspection, preceded by the preparation of thorough and insightful preliminary memoranda in advance of discussion, vigorously (yet respectfully) debated on numerous calls, and a consensus then reached on areas of suggested changes (or not). The experience has enriched me personally and professionally, and I am grateful for the opportunity to participate in this endeavor. Under the leadership of Richard Mikels and Jay Goffman (and George Kuney as our faithful reporter), this Commission's Committee forges ahead with its tasks.

That said, all these remarks are made in my individual capacity and constitute my own opinions, not those of any of the groups with which I am affiliated.

Areas Of Examination

There are four (4) two areas that the Committee has identified as being a focus of review for Chapter 11 reform: (a) What obligation, if any, should a debtor have to negotiate a plan; (b) What fiduciary duties, if any, should a debtor have in connection with plan negotiation; (c) Should there be a structured process for plan negotiations (such as exists as a legal prerequisite for filing in a Chapter 9 case);and (d) What rights, if any, should other parties in interest have to file a plan?

While it is often the case that this Commission hears from witnesses who are advocating changes (both major and minor) in the law, there are times when changes are not always desirable. As the saying goes, "If it's not broke, don't fix it." To come to this conclusion after a detailed analysis of certain portions of the Code is in itself noteworthy, and deserves attention.

Preliminary Observations

The *Report of the Commission on Bankruptcy Laws* published September 6, 1973 for Congress included a discussion of the philosophical basis for a federal bankruptcy law. This report discusses three goals or values regarding the policy of bankruptcy law that must constantly be balanced. These values include: (1) the fair and equitable treatment of creditors' claims, by maximizing creditor returns and providing creditors due process, (2) rehabilitation of debtors, and (3) efficient and economical case administration. It is with this fundamental premise that I make my remarks today. The preservation of going concern, wherever possible, with its attendant jobs, tax base and other contributions to the economy, should be the goal of any restructuring law, with a watchful eye over the due process and other legal rights of the stakeholders in the process (such as creditors). While these are, I assume, relatively universally acceptable aspirations, the devil, as they say, is always in the details.

Further, I think it is important to recognize and understand some realities that I think contribute to the success of U.S. Chapter 11 as I see them. I think those are fourfold: (a) restructuring through Chapter 11, while often involving litigation, is not at its core a "litigation" process as much as it is judicially supervised negotiation involving constituencies in all parts of the capital structure. Viewing the restructuring process as a litigation process, with a plaintiff and defendant, a winner and loser at the end, is simply wrong and will create both excessive litigation and skewed expectations from the participants in the process.[1] (b) Restructuring is also, at its core, equal parts

[1] Indeed, Prof. Thomas Jackson at the University of Virginia Law School aptly (and perceptively) analogized the negotiating dynamics amongst the diverse and varied constituents in a commercial reorganization to the convoluted negotiations amongst the people who learn of the hidden treasure in Stanley Kramer's 1963 ensemble comedy *It's*

economic and legal. The law creates the framework for what is essentially an economic solution. Chapter 11 does not "solve" problems of unviable economic entities[2]; rather, it creates a framework to implement economic changes that will assist a company to survive (such as sales of unproductive assets, rejection of burdensome contracts, etc.). (c) One cannot legislate economics. Any law that attempts to dictate what creditors will receive, over what period of time, in a framework that artificially limits time to negotiate will produce a playing field which, on its face will appear to enhance recoveries for creditors, but in reality will foster liquidations. Such a legal regime will be a shining example of the law of unintended consequences. (d) Finally, the flexibility of a restructuring law is an essential and integral key to its success. Safeguards must be built into any system, of course. Rigidity will stifle creativity of financial and legal professionals, making restructurings possible on paper, but impossible in the real world. Moreover, one must have faith in the vigilance of the judiciary to exercise sound discretion to prevent abuses

Summary Of Conclusions

In this broad context I address my specific remarks. The four areas of examination I identified above are, I believe, interrelated, both legally and practically. Those in favor of changing existing Bankruptcy Code and legal standards would assert: (a) there is an inherent conflict in the role of debtor in possession (particularly in small to mid-size cases), and creating specific legal duties to negotiate (and legally imposed, specific fiduciary duties related to such duty to negotiate) will create a more precise framework that will streamline Chapter 11 cases; (b) likewise, having more legally mandated "structure" to the plan negotiation process will ensure that debtors stay on the "straight and narrow", do not use Chapter 11 as delaying tactic, and in all events provides more benchmarks for discharge of a debtor's legal duties (with the failure to discharge those duties providing legal remedies); and (c) allowing a broader array of parties to file plans sooner will result in a more egalitarian process whereby stakeholders will have a greater say in the Chapter 11 process.

It is my belief that: (a) there should not be any legally imposed obligation on a debtor in possession to negotiate a plan, but instead failure to negotiate should be dealt with through other means (conversion, dismissal, appointment of trustees/examiners, termination of exclusivity, etc.); (b) there should be no statutorily mandated change to the fiduciary duties of a debtor in the plan negotiation process, and the same generally applicable fiduciary duties attendant with a debtor in possession capacity in the case as a whole should control: (c) there should not be a legally imposed "structure" for plan negotiations in Chapter 11 cases similar to Chapter 9 cases (as such legally imposed structures in Chapter 9 cases can and do result in ancillary

---

A Mad, Mad, Mad, Mad World. While at first blush the metaphor may seem puzzling, a cursory view of the negotiations makes it quite apparent. *See, e.g.* Salerno, Kroop & Hansen, *The Executive Guide To Corporate Bankruptcy—Second Edition* (Beard Publications 2010) at 114-16.

[2] Distressed economic entities that have no viable "core business" operationally, even after trimming operating expenses, are not viable prospects for true restructurings. That said, the Chapter 11 process may still be a good tool for an orderly wind down or sale.

litigation); and (d) there should be one change to the Bankruptcy Code regarding the rights (and timing) of other parties in interest in Chapter 11 cases to file plans of reorganization—*i.e.* the absolute cap on extensions of exclusivity enacted as part of BAPCPA should be removed. On these issues, and other than the one change to exclusivity (which would return the Bankruptcy Code to pre-BAPCPA law), the Bankruptcy Code and case law is adequate as currently drafted and in place. One of the greatest attributes of the Bankruptcy Code as it exists today is its ability to be applied to a myriad of industries and complex financial exigencies, relying upon vigilant judicial overview and discretion. Creation of new legal requirements, which are often mercurial in their precise meaning and application, will not advance the reorganization process or improve Chapter 11 administration. Indeed, such changes would likely result in more ancillary litigation over whether the standards have been met, thereby further impeding the reorganization process.

Detailed Discussion

With respect to plan formulation and/or exclusivity:

(a) What obligation, if any, should a debtor have to negotiate a plan?

(b) What fiduciary duties, if any, should a debtor have in connection with plan negotiation?

(c) Should there be a structured process for plan negotiations (such as exists as a legal prerequisite for filing in a Chapter 9 case)?

(d) What rights, if any, should other parties in interest have to file a plan?

I. Proposed Principles

It is my belief the imposition of legally mandated duties or structures will not result in greater recoveries, or more efficient and economical Chapter 11 administrations. While such provisions may be facially comforting, they ignore the economic realities of restructurings. Restructurings are driven by market and economic forces. Putting into place legal duties or structures will not create faster of increased recoveries, any more than requiring any plan that is proposed must repay unsecured creditors at least 50% of their claims in order to be confirmed. On paper, this looks like it would result in greater recoveries. In reality, how much unsecured creditors will receive is not a matter of statutory fiat, but rather is a matter of the economic and financial realities of each case.

A. ***Duty To Negotiate:*** There is no need to impose an independent statutory duty on a debtor to negotiate with creditors. The extensive requirements for confirmation of a plan and the likely consequences of failing to negotiate and formulate a confirmable plan (conversion/dismissal, appointment of trustee, termination of exclusivity, stay relief for secured creditors, etc.) are already sufficient safeguards to encourage good faith negotiations. In most cases, a debtor will necessarily be required to negotiate with creditors at least to some extent in order to formulate a viable plan and in order to meet the good faith requirement of Bankruptcy Code § 1129(a)(3). Imposing such a duty will likely lead to more ancillary litigation in the case related to whether the debtor was failing to comply with that duty. Such a result does nothing to promote efficient administration, and only adds to the expenses of Chapter 11 cases.

B. ***Fiduciary Duty To Negotiate A Plan:*** Chapter 11 debtors (through their partners, principals, managing directors/members, officers and directors) already owe a duty of loyalty and a duty of due care to the estate. However certain provisions of the Bankruptcy Code related to the plan negotiation process appear inconsistent with imposition of a duty of loyalty to creditors of the estate occurring in plan negotiations. In light of these provisions, and the sheer impossibility of absolute loyalty to two adverse interests in the negotiating process, it appears that directors and officers are not held, and should not be held, to the same fiduciary duty of loyalty to the estate in the negotiation of a plan. As with the general duty to negotiate, imposing such a duty will likely lead to more ancillary litigation in the case related to whether the debtor was failing to comply with that duty. Such a result does nothing to promote efficient administration, and only adds to the expenses of Chapter 11 cases.

C. ***"Structured Process" for Plan Negotiations:*** There is no need to create "structured" processes in the Bankruptcy Code or Rules related to plan negotiations. Existing (and evolving) judicially crafted remedies have made the requirement of prepetition structured negotiation unnecessary. Moreover, many Chapter 11 debtors engage in negotiations with their principal creditors prior to filing chapter 11 in those cases where they have the ability to do so (such as in pre-negotiated plan situations). Plan negotiation and formulation is not "one size fits all", and is often dictated by economic realities—it is not driven by any formulaic "structure". Attempting to superimpose "structured" negotiation requirements in Chapter 11 would add little, and ultimately could add costs and delay both pre and postpetition. Moreover, like the duty to negotiate or imposition of a specific legal fiduciary duty attendant to plan negotiations, such a legally created structure will likely lead to more ancillary litigation in the case related to whether the debtor was failing to comply with that duty. Such a result does nothing to promote efficient administration, and only adds to the expenses of Chapter 11 cases.

D. ***Exclusivity Amendments:*** It is difficult to determine with certainty whether § 1121 and its subsequent amendments are properly striking the balance of debtor and creditor rights. The unique facts of each case make it difficult to establish any bright-line rule. As set forth above, Section 1121 was enacted to strike a balance in bargaining power between debtors and creditors. This goal is consistent with the dual purposes of bankruptcy. And because section 1121 allows a court to decrease or enlarge the exclusivity period for cause, it grants courts the flexibility they need to address the appropriate course based on the facts of each case. For this reason, I would retain § 1121. However, the 18 and 20 month caps, at least in larger cases involving operating companies, should be eliminated as inconsistent with the flexibility of section 1121. Congress is simply not in a position to make a bright-line determination that a corporate debtor will never need more than 18 months to formulate and commence solicitation of a feasible Chapter 11 plan without the threat of being displaced by an aggressive creditor that may not have the estate's interest in mind.

II. Supporting Discussion.

I respectfully submit the following support for my position.

A. A separate legal obligation should not be placed on the debtor to negotiate a plan.

Several provisions in Chapter 11 of the Bankruptcy Code relate to the prosecution and negotiation of chapter 11 plans. Pursuant to section 1106(a)(5), a debtor-in-possession[3] "shall . . . as soon as practicable, file a plan under section 1121" or a report as to why a plan could not be filed. Section 1121, in turn, grants the grants the debtor-in-possession the exclusive right to file a plan for the first 120 days of a bankruptcy case, unless that period is reduced or expanded for cause. If a debtor-in-possession fails "to file a disclosure statement, or to file or confirm a plan, within the time fixed by this title or by order of the court;" such failure may constitute cause for dismissal or conversion of the chapter 11 case. *See* § 1112(b)(1), (b)(4)(J).

Missing from the Bankruptcy Code, however, is an express requirement that the debtor-in-possession actually negotiate its plan with creditors of the estate. Courts have at least commented, however, that a debtor-in-possession has such a duty. In the case of *Construction Management Servs. v. Manufacturers Hanover Trust Co. (In re Coastal Group)*, 13 F.3d 81 (3d Cir. 1994), for example, in ruling that the statute of limitations applicable to avoidance actions set forth in § 546(a)(1) should apply equally to debtors-in-possession as it does to trustees, the court also commented on other duties of trustees and debtors-in-possession. Several provisions in chapter 11 of the Bankruptcy Code relate to the prosecution and negotiation of chapter 11 plans. Pursuant to section 1106(a)(5), a debtor-in-possession[4] "shall . . . as soon as practicable, file a plan under section 1121" or a report as to why a plan could not be filed. Section 1121, in turn, grants the grants the debtor-in-possession the exclusive right to file a plan for the first 120 days of a bankruptcy case, unless that period is reduced or expanded for cause. If a debtor-in-possession fails "to file a disclosure statement, or to file or confirm a plan, within the time fixed by this title or by order of the court;" such failure may constitute cause for dismissal or conversion of the chapter 11 case. *See* Bankruptcy Code *§* 1112(b)(1), (b)(4)(J).

Specifically, the Court noted that in connection with trustee or

---

[3] Section 1107 provides that a debtor-in-possession has the same rights, duties and responsibilities of a trustee other than the duties set forth in section 1106(a)(2), (3), and (4) (related to the trustee's investigative role).

[4] Section 1107 provides that a debtor-in-possession has the same rights, duties and responsibilities of a trustee other than the duties set forth in section 1106(a)(2), (3), and (4) (related to the trustee's investigative role).

debtor-in-possession's duty under § 1106(a)(5) to file a plan, a trustee or debtor-in-possession "must negotiate and cooperate with the creditors who will vote to accept or reject the plan." *Id.* at 86. According to the Court, the legislative history of § 1106(a)(5) supported the proposition that "Congress expected a Chapter 11 trustee to work with the creditors in formulating a plan". *Id.* citing H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 404 (1977), *reprinted in* App. 2 *Collier on Bankruptcy* Pt. II (15th ed. 1993). Further, subjecting a debtor-in-possession to § 546(a)(1) was complimentary of the debtor-in-possession's "duty to negotiate in good faith with the individual creditors against whom the debtor may have preference or avoidance claims and to disclose early on to its creditors the potential for recovery of assets for the estate." *Id.*

In order to obtain confirmation of a plan of reorganization, a debtor-in-possession must also, among other things, demonstrate that the plan was "proposed in good faith and not by any means forbidden by law." Bankruptcy Code §1129(a)(3). Section 1129(a)(3)'s requirement that a plan be "proposed in good faith" may encompass a debtor-in-possession to act in good faith in the plan negotiation process. Several courts have mentioned that a plan was negotiated at arm's length as support for finding that the plan met the requirements of § 1129(a)(3). *See, e.g.*, *In re Jetstar Partners, Ltd.*, 2013 Bankr. LEXIS 357 at *7 (Bankr. N.D. Tex. 2013); *In re Finlay Enters., Inc.*, 2010 Bankr. LEXIS 5584 at *14 (Bankr. S.D.N.Y. 2010); *In re ProtoStar Ltd.*, 2010 Bankr. LEXIS 5186 at *15 (Bankr. D. Del. 2010); *In re McGuire*, 2009 Bankr. LEXIS 4593 at *7 (Bankr. C.D. Cal. 2009).

This does not mean, however, that a debtor is required to formulate a plan universally acceptable to creditors. In fact, a debtor's plan may still satisfy Bankruptcy Code §1129(a)(3) even if not all creditors participated in the plan negotiation process. *In re W.R. Grace & Co.*, 468 B.R. 81, 136 (D. Del. 2012) (citing *In re W.R. Grace & Co.*, 446 B.R. 96, 104 n.5 (Bankr. D. Del. 2011)). Further, a debtor's plan may satisfy § 1129(a)(3) even if it is not the solution the creditors themselves would fashion. *Id.* citing *In re Frascella Enters., Inc.*, 360 B.R. 435 (Bankr. E.D. Pa. 2007).

B. There should be no legally imposed fiduciary duty imposed on a debtor as part of the plan negotiation process.

As a fiduciary to the bankruptcy estate, a debtor-in-possession possesses at least the fiduciary duties of a pre-petition officer or director of the debtor. *See, e.g.*, *Fulton State Bank v. Schipper (In re*

Schipper), 933 F.2d 513, 515 (7th Cir. 1991); *United States v. Aldrich (In re Rigden)*, 795 F.2d 727, 730 (9th Cir. 1986). As such, officers and directors of a debtor-in-possession are subject to the duty of due care and the duty of loyalty. *Lange v. Schropp (In re Brook Valley VII)*, 496 F.3d 892, 890 (8th Cir. 2007). Consistent with the duty of loyalty, the debtor-in-possession may not act with a conflict of interest and must not take improper actions. *In re Coram Healthcare Corp.*, 271 B.R. 228, 235 (Bankr. D. Del. 2001). Consistent with the duty of care, manager of the debtor-in-possession must perform their duties with the reasonably prudent care, and must act in a manner they reasonably believe to be in the best interest of the corporation. *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985).

A debtor-in-possession must use reasonable diligence in formulating a plan that is feasible and maximizes the estate's value. 1 Norton Bankruptcy Law and Practice 2d 27:3 (2005). A debtor-in-possession may, however, negotiate with the debtor's creditors without violating its fiduciary duties. *Hansen, Jones & Leta, P.C. v. Segal*, 220 B.R. 434, 459-60 (D. Utah 1998). Moreover, at least one court has noted that the Bankruptcy Code places no fiduciary obligations on a debtor-in-possession in the plan negotiation process. *See In re Water's Edge Ltd. P'ship*, 251 B.R. 1, 7 (Bankr. D. Mass. 2000).

In *Water's Edge*, the court noted that the provisions of the Bankruptcy Code dealing with the plan formulation process (§§ 1121, 1127, 1129, 1142, and 1144) refer to the debtor-in-possession as the "debtor" or the plan "proponent" rather than the "trustee," and that the only fiduciary obligation on the debtor-in-possession in such provisions relate to the minimal disclosure requirements of § 1125. *See Water's Edge Ltd. P'ship* at 7. According to the court, the Bankruptcy Code's plan provisions evinced Congressional recognition regarding the realities of the plan formulation and negotiation process. *Id.* The court noted that even a consensual plan is generally the product of intense negotiations, and that the Bankruptcy Code authorizes a debtor-in-possession to proceed under the "self-serving" cramdown provisions of § 1129(b) if a consensual arrangement is not reached. *Id.* The Court concluded:

> A debtor in possession is therefore permitted to place its own interests above those of the unsecured creditors with respect to what it proposes to pay under its plan. This is of course inconsistent with the concept that the debtor in possession is a fiduciary of the unsecured creditors owing them a duty of loyalty. The conclusion seems inescapable. As to its proposed plan dividend, a

> debtor in possession is not a fiduciary of the unsecured creditors owing them a duty of loyalty. Its bargaining and cramdown rights necessarily exclude such a fiduciary obligation.

Id. at 8.

As a practical matter, negotiation of a plan involves maneuvering between and among numerous diverse (and often conflicting) constituencies, each demanding concessions that can be mutually exclusive (such as increased interest rate/terms for secured debt, at the expense of recoveries to unsecured creditors and/or challenges to feasibility). It has been likened to "herding cats".[5] How any coherent fiduciary duty standard could be imposed on a set of complex negotiations and dynamics such as plan negotiations is hard to fathom. Indeed, discharging a fiduciary duty to one set of creditors may be assailed as violating the fiduciary duty to another constituency.

C. There should not be imposed a "structured" plan negotiation process imposed similar to the filing requirements in Chapter 9 cases.

Municipalities seeking chapter 9 protection must establish certain specialized eligibility requirements. *See* Bankruptcy Code § 109(c). Section 109(c)(5) requires such municipalities to either: (a) obtain the agreement of the majority of its impaired creditors; (b) negotiate in good faith (albeit unsuccessfully) to obtain such agreement; (c) demonstrate its inability to negotiate with such creditors; or (d) show a reasonable belief that a creditor may attempt to obtain an avoidable transfer.

The purpose of § 109(c)(5) is to promote prepetition negotiations between a municipality and its creditors. *In re Valley Health Sys.*, 383 B.R. 156, 161 (Bankr. C.D. Cal. 2008). The burden of establishing eligibility under § 109(c) is on the municipality. *Id.* The debtor is generally required to show that it engaged in good faith negotiations with its creditors regarding the potential terms of a plan of reorganization. *Id.* at 162. However, the debtor may also show circumstances that render prepetition negotiations impracticable. *Id.* This "negotiations impracticable" exception of § 109(c)(5)(C) is not limited only to bankruptcies involving large municipalities with large

---

5 *See, e.g.* Salerno, Kroop & Hansen, *The Executive Guide To Corporate Bankruptcy—Second Edition* (Beard Publications 2010) at 13.

bodies of creditors. *Id.* Rather, negotiations may also be impracticable where a municipality must act quickly to preserve its assets, and a delay in filing to meet a prepetition negotiation requirement creates the risk of significant loss to those assets. *Id.*, citing *In re County of Orange*, 183 B.R. 594, 607-08 (Bankr. C.D. Cal. 1995); 2 Collier on Bankruptcy ¶ 109.04[3][e][iii]. Ultimately, the inquiry under § 109(c)(5)(C) is fact-intensive, and a court may find that negotiations are impracticable even in cases not involving large municipalities or risk of significant loss to assets. *In re New York City Off-Track Betting Corp.*, 427 B.R. 256 (Bankr. S.D.N.Y. 2010); *Cf. In re City of Vallejo*, 408 B.R. 280 (B.A.P. 9th Cir. 2009) (noting that impracticability may be present where municipality must act quickly to avoid public harm).

Based on the tests established by Courts in analyzing whether prepetition negotiations are impracticable, a large loophole exists for struggling municipalities to file bankruptcy without engaging in meaningful prepetition negotiations with creditors. Many bankruptcies, after all, are filed in moments of crisis in which the failure to file may result in substantial risk of loss to assets. This is certainly the case in Chapter 11. In many of the larger or mid-level Chapter 11 cases, debtors are already negotiating with their principle creditors (sometimes for an extended period of time) prior to filing bankruptcy. Usually in such situations, a preliminary deal is either in place or such a deal broke down at some point in the process and the debtor was forced to file Chapter 11 in order to preserve its assets. Where such negotiations do not occur, it is frequently the result of exigent economic circumstances that preclude such negotiations as a practical matter.

For this reason, application of a structured prepetition negotiation requirement to Chapter 11, at least one encompassing similar criteria (to the extent they apply) as is currently required in Chapter 9, may not make much sense. Prepetition negotiations with major creditors, particularly secured creditors, in the chapter 11 context already routinely take place. Cases are often filed after such negotiations either become fruitful or break down. Thus, most debtors would easily satisfy § 109(c) (5)(A) or (B) in any event. And given the factors that courts are currently considering under § 109(c)(5)(C), most chapter 11 debtors that file out of desperation either before or in the initial stages of the negotiation process would likely be able to show that filing was immediately necessary to preserve the debtor's assets. Because of this, requiring a debtor to make such a showing would accomplish little in most cases and would add to the already heavy burden of administrative expense for the estate.

Moreover, as with the imposition of statutorily mandated duties to negotiate (structured or nor) and/or fiduciary duties in negotiations, "structure" does not create economic benefit. Instead, it often creates procedural challenges that create ancillary litigation by parties looking to derail or delay the reorganization process.

D. There should be a change in the law to the rights (and timing of the exercise of those rights) of other parties in interest to file a plan in a Chapter 11 case.

Prior to enactment of the Bankruptcy Code, in corporate reorganization bankruptcy cases only the debtor was authorized to file a plan. *In re Lake in the Woods*, 10 B.R. 338, 343 (E.D. Mich. 1981). With enactment of the Bankruptcy Code, however, came section 1121, which represents a compromise between the interests of debtors and their creditors.

On the one hand, section 1121 seeks to eliminate the effects of the pre-Code arrangement, under which corporate debtors arguably possessed unfair bargaining power over their creditors. *See In re Ravenna Industries, Inc.*, 20 B.R. 886, 889 (Bankr. N.D. Ohio 1982) (noting the lack of balance in bargaining power between in favor of debtors over their creditors that Congress sought to alleviate through enactment of section 1121). Congress was concerned that under the Bankruptcy Act creditors had severely limited bargaining power, being essentially forced into the so-called "take-it-or-leave-it" scenario of either accepting the debtor's proposed terms or facing the alternative of liquidation and a drastically decreased distribution. *In re Lake in the Woods*, 10 B.R. at 343-44 (citing relevant legislative history).

On the other hand, Congress also recognized that eliminating exclusivity altogether could have damaging consequences to debtors. *In re Lake in the Woods*, 10 B.R. at 344-45 (citing relevant legislative history). Relinquishment of control at the outset of a bankruptcy case could destroy the debtor's hopes of a successful reorganization. *Id.* at 344. Other factors supporting an exclusivity period include: providing an incentive to the debtor's management to remain in place through the bankruptcy case without fear of creditors immediately filing a plan to bring in new owners, and avoiding potential chaos at the outset of a bankruptcy case caused by multiple competing plans potentially being filed at or just after the petition date.

Section 1121 seeks to balance competing interests by granting an exclusivity period for a Chapter 11 debtor to file a plan. The debtor has the exclusive right to file a plan for the first 120 days of the case, and the exclusive right to seek confirmation of a plan for the first 180 days. § 1121(b), (c)(3). These periods may be reduced or extended for "cause." § 1121(c). Courts now apply a lengthy yet non-exclusive list of factors to determine whether cause exists to reduce or enlarge exclusivity. *See, e.g.*, *Official Comm. of Unsecured Creditors v. Henry Mayo Newhall Mem. Hosp. (In re Henry Mayo Newhall Mem. Hosp.)*, 282 B.R. 444 (B.A.P. 9th Cir. 2002) (applying factors).

Originally, the exclusivity period could be extended indefinitely as long as "cause" existed. *See In re Ravenna Industries, Inc.*, 20 B.R. at 889-90 (noting that eight extensions of exclusivity had been granted to corporate debtor, and denying debtor's ninth request). Section 1121 was amended through BAPCPA, however, to place an absolute cap on exclusivity of 18 months (filing a plan) and 20 months (obtaining acceptances to confirmation of a plan). *See* Bankruptcy Code § 1121(d).

It is my belief this "cap" is artificial and should be removed. When (and for how long) an exclusivity period should be extended should be left to the sound discretion of the Bankruptcy Court, with input and consideration of the views of the others constituents. Putting a hard "cap" on an exclusivity period is, in my view, an attempt to legislate economics. Sometimes restructurings, and the dynamics leading to those ultimate restructurings, take time. "Deals", like a fine wine, sometime take time to age. Artificially limiting the time for these resolutions to bear fruit is in my view counterproductive. The Bankruptcy Code already has in place alternatives to constituents who believe the debtor is being dilatory—*e.g.* dismissal, stay relief, motions to terminate exclusivity, motions for appointment of trustees or examiners, and similar mechanisms. Moreover, the ultimate stopgap on dilatory tactics is and should be the judge overseeing the case. Respectfully, in this regard BAPCPA dealt with a perceived problem with a sledgehammer when it should have used jeweler's hammer in my opinion.

Recommendations And Conclusion

In light of the foregoing, I would respectfully recommend as follows: (a) there should not be any legally imposed obligation on a debtor in possession to negotiate a plan, but instead failure to negotiate should be dealt with through other means (conversion, dismissal, appointment of trustees/examiners, etc.); (b) there should be no change to the fiduciary duties of a debtor in the plan negotiation process, and the same fiduciary duties attendant with a debtor in possession capacity in the case as a whole should control: (c) there should not be a legally imposed "structure" for plan negotiations as such legally imposed structures in Chapter 9 cases can and do result in ancillary litigation and will do nothing to advance the reorganization process; and (d) there should be no changes to the Bankruptcy Code regarding the rights (and timing) of other parties in interest in Chapter 11 cases to file plans of reorganization. This panel concludes that the imposition of legally mandated duties or structures will not result in greater recoveries, or more efficient and economical Chapter 11 administrations. While creation and imposition of such provisions may be facially comforting, they ignore the economic realities of restructurings. Restructurings are driven by market and economic forces. Putting into place legal duties or structures will not create faster of increased recoveries, any more than requiring any plan that is proposed must repay unsecured creditors at least 50% of their claims in order to be confirmed. On paper, this looks like it would result in greater recoveries. In reality, how much unsecured creditors will receive is not a matter of statutory fiat, but rather is a matter of the economic and financial realities of each case.

The Bankruptcy Code and case law is adequate as currently drafted and in place, with the exception of abolishing the hard deadline on plan exclusivity. One of the greatest attributes of the Bankruptcy Code as it exists today is its ability to be applied to a myriad of industries and financial exigencies, relying upon vigilant judicial overview and discretion. Creation of new legal requirements, which are often mercurial in their precise meaning and application, will not advance the process or improve Chapter 11 administration.

I thank you for your time and consideration.

Thomas J. Salerno, Esq.
Squire Sanders (US) LLP