AMERICAN BANKRUPTCY INSTITUTE

COMMISSION TO STUDY THE REFORM OF CHAPTER 11

PUBLIC HEARING

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GEOFF BERMAN: Good morning, and welcome to the first public meeting of the American Bankruptcy Institute Commission to Study the Reform of Chapter 11. My name is Geoff Berman, and I am the President of the ABI.

In the fall of 2009, the ABI, the world's largest association of insolvency professionals with over 13,000 members, held a two-day symposium to address the need for reform to the Chapter 11 process. That symposium, titled "Chapter 11 at a Crossroads: Does Reorganization Need Reform?", was organized by then ABI President and the current chairman of the ABI Board of Directors, Bob Keach.

Many of the leading practitioners in the insolvency community participated in the 2009 symposium. And since then, they, along with many others from across the country have called for reforms suggested in that symposium to move towards reality. The reasons are several.

The Bankruptcy Code was developed in an era where the biggest employers were manufacturers. Today, America's biggest businesses are retailers, technology-driven enterprises, and service companies. Further, the typical financing structure of business has changed, with more sophisticated forms of debt and bond holder components, including a robust market for all forms of distressed debt, and with the role of a more typical unsecured trade creditor greatly reduced.

These changes have made many of the concepts originally designed and enacted into the Bankruptcy Reform Act of 1978 outdated and difficult to work with in today's modern restructuring cases. The idea for a follow-up to the 2009 symposium was raised in early 2011 by Al Togut who, along with Bob Keach, agreed to help make this commission become a reality.

The members of the commission represent many of the country's best and brightest bankruptcy practitioners, a proverbial "who's who" of the insolvency community. The commission's mission statement is as follows:

"In light of the expansion of the use of secured credit, the growth of distressed debt markets and other externalities that have affected the effectiveness of the current Bankruptcy Code, the commission will study and propose reforms to Chapter 11 and related statutory provisions that will better balance the goals of effectuating the effective reorganization of business together with the attendant preservation and expansion of jobs and the maximization and realization of asset values for all creditors and stakeholders."

The commission's work is underwritten by a grant from the ABI's Anthony H.N. Schnelling Endowment Fund. The Endowment Fund was created in 1989 to provide resources for research and education in insolvency-related areas. Over $1.5 million in grants and scholarships have been awarded by the endowment fund since its creation. This commission and a task force to address ethical issues in the practice of bankruptcy are the two most recent recipients of grants from the ABI Endowment Fund.

It is now my pleasure to introduce the co chairs of the commission; Bob Keach and Al Togut.

ROBERT KEACH: Thank you, Geoff. Why the need for reform, and why now? Believe it or not, it has been over 30 years since the current Bankruptcy Code was enacted, and there is a growing view that the current law needs an overhaul.

As Geoff noted, that the current law needs updating was recognized in the opening panel of the 2009 symposium. And that opening panel in 2009 was comprised of a number of the founding fathers of the 1978 Code, some of whom now sit on this commission.

That group noted that the 1978 Code's passage was expected to have a shelf life, if you will, of at best, 40 or so years before changes in the credit economy and the business world would mandate more reform. Well, as they predicted, the credit economy and the business world have indeed changed, and the Code needs to change to keep up.

Individual commissioners and witnesses will today elaborate on some of the things I'm going to touch on. But let me note a few themes briefly. Arguably, the best quality of the 1978 Code was that the statute offered a balance betweem creditor and debtor interests, establishing what was often described as a level playing field for restructurings.

When first enacted, the Bankruptcy Code fit its time, and arguably served the interest of all those impacted by a debtor in distress including employees, the surrounding community, the public interest, and creditor interests. But it did so in a flexible way that balanced all interests while meeting the debtor's goal of succeeding in saving its business.

Some of the many changes to the Code throughout the years have also not helped further the goal of restructuring or have had unintended consequences. For example, the automatic stay once had eight exceptions. After repeated amendment, it now has 34.

Most of the changes since 1978 have resulted in some creditor group or another being excepted from the strictures of the Bankruptcy Code. This is a process one commentator referred to as "piecemeal repeal of the Bankruptcy Code." As Professor Stephen Lubben has noted, while each of these exceptions may have seemed reasonable in isolation, when taken together, they seriously challenge the efficacy of Chapter 11.

We need to address the cumulative impact of these changes. However, primarily, the world changed along with the 1978 Code. Just to return to the 1978 law would not do it. For the most part, a series of external factors drive the need for reform of Chapter 11.

Since the Code's enactment, there has been an explosion in the use of secured credit, placing secured debt at all levels of the capital structure and often trumping any long-term reorganization for the benefit of existing shareholders. On the whole, the debt and capital of all companies are more complex with multiple levels of secured and unsecured debt and layers of equity interests.

The unparalleled expansion of distressed debt markets and claims trading has often made modern Chapter 11 a financial and take-over play, minimizing the debtor's ability to control its own destiny.

Meanwhile, traditional creditors' committees were populated with trade and other long-term claim holders concerned about the future of the company. Today's statutory and ad hoc committees may consist of debt traders who buy claims at less than par and who may have a different agenda than the long-term survival of the enterprise. While the Bankruptcy Code was developed in an era when the biggest employers were manufacturers with primarily domestic operations, many of the biggest employers today, as Geoff noted, are service companies, retailers, and technology-related concerns.

Many of the remaining American manufacturers are less dependent on hard assets and more dependent on contractual relationships and intellectual property assets. Debtors are more often multinational companies, with their distress having an impact across borders.

Both sets of changes, the internal changes to the Code and the externalities, have been dramatic. The expansive use of secured credit has been a particular challenge to the traditional reorganization regime. The challenge is, how can reorganization be financed when there is little or no apparent equity in the assets? In the case of over-leveraged balance sheets, how are employee, tort claim, and trade creditor interests, much less equity interests, to be protected or at least recognized? Faced with underwater companies, and the goal of a quick resolution as opposed to a restructuring, secured parties and debt traders often push for a quick sale or a liquidation. The result has been more liquidations and fewer reorganizations, greater loss of jobs, and attendant loss of state and local tax bases as factories and other businesses closed.

And there are collateral effects. Studies have shown that the absence of an effective reorganization statute discourages entrepreneurship. Thus, fewer startups and fewer of the small businesses that are often the drivers of job growth in the United States.

Moreover, given the added complexity and a statute that often simply does not have the tools or clear answers to deal with the problems that arise, even the cases that do reorganize cost more. Reorganization is less efficient, more litigious, more contentious, and more costly.

That's the framework under which the commission idea emerged. And now, my co-chair, Mr. Togut, will talk about what the commission is going to do about those problems.

AL TOGUT: Thank you, Bob. I am Al Togut, the co chair of the commission, and I will talk some about the commission, its mission, and how it will do its work.

It was Rich Levin, who's down at the end of the dais here, who said at the 2009 symposium, "You can't go back to the future. The world doesn't work as it did in 1978. It's not a question of amendments; it's not a question of adjusting this or that; it's a question of we're in a very different world now. Let's start from scratch, and write something that makes sense for this world." The charge of the commission is the study of comprehensive Chapter 11 reform, a very large undertaking.

This will be a soup-to-nuts effort. We will fully examine Chapter 11 of the Bankruptcy Code, the business bankruptcy provisions, and for companies of all sizes: small and large. We're going to look at the Code with fresh eyes and a willingness to consider new ideas.

ABI is the logical organization to do this work for two fundamental reasons. First, it's not a political or a government organization. As part of its basic charter, ABI does not lobby or advocate for particular positions, nor does it take sides.

And thus, ABI has no interest other than intellectual honesty and an open process.

Second, ABI has over 13,000 members that represent a cross-section of all parts of the bankruptcy and insolvency practice. It includes lawyers and financial advisors who advise small, midsized, and large companies and those who advise creditors as well as debtors.

Its membership includes judges, academics, financial advisors, investment bankers, trade creditors, lenders and others. And consistent with ABI's 30-year, nonpartisan tradition, the commission will be a forum for all voices and all points of view. Note also that Bob Keach and I are not with big firms. His is bigger than mine, but neither of us is ... (LAUGHTER) ... what would be defined in this day and age as a big firm. We are truly independent, we have no agenda, and our goal here is to lead this effort to study Chapter 11. ABI president Geoff Berman asked Bob and me to assist in assembling the commissioners.

We were asked to bring together the best and the brightest, to use a well-understood phrase, to study possible business bankruptcy law reforms. And I think you'll conclude that we succeeded. I would like to introduce these prominent members of the commission, noting that their full biographies are on our website.

The commission members are: Jan Baker of Latham and Watkins, who is the current president of the American College of Bankruptcy. Don Bernstein, who chairs the Bankruptcy Group at Davis Polk & Wardwell, and is the chairman of the National Bankruptcy Conference. William Brandt, seated next to Don, is with Development Specialists Inc. of Chicago, a turnaround firm. He's been an adviser to Congress on bankruptcy legislation, and he is the chairman of the Illinois Finance Authority. Jack Butler, right in front of me, is with Skadden, Arps, Slate, Meagher & Flom, and was named one of the decade's most influential lawyers by the National Law Journal. He is a senior member of the Skadden Bankruptcy Practice, and he is currently counsel to the Unsecured Creditors Committee of American Airlines.

Next to me here is the Honorable Arthur J. Gonzalez, whose most recent service was with the United States Bankruptcy Court for the Southern District of New York, where he was the Chief Judge.

He's now a law professor at the New York University School of Law. Judge Gonzalez presided over the *Chrysler Motors* case and the *Enron* case, both of national importance, among many important cases. Steve Hedberg is a member of Perkins Coie in Portland, Oregon, where he is listed as one of the best lawyers in America, and a Fellow in the American College of Bankruptcy. Bob Keach, my co-chair, with Bernstein Shur of Portland, Maine, is another of our Commission members listed in the best lawyers in America, and a past President and chairman of the board of ABI. Ken Klee, down at the end of the dias, teaches at the UCLA School of Law, and is the name partner of Klee, Tuchin, Bogdanoff and Stern in Los Angeles. He is a nationally recognized expert on bankruptcy law who has appeared in several hundred educational programs dealing with bankruptcy law, and truly, is a recognized expert.

Rich Levin, who I referred to before, chairs the bankruptcy group at Cravath, Swaine & Moore. He was counsel to a subcommittee of the House Judiciary Committee from 1975 to 1978 where he was one of the primary authors of the 1978 Bankruptcy Code. Harvey Miller of Weil, Gotshal & Manges, who couldn't be here because he's teaching his class at Columbia Law School, is probably the most famous bankruptcy lawyer in the world. He is now representing American Airlines on the debtor side. So, Jack's got the creditors, and Harvey's got the debtor. And he also represented Lehman Brothers and General Motors in their Chapter 11 cases. James Millstein, down there on the dais, chairs Millstein & Co. He was chief restructuring officer of the United States Department of the Treasury, where he was primarily responsible for managing and resolving a number of the department's largest TARP investments.

Harold Novikoff chairs the bankruptcy group at Wacthell Lipton Rosen & Katz, and represented the United States Treasury in the Fannie Mae and Freddie Mac rescues, and is a co-author of Collier on Bankruptcy. Sheila Smith, directly in front of me, heads up the worldwide restructuring practice of Deloitte Financial Advisory Services, and is one of the most highly regarded professionals dealing on the financial side of bankruptcy. James Sprayregen, down at -- Jamie. I can't call you James --Jamie Sprayregen, from Kirkland & Ellis, where he is recognized as one of the country's most outstanding bankruptcy lawyers and who formerly co-headed the restructuring group at Goldman Sachs.

Clifford White is the Director of the Executive Office for United States Trustees in Washington. He is in charge of all the U.S. trustees around the country. He has served the Federal government for 30 years and has been recognized with a Presidential award for distinguished executive and one for meritorious executive, and the Attorney General's Award for distinguished service.

Bettina Whyte is from Alvarez & Marsal, where she is a nationally recognized leader in the financial and operational restructuring industry, and a past President of ABI. Deborah Williamson, from Cox Smith Matthews Incorporated in San Antonio, Texas. Deborah was named one of the top five bankruptcy lawyers in Texas. But that's misleading. She is the most famous bankruptcy lawyer from Texas. And she was named the leader in her field by Chambers USA and is also a past ABI President. Geoff Berman, who opened up the meeting as an Ex Officio member, is with Development Specialists Inc., and is the current ABI President. And James Markus is an Ex Officio member and is a partner with Markus Williams Young and Zimmerman in Denver. He is the incoming ABI President.

That's our commission. What a group. The commission is also pleased to announce our honorary chair; the Honorable Howard Coble, chairman of the House Judiciary Committee Subcommittee on Courts, Commercial and Administrative Law.

And I note that Senator Richard Durbin, the assistant Majority Leader of the United States Senate, will also stop by soon because of his interest in our work. The support of congressional leaders in both chambers will be, of course, critical if reform is to move forward based on this commission's work.

The commission is also ably assisted by its reporter, Michelle Harner, who is an eminent bankruptcy scholar in her own right. She is a professor of law and co-director of the Business Law Program at the University of Maryland Frances King Carey School of Law. Professor Harner will oversee the work of the advisory committees, provide critical research assistance, record the deliberations of the commission, and assist in the production of the commission's final work product. Many thanks to Professor Harner, for her willingness to serve.

The commission, in a series of preliminary meetings, has selected a number of topics for initial study. They are the areas that require close attention and consideration for reform. The commission has selected advisory committees of distinguished judges, academics, and practitioners to assist the commission in the study of each of these topics, research the topic, and propose possible reforms, and where warranted, to develop the arguments for reform alternatives.

Over 100 of the best minds from the judiciary, the law schools, the bar, financial advisory services, and the worlds of finance and banking have agreed to serve on these committees. And I can tell you that when we've called them up to ask if they would serve, the answer isn't simply, "Yes, we would like to serve." The answer is, "This is a true honor. We're really thrilled to be a part of this effort, and thank you. Of course we would like to serve."

The commission will also hold hearings around the country to hear and collect data and opinions on various issues. We're going to have open meetings where folks can come forward and express to the commission areas of their concern, topics for our review, suggestions for reform, and so forth. And the commission will also solicit and accept written submissions on all issues. So as I said at the outset, this is a completely open and transparent process. We hope to hear from every interest affected by restructuring legislation.

The commissioners will discuss, debate and search for consensus and change. The final result will be a comprehensive report -- part blueprint for reform and part catalog of open issues and current options that are to be considered in updating Chapter 11. If the commission succeeds, its work will lead to legislation that's fully informed by the careful and thorough process, benefitting from the input of the entire restructuring community.

KEACH: Thank you, Al. At this point, we're going to hear from a number of people, starting with the members of Congress. At this point, the chairs would like to knowledge our honorary member, Congressman Howard Coble who has a few words to say about the work of the commission. Let me say a few words about him first. Congressman Coble is the representative for the sixth District of North Carolina. He has proudly represented that district since 1985. He is a member of the committee on the Judiciary and chairman on the subcommittee on Courts, Commercial and Administrative Law. He is also a member of the Committee on Transportation and Infrastructure, a member of the Subcommittee on Aviation, a member of the Subcommittee on Coast Guard and Maritime Transportation, and a member of the Subcommittee on Highways and Transit. As you can tell from that brief resume, he is a very busy man. He has been kind enough to bless us with his remarks this morning, and then he has to scoot. So, welcome, chairman Coble.

COBLE: Thank you. I'm not sure you all -- thank you sir. I'm not sure you're going to be blessed with my presence ...

(LAUGHTER)

COBLE: ... but it's good to be with the institute. And I thank you all for the honor of serving as honorary chairman of the Commission. The ranking member on our subcommittee dealing with bankruptcy is Steve Cohen from Tennessee. And contrary -- contrary to some reports you may have heard, the Republicans and Democrats do speak to each other on the Hill occasionally. It has had a very harmonious relationship, and I enjoyed very much working with him.

And I appreciate what you and the Institute do, as a matter of fact. I know that the Congress still needs to extend, and perhaps create, bankruptcy judgeships. And I believe that some attention will be forthcoming on that issue imminently. Now, by imminently, I mean within two or three weeks. I started off today with the kind of day I'm sure that none of you have ever had with everything that could go wrong, went wrong. You've never known those days. I'm sure. I say that tongue-in-cheek. But I have two other meetings that I have to go to. But I do appreciate the invitation, and best wishes to you all. I do thank you for what you all do. And thank you for the invitation to be with you.

KEACH: Thank you, congressman. We appreciate it very much.

COBLE: Can I - I do have a written statement.

TOGUT: Yes sir.

COBLE: And I can have that for the record?

KEACH: Yes. We thank that congressman for his written statement. It will be part of the record. It will be posted on the commission website and part of the permanent record of this meeting. Thank you.

KEACH: At this point in time, the chairs would like to recognize the Honorable Joan Feeney. Judge Feeney is the United States Bankruptcy Judge for the District of Massachusetts, a longtime friend of the ABI, and significantly now has the great honor to be the president of the National Conference of

Bankruptcy Judges. And she has also been kind enough to appear today to speak on behalf of the NCBJ. Judge Feeney?

HON. JOAN FEENEY: Thank you, Chairman Keach, and thank you to the commission for the opportunity to appear on behalf of the National Conference of Bankruptcy Judges. I have been a bankruptcy judge for the District of Massachusetts for the past 19 years. I am the co-author, with honorable Nancy C. Dreher, of the Bankruptcy Law Manual, and I have also written a book for consumers on debt relief called The Road out of Debt.

I'm honored to be included in the first public meeting of the commission. The NCBJ applauds the commission for establishing a study of chapter 11, and to propose reforms that will better balance the goals of the organization and maximization of asset values to creditors. The areas of study that you proposed to explore are comprehensive, well-founded, and timely. The NCBJ is ready and willing to assist the commission in its review and study and formulation of proposals and recommendations. Our 350 sitting judge members and retired members have a wealth of knowledge and experience on the front lines and in the trenches of all types of Chapter 11 cases; large corporations, partnerships, small businesses, and individuals who also seek Chapter 11 relief.

Our role as judges requires us to listen to all constituencies, to encourage consensus, and when that fails, to serve as an independent adjudicator of complex, factual, and legal issues which affect the rights of all interested parties, many of whom are not directly before the court. The bankruptcy judges of the NCBJ are uniquely qualified to serve you as neutral experts to testify, to write papers, or in any format you request for your hearings.

As our members can attest, Chapter 11 often functions well. And when it does, everybody wins. Chapter 11 can harness market forces to keep failed companies alive, and it is a much better alternative than liquidation or government intervention. The Chapter 11 model is still the best in the world although this commission has recognized there is room for improvement. Chapter 11 has evolved and changed since the enactment of the Code in ways that the drafters may not have foreseen or intended. The typical business case that most bankruptcy judges see now is not a business that simply needs a breathing spell, and some time to fix its business problems.

Today, most chapter 11 debtors are leveraged with secured debt far beyond asset values, often in complex tiers. They arrived at bankruptcy court close to, if not dead on arrival; hemorrhaging money with few prospects other than liquidation. A quick sale to the highest bidder is often promoted as the only option. The world of corporate finance has changed. Secured creditors and distressed debt traders who have purchased debt pre-petition are often in control of the Chapter 11 case. And they seek to advance their own agenda and interests; inter-creditor agreements that were entered into pre-petition purport to bind all parties.

The prospects for unsecured creditors getting anything are abysmal. The Chapter 11 debtor in possession is often in a corner, and has agreed to terms and cash collateral and borrowing stipulations that are onerous and oppressive out of desperation. Professionals are required to negotiate a carve-out to even get paid. Management is often put in a conflicting situation, trying to maintain operations while their jobs are in jeopardy. The quick sale is often for a price less than the amount of secured debt, and the unsecured creditors have to negotiate for a carve-out if the secured creditor is willing. Who knows whether these quick sales get the best possible price?

They're always presented to a bankruptcy judge as emergencies without much marketing or notice. The pervasive argument that the debtor is a melting ice cube may be warranted in some cases, but certainly not all. After a quick sale is approved, the plan is usually that the committee gets the avoidance actions: few recoveries, good luck. There is a public perception that the only beneficiaries in this type of case are the professionals and executives who brought it to Chapter 11. And everyone else loses.

Whether this is true or not, perceptions matter and influence legislative action. I do not agree with the academics who predict the demise of Chapter 11. But Chapter 11 has to adapt to the changes in the American economy, the worlds of finance and business, and globalization.

Chapter 11 must also adapt to the various types of businesses who now seek it, which also includes high-income individuals and also low-income individuals who simply don't qualify for Chapter 13 relief because of the debt limitations. Thus, Chapter 11 must be rewritten to adjust to the very broad ranges of debtors and their problems who seek relief under this umbrella.

There is no doubt that speed is often paramount in many cases, and the code and the rules need to adapt to such needs. The code also needs to recognize that discretion of bankruptcy judges is essential to Chapter 11 cases in order to foster consensus and to formulate unique solutions to unique debtor's problems.

Changes to Chapter 11 are needed to make it stronger to increase the likelihood of reorganizations over liquidations, and to enable the real estate market to recover. Chapter 11 is still the most transparent and neutral multiparty forum bringing all the parties to one table, giving them time to figure out what the appropriate course of action is.

Failing a negotiated solution, a bankruptcy judge must decide whether to confirm a plan or to convert or dismiss the case. The judge should not be hampered by strict and inflexible rules as there is no one size fits all solution to legal and business problems.

There are many types of Chapter 11 debtors; many more types than mega cases. Although the provisions for small business debtors seem to work well and are streamlined, the 2005 amendments for individuals have caused much confusion. There has been much litigation about various issues including the application of the absolute priority rule and requirements for submission of income and plan duration. Chapter 11 for individuals needs reform now. And as is evident from all of the 2005 amendments, amendments can have unintended consequences. Recommendations for reform should be tested for all debtors.

I'd like to turn to a couple of the topics that you have chosen for your study and give some ideas which may warrant further study within these categories. And we commend your choice of a topic;

multiple enterprise cases. Corporate groups present complex legal and business issues. And the current code does not contain adequate guidance on how they should be handled. There is much litigation, time, and money spent on resolving these issues in Chapter 11 due to splits in the circuit courts.

Substantive consolidation is not even a remedy that's recognized in the Bankruptcy Code. Query whether it should be and what should the standards be. And there are variations on consolidation; partial consolidation, deemed consolidation used offensively. There are differing views on this -- these remedies, resulting in lack of uniformity across the country. The entire procedure, with respect to alter ego actions and veil piercing, is in a state of disarray.

Clarification of these issues is important to all bankruptcy lawyers and judges. Clarification of the authority of bankruptcy judges to deal with bankruptcy remote entities is also necessary; and may well improve transparency in reorganizations. Parties have had to find equitable ways to deal with these issues within the confines of the code to get to such entities, and legislation is warranted to eliminate shell games. With respect to the governance topic, we think it's appropriate to study whether Chapter 11 should promote scrutiny of management, and also to examine the issue of whether the code should provide for remedies for recoveries against failed management. One thought is to give parties more powers to examine grounds for or request termination of managers who do not prove themselves, or worse. Another idea is to extend cause for the appointment of the Chapter 11 trustee.

Some of the most successful cases I have seen have been where a professional financial adviser is appointed a Chapter 11 trustee, and cleans house in ways that management couldn't perceive or implement. This is not to say that the debtor in possession concept is no longer valid. But it may be appropriate to include new tools for dealing with inadequate management. On a related note, executive compensation is still a burning issue. Although the subject has several amendments in 2005, the amendments were not a model of clarity. And further amendments are necessary to clarify the parameters of appropriate incentives and compensation.

For some time, there has been a split of authority on the issue of separate classification of deficiency claims. In those jurisdictions where deficiency claims cannot be separately classified, confirmation of real estate reorganizations is difficult and has been contested with debtors seeking novel ways to circumvent the problem, which drives up cost and delays distribution. Legislation clarifying this issue would facilitate solutions in real estate cases. Bankruptcy judges have been efficiently deciding evaluation, strip off and lien avoidance matters in commercial real estate cases in Chapter 11 for years.

As timely and as necessary this commission is, I submit that Chapter 13 needs an ABI commission too. The lack of uniformity in the application of Chapter 13, and the restrictions within which bankruptcy judges must operate, make Chapter 13 most unhelpful to most debtors who need its relief.

Several of our members have also suggested that Chapter 9 needs a commission too. Finally, with respect for the authority of bankruptcy judges, there are *Stern v. Marshall*-related uncertainties that are affecting Chapter 11 cases, causing delay and increased costs. Many parties are advocating a broad interpretation of *Stern v. Marshall*. Many litigants are making inappropriate motions to dismiss for lack of subject matter jurisdiction. There are many more motions to withdraw the reference. Some litigants are using *Stern* tactically for the sole purpose of delay. These are increasing costs. Bankruptcy judges urge this commission to recommend amendments to the code to clarify bankruptcy judges' authority. One idea is that bankruptcy judges can enter final orders in all types of proceedings if the -- if the parties consent to the entry of a final order. And I note that the Bankruptcy Rules Committee has just proposed such a solution. Thank you, Judge Wedoff, who I note is here in the audience today.

In closing, I'd like to make two requests of the commission that you consider while formulating your recommendations. Because Chapter 11 cases come in all sizes, ranging from small, medium, large, the mega, I request that in performing your review you consider how the changes you recommend will affect all types of cases. It may be appropriate to carve out a special Chapter 11 for mega cases. I leave that to you. Finally, I ask the commission to reject simplistic proposals that are based on a rules approach and recognize that the discretion of a bankruptcy judge is indispensable in the Chapter 11 process.

I thank you for the opportunity to be here today.

KEACH: Thank you, Judge Feeney.

KENNETH KLEE: Mr. Chairman, I have a question for the witness.

KLEE: You've advocated that we consider treating individuals in Chapter 11. What's your position simply on removing the debt limits in chapter 13?

FEENEY: I think that would be a good solution to increase them.

KLEE: Thank you.

KEACH: Thank you, Judge Feeney. You can tell this is an entirely unrehearsed event.

FEENEY: Thank you.

(LAUGHTER)

KEACH: Next, the chairs would like to recognize Senator Richard Durbin who has been kind enough to come speak to the commission today. Senator Durbin, as virtually everyone knows, is the senior senator from Illinois. He is the Assistant Majority Leader, and has been since 2006. He sits on the Senate Judiciary, Appropriations, Foreign Relations and Rules committees, and is the chairman of the Judiciary Committee's subcommittee on the Constitution, Civil Rights and Human Rights. He is also chairman of the Appropriations Committee's subcommittee on Financial Services and General Government. Senator Durbin has consistently been one of the senators most conversant with bankruptcy issues, and has been at the forefront of making sure that the Bankruptcy Code and related law stays as relevant and as workable as possible for all of us who toil in the insolvency fields. He was involved in the aftermath of the GM bankruptcy in trying to soften that landing with respect to several of his constituents and others. And I'm told, from a fairly reliable source, that he may be the only sitting member of Congress who was once a bankruptcy trustee.

(LAUGHTER)

So, I think he'll bring some unique insights to the process. The commission and the chairs would like to thank and acknowledge Senator Durbin. Senator?

HON. RICHARD DURBIN: Thank you very much, Bob Keach. And thanks to your outgoing president, Geoff Berman, the ABI Executive Director Sam Gerdano, and my friend Bill Brandt for inviting me to join you today.

For over 30 years, Congress has looked to the ABI for expertise. We've benefited from your insights, and I'm pleased to hear your new Blue Ribbon Commission is going to study the Bankruptcy Code and identify some new reforms.

It turns out that not many of us in Congress are expert in bankruptcy law. When I came to the Senate 16 years ago and went to the Judiciary Committee, there was a Republican majority and Senator Chuck Grassley was the chair of the subcommittee looking at Bankruptcy Code.

Chuck is not a lawyer, but he is a very bright person and, I think, really did an extraordinarily good job in looking at a complex piece of our law. I came to be his ranking Democrat of that subcommittee.

And as I looked around at the senators and staff in the room as we rewrote the Bankruptcy Code, I realized that by virtue, of having taken a one-semester bankruptcy course at Georgetown Law School 30 years before, and having been appointed by Judge Basil Coutrakon of Springfield, Illinois as a trustee in bankruptcy for a truck stop outside our town, I had more experience in bankruptcy than any other person in the room.

(LAUGHTER)
That should be a sobering reality.

(LAUGHTER)

It was to me. So, we did our best to put together a bankruptcy reform. We even had a bipartisan version at one point; the last version of it I didn't support. But I know that the efforts were genuine and in good faith to make difference.

I think that there is little difference now, as I look around the room, in terms of bankruptcy expertise in the Senate's Judiciary Committee. So, as we -- if we addressed this in the near future, we need you.

There's a lot for your Reform Commission to dig into. And I know you're going to focus on Chapter 11 as I've just heard. You'll do us a great service if you can identify areas of reform that we can deal with in a fair manner.

We want to ensure that sacrifices are shared equitably. We also know there are occasions when major corporate bankruptcies happen on an extremely quick timetable, with huge ramifications. GM and Chrysler are classic examples.

I also hope that ABI can help educate Congress on the significant impact that some other provisions in bankruptcy law have on our country and our broader economy. Specifically, I want to raise two issues that may not be directly in your purview as you study this aspect of the Bankruptcy Code. But I think these really impact the future of our nation. The first is the mortgage debt bomb which has already exploded on us in the form of millions of foreclosures and billions of dollars in lost home value.

Several years ago, I tried, vainly, twice, on the floor of the Senate to change the Bankruptcy Code where bankruptcy judges now can restructure the debt in secondary residences and cars, and yachts, boats. But they can't touch the primary residence. And as a result, we were finding many homes going into foreclosure with little or no prospect of the banks renegotiating the terms of the mortgage to allow the persons to stay in. The banks hated my amendment like the devil hates holy water.

They called it cram down, and they beat me by a handful of votes. My notion behind it was not to force everyone into bankruptcy court at all, but at least to hold out the prospect that if banks were not more reasonable in renegotiating the terms of the mortgage, that there ultimately would be someone sitting in on a bench with a black robe, who would be an incentive for change in bank behavior.

Well now with 40 percent of the mortgages in America underwater, with the real estate markets still roiled, and I think a critical part of our weakened economy, I happen to still think that was an idea that we should have considered. I don't know if we ever will, but it -- as I said, I brought it to the Senate floor twice.

Now, I want to call your attention to the second debt bomb, which I hope you're aware of. In October of 2010, for the first time in our history, student loan debts surpassed credit card debt in America. It hit $1 trillion; credit card debt, $900 billion. It is just below mortgage debt; home mortgage debt. And the ramifications of this are dramatic, and I see them all the time. As I mentioned, I went to Georgetown Law School. Not too far away from here. And when I graduated in 1969, that's how old I really am, I managed to accumulate all of the student debt that I had incurred over my seven years in college and law school. I was married with a baby, and another one on the way, and I came home to my wife Loretta, and I said to her they've added it all up.

All the money I borrowed over these years, I never paid any attention to it. And I'm sorry to tell you, it's $8,500. And she looked at me, and I looked at her and she said, we'll never pay that. I don't know how we'll ever pay that. And I said to her, I don't either. We were really broke. If you can imagine in my senior year in law school. My first job out of law school in Georgetown paid $15,000 a year, just to put that in perspective. So, it was a little more than half of my annual income that I faced in debt. Well, we did pay it. And naturally, we had a year of grace and then 10 years to pay it off with an awful three percent interest rate. And we got it paid for and, I think, kept our end of the bargain so that next generation would have its chance to borrow some money too. Now, look at what we're faced with today.

That Georgetown law school that I attended is now $50,000 a year in tuition; and on top of undergraduate debt imagine what those law students face. And the likelihood that their total debt will be half of what they are likely to make in their first year working? Not likely at all.

What's happening, we're finding, is that more and more students are falling further and further behind; and not just the students. When it comes to private loans to students, which has its ups and downs, at this point, most of the schools are requiring co-signers.

Well, there was a report in the New York Times two weeks ago; the first report I've read of a grandmother whose Social Security check was being garnished to pay back the student loan of a granddaughter that she had guaranteed. Parents and grandparents are being caught in the same trap.

And the debt that these students are facing is enormous. Some of them are enormous. You can't believe how big they are.

One of -- some of the worst culprits are the for-profit schools. Just put this in perspective for a minute. Of those graduating from high school in America, 10 percent go to for-profit schools.

The biggest for-profit schools, number one, the Apollo Group, University of Phoenix; almost 400,000 students; number two, DeVry of Chicago, which has been in business for about 75 years; number three, Kaplan. The Washington Post likes to say they own Kaplan. But because Kaplan makes more money -- Kaplan owns the Washington Post, as far as I'm concerned. Those are the top three.

And these schools represent 10 percent of high school graduates in America who end up in these for-profit schools. These schools, because they take up to 95 percent of their revenue directly from the federal government -- directly, in terms of Pell Grants, and student loans, they represent 25 percent of all federal aid to education; 10 percent of the students, 25 percent of the federal aid to education, and 50 percent of the student loan defaults.

The students are getting in over their heads with these for-profit schools and ending up many times with worthless diplomas. I cannot tell you what it's like to stand and talk to somebody who is 32 years old and over $100,000 in debt in student loans to an interior design school in the suburbs of Chicago. Can't find a job in the field, has made decisions that they're going to give up the little home they bought, and can't really even consider starting a family with this much debt.

A decision made when you're 22 years old, and here you are at the age 32 with this hanging over you for how long? The rest of your life. This is the only private sector loan not dischargeable in bankruptcy. They've got a special deal through some crafty lobby a few years back, and they enjoy this distinction. This loan will trail you to the grave until you pay it. And that is a reality.

I brought this up with Secretary Geithner and others. This, I think, is a pall over our economy; these young people and their debts, and what it means for the future of our economy. I think we need to do something about it. I think it's an outrage that these private loans are enjoying this special status in bankruptcy court.

I served over here in the House before I went to the Senate. And I've always said, if you want a reunion of everybody you ever served with in the House or Senate, take on a bill involving for-profit schools. You'll get to meet them all, because they're all lobbying, both sides of the aisle, for the for-profit schools. And they are a major part of the lobbying effort here in Washington. So, that's an issue that I'm working on, and I hope it's one that you will take into consideration. But whatever we decide to do by way of law, we need your input.

You are on the front lines as people engaged in bankruptcy from the judicial level on down. And you know how this world works far better than we do in Congress. We hope that we can improve the bankruptcy code with your help.

I want to commend you for all you've done in the past. You've been a great resource in my office, and I look forward to your hearing today, your commission process, and your findings. Now I hope you'll excuse me. I have two simultaneous committee meetings that started five minutes ago. And I'm supposed to be at both of them. How? I don't know. But, thank you very much for inviting me to join you for a few minutes today.

KEACH: Thank you, Senator. We thank Senator Durbin for those remarks. I also think that it frankly highlights the inter-relatedness of what we like to refer to as the consumer side and the business side because clearly, consumer issues of the magnitude of the student loan crisis and the housing crisis hit the larger economy and affect businesses across the board. So, I think that it shows how hard it is, to divide these issues and to categorize them easily.

At this point, a few of the commissioners are going to share their thoughts on the commission's mission and its work.

As Al said in his introduction of the various commissioners, this is truly a Blue Ribbon panel. Sometimes, I wonder what I'm doing here. But we're going to hear from a few people today, and a number of other commissioners, I might add, will have submitted written statements and those will be on the commission website.

Before we move to the commissioners, I would also note in addition to Representative Coble and Senator Durbin, other members of Congress will be offering their written statements for the record, including Senator Grassley. And we thank them for their submission of statements.

At this point, the chairs would like to knowledge Commissioner Ken Klee, who is going to offer a few remarks on the goals and challenges of the commission. Ken is certainly one of the founding fathers of the 1978 code. He is a professor, a practicing lawyer, an examiner of some note, and also an author of a fantastic book on the Supreme Court's treatment of bankruptcy issues. So, without more, Ken.

KLEE: Thank you, Mr. Chairman. Commissioners, as we undertake our study of the reform of Chapter 11, we should be mindful of the changes in the world and the economy that have occurred in the last 35 years.

Although the 1978 Bankruptcy Code should be a reference point for our work, we shouldn't feel bound by the decisions made in 1978 that no longer work in 2012. Instead, we should craft a new business reorganization chapter to meet the needs of modern business and capital structures.

Our work should focus on businesses of all sizes. We've got to develop a cost-effective streamlined procedure for small businesses to reorganize. By the same token, we face a particular challenge in dealing with multi-debtor groups, particularly those that are transnational.

The absence of a world government and significant international treaties creates large obstacles in providing a robust reorganization law. We have a global economy with transnational businesses, but little or no means to enforce laws extraterritorially. This deficiency has large implications for the crafting of the avoiding powers, the automatic stay, claims allowance, and priority schemes, and the discharge among others. We should also devote significant attention to the interface between bankruptcy and secured credit and securitization.

Just because commercial lawyers have crafted non-bankruptcy laws to favor secured creditors and to encourage securitization transactions, does not mean that a business reorganization law should respect those laws inviolate. We should carefully examine the cost of Chapter 11 reorganization, and who should bear the direct costs, and the process, and the indirect cost of delay imposed by the process.

Other systems facilitate the sale of secured creditors' collateral during bankruptcy free and clear of liens, and we should carefully consider the wisdom of adopting a similar approach in the United States. Likewise, we should examine whether sale free and clear of successor liability is desirable and feasible.

The rampant expansion of secured creditor left little in the way of free and clear assets in many Chapter 11 cases. Trade creditors are far less important today than in 1978 and often are left unimpaired in business reorganization cases.

We should consider the implications this has on formation of creditors committees, DIP financing, sales, subordination, classification, and voting among other issues.

The advent of securitization and bankruptcy remote vehicles has removed the lifeblood of accounts receivable and inventory from some large Chapter 11 estates. We should carefully consider the wisdom of codifying broad equitable powers to enable a bankruptcy judge to pierce through form to substance when these transactions in essence are little more than disguised secured loans.

The rise of the service sector in the United States economy presents special challenges. Bankruptcy laws geared to traditional manufacturing companies do not fit well with service sector debtors.

For example the avoiding power is focused on the transfer of property of the debtor, not on services performed by the debtor. It's not clear whether a pre-petition provision of services should be avoidable. Although the services may preferentially confer value they don't diminish the bankruptcy estate.

Moreover a levying creditor cannot levy on services. In a service business, the employees are the key assets of the business. We should consider whether bankruptcy policy should facilitate retention of key personnel when necessary to enhance the prospects for business reorganization.

Commissioners, let me close urging us to reform executory contract law. Chapter 11 deals poorly with the interface between intellectual property and bankruptcy. Without question, the debtor in possession should be allowed to assume the debtor's own intellectual property licenses. The *Catapult* decision is flawed and we should recommend that it be overturned legislatively.

Likewise, the landlord amendments of 2005 have caused premature rejections or liquidations by leaving insufficient time for a debtor in possession to determine whether to assume or reject non-residential real property leases in Chapter 11 cases.

We should recommend restoring judicial flexibility to extend the assumption decisions or confirmation of a plan.

My remarks this morning touch on only a few of the important issues we will face in proposing to update Chapter 11 of the bankruptcy code. I look forward to working with you as we study and deliberate on these important questions.

The success of our efforts will have a lot to do in determining whether the United States can maintain its leadership in business reorganization law during the first half of the 21st century.

Thank you Mr. Chairman for the opportunity to make these remarks.

KEACH: Thank you, Ken.

Next we have remarks from Harvey Miller of Weil, Gotshal, one of the nation's preeminent reorganization lawyers. As Al mentioned, Harvey has been lead debtor's counsel in some of the world's largest reorganizations.

Harvey could not be here in person today. He's teaching a class at one of the two law schools that he teaches at in New York in his spare time. But he was kind enough to tape these remarks. Actually this is a five minute condensation of the 17 minutes' worth of remarks that we taped with Harvey. His full statement will be on the Commission's website.

(BEGIN VIDEO CLIP)

HARVEY MILLER: I greatly appreciate the opportunity to participate as a member of the American Bankruptcy Institute Commission to Study the Reform of Chapter 11 of the United States Bankruptcy Code. I am a practicing attorney and a senior member of the international law firm of Weil, Gotshal & Manges, LLP, which maintains its principal office in New York, New York.

During my professional career, I have represented debtors, debtors in possession, secured and unsecured creditors, trustees in bankruptcy, creditors' committees, equity interest holders, asset purchasers, and I have served as a trustee and as an attorney for a trustee in cases under the Securities and Investor Protection Act .

My experience in connection with bankruptcy and reorganization legislation and laws began in 1960 under the former Bankruptcy Act of 1898, as amended and extended through the legislative process that led to the enactment of the Bankruptcy Reform Act of 1978.

In connection with the ABI Commission to Study the Reform of Chapter 11, I note that it is now 34 years since the enactment of the Bankruptcy Reform Act that replaced the Bankruptcy Act of 1898, with Title 11 of the United States Code.

The enactment of the 1978 Reform Act was the result of many years of diligent comprehensive review of the then existing Bankruptcy Act and its operation as well as determining whether a need for reform and revision existed. Since the enactment of the Reform Act, however, the world and in particular the world of business, has changed dramatically. The world has gotten smaller, more complex, and more interconnected than ever before.

Business operations are more international, and in many respects more esoteric than ever before. The passage of 34 years in terms of the changes that have occurred in the world of business and the national economy is profound.

Time and practices have outraced the provisions of the 1978 Code. Chapter 11 as adopted in 1978 made a dramatic change in the world of reorganization and rehabilitation, yet recognized the changes that had occurred in the world of finance and business subsequent to World War II.

During the first 20 to 25 years of the new Chapter 11 and despite the negative effect of restrictive amendments made to the bankruptcy code during that time, the universal conclusion was that although it wasn't a perfect statute, it worked and was achieving the original objectives of its adoption.

Distressed businesses were being rehabilitated and reorganized as originally contemplated. Creditors, employees and the public interest were being protected and benefited.

Businesses such as Federated Department Stores, retail, now known as Macy's; Storage Technology Corporation, computer technology; Global Marine Corporation, offshore drilling; Kmart Corporation, retail; LTV Corporation, an industrial conglomerate; Johns Manville Corporation, a mass tort offender; Maxwell Publishing Corporation, publishing and media; Continental Airlines Corporation, United Airlines, Delta Airlines, Northwest Airlines, to name just a few were successfully reorganized.

However, it has been 34 years since the enactment of the Reform Act. As was the case, in respect of the consideration of the Reform Act, the worlds of finance, business, and global interest are radically different from what existed in 1978. Indeed, it has changed more dramatically, faster and more intrusively than in the 1970s, or what could have been imagined in the 1980s.

The introduction of free trading in bankruptcy claims, distressed debt traders, hedge funds dedicated to the bankruptcy and reorganization process, and the innovations in financing involving derivatives, credit default swaps, and other opaque esoteric securities and financing techniques have materially complicated a world of reorganizations and the manner in which bankruptcy law is applied and administered.

This is particularly true as businesses and commercial institutions are transforming and have become more global and more interconnected. Business failure is a fundamental part of a capitalist system.

The assumption of risks in an environment of economic volatility and business cycles will always result in some degree of failures. The means to deal with business failure to protect the nation's interest and those of the economic stakeholders is an essential legislative objective.

The creation of the ABI Bankruptcy Reform Commission is a step in the right direction. It's now the turn of Congress to accept the challenge that lies before it to bring the bankruptcy law and its administration and operation into the 21st century. The ABI Reform Commission stands ready, willing, and able to assist Congress in the discharge of their responsibility. I thank you for the privilege of being able to present this short statement to emphasize the need for reform consideration.

(END VIDEO CLIP)

KEACH: And we thank Harvey for that recording.

Next the chairs would like to acknowledge additional commissioners who have remarks, starting with the Honorable Arthur Gonzalez. As was noted in Al's introduction, Judge Gonzalez has presided over some of the more complex restructurings in modern times, including Enron and Chrysler to name a couple of recent examples.

Recently retired, he's now a professor at the NYU School of Law. The judge's career change is our great blessing because he brings to this Commission I think a unique perspective. Judge Gonzalez?

ARTHUR GONZALEZ: Thank you. I am honored to be here today as a member of the American Bankruptcy Institute Commission formed to study and propose reforms of Chapter 11 in the United States Bankruptcy Code.

Over my career on the bench, the predominant focus of my tenure was on Chapter 11 cases, including some of the largest Chapter 11 cases in United States' history.

During the more than 16 years I spent on the bench, debtors of all types, sizes, and from many different industries came before the court, seeking the benefits and protections of the Bankruptcy Code, often achieving confirmation of a plan and in so doing furthering the policies and goals of the restructuring process.

Although the Bankruptcy Code over the years has undergone some changes, it appears that after more than 30 years and the ever evolving financial structures of businesses, there is a need to examine fully Chapter 11 and related sections in the context of the debt structure of today's businesses.

In recent years as I presided over Chapter 11 cases, I questioned at times whether the bankruptcy Code still has the tools to address some of the needs of today's distressed businesses, as well as whether the underlying goals and policies of the Bankruptcy Code have been frustrated by the debt structures and related issues that burden today's businesses. And whether, too often the administrative cost of the Chapter 11 process unduly frustrates the efforts of small and medium sized companies to reorganize. Thus, reform of the Bankruptcy Code and the extent of such reform should be examined.

The time has come for that process to take root. By its composition, the ABI Commission provides the experience, knowledge, and skills of all the facets of the Chapter 11 process. It ensures a comprehensive analysis of corporate insolvency under the Bankruptcy Code in the current financial times.

It will aid in ensuring that the ultimate goals and policies of restructuring, the preservation and maximization of value, preservation of jobs and fostering economy stability will continue to be accomplished under our restructuring laws.

In closing, it is the role of Congress to ensure that our laws remain effective and relevant to the issues and concerns that warranted their enactment. The ABI Commission provides a vehicle that will promote, facilitate, and inform that process.

I thank the chairs for providing me the opportunity and privilege of making this statement today.

KEACH: Thank you Judge Gonzalez.

The chairs would now like to recognize Bettina Whyte. Bettina is a true pioneer in this business. She has been ...

WHYTE: Makes me old.

KEACH: You could say that about this entire august body. You are the youngest at heart of anybody here, Bettina.

But she's a true pioneer in this business. She was a CRO before frankly there were such things. She has been a financial adviser to some of the country's largest companies, and brings a very, very important business side perspective to the Commission's proceedings.

Without more, Bettina Whyte.

BETTINA WHYTE: Thank you, Mr. Chairman.

The members of this Commission share decades of experience and commitment to assisting our clients through the restructuring process. The Commission's primary focus is to identify what changes should be proposed to aid this process, with special attention given to the preservation of employment opportunities, not only with the debtor but how it affects the debtor's suppliers and customers.

However, since the adoption of the Bankruptcy Code some 34 years ago, as you've already heard, the bankruptcy process has evolved as well as the environment for bankrupt companies. Achieving the goal of a fresh start which is an underpinning of the bankruptcy process for the debtor and the goals of preserving jobs has become increasingly more difficult.

To understand this phenomenon, this Commission must ask why this is so, and what has changed.

As a turnaround professional for over 30 years, who has served as an interim chief executive officer of small private companies, and large multibillion dollar private corporations, as well as being appointed as a Chapter 11 trustee and a federal court receiver, my focus on this Commission would be to consider what parts of the bankruptcy Code impede or further a successful financial restructuring of a company in today's world of fast changing technology and sophisticated financial instruments.

I do not define a successful restructuring as merely an exit from bankruptcy, but rather an exit from bankruptcy by a company which is stable, operationally sound, with a capital structure which will allow it to compete and allow jobs to be saved as well as eventually created.

So what are some of the elements of these changes? Twenty years ago, major lenders were driven by long term relationships. The agent bank held the largest position in the debt and members of the syndicate remained the same throughout the period of the loan.

These lenders had a vested interest in seeing that the debtor survived. Their money and their own reputation, not just the reputation of the debtor, were at stake. Today, the agents and arrangers of loans no longer have to correspond to the borrowers, and often hold very little of the debt after issuance.

Even the syndicate members frequently trade in and out of their debt as often as daily if there is a profit or fee to be made. Now, most bankruptcies are driven by financial holders of claims which you heard from other members of this Commission, such as debt traders, holders of credit default swaps and intricate securitizations. The agendas of these financial claim holders often have little to do with the true long term success of the debtor, or the welfare of their employees. Rather their goal is their own short term profit gains.

As a result, the debtors and the court are now required to spend an inordinate amount of time dealing with extremely complex financial issues and instruments that did not even exist a decade ago. In short, this financially driven bankruptcy model which we find so common today diverts management's attention and resources away from fixing the problems of the business and from dealing with the truly important constituents, namely vendors, customers, and employees.

Additionally, the bankruptcy process has become inflexible and cumbersome in our fast changing world, creating new obstacles to the success of the debtor. These obstacles include such issues as unrealistic time constraints for the assumption or rejection of executory contracts, and accelerated plan proposals because of shortened exclusivity, both of which rob the debtor of the time necessary to determine and implement the operational improvements to return a company to a position of strength.

Also, the inability to offer meaningful incentives to employees and management, who must balance their concerns for their family, with a commitment to the preservation of company jobs has caused the loss of the debtor's prime talent.

On top of this, now it is common to have numerous committees, each with its own multiple set of advisers, all paid for by the debtor. Each committee also has its own set of demands, which drains the debtor of his most important assets, liquidity and employee time.

Twenty years ago, there would have only been one official committee, the unsecured creditor's committee. This committee would have been composed of the vendors who provide services and products to the debtor. The members would have had a vested interest in seeing this debtor survive because a failure of the debtor would directly impact the supplier's own profits and its employees.

Today, it is more difficult to sit on a creditors committee with suppliers to the debtor, as it is likely that these suppliers have sold their claims to debt traders at some discount in order to cash out quickly.

This trading of debt as you've heard is now pervasive at all levels of the capital structure, and as the term trader implies, these people are often here today and gone tomorrow. I'm going to give you a really quick scenario.

Twenty one years ago I was appointed the Chapter 11 trustee of Fairchild Aircraft Corporation. It was the second largest non-government employer in San Antonio. It manufactured 17 seater passenger airplanes used by commuter airlines.

When I was appointed two weeks into this bankruptcy, the debtor was in state of chaos. They had no funding, and the lenders refused to provide a DIP loan. The sole supplier of engines, Allied Signal, no longer was delivering and in fact has started dissembling the manufacturing plant.

The only supplier of brakes had an executory contract and had moved the courts for its rejection. And in two days I had a multimillion dollar payroll to make, with no money. I was left with no option but to call 350 employees into the auditorium and lay them off. In fact it went dark. There was no reason to believe at that point that Fairchild had a future.

However, Fairchild filed its disclosure statement eight months after its entrance in the bankruptcy and emerged within 10 months. This was possible in part because the debtor could negotiate with one agent bank and obtain a DIP loan rather than negotiate with DIP traders who as I said before will be here today and gone tomorrow.

And Fairchild had some assets that were not encumbered which enabled the debtor to receive a DIP loan of adequate amount to operate its business. This allowed me to regain the necessary confidence of suppliers, customers, and employees to restart the plant and the manufacturing process and to rehire new employees.

I had only one committee, and its members had a vested interest to help me get out of this mess. And I said before, they had profits to worry about in their own businesses. So they helped, including helping me get the manufacturer of the engines back to supplying me.

I had the required time which was key to be able to make the improvements in the operations to return the company to health, and to find eight qualified buyers who wanted to negotiate for the acquisition of the company.

The time allowed me in fact to get the best terms and the price for the benefit of all the creditors, as well as enabling employee retentions and improve benefits. When Fairchild exited bankruptcy it had 522 employees, almost 200 more than when we filed. And three months later, under its new owner, it had 850 employees.

The bankruptcy environment has changed dramatically since 1978. In many ways the Bankruptcy Code does not reflect this reality. This commission is charged with analyzing this issue and determining the ways to make improvement which appropriately align it with today's environment and continues to ensure that the fresh start concept is alive and well.

Thank you Commissioners.

KEACH: Thank you, Bettina. Next the Commission chairs would like to recognize Jim Millstein. I can't improve on CRO of the Department of the Treasury as an intro. I would note that Jim was involved in successfully restructuring some of the government's larger TARP investments. And again, he brings a perspective not shared by the other commissioners. Jim?

JAMES MILLSTEIN: Thank you. I too am honored to participate on the Commission. I can tell you in a 30 year career as a lawyer and investment banker, when I had difficult questions of law or difficult questions of the interaction of finance and law, I've had occasions to consult almost everyone on this Commission. And so I think the chairs have assembled quite a spectacular crowd that should be able to put forward thoughtful reflections on how to reform the Code.

The work of the Commission comes on the heels of the greatest financial crisis in the United States since the Great Depression. A crisis that itself led to the enactment of a new insolvency statute, the so-called Orderly Liquidation provisions incorporated as Title II of Dodd-Frank. These were enacted in part because of the perceived inadequacies of Chapter 11 in resolving the insolvency of multinational financial conglomerates such as Lehman Brothers.

In that regard I think Chapter 11 has gotten a bad rap. But that said, since the enactment of the Bankruptcy Code in '78, the deregulation of the financial sector over the last 30 years through a series of legislative and regulatory actions have facilitated and encouraged the creation of a group of enormous transnational financial institutions such as Lehman Brothers who have had an enormous impact on both the shaping of the economy, the finance sector and the law.

The heavy reliance of such institutions on short term funding, as well as their global footprints have made reorganizations of such institutions under Chapter 11, let alone under any other single national insolvency statute, problematic without significant government funding or central bank funding, and significant international coordination.

The lack of a framework within which to coordinate national insolvency proceedings, so as to mitigate the damage associated with these firm's failures and to equitably allocate among affected nations and national creditors the cost of their rehabilitation or liquidation, is a challenge that even Dodd-Frank has not adequately addressed.

The development of protocols to govern concurrent proceedings in different national jurisdictions in commercial settings has given modest procedural coherence to the coordination of outcomes of such proceedings in respect of non-financial transnational enterprises.

However, differences in substantive creditor rights law among the various nations means that territorial ring fencing remains the order of the day, often producing vastly different outcomes for similarly situated creditors, depending on the jurisdiction within which those claims are asserted.

Unfortunately, because of the relative sophistication of our law and practice where reorganization of a transnational enterprise is possible under Chapter 11, United States-based creditors often end up subsidizing the recoveries of foreign creditors.

While Dodd-Frank directs U.S. regulators to work through this coordination problem, and there are some positive developments in this regard occurring, under the auspices of the Bank for

International Settlements, for the class of financial institutions eligible to be placed into orderly liquidation, the absence of an international insolvency regime for systemically important financial institutions means that any proceedings under the Title II of Dodd-Frank will involve similar ring fencing and likely similar subsidization of foreign creditors as we've seen in Chapter 11 cases. In this respect, when it comes to the reorganization of transnational enterprises, the shortcomings of Chapter 11 are no different than the shortcomings of Dodd-Frank. Our insolvency regimes unfortunately remain national, while economic activity is increasingly organized on a global basis.

Similarly the evolution of credit markets in the United States since the 1978 Code has altered the distributional consequences of various creditor protection provisions in the bankruptcy. First, by virtue of the significant protections afforded secured debt under Chapter 11, sophisticated creditors take pains to structure their credit extensions in secured form, particularly when lending to companies in distress. As a result, in cases where the aggregate amount of secured debt exceeds the going-concern value of the enterprise, Chapter 11 reorganization has become little more than a court supervised assignment for the benefit of creditors.

One question I think the Commission needs to address itself to is whether the Code shouldn't require a price to be paid to the bankruptcy estate by secured creditors for the value of the clean title that the Bankruptcy Code allows a bankruptcy court to convey.

Second, since 1978, the growth of secondary trading in bank and bond debt and the development of pools of distressed investment capital together have transformed the voting rights afforded to impaired claims into a means for the acquisition of corporate control.

Again, another question to which I think the Commission needs to address itself is whether there shouldn't be a set of procedural and substantive rules to protect general creditors in Chapter 11 cases, as well as the integrity of the reorganization process, similar to the disclosure, "all holders" and creeping tender rules that protect common stockholders under the federal securities laws.

Similarly, we should ask ourselves whether the valuation standards under 1129 should afford general creditors the right to a control premiums in the same way that the securities rules governing tender offers confer such rights on ordinary shareholders.

Finally, the growth in derivatives markets over the past 30 years and the related expansion of the qualified financial contracts exemptions from the avoidance powers and the automatic stay provisions of Chapter 11, when taken together, have created enormous incentives to structure ordinary lending and guarantee transactions, as well as ordinary commercial transactions, within one of the now many exemptions available to such contracts.

With trillions of dollars now in play in the so-called swaps market, we are in danger of having created a two tier insolvency regime, one where ordinary creditors are forced to bear the cost of the reorganization process while sophisticated financial institutions get away scot free.

At some point, the multitudes of exemptions will undermine the efficacy of Chapter 11 in solving the collective action problem of separate collection actions because separate collection actions will become the rule rather the exception and successful lobbying rather than successful reorganizations will be the only path to recovery.

I look forward to working with my fellow commissioners to address these issues so as to ensure that similarly situated creditors are once again treated similarly, the cost of the business reorganization are borne proportionately by all creditors and bankruptcy courts again have a chance to make the equity of redemption a meaningful right again.

KEACH: Thank you, Jim.

The Chairs we'd now like to recognize Cliff White of the Executive Office for United States Trustees. In addition to his day job, Cliff has also been an author of articles on the system, potential changes to the system, particularly changes that focus on the area of efficiency and cost. And the Commission is again blessed to have Cliff's contribution to its efforts. Cliff?

CLIFFORD WHITE: Well, thank you and good morning. I'm pleased to participate in the ABI's Commission to Study the Reform of Chapter 11.

Unlike other Commissioners, I sit here as a non-voting member to offer assistance and perspectives to the Commission as it conducts its research and its deliberations. By statute, the U.S. Trustee Program, which is a component of the U.S. Department of Justice, is the watchdog of the bankruptcy system. We carry out a variety of administrative, regulatory, and enforcement responsibilities in nearly all Chapter 11 cases filed in the United States.

In Chapter 11, we play a vital role in ensuring that cases proceed expeditiously and efficiently for the benefit of all stakeholders. That includes the debtor company, including its shareholders and employees; creditors; as well as the general public.

When management does not do its job properly or engages in questionable conduct, it is our responsibility to seek to oust management in favor of an independent trustee or to seek the appointment of an independent examiner who could investigate the financial affairs of the company.

When companies in Chapter 11 seek to pay executive bonuses, even though employees are laid off and creditors lose their money, we're often the only party to enforce the bonus restrictions imposed by current law. And when bankruptcy attorneys and other professionals in the case seek to be paid unreasonable sums, we again are often the only party to police the compensation in accordance with statutory standards.

In the seven years since the last major Bankruptcy Code amendments were signed into law, the nation's economic environment has changed and the conduct of bankruptcy cases has changed. Lending for debtors-in-possession increasingly includes more aggressive provisions that may tilt the process in favor of one set of interests, over the interest of other stakeholders in a case. So for example, more and more frequently, chief restructuring officers with extraordinary powers are installed by the bankrupt company's board and its lenders without protections afforded by the appointment of an independent trustee or examiner. In addition, with seeming greater regularity, companies are selling substantially all of their assets on an expedited basis without the protections of a plan confirmation process.

All of these approaches have their advantages and disadvantages. So it's important periodically to assess the trends and to make sure that all stakeholders in the case are being protected in accordance with law. The business judgment of incumbent management is entitled to meaningful deference. But that deference has its limits. Institutional creditors do have rights in a case, but employees, private equity funds, small trade vendors and others also have a legitimate interest in the case's outcome.

The traditional purpose of Chapter 11 is to provide a viable business with breathing space to reorganize its operations and its finances. The Bankruptcy Code however, also provides that the assets of the company should be deployed in a way to maximize value for all stakeholders in the most efficient manner. That sometimes requires the debtor to transfer its assets to others who could more efficiently use those assets, including new enterprises that ultimately may grow more jobs than yhe debt laden and inefficient business operation that entered Chapter 11.

Now in considering these and so many other matters of emerging importance to the Chapter 11 business reorganization arena, the experts assembled by the ABI will bring important insights based upon many years of practical and scholarly experience.

It would be hard to compile a list of more distinguished practitioners who have also demonstrated a deep commitment to public service and to the development of bankruptcy law and practice to serve the public good. I know that the research and deliberations of this group will be of great value to the U.S. Trustee Program as we carry out our duties in the bankruptcy system, and I hope that, on behalf of the U.S. Trustee Program, I may be able to offer some perspectives that can enhance the important work of these distinguished commissioners.

Thanks, Bob.

KEACH: Thank you, Cliff.

Now in many respects we're going to end where we started with remarks by Rich Levin. As the Commissioners know and the audience heard, both Al and I quoted from Rich's remarks at the 2009 symposium. Rich may not know this, but in many respects his contributions at the 2009 symposium were the inspiration for my efforts to launch this Commission not long after the symposium. Efforts shared by Al Togut and embraced by Geoff Berman.

Rich's frankly refreshing lack of nostalgia for his previous creation of the Code ...

(LAUGHTER)

... and his recognition that we needed a new Code for a new world are in many respects the rallying cry for this Commission. So with that, Rich Levin.

RICHARD LEVIN: Thank you Mr. Chairman Keach and Mr. Chairman Togut. First, I'd like to express my appreciation for the opportunity to present this statement at the first public meeting of the Commission, and as well as for the opportunity to serve as a member of the Commission.

As you know -- and as you've noted, I've long been interested in improvement in the bankruptcy laws and the operation. Mr. Chairman, you have my written statement as part of the record. It covers many of the things that other commissioners have already mentioned, and so I don't propose to repeat , but simply refer you to my statement.

I would like to make just a few additional quotes, however, in addition to what you quoted me as saying, at the 2009 symposium. I said something else that I think we have to keep in mind as we go forward in this process. Over the years as additional provisions have been added to the Bankruptcy Code to protect various stakeholders and constituencies in bankruptcy, they have all been justified by particular needs of those stakeholders and constituents.

Indeed those stakeholders do have particular needs that do need protection. But we run the risk as we try to protect everybody, as I said in 2009, that the only way a company would be able to go into bankruptcy is if it is able to pay all of its debts. And so we do have to be careful. Certainly those constituencies are going to be seeking continued protection of that sort and we have to be cognizant of the political reality as well as of the economic reality that the bankruptcy system has to address.

The commissioners have discussed at length all of the things that have changed in the last 35 years. I'd like to discuss the things that haven't changed, because I think they're important to the work of this Commission. The first thing that hasn't changed, as Mr. Klee will remember, is the room. Many of the hearings and the mark-up sessions for the 1978 Bankruptcy Code took place in this same room. So welcome back, nice to see you. Glad we're continuing. There's some continuity in the whole process.

Then ...

KLEE: The difference is Rich, back then you had a beard and I didn't.

(LAUGHTER)

LEVIN: That's right. But I was talking about things that haven't changed.

(LAUGHTER)

And you -- you and I also had more hair. But that's another story.

More importantly, what hasn't changed is the creativity and determination of the bankruptcy bar, of the business community, and of the bankruptcy bench to make the bankruptcy system work.

We saw in the 1960s and 1970s as the Bankruptcy Act was becoming outmoded because of the changes in the economy then, that old Chapter XI continued to work. It's strange, but it continued to work until the Code was enacted.

And the same has been true over the last 10 to 15 years, as the economy has changed so dramatically, judges and lawyers and CROs and turnaround managers and financial advisers and business people generally, have figured out ways to reorganize companies in this entirely changed environment, despite a statute that is like a typewriter is to today's iPhone.

That determination and creativity I think will serve this Commission well as the same people who make the existing system work, think about how to craft a new system that will accommodate all of the changes that have taken place.

The need for modernization is apparent. The Commission is doing important work in setting out on this project in the way that is proposed. The ABI is as noted the largest umbrella organization of those involved with the bankruptcy system. There's no organization with broader experience and expertise than the ABI. And even so it will be seeking input from all constituencies. I don't view this as a debtor project, I don't view this as a creditor project.

This is a project whose sole goal is to improve the operation of corporate reorganization to preserve jobs and to preserve investments. These factors should result in a strong credible product that should receive favorable consideration from Congress.

I'm proud to be part of this effort and I thank the chairs for their efforts in putting this together and allowing me to participate. Thank you.

KEACH: Thank you, Rich.

That concludes our formal program. Let me just briefly say, I had my doubts that the 2009 symposium could come together. And virtually everyone I asked to speak at the symposium spoke and it was an incredible event. I had my doubts as to whether or not Al and I could get the Commission off the ground, but everybody we asked to be on the Commission accepted. We've asked nearly 120 people to be on advisory committees and the response has been the same.

So whatever skepticism I may have ever had about this effort is now incredible optimism. As Rich has pointed out, the thing that gives me the most optimism is if you look at the collective intellect, creativity and vision from the Commission, and of the members of the advisory committees, I think this can't fail frankly. When I combine that with incredible energy that's coming from the insolvency community as a whole, then I think we're headed for a good two years. As we said, we pledge an open and comprehensive process. We look forward to moving forward with the important work of this Commission.

We want to hear from everyone, we want every point of view represented, because that will make the product most credible. Please follow the Commission's work on the Commission's official website at www.commission.abi.org. We look forward to everyone's help, everyone's involvement. And with that, the chairs will entertain a motion to adjourn.

TOGUT: So moved.

KEACH: Accepted by acclimation. Thank you all.