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MEMORANDUM

Date: October 16, 2012

To: ABI Commission to Study the Reform of Ch. 11

cc: Samuel J. Gerdano, Executive Director, ABI

From: Howard Brod Brownstein, CTP
Coordinating Editor, *ABI Journal*, & President, The Brownstein Corporation

Re: *ABI Journal* column – “Problems in the Code”

Thank you for this opportunity to address the ABI Commission to Study the Reform of Ch. 11.

In 2011, contemporaneously with the formation of the Commission, and with the support of Lynnette Warman, ABI’s Vice President of Publications, and Elizabeth Stoltz, Managing Editor of *ABI Journal*, I initiated the launch of a column in the *ABI Journal* entitled “Problems in the Code”.

Our column was created to be a parallel effort alongside the Commission’s efforts to study the first major overhaul of our nation’s bankruptcy laws in over thirty years. The purpose of the column has been to augment and support the Commission’s work, by highlighting areas of the Bankruptcy Code and Rules that have proven to be problematical in theory and/or application, and offer legislative solutions to the problems.

Examples of situations that have given rise to “Problems in the Code” include:

- Circuit “Splits”, whereby interpretation varies by jurisdiction, leading to inconsistent application of laws and forum shopping
- Areas where courts and/or attorneys have created “workarounds” to adapt the Code to the reality of business necessities and practice of law, such as the so-called “Jay Alix Protocol” in the Third Circuit
- Situations where one or more of the ultimate purposes of bankruptcy, e.g., creating fair opportunities for debtors to be rehabilitated, treating creditors of the same class equally, etc.—just aren’t being served well by the Code and Rules as written.

In addition to the public hearings held by the Commission, the “Problems in the Code” column serves as another “voice of the people”—ABI members who are prominent or emerging

bankruptcy law practitioners, and who have observed first-hand the imperfections of our system of bankruptcy laws.

Several months after launching the column, Frank Volk, Law Clerk in the U.S. District Court in Charleston, WV, joined me as a Coordinating Editor. Frank focuses on soliciting and editing articles about consumer bankruptcy, and I focus on business bankruptcy.

Our articles follow the general format of:

1. Here's the problem
2. Here's why it's a problem
3. Here's the suggested legislative solution

Over the past sixteen months, our column has published a prolific stream of articles in *nearly every issue* of *ABI Journal* (listed at: <http://journal.abi.org/category/column-name/problems-code-0>).

We have been struck by the *breadth* of subjects—so many areas of the Bankruptcy Code are in need of legislative attention, according to our authors! This published body of work is perhaps the most powerful and eloquent evidence for the need for reform of Ch. 11.

Here is a list of article subjects published to date, in our current queue or in development:

- Treatment of Franchisee Leases under § 365(d)
- Priming Setoff Rights
- Impact of *Stern v. Marshall*
- Effect of *Northern Lights* on Chapter 15 Practice
- Calculation of Lease-Damage Claims after Early Termination
- Assumption of Intellectual Property Licenses
- Impracticality of Rule 2002(a)(2)
- Expediting Chapter 11 Liquidating Debtor's Distribution to Creditors
- Section 507(a)(4) and Executoriness
- *Qualitech* and § 365(h)
- Absence of Reference to LLC's in the Code
- Statutes of Limitations vs. Nondischargeability Actions"
- Definition of "Income"
- *LGI* & Treatment of Third-Party Payors
- Treatment of Unrejected Leases
- Abuse of §548 fraudulent transfers
- Tension between receiverships and bankruptcy proceedings
- The Decline of Avoidance Powers
- *Sunbeam* and *Lubrizol*: rejection of contracts
- Custodians' obligation to turnover and grounds for excuse from compliance
- Priority of Environmental Claims
- Single-asset RE cases and expedited treatment

- §327 Disinterestedness and Prepetition Turnaround Professionals

In addition to calling the attention of the Commission to the specific topics covered by the above articles, we hope that the Commission will also look for the “penumbra” of each topic—the implications of each topic on related subjects within the Code. The implications of the breadth of topics illustrated above are clear—**nothing short of a systematic and exhaustive examination of Ch. 11 will suffice**. In addition, the Commission’s program of public hearings and soliciting input from all quarters are clearly appropriate and will be beneficial for the outcome.

It remains to be seen whether, after the Commission has completed its work and submitted it to our lawmakers, there will exist the political will to avoid just another “swinging of the pendulum” toward or away from perceived advantages to debtors or creditors, and instead whether changes will be made that are truly necessary for bankruptcy to work more efficiently and effectively for all concerned, as determined by the best minds in bankruptcy practice and academia, and as informed by the 13,000-plus members of the American Bankruptcy Institute.

Thank you.