Written Submission to
ABI Commission to Study the Reform of Chapter 11

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I am a Partner in the Houston office of Norton Rose Fulbright. Our firm represents financial institutions, non-bank lenders, debtors, creditors committees, and other significant stakeholders in complex Chapter 11 cases and related bankruptcy litigation. It is a pleasure and distinct honor to have the opportunity to address the ABI Commission on several matters we believe to have been raised by a recent survey of Texas bankruptcy practitioners.

I began my legal career in 1979 with the law firm of Upton, Shannon, Porter & Johnson in San Angelo, Texas principally representing banks and other financial institutions. On September 1, 1987, I was appointed to the bankruptcy bench in Houston, Texas where I served for almost 17 years. I retired from the bench as Chief Judge in 2004 and immediately joined Fulbright & Jaworski L.L.P., which has since become Norton Rose Fulbright.

Recently, Michelle Mendez, Chair of the Bankruptcy Law Section of the State Bar of Texas, directed an online survey of members of the Section regarding Chapter 11 practice and experience. My comments below are principally designed to reflect and report on the results of the survey.

First, section members overwhelmingly reported that Chapter 11 is being utilized differently these days than in the past. While not everyone agrees that this is a bad development, nearly two-thirds of our respondents mentioned one or more of the terms “363,” ”sale,” or “liquidation” in their responses. Clearly, 363 sales are here to stay as a part of the Chapter 11 process.

Second, 88% of those responding felt that Chapter 11 is not utilized as much as in years past because it has become too expensive (and 98% of respondents agreed that Chapter 11 is more expensive now than 10 years ago). But, interestingly, 2/3rds of those responding believed Chapter 11 is “faster” than it was ten years ago.

Third, when asked whether the role of the United States Trustee has been positive or negative in Chapter 11 cases, 21% said positive, 44% said negative and 35% took no position. A common comment was “depends on where you are.” Clearly, the survey respondents feel that U.S. Trustee practices are not consistent across districts and/or regions. The respondents were almost equally divided on whether the U.S. Trustee Program was “obsolete” or not.

Fourth, when asked about the role of CRO’s, almost 2/3rd’s of respondents found this a positive development while only 15% found it to be a negative.

Fifth, when asked how best to simplify or improve the jurisdiction of bankruptcy courts, 2/3rd’s of those responding said “make them Article III judges.”

Sixth, when asked to identify "what good things" are available only in Chapter 11, 84% said "clean assets to buy" and 55% said "liquidation under control of management." But notwithstanding these benefits, 55% of respondents felt that Chapter 11 reorganizations were less successful than 10 years ago.

Seventh, individual Chapter 11 cases unexpectedly appeared in a number of comments, such as "need guidance," "do away with the absolute priority rule," and "deal with exemptions and budgets."

Eighth (and finally), a need to reform venue choice for Chapter 11's was also a major comment.

So, what should we glean from all this?

363 Sales

They are fast, efficient, and offer the best, clearest title in the market place. The fact that the financial marketplace or the nature of lenders and/or lending practices has changed since 1978 and that secured creditors with a lien on all assets may now be more common place does not invalidate this process or the ability of 363 sales in Chapter 11 cases. Indeed, we should legitimize 363 sales and make the process universally available notwithstanding the fact that some courts discourage or impede 363 sales in the absence of a confirmed plan. After all, secured creditors have rights too…

Jurisdiction

Make Bankruptcy Judges Article III judges. Marathon was bad enough. While dealing with Stern v. Marshall has been both interesting and somewhat entertaining for lawyers, it is a huge waste of judicial time and resources. Even worse, what must the public think?

Venue

Get rid of place of incorporation venue and replace it with venue based on principal place of business, primary operations or headquarters. Again, what must the public think when one of the largest and most visible businesses in Dallas – American Airlines – goes to New York to go to court?

United States Trustee

My experience as a sitting judge working with the United States Trustee in the Southern District of Texas was wonderful. They were helpful and constructive. Nevertheless, the survey results appear to seek more uniformity in what the U.S. Trustee does across its regions – which may mean a need for more transparency. For instance, the new guidelines for Chapter 11 attorneys purport to be uniform and should enhance transparency. If they are implemented uniformly by the U.S. Trustee and applied uniformly by the courts, I would view this as a positive contribution to transparency of the process.

Transparency

How do we explain why all big cases go to Delaware or New York? How do we explain why Chapter 11 costs so much? How do we explain why a bankruptcy judge may be just an "enhanced master in chancery?" Many outsiders already think that our practice area is both narrow and arcane. Anything we can do to make Chapter 11 more sensible and uniform in application benefits not only the system but the marketplace and society as a whole.