

**ABI COMMISSION TO STUDY THE REFORM OF CHAPTER 11**

**Financing Chapter 11 Advisory Committee**

May 1, 2013

Meeting (by Telephonic Conference Call)

MINUTES/SUMMARY

The Financing Chapter 11 Advisory Committee (the “Committee”) of the ABI Commission to Study the Reform of Chapter 11 (the “Commission”) held a meeting on Wednesday, May 1, 2013, via teleconference. *The following individuals participated in the meeting:* Marc Abrams; Ashley Bruce; Judge Robert Drain; William Fox; Elliot Ganz; Michelle Harner; Nathan Lebioda; Christopher Mirick; Harold Novikoff; Rebecca Roof; James Seery; Eli Vonnegut; and Judge Gregg Zive. *Committee members not in attendance:* Jo Ann Brighton; Norma Corio; Marshall Huebner; Robert Keach; Harvey Miller; Paul Singerman; and David Skeel.

Ms. Roof commenced the meeting at approximately 3:03 p.m. prevailing Eastern time. The following matters were discussed during the course of the meeting:

*Approval of minutes.* The minutes from the April 3, 2013, meeting of the Committee were approved. Note, the Committee meeting scheduled for April 17<sup>th</sup> was cancelled.

*Adequate Protection and Priming Subcommittee.* Mr. Fox, Mr. Abrams and Mr. Vonnegut (on behalf of Mr. Hubner) reported that the adequate protection and priming subcommittee would be prepared to discuss their progress on the May 29<sup>th</sup> Committee call.

*Equities of the Case Exception Subcommittee.* Mr. Mirick and Judge Drain reported that the equities of the case exception subcommittee would welcome the opportunity to discuss the issues with the Committee on the May 15<sup>th</sup> Committee call.

*Pay-to-Play Subcommittee.* The Committee engaged in a discussion of the issues raised by the materials that were prepared by members of the pay-to-play subcommittee and circulated in advance of the Committee call. Among the points raised and discussed were the following:

- There is a distinction between requiring secured creditors to carve out from sale proceeds the costs of administering the sale on the one hand, and imposing some sort of an expected or required recovery to unsecured creditors as a “fee” for running the sale in chapter 11.
- Any requirement for a carve-out to cover the costs of the sale leads to a need to specify what those costs are. Should a carve-out cover:
  - Operating expenses to the time of sale?
  - Professional expenses to the time of sale?
  - Tax consequences of any realized gain on sale?
  - 503(b)(9) claims?

- Some amount to wrap up the case post-sale? (sometimes referred to as “burial expenses”)
- Should a carve-out be mandated? If so, is a change in the Bankruptcy Code needed to require, or to codify the extent of, a carve-out that covers the costs of getting to a sale?
- A consensual carve-out for the benefit of the general unsecured creditors is sometimes agreed to as part of resolving disputes in a chapter 11 case, but if such a carve-out became required, how would it work? Among the concerns:
  - Would a change in the Bankruptcy Code that required a carve-out to provide a return to unsecured creditors be a taking of the secured creditor’s property and raise Constitutional issues?
  - Would a carve-out for the benefit of unsecured creditors lead to value going around administrative or other classes of creditors, and thus create issues regarding gifting?
- Does section 506(c) give the court the ability to address these concerns through surcharge? If the sale is really being run for the benefit of the secured creditor, would that be sufficient to impose a surcharge to cover the costs? How, and at what stage, can or should the court indicate to the parties that a sale may not proceed without covering the costs that are created?
- If the buyer of the assets is the party who wants the benefit of the free and clear sale order, is it appropriate to consider charging the buyer for this? Instead of reducing the recovery to the estate, add to the price the buyer needs to pay?

The Committee asked the members of the subcommittee to consider the issues raised in the discussion and revise the draft report for further consideration.

*Other Business.* Ms. Roof reminded the members of the Committee that Commission is holding a field hearing in New York City on May 15<sup>th</sup>, and encouraged members of the Committee to attend or to watch on the internet as their schedules permitted.

*Conclusion.* Ms. Roof concluded the meeting by thanking everyone for their participation in the meeting and dedication to the work of the Committee.

The meeting adjourned at approximately 3:45 p.m. prevailing Eastern time.