

The Honorable Charles E. Grassley
Statement
American Bankruptcy Institute
Commission to Study the Reform of Chapter 11

Commission Co-Chairmen Keach, Togut and members of the Commission, as you all know, I have long been involved in changes to the Bankruptcy Code. It is fundamental to our society that we have a system in place to ensure fairness to both debtors and creditors when a business or individual is faced with reorganization or liquidation. Overall, the current process, particularly with regard to Chapter 11 cases, is a pretty good one. However, that is not to say there is no room for change so as to make it better.

One aspect of Chapter 11 I have been interested in recently involves the payment of bonuses to executives during bankruptcy. It is difficult to justify why executives, who were in charge of a business while it plunged into bankruptcy, should be rewarded at the expense of creditors. I am not alone in this position. Congress took steps in 2005, when we passed the Bankruptcy Abuse Prevention and Consumer Protection Act, to restrict these kinds of payments except in limited circumstances, which was codified in 11 U.S.C. § 503(c).

However, attorneys and courts have found a way to work around the restrictions in § 503(c). In order to avoid the new requirements, attorneys are creating “incentive” based payment plans for executives and management. These “incentive” plans seek to reward key employees who stay with the company during the reorganization.

I have expressed my concern with these plans to the Attorney General. I wrote to him in February asking how the Department of Justice, through the Trustee Program, reviews these plans during confirmation. If these plans are “incentive” in name only, that is, the performance goals are easily attainable making them retention plans masquerading under the name incentive, then Congress’s intent is not being followed.

I look forward to reviewing the work that this Commission performs and trust this issue will be one that is examined, so that Congress can respond appropriately.