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REPORT
of the
SELECT ADVISORY COMMITTEE ON BUSINESS REORGANIZATION
(“SABRE”)

A special committee of the American Bar Association’s Section of Business Law
Business Bankruptcy Committee

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The views expressed in this Report are presented on behalf of the Section of Business Law and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and should not be construed as representing the position of the American Bar Association.

PART I: SABRE MEMBERS AND CONSULTANTS

SABRE's members are drawn from the bankruptcy bench, government administration, academia, and private practice. They are widely experienced and highly respected bankruptcy experts and reflect a wide diversity of views concerning bankruptcy law.

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- Chair
  - Business Bankruptcy Committee Chapter 11 Subcommittee
- Member
  - American Law Institute
- Conferee
  - National Bankruptcy Conference
- Fellow, Director and Former Chair
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- Former Deputy Director
  - Commission on the Bankruptcy Laws of the United States
- Former Member
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Reporter and Member

Professor Karen M. Gebbia-Pinetti
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- Vice-chair
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Members

Honorable Burton R. Lifland
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- Former Chief Judge
  - Second Circuit Bankruptcy Appellate Panel
- Fellow
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- Member
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Visiting Lecturer
Yale Law School, 1994-1997, 2001
Lecturer
Harvard Law School, 2001

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Business Bankruptcy Committee
Fellow
American College of Bankruptcy
Member
United States Delegation to the United Nations Commission on International Trade Law Insolvency Working Group

Hugh M. Ray
Andrews & Kurth, Houston, Texas
Member
Business Law Section Council
Former Chair
Business Bankruptcy Committee

Consultants

SABRE's consultants comprise a select group of nationally prominent judges, government officials, law professors, private practitioners, and other financial distress business experts. They represent a cross-section of the most widely experienced and highly respected bankruptcy experts in the country and reflect a wide diversity of views concerning bankruptcy law.

SABRE's members are particularly grateful to the Honorable Edith H. Jones, Circuit Judge of the United States Court of Appeals for the Fifth Circuit, and Commissioner, National Bankruptcy Review Commission, and Elizabeth Warren, Leo E. Gottlieb Professor of Law, Harvard Law School, and Reporter, National Bankruptcy Review Commission, for their helpful suggestions, observations, and insights on the reform proposals.

SABRE's members also wish to express their appreciation to Lynn M. LoPucki, Security Pacific Bank Professor of Law, University of California at Los Angeles School of Law, Jay Lawrence Westbrook, Benno C. Schmidt Chair of Business Law, University of Texas School of Law, and Joseph Guzinski, Esq. and Ed Flynn, Esq., Executive Office of the United States Trustee, for discussing compilations and studies of empirical bankruptcy data.

Thoughtful comments were received from the following other Consultants:[1]

[list]

Business Bankruptcy Committee Council

The Business Bankruptcy Committee Council comprises the chairs and vice-chairs of the thirty subcommittees of the Business Bankruptcy Committee, which is the second largest committee of the ABA Section of Business Law.[2]

Acknowledgments

Special thanks are due to:

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PART II: PURPOSE, PROCESS, AND EXECUTIVE SUMMARY

STATEMENT OF PURPOSE

The purposes of the Select Advisory Committee on Business Reorganization (a special committee of the American Bar Association's Section of Business Law Business Bankruptcy Committee) are to consider the perception that chapter 11 business reorganizations take too long and cost too much and, if appropriate, to develop legislative solutions to reduce the time and cost of business reorganizations.[3]

PROCESS AND SUMMARY

In March of 2000, Mike Sigal, Chair of the Business Bankruptcy Committee, appointed Gerald K. Smith to chair a Select Advisory Committee on Business Reorganization ("SABRE"). Messrs. Smith and Sigal appointed the SABRE members and consultants.

SABRE met every two-to-three weeks from May 2000 through December 2000. During this time, it developed a process and framework for investigating cost and time of chapter 11; engaged in inquiry and investigation, including by gathering and reviewing studies, commentary, and criticisms of chapter 11; developed and analyzed specific reform proposals; marshaled data and commentary relevant to the specific proposals; and identified areas for further study.

In February 2001, after SABRE completed its foundational work, it transmitted a preliminary, draft Report to the Business Bankruptcy Committee Council and seventy-five expert bankruptcy consultants to obtain further input, perspective, analysis, and diversity. The Business Bankruptcy Committee Council and Consultants provided extensive commentary, analysis, advice, and recommendations, which SABRE carefully considered.

This Report is the product of work generated by SABRE and the thoughtful input and commentary of the Consultants and members of the Business Bankruptcy Committee Council. The proposals set forth herein represent the consensus of the members of SABRE and enjoy wide support among the Consultants and Business Bankruptcy Committee Council, although not every Consultant and member of the Business Bankruptcy Committee Council agrees with each element of each of the proposals.

SABRE has developed three specific reform proposals. These reforms are addressed to specifically identified aspects of chapter 11 practice that may unnecessarily increase the cost and time of business reorganizations. These are:

1. Hurdles to achieving consensus out-of-chapter 11

Proposal 1 is designed to foster out-of-court resolutions of some business and economic difficulties and avoid a bankruptcy filing by establishing a federal statutory mechanism that stays creditors from enforcement and the debtor from out-of-the-ordinary course asset transfers during a short workout period.

2. The difficulty of achieving consensus in a litigious environment

   Proposal 2 is designed to employ a neutral facilitator to foster consensus and break through impasse if the parties are unable to agree on the essential structure of a plan within a reasonable period.

3. The proliferation of conflicting business experts

   Proposal 3 is designed to foster the shared use of neutral financial and business analyses prepared by the debtor's experts and neutral, court-appointed experts.

These specific proposals will not eliminate all of the perceived ills of the bankruptcy system. SABRE strongly believes, however, that they will make significant inroads toward reducing the time and cost of business reorganizations, and will make other incidental, yet important, improvements in chapter 11 practice. The proposals**:**

a. attempt, to the extent possible, to proceed from consensus concerning the nature of the problems, and to build consensus concerning appropriate solutions,

b. build upon earlier analyses of the Bankruptcy Code (including those of the National Bankruptcy Review Commission, the National Bankruptcy Conference, the American Bankruptcy Institute, the Commission on the Bankruptcy Laws of the United States, and others),

c. operate in conjunction with each other to address cost and time concerns, and

d. are rooted in judgments based upon practical experience and, to the extent possible, in empirical data.

In addition to these specific reform proposals, SABRE has concluded that there are four other, important issues that may unnecessarily increase the time and cost of chapter 11 and decrease its effectiveness and efficiency.

First, in many (typically smaller) cases, no committee is appointed. It may be appropriate to design alternate ways of monitoring the debtor and ensuring adequate creditor representation in such cases.

Second, in cases in which committees are appointed, an unnecessary proliferation of committees or an overzealous committee may unnecessarily increase debtor/committee litigation. An empirical study is now pending that may shed light on committee practices and provide a basis for examining the appointment, role and effectiveness of committees.

Third, the current structure of chapter 11 may impose upon scarce judicial resources more often than is necessary or appropriate. Judges are often called upon to make administrative or business decisions rather than judicial decisions. It may be appropriate to consider ways of targeting judicial resources to judicial determinations and developing alternative means of rendering non-judicial determinations. Alternative decision-making would need to balance, respect and protect the interests of all parties.

Fourth, uncertainty at several levels may increase costs in bankruptcy cases. Uncertainty arises from statutory ambiguity, the absence of clear standards, and variations in local legal practice and local administration. Further study may reveal more specifically those areas of particular uncertainty that increase costs. As the National Bankruptcy Review Commission also recognized, it may be appropriate to consider means to obviate ambiguities, develop clear standards, and increase uniformity.[4]

SABRE is not making any specific proposals at this time with respect to these last four concerns, each of which raises questions that implicate complex intersections between bankruptcy law, policy, and practice. Rather, SABRE intends to continue studying these, and possibly other, causes of increased cost and delay to determine whether additional reform proposals would be appropriate in the future to obviate the underlying problems without upsetting the delicate balance among the parties in interest in reorganization cases.

PART III: REFORM PROPOSALS

PROPOSAL 1: FEDERAL WORKOUT PROCEEDING 11

Foster out-of-bankruptcy resolutions of some business and economic difficulties by establishing a federal statutory mechanism that stays creditors from enforcing their claims and prevents the debtor from making extraordinary asset transfers during a short workout period.

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In appropriate circumstances, after a reasonable period of time has passed during which the parties are unable to reach consensus on a plan, the court may appoint an independent facilitator to foster consensus. If facilitated negotiations fail to produce a plan, the court may permit the facilitator to file a plan, subject to the usual voting and confirmation requirements, and to parties' objections and requests to modify.

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Foster access to neutral business information by requiring that the debtor and its professionals share financial information with parties in interest, and by enabling the court to appoint one (or more) neutral business experts to conduct financial and other analyses, at estate expense. Parties in interest would be permitted to engage separate experts at their own expense or, if parties satisfy the "substantial contribution" standard, at estate expense.

PART IV: ANALYSIS OF REFORM PROPOSALS

PROPOSAL 1: FEDERAL WORKOUT PROCEEDING

Foster out-of-bankruptcy resolutions of some business and economic difficulties by establishing a federal statutory mechanism that stays creditors from enforcing their claims and prevents the debtor from making extraordinary asset transfers during a short workout period.

A. Outline of Proposal 1

A federal workout proceeding is commenced when the debtor and some specific (to be defined) number of its unaffiliated creditors jointly file a workout petition in federal bankruptcy court.

A federal workout proceeding embodies three essential elements:

(i) It provides a federally imposed stay that prevents enforcement actions by creditors (similar to the automatic stay in bankruptcy) and prevents dissipation of assets by the debtor, for a short period, to permit negotiation so that business solutions rather than judicial intervention might solve business and financial problems. The stay, including any extensions, may not exceed 120 days.

(ii) In order to validate the debtor's intention to attempt an out-of-bankruptcy workout, prevent abuse, and verify that at least some significant number of creditors are willing to work with the debtor toward a workout, a federal workout proceeding may be commenced only by the debtor plus some specific (to be defined) number or percentage of its unaffiliated creditors.

(iii) The federal workout proceeding provides a vehicle for consensual debt restructuring. It does not allow the debtor to impose terms on dissenting creditors and it does not provide a mechanism by which a majority can bind the minority. If a debtor wishes to modify a particular creditor's claim without that creditor's consent, the debtor must file a bankruptcy case and attempt to modify the claim under the strictures of the Bankruptcy Code.

To prevent abuses, the statute will expressly define who may file, what standards must be satisfied, what documentation will be required in support of a filing, and what form of notice shall be provided to whom, in what manner, and in what time period upon the filing of the federal workout proceeding.

The stay will apply to all creditors. It will prohibit creditors from taking actions to enforce claims against the debtor and the debtor's property. Prohibited actions will include (without limitation) commencing or continuing litigation, imposing or enforcing tax or other liens, and enforcing judgments.[1]

As to the debtor, the stay will permit ordinary course transactions (which will be defined in the statute and will include transactions such as the grant of security for new money and the payment of employee wages and other operating expenses), but prohibit the debtor from granting security for existing debt or transferring or encumbering property out-of-the-ordinary course. Payments made and obligations incurred during the workout proceeding will be avoidable to the same extent as if they were made before a bankruptcy filing.[2]

To reduce the need for judicial intervention, the stay will be automatic upon the filing of the workout petition. The stay will be short to prevent abuse. The initial stay will be for a 30-day or 60-day period. The federal workout proceeding will automatically terminate and be dismissed [30 or 60] days after it is filed unless the court continues the proceeding, for cause. The proceeding may not be extended beyond 120 days after its commencement.

A mechanism and standards for cause to extend the proceeding and continue the stay will be defined. The stay will be continued (subject to the 120-day limit) only if a stringent standard is met showing that (i) the debtor and creditors are making appropriate progress toward a consensual workout, and (ii) there is a compelling business or financial need for a continuation of the stay to permit the workout to be effectuated.[3]

Example 1: The debtor and creditors have agreed on the general terms of a restructuring, but need a short period of time in which to document the agreement and ensure that all parties agree to all terms, in writing. Continuation of the stay will permit the parties to memorialize their agreement.

Example 2: The debtor and substantial creditors are close to an agreement. The debtor does not currently have liquid assets sufficient to pay the claims of dissenting creditors, but, after the agreement is implemented, the debtor will have access to adequate credit to pay the claims of dissenting creditors. Continuation of the stay is necessary to prevent the dissident creditors from attaching property before the agreement can be completed and implemented.

Example 3: The debtor and substantial creditors are close to an agreement but, because one or a few dissident creditors will not consent and the debtor is unable to pay those creditors without impairing the debtor's prospects for a successful reorganization, the debtor will need to file a pre-packaged bankruptcy case within a matter of weeks. The continuation of the stay is necessary to prevent the dissident creditor(s) from attaching property before the agreement is sufficiently formed to permit the debtor to file a pre-packaged bankruptcy case. In this situation, the federal workout proceeding might provide a means of fostering pre-packaged cases by staying dissidents until the pre-packaged case is ready to be filed.

Example 4: The stay will not be extended if substantial creditors are willing to sign a forbearance agreement and continue to work with the debtor and the debtor has sufficient liquid assets to pay dissenters without impairing the debtor's prospects for reorganization.

Example 5: The stay will not be extended if the debtor has a continuing negative cash flow and there is limited creditor support for the debtor's repayment terms.

The statute will establish a mechanism and standards for relief from the stay. The mechanism and standards will provide means for (i) ending the proceeding entirely ("global"), and (ii) providing relief from the stay to particular creditors ("individual").

Standards for global relief from the stay to end the federal workout proceeding will mirror the standards for extending the proceeding and the stay, *supra*.

Standards for individual relief from the stay will focus on hardship to the particular creditor, harm to the debtor and other creditors, and the impact of the creditor's proposed actions on the prospects for the debtor's reorganization. For example: A creditor seeks to foreclose its security interest in certain equipment. The court might consider factors such as:

(i) How long the debtor has been in default.

(ii) How the stay, the lack of payment, and the inability to foreclose will affect the creditor's financial ratings or business.

(iii) Whether the collateral is clearly essential to the debtor's business or clearly not essential to the debtor's business. Whether the debtor could replace the collateral with alternate equipment (for example, under a new purchase money transaction).

(iv) How the foreclosure would affect the debtor's business, the prospects for reorganization, and the debtor's other creditors.

There will not be a mechanism for granting the debtor relief from the stay and allowing the debtor to engage in transactions out-of-the-ordinary course. The stay is short and the type of out-of-the-ordinary course transactions in which the debtor might wish to engage are likely to involve contract modification, which is not contemplated by the federal workout proceeding. A situation in which the debtor must undertake such extraordinary actions warrants a bankruptcy filing.

In addition to the stay relief standards, the following mechanisms governing the filing of the federal workout proceeding and its impact on creditors are designed to prevent abuses.

First, the requirement that both the debtor and some number of its unaffiliated creditors jointly commence the federal workout proceeding is designed to prevent abuses that could occur if a simple process allowed either the debtor, alone, or its creditors, alone, to obtain the benefit of a federal stay. The standards that define the nature and number of creditors who must join with the debtor to commence a federal workout proceeding shall include a consideration of whether the debtor's major creditor(s) support or oppose the filing.

Second, the imposition of a stay on both the debtor and creditors further prevents abuses. For example, a business with little prospect of reorganizing will be unable to use the federal workout proceeding stay unilaterally to impair creditors' enforcement actions because the debtor will be unable to achieve the requirement of creditor approval to the filing of the federal workout proceeding. Creditors will not be able to use the federal workout proceeding to prevent the debtor from dissipating assets during creditors' collection activities because the creditors will also be stayed and the debtor's approval will be required to commence the proceeding.

Third, the debtor will not be able to use a federal workout proceeding to bind dissenting creditors.[4] In a chapter 11 case, the debtor can bind dissenters only under a confirmed plan that satisfies all of the requirements of the Bankruptcy Code.[5] A federal workout proceeding does not alter these requirements. If a creditor and the debtor are unable to reach accord under non-bankruptcy law and the terms of their contracts, the debtor will be able to bind the creditor to terms only by filing a bankruptcy case and satisfying the requirements of the Bankruptcy Code.

If the debtor and certain creditors do reach an accord through the federal workout proceeding, the court need not review, approve, or pass upon the agreement. The debtor and creditors can either ask the court to terminate the proceeding or simply allow the federal workout proceeding to terminate at its expiration date. The debtor/creditor agreement can then be implemented through typical, business methods without the need for judicial intervention.

The principal purpose of a federal workout proceeding is to provide the debtor and creditors with an opportunity to reach agreement without the need for a bankruptcy filing. Nevertheless, there may well be situations in which debtor is unable to obtain sufficient agreement through the workout proceeding. In some of those cases, the debtor will file a bankruptcy case in an attempt to bind dissenting creditors, in accordance with the stringent requirements of the Bankruptcy Code. As a prelude to such a case, the federal workout proceeding may allow the debtor and substantial creditors to reach accord, may narrow the issues for resolution, may shorten the duration of a subsequent bankruptcy case, and may foster a pre-packaged chapter 11 bankruptcy case rather than a longer and more costly, traditional chapter 11 case.

Because the federal workout proceeding contemplates a new, independent, federal stay rather than a simple fine-tuning of the present bankruptcy process, it will be necessary to define the relationship between the federal workout proceeding and a bankruptcy case. The following six issues will be clearly defined in the statute.

(i) The statute will identify the constitutional basis for the federal workout proceeding (commerce clause and/or bankruptcy clause).

(ii) The federal workout proceeding will be commenced by filing a Petition for a Federal Workout in the federal bankruptcy court. Appropriate amendments to the bankruptcy jurisdiction statutes will be required.[6]

(iii) The statute will define how the proceeding affects avoidance periods. Any otherwise applicable avoidance periods will be extended for a period equal to the period of the federal workout proceeding stay. Payments made during the workout proceeding will be avoidable to the same extent as if they were made before a bankruptcy filing.

(iv) No special treatment will be accorded to claims that arise during the federal workout proceeding if the workout fails and a bankruptcy case ensues. Because of the very short duration of the federal workout proceeding, and the fact that it permits the debtor to engage in ordinary course transactions, creditors likely will continue to deal with the debtor during this period either without special assurances or through cash-in-advance arrangements.

(v) The statute will specify the extent to which the federal workout proceeding must be implemented by legislation and the extent to which it may be implemented by rules changes.

(vi) The filing of a federal workout proceeding does not commence a bankruptcy case. Consequently, the proceeding will not bind minorities or publicly traded debt absent individual creditor consent.

B. Analysis of Proposal 1

A business might restructure its financial affairs for a variety of reasons, including financial distress, market shifts, interest rate fluctuations, and strategic business decisions. A restructuring might occur through various avenues, including an out-of-court workout, a pre-packaged chapter 11 case, and a traditional chapter 11 case. Restructuring in any of these formats typically causes the business to incur both direct (e.g., professional fees, administrative costs) and indirect (e.g., loss of business, loss of business opportunities, lost productivity, distracted management attention, valuation fluctuations) costs.[7] In a successful restructuring, these costs are offset by enhanced viability or efficiency. Indeed, achieving restructuring benefits that exceed restructuring costs is one measure of "success."[8]

The widely held perception among business people and bankruptcy experts,[9] and the limited empirical data that is available,[10] confirm that workouts are faster and cheaper than pre-packaged chapter 11 cases, and pre-packaged chapter 11 cases are faster and cheaper than traditional chapter 11 cases.[11] One study also shows that average recovery rates were highest in out-of-court restructurings, somewhat lower in pre-packaged cases, and much lower in traditional chapter 11 cases.[12]

Although certain costs are unavoidable regardless of the format in which a business undertakes a restructuring, avoiding unnecessary restructuring costs benefits businesses, their creditors, and their investors.[13] If all other factors were equal, businesses and their creditors presumably would choose to reorganize through the fastest and least expensive vehicle, and the vehicle that results in the highest recoveries – the out-of-court workout.[14] Indeed, in practice, workout efforts often precede chapter 11 filings.[15]

All other factors are not equal, however. There are several hurdles that may prevent debtors and their creditors from negotiating an out-of-court workout and force them to litigate or negotiate their disputes in a chapter 11 case. Parties who engage in workout discussions do so with chapter 11 as the backdrop. They realize that, if the workout fails, they may elect to be, or find themselves, subjected to the provisions of chapter 11.[16]

From the debtor's perspective, hurdles to out-of-court restructuring include the logistical difficulties of negotiating with large numbers of diverse creditors while convincing each creditor not to enforce its claim pending negotiation.[17]

There is no federal statutory mechanism other than an actual bankruptcy filing that allows a debtor to stay enforcement actions by dissident creditors while the debtor and its other creditors attempt to achieve a restructuring.[18] Although the debtor may be able to negotiate forbearance agreements with certain major creditors pending workout negotiations, these bind only the signatories and often expire if a third party creditor attaches a significant asset. Consequently, a debtor may need to file bankruptcy if it is unable to forestall a few dissident creditors from enforcing their debts while the debtor attempts to restructure the debts of other, sometimes more substantial or higher priority, creditors.

From the creditor's perspective, hurdles to achieving an out-of-court workout include the inability to prevent other creditors from attaching the debtor's assets while negotiations are proceeding and the inability to prevent the debtor from dissipating its assets (including through preferential grants of security) while the negotiations are proceeding. Creditors fear that, if they accommodate the debtor, other, less accommodating creditors will gain an advantage in payment or collateral.

There is no federal statutory mechanism that allows creditors to obviate these problems (by preventing other creditors from attaching and foreclosing upon assets and preventing the debtor from dissipating assets) while the creditors and debtor negotiate an agreement. Individual creditors may obtain post-judgment asset attachments[19] and, under limited circumstances, pre-judgment asset attachments[20] to prevent asset dissipation.[21] These are merely collection devices, however, and they accrue to the benefit of a single creditor, rather than all creditors. The debtor and individual creditors or groups of creditors may enter into forbearance, negative pledge, or inter-creditor agreements. Such agreements, however, protect only the signatory parties and, if a party violates the agreement, the violation generally is enforceable only by an unsecured claim rather than an injunctive remedy. Consequently, creditors may prefer to negotiate in the relative safety and constraint of a bankruptcy case.[22]

These hurdles may increase the costs of restructuring by forcing debtors and creditors into chapter 11 rather than allowing them to restructure their debts through a less costly out-of-court workout. A court proceeding occasions some inherent and unavoidable costs that are avoided in an out-of-court proceeding. These include, for example, filing fees, the costs of complying with reporting requirements, attorney fees and expenses associated with court filings and court appearances to administer the case and comply with statutory requirements, the costs of complying with disclosure requirements, etc.[23] Moreover, many commentators suggest that at least some of the direct costs of a traditional chapter 11 restructuring are unnecessary and that the high level of monitoring, litigation, and professional involvement in chapter 11 cases imposes excessive costs on business restructurings.[24]

Indeed, both the National Bankruptcy Review Commission and the National Bankruptcy Conference have formally recommended that efforts be made to reduce unnecessary costs and delay in chapter 11 restructurings by facilitating and expediting pre-packaged chapter 11 reorganization cases.[25] Other bankruptcy experts have proposed means of fostering out-of-court business restructurings.[26]

The federal workout proceeding is designed to obviate some of the hurdles that prevent debtors and creditors from achieving an out-of-bankruptcy workout. It provides a limited period in which the debtor and creditors can attempt to resolve their differences without fear of foreclosure or asset dissipation. Although the federal workout proceeding will not provide a mechanism for binding holdout creditors, it will prevent such creditors from enforcing their claims while the debtor attempts to negotiate with them and with other creditors, and it will prevent the debtor from dissipating its assets while the parties negotiate toward a restructuring. This opportunity for intensive, last chance negotiations may reduce costs if it leads to an out-of-court resolution or to a narrowing of the issues and framing of a plan that can be confirmed swiftly in chapter 11. Even if the out-of-bankruptcy process does not succeed in preventing a bankruptcy filing, it is not likely to add significantly to the overall restructuring costs.

Notice of the pendency of the workout proceeding will give creditors an opportunity to make an informed decision whether to continue dealing with the debtor, and may obviate certain concerns regarding the debtor's disclosure of its financial condition during the workout attempt.[27]

PROPOSAL 2: PLAN FACILITATOR

In appropriate circumstances, after a reasonable period of time has passed during which the parties are unable to reach consensus on a plan, the court may appoint an independent facilitator to foster consensus. If facilitated negotiations fail to produce a plan, the court may permit the facilitator to file a plan, subject to the usual voting and confirmation requirements, and to parties' objections and requests to modify.

A. Outline of Proposal 2

In appropriate circumstances, at any time after 120 days after the commencement of a case (without regard to whether the debtor's exclusive period to file a plan has expired or been enlarged), the court, *sua sponte* or at the request of any party in interest, may appoint a plan facilitator to foster consensus. If facilitated negotiations fail, the facilitator, with court approval, may develop and file a plan.

Appropriate circumstances include any or all of the following, without limitation:

*appointment is in the best interests of the debtor and the creditors
*appointment may facilitate or expedite reorganization
*the parties are at impasse
*passage of time since filing
*no plan has been filed
*no plan is likely to be confirmed soon

The order appointing the facilitator shall define the scope and substance of the facilitator's duties and the extent and format in which the facilitator shall disclose the status of negotiations and make recommendations to the court. The parties' discussions with the facilitator shall be protected by confidentiality, as in mediation.

In general, the facilitator will attempt to bring the parties together around plan terms and will advise the court whether consensus is possible and whether the debtor has a realistic prospect of reorganizing within a reasonable period of time.[28] The court might also ask the facilitator to make a recommendation, based upon the standards set forth in Bankruptcy Code section 1112, concerning whether to dismiss the case or convert the case to chapter 7.[29] The court, in its discretion, may define other duties of the facilitator. If reorganization appears to be feasible but the facilitator is unable to develop consensus, the court, *sua sponte*, or following an order to show cause, or on the motion of the facilitator, may grant the facilitator authority to file a plan.

If the facilitator develops and files a plan, the extant Bankruptcy Code voting, acceptance, and confirmation rules shall apply. A process similar to that employed under Chapter X of the former Bankruptcy Act[30] shall be added to the existing plan confirmation process with respect to facilitator-filed plans. Under such a process, the debtor and all other parties in interest will have the right to interpose objections and to propose modifications and amendments prior to the voting stage.

Although the facilitator will not have an economic stake in the plan, the process of objection, modification, and voting, and the confirmation standards will ensure that the parties with an economic interest will determine whether the plan will be accepted and that the court will determine whether the plan will be confirmed. This process may also foster continued negotiation and consensus in a context in which the entity that files the preliminary plan, i.e., the facilitator, has no significant economic self-interest that might unfairly skew the plan's terms.

The facilitator, and such attorneys, accountants and other professionals as the court may appoint to represent the facilitator, shall be paid from the estate under the standards established by Bankruptcy Code section 330.

If the court appoints a facilitator, the court may, but need not, terminate exclusivity. The court would have discretion to give weight to the facilitator's recommendation in determining whether to terminate exclusivity. After a facilitator has been appointed, the facilitator and any party in interest shall have standing to request that exclusivity be shortened. After a facilitator has been appointed, neither the debtor nor any other party in interest, except the facilitator, shall have standing to request an extension of exclusivity.

B. Analysis of Proposal 2

In recent decades, civil courts, nationwide, have dramatically increased the use of alternative dispute resolution ("ADR").[31] Proposal 2 employs ADR principles (the reduction of litigation and encouragement of negotiated resolutions) to expedite and enhance plan formulation.

Bankruptcy cases provide a particularly appropriate and fertile ground for ADR. Reorganization cases involve multiple, diverse interests competing over business plans, allocation of value, and capital structure, in a context in which litigation traditionally increases the time to resolution and strategic bargaining can easily lead to impasse.[32]

Indeed, bankruptcy courts have used ADR in a variety of creative and highly effective ways. In several cases, including *Macy's* and *Eagle Picher*, the court appointed a mediator to facilitate plan negotiations.[33] In *AH Robins* and other cases, bankruptcy courts have employed ADR to liquidate claims or determine valuation.[34]

Several hurdles may explain why ADR is not used more extensively in bankruptcy cases.[35] First, although current law probably grants most bankruptcy courts discretion to appoint facilitators or mediators in bankruptcy cases, some bankruptcy judges may feel that the authority and standards for appointment are not clear.[36]

Second, existing mediation structures have limits that impair their broad adaptability to bankruptcy cases and their ability to form the basis for a comprehensive mediation program in chapter 11 cases.[37] For example, some mediation programs do not provide for payment of mediators or settlement judges,[38] others require the parties' consent for mediation.[39] Consequently, bankruptcy ADR often involves flexible, case-specific judicial appointments using general authority rather than established mediation structures. These appointments require judicial time and creativity to invent structures that will work for each particular case.

Third, even if the laws and standards governing ADR in bankruptcy were clear, a variety of other practical considerations limit the use of ADR in bankruptcy. Many bankruptcy courts have no experience or only limited experience with ADR, there is no formal ADR training for bankruptcy judges, the Bankruptcy Code and Bankruptcy Rules contain no express ADR provisions and no provisions for mandatory ADR, and there are no established panels of trained bankruptcy-specific mediators who are available to accept assignments in bankruptcy cases.[40]

The Proposal for the appointment of a facilitator seeks to obviate some of these hurdles by establishing facilitation structures, defining standards for appointing a plan facilitator, articulating the role facilitators will play in chapter 11 cases, and freeing the courts from re-creating plan facilitation structures in each case. The term "facilitator" is used because this Proposal has the potential for expanding the appointee's role, duties, and powers beyond those generally practiced by mediators (who attempt to bring the parties together consensually around a solution, but have no power to implement solutions if an impasse is reached).

The facilitator embodies critical features of a mediator, including neutrality and confidentiality. The plan facilitation process saves judicial resources and may lead to an amicable resolution that fosters continuing business relationships among the parties.[41]

This Proposal allows the court to define the precise role of the facilitator in each case in order to accommodate the facilitator's duties to the needs of each case. It does not limit existing authority that permits mediation and other forms of ADR in other aspects of bankruptcy cases. It contemplates that facilitators generally will serve the three principal and related functions.

First, it contemplates the regular and frequent use of neutral facilitators in chapter 11 cases to engage in confidential facilitation of plan negotiations in order to foster agreement and reduce the time and cost of protracted plan negotiations.

Second, in appropriate circumstances, when the facilitator believes that reorganization is feasible, but the facilitator is unable to bring the parties together around the terms of a pan, the facilitator would have the added option, with court approval, of drafting, filing, and advocating a plan of reorganization. In this regard, the facilitator's role is in some ways analogous to the plan-filing role that the trustee played under Chapter X of the former Bankruptcy Act.

The appointment of a facilitator who has the authority to file a plan if he is unable to garner consensus on a party's plan does not, however, modify the essential debtor/creditor balance or alter the fundamental notion that the debtor-in-possession shall operate the business under the Bankruptcy Code.[42] It merely recognizes that the 1978 Bankruptcy Code's justifications for eliminating the appointment of a trustee in every case (as occurred under certain chapters of the Bankruptcy Act),[43] in favor of allowing the debtor to operate the business, do not necessarily favor allowing the debtor also to retain exclusive control over the reorganization/liquidation decision or the plan negotiation process.[44]

In addition to expediting plan negotiations, the presence of a neutral facilitator who has the power to file a plan may also address several incidental, yet important, concerns that currently plague chapter 11 cases

It may obviate some concerns that the chapter 11 plan negotiation process permits or even fosters obstreperous behavior by debtors, creditors and equity holders. These concerns arise, in part, from the fact that debtor exclusivity, expectations that exclusivity will be enlarged, the simple logistics and economics of obtaining relevant business information, creditor fragmentation, the costs and burdens of mounting an effort to file a creditor's plan, and the costs that delay may impose upon creditors, give the debtor a great deal of leverage and control in the plan formulation process. Empirical studies concerning the possible effects of exclusivity and debtor control on the time, cost and consequences in chapter 11 cases are limited and, at best, inconclusive.[45] Nevertheless, based upon the available data and their own practical experience, many bankruptcy experts believe that the debtor's control over the chapter 11 process contributes to excessive cost, delay, and violations of absolute priority in chapter 11 cases by permitting, or even encouraging, a debtor to delay until it forces concessions favorable to the debtor, its management, and its shareholders. Many bankruptcy experts favor restrictions on extensions of exclusivity in order to reduce the debtor's leverage.[46]

Some bankruptcy experts also believe that there is an opportunity for creditors and equity holders to use the Bankruptcy Code to gain an unfair advantage through delay and bad faith negotiations. Creditors (particularly subordinated debt holders) and equity holders may use obstreperous behavior, litigation, and the threat of plan rejection, plan litigation and delay to extract from the debtor and other creditors concessions, to which they would not be entitled under a strict application of the absolute priority rule, in exchange for their agreement to vote in favor of the proposed plan.[47] Threatening to delay the plan confirmation process may force concessions because the plan confirmation process strongly favors widely consensual plans, and plan litigation increases costs and decreases recoveries for many creditors, and may increase cost and impair business opportunities for the debtor. Although empirical studies of these behaviors are limited and arguably inconclusive,[48] these perceptions are bolstered by anecdotal evidence.[49]

Some degree of strategic bargaining in bankruptcy cases is unavoidable.[50] Yet, ADR studies show that the insertion of a neutral third party reduces opportunities for prolonged strategic bargaining.[51] Consequently, even without more comprehensive data concerning the causes and implications of strategic bargaining in bankruptcy cases, it would appear that the appointment of a facilitator to serve like a mediator but with power to file a plan of reorganization will obviate some plan-related strategic bargaining concerns. Moreover, the appointment of a facilitator may be more effective than the mere termination of exclusivity because termination of exclusivity does not eliminate, and may exacerbate, strategic bargaining behavior.

The appointment of an objective facilitator whose perspective on the terms of a plan is not biased by economic interest might also foster more viable reorganizations that are less likely to result in future restructuring or re-filing. Reducing cost and time in chapter 11 will not further reorganization policy if expedition flows from excessive leverage by one party or from debtor-oriented court procedures. Either of these factors can result in expeditious confirmation of plans that are not feasible, and the reorganization of businesses that simply file another bankruptcy case or otherwise reorganize not long after the plan has been confirmed.[52]

Third, and finally, the facilitator, in the course of seeking consensus on a plan, is in a position to form a view concerning whether reorganization is practicable. The court may ask the facilitator to make a recommendation concerning whether the business should be reorganized or liquidated, or to recommend the appointment of an independent expert to conduct an analysis in this regard. By assisting the court to identify candidates for liquidation, the facilitator can help reduce losses caused by lengthy chapter 11 cases that eventually are converted to chapter 7. Many bankruptcy experts have recommended implementing procedures for an early determination of feasibility and viability.[53]

The National Bankruptcy Review Commission, National Bankruptcy Conference, and many bankruptcy experts have recommended increasing the use of mediators and other independent third parties to decrease the time and cost of business reorganization and to decrease strategic behavior that leads to violations of reorganization policy.[54] Some foreign proceedings also employ neutral facilitators or conciliators to foster similar objectives.[55]

The facilitator proposal builds upon these recommendations without requiring a major overhaul of the Bankruptcy Code and without imposing the type of governmental oversight that the creation of a separate bankruptcy administration agency would entail.

Many superb resources are available to assist legislative drafters in articulating the appointment processes, payment structure, and other mechanics of the plan facilitator.[56] Several requirements will be critical in drafting the governing provisions.

First, the central role of the proposed facilitator in chapter 11 cases makes it essential that the court appoint facilitators who enjoy the respect of the parties and the court.[57] A ready resource of highly respected individuals who might serve as facilitators exists in the ranks of experienced bankruptcy practitioners, trustees, academics, retired judges, and retired practitioners.

Second, the payment of facilitators probably will be required. The extensive role contemplated for facilitators is too expansive and central to be implemented by the types of unpaid mediators or settlement judges authorized by certain court-annexed ADR programs.

Third, the rules and appointment orders governing facilitators should clearly specify the scope of appointment and limitations on the facilitator's role and should clearly distinguish the facilitator's responsibilities from those of an examiner, creditors' representative, and independent expert.[58]

Fourth, although this Proposal does not mandate that facilitators be lawyers, there may be significant benefit to the use of lawyers whose experience in chapter 11 practice and financial analysis gives them an understanding of the business prospects and of the legal rules that ultimately will govern the resolution of the dispute if facilitation is unsuccessful.

PROPOSAL 3: NEUTRAL BUSINESS INFORMATION

Foster access to neutral business information by requiring that the debtor and its professionals share financial information with parties in interest, and by enabling the court to appoint one (or more) neutral business experts to conduct financial and other analyses, at estate expense. Parties in interest would be permitted to engage separate experts at their own expense or, if parties satisfy the "substantial contribution" standard, at estate expense.

A. Outline of Proposal 3

This Proposal is designed to reduce the proliferation of conflicting business experts by (i) ensuring that the debtor and its professionals share neutral financial and business information with all parties in interest, and (ii) replacing multiple, partisan, business experts with court appointed, independent, business experts who will generate neutral business and financial analyses that all parties in interest may share.

The fundamental objective is that neutral, financial and business data and analyses that are relevant to the reorganization should be available to all parties in interest. The court is in the best position to determine how best to achieve this objective in each case.

In some cases, it may be necessary only to require that the debtor provide to any official and unofficial committees, and any party in interest who requests, all material, historical, current, and projected financial data and analyses prepared by or for the debtor, including by its accountants and other financial and business experts and advisors.[59]

In other cases, it may be necessary to appoint one or more neutral, independent, disinterested experts to generate data and analyses. Independent business experts may be particularly appropriate when the data are subject to interpretation, including on issues such as valuation, feasibility, prospects for reorganization, and the recommendation to liquidate or reorganize. In such cases, the court, with the advice and recommendations of the debtor, any creditors' committee or creditors' representative, and other parties in interest, may appoint one (or more) neutral, independent, disinterested, business experts[60] to generate financial and other business analyses that all parties in interest will share.[61]

Example 1: There may be no need for independent analysis in some cases in which the debtor proposes a liquidating plan.

Example 2: There may be no need for independent analysis if the debtor generates all of the relevant financial information in-house; promptly shares this data and analysis with all committees and all parties in interest who request it; the creditors committee members have the expertise to evaluate and understand data; and no party raises a credible objection to the debtor's data or analysis.

If an independent expert is appointed, the court, with advice from the debtor, creditors' committee, other parties in interest, and the proposed expert, shall tailor the independent expert's duties to the needs of each case. The order appointing the expert shall specify the scope, substance, and budget of the expert's services.[62]

The independent expert shall be neutral, independent, and disinterested. The "neutral and independent" requirement prohibits the appointment of an expert who has provided services to a party in the case. The "disinterestedness" requirement prohibits the appointment of an expert who is the debtor, creditor, or employee of the debtor or creditor, or who holds a claim against the estate.[63]

The process by which the independent expert is appointed will be similar to the process by which a neutral expert is appointed under Federal Rule of Evidence 706.[64] Appointments may be *sua sponte* or by motion of any party in interest. The statute (or rule) will not elaborate in detail the manner in which independent experts operate (such as whether public reports filed with the court would be required), but will leave such matters to judicial discretion in each case.

The independent experts will be compensated from the estate under the standards established by Bankruptcy Code section 330.

Because the appointment of an independent expert is designed to reduce the number of experts employed in a case, the appointment should obviate the need for separate experts for the debtor and creditors. If the court determines that there is a need for financial or business analyses in the case, the court shall appoint an independent expert to generate such analyses for all parties in interest unless a party in interest demonstrates a compelling reason why separate experts for separate parties should be appointed. The mere fact that the parties have already retained and used the services of separate experts shall not constitute a "compelling reason" for the appointment of separate, partisan experts. Similarly, the fact that the court declines to appoint an independent expert does not authorize the debtor's and creditors' separate experts to perform services at estate expense.

As in Federal Rule of Evidence 706, parties may engage their own experts at their own expense, without court approval. A committee or other party may seek compensation for its separate expert based only upon the existing standard of "substantial contribution."[65]

Any confidentiality concerns that the debtor may raise with respect to the sharing of information by the debtor and its experts or access to the debtor's records by independent experts will be addressed by confidentiality agreements executed, as a condition of access, by the experts and all parties who have access to disclosures and to the experts' oral or written reports. A standard form, perhaps created by the United States Trustee or Rules Committee, with modifications as required for the particular industry and particular case, should be developed to obviate disputes concerning the terms of the agreement.

B. Analysis of Proposal 3

In recent years, several bankruptcy practitioners, scholars, and judges have advanced proposals for shared experts, in various permutations.[66] Similarly, some commentators have recommended the appointment of a neutral third party facilitator (similar to the concept discussed in Proposal 2, *supra*) who would hire financial and perhaps other professionals to provide neutral, shared data.[67] Each of these proposals recognizes that cost- and time-savings likely will flow from reducing or eliminating competing experts' analyses.

Proposal 3's requirements for the disclosure of neutral business and financial data and the appointment of independent experts who will perform analyses of critical data in bankruptcy cases are designed to ensure that all parties have equal access to relevant data, bring the parties together around shared data, reduce the cost of duplicative analyses of "neutral" information (such as financial data, business analyses, etc.), reduce the adversarial nature of the plan process, reduce the potential for litigation over conflicting analyses prepared for different parties, and, perhaps, foster the confirmation of feasible plans. In cases is which no committee is active, the appointment of independent experts provides a counter-balance to the debtor's in-house financial and business analysis. In cases in which a committee is active, neutral experts should reduce costs, duplication of efforts, and litigation over divergent recommendations urged by partisan experts for competing parties.

Although the appointment of independent experts is unlikely to eliminate completely disputes among experts hired by separate parties in interest for their own account, the independent expert can provide the court with a non-partisan view in the event that litigation arises over matters within the expert's purview.

Federal courts have the authority under Federal Rule of Evidence 706 to appoint expert witnesses.[68] This same rule applies in bankruptcy court.[69] Federal courts frequently have appointed neutral experts for a wide variety of reasons,[70] including to conduct, and testify concerning, business and financial analyses.[71]

Although reported decisions reveal that bankruptcy courts have appointed independent experts to perform claims-related analyses,[72] bankruptcy courts do not frequently and regularly appoint independent experts under current law. The reasons bankruptcy courts do not frequently appoint independent experts have not been studied. Under current practice, however, independent experts would simply add to the proliferation of professionals because the current system contemplates that the debtor and official committees will each retain separate experts. The expense of an additional expert may discourage the courts from appointing neutral experts. Also, in cases in which an investigation of the debtor is required, the court may appoint an examiner, who would have greater investigatory powers than an independent expert.[73]

This Proposal seeks to reduce the proliferation of professionals and gain the other benefits that flow from having an independent expert advising the court in bankruptcy cases. It modifies existing practice in at least five ways: (i) it mandates the sharing of neutral financial information generated by the debtor and its experts, (ii) it fosters the appointment of independent experts, (iii) it expressly provides for payment of the independent expert's fees and expenses from the bankruptcy estate, (iv) it discourages parties from retaining separate experts and significantly limits the circumstances in which those separate experts' fees may be paid from the bankruptcy estate, and (v) it recommends areas of analysis that are appropriate for the experts' study, but gives the court flexibility to define the precise role of each expert.

Because these changes will give the independent expert a more important and higher profile role than experts currently have in bankruptcy cases, the appointment process should be beyond reproach and the independent experts must be neutral**,** independent, and disinterested.

The statute will not specify the independent experts' reporting requirements. Rather, it will provide that the order of appointment shall specify those requirements in each case. For example, in many respects, independent experts will be more akin to technical and scientific advisors to the court and the parties than to expert litigation witnesses. In some cases, courts have limited formal discovery requests against such advisor/experts.[74]

The legislative proposal will elaborate the extent to which these changes might be implemented by rules changes, rather than legislative changes.

PART V: INQUIRY

Part V collects studies, data, and commentary concerning topics that SABRE identified as being potentially relevant to its work.

SABRE's inquiry was not designed to seek answers to every empirical question that might be posed regarding chapter 11 before recommending any reforms. It was designed, instead, to identify areas of consensus that might offer guidance for reforms that could be narrowly targeted to address specific, established concerns with respect to the time and cost of chapter 11 without creating ancillary problems. As noted in Part II, in addition to the three specific proposals presented above, SABRE has identified four other matters that may unnecessarily increase the cost and time of business reorganizations, but that require further analysis before specific reforms can be proposed.

SABRE's work has benefited from many thoughtful and insightful studies that examine various aspects of business reorganizations. It is, however, extraordinarily difficult to conduct a fully comprehensive study of any major component of business reorganization. Therefore, the authors of these studies generally acknowledge that each study is limited, to some degree, by its particular scope of inquiry. (For example, a particular study may examine every case filed within a particular district, a sample of cases filed in more than one district, a sample of cases filed or closed nationwide in a particular year, or cases meeting particular size and nature criteria filed over a period of years.)[75]

1. What are the fees and other direct costs of a typical chapter 11 case, as measured against some standard criterion (such as assets, business operations, distributions, debt)?

Direct costs include legal, accounting, filing, and other administrative costs.[76] (In comparison, indirect costs include lost profits, lost sales, higher costs of credit, and lost opportunity costs.[77]) Most empirical studies compare direct costs to either firm value at filing, book value of assets at filing, or total distributions.

Empirical studies of the costs of bankruptcy reorganization conclude that the average direct costs of a traditional bankruptcy reorganization cases range from approximately 3 to 6 percent of firm value,[78] 17 to 36 percent of the book value of assets at filing,[79] and up to 26 percent of total distributions.[80]

Empirical studies show that the direct costs of out-of-court business restructurings and pre-packaged bankruptcy cases are lower than the costs of traditional bankruptcy reorganization cases.[81] The direct costs of business bankruptcy liquidation tend to be higher than the costs of reorganization, at least when measured as a percentage of asset values or total distributions.[82]

2. Does the size of the case (as determined by some standard criterion such as assets, business operation, or debt) affect the cost?

Several studies consider whether reorganization cases reveal a scale effect (i.e., economy of scale). In other words, do larger entities have lower average direct restructuring costs, as a percentage of value, assets, or distributions, than smaller entities? The results are not conclusive because they appear to conflict.

A national sampling of chapter 11 cases shows no scale effect.[83] A comparison of other direct cost studies (to the extent possible), however, seems to establish a general scale effect in which the very largest cases have lower direct costs as a percentage of firm value, asset value, or distributions and the smallest cases have higher direct costs as a percentage of firm value, asset value, or distributions.[84] The effect is less apparent in narrower studies.

The studies are somewhat difficult to compare because some consider Bankruptcy Act cases whereas others consider Bankruptcy Code cases, some consider very large publicly traded entities whereas others consider a broad spectrum of entities, and some consider reorganizing cases whereas others consider liquidating cases or a mix of liquidating and reorganizing cases.

3. Does the size of the case (as determined by some standard criterion such as assets, business operations, or debt) affect the time in bankruptcy?

4. Does the amount of time in bankruptcy affect the cost of bankruptcy?

[Note: Topics 3 & 4 are combined because of significant overlap in data and commentary concerning the inter-relationship among size, time, and cost.]

Studies show that businesses spend the following average number of months in reorganization under the Bankruptcy Code and the former Bankruptcy Act:[85]

	Bankruptcy Code Cases	Average Median
Altman 1993[86] 284 non-railroad cases	21	17
Bermant & Flynn 1998[87]	14	
Ernst & Young[88]	15.4-31.4	
Flynn 1989[89]	24.6	21.8
Franks & Touros 1989[90] 1970-1983 30 publicly traded firms including railroads, which took the longest Code and Act cases	3.67yr (44mo)	
Gilson 1990[91]	20.4	18

Hotchkiss 1995[92] 1096 public company cases filed between 1979 and 1990	18	16.2
	Bankruptcy Act Cases	Average Median
Jensen-Conklin 1992[93] 260 cases filed in SDNY between 1980 and 1989	22.04	
Kerkman 1987[94]	12.5	
Lawless & Ferris 2000[95] National sample of – cases	14.5	13
LoPucki 1991[96]	17.5	
LoPucki 1983[97]	10.4	
Altman 1993[98] 90 non-railroad cases	27	20
Ang 1982[99] 86 random cases filed in Oklahoma closed between 1963 and 1978	14	
Warner 1977[100] 11 railroad cases filed between 1933 and 1955	12.5yr 150m	13yr 156m

Most studies and commentators agree that the time in reorganization under the Bankruptcy Code is shorter, in general, that the time in reorganization under the Bankruptcy Act. Some data, however, suggest that chapter 11 has decreased the time and cost of reorganization for the largest firms but increased the time and expense of reorganization or liquidation for smaller firms.[101] Other data suggest that there is little relationship between time in bankruptcy and the size of the case except that the very largest cases take longer to confirm and the very smallest take shorter to confirm.[102]

Several studies find that the very largest cases have far higher confirmation rates than the smallest cases.[103] One study, however, suggests that large firms that reorganize quickly also have high re-filing rates.

Other studies suggest that the nature of the debt, rather than the size of the case, per se, is the primary determinant of time and cost of bankruptcy (*see infra* Question 5a).

5. Do identifiable factors other than the size of the case affect the time and cost of chapter 11? Factors to consider might include:

5a. type of assets and debt

The nature of the debt may be as important or more important than the amount of the debt, value of the assets or, perhaps, the size of the case, in determining the time and cost of reorganization, although it is a factor over which bankruptcy legislation has no control. Specifically, debtors with relatively more institutional debt held by a few, larger creditors and relatively less diverse trade and tort debt are reorganized faster and cheaper than debtors with relatively more diverse trade and tort debt held by a large number of small creditors.[104]

One study found that out-of-court restructuring is more likely to be successful if the firm's assets are intangible, and the firm owes relatively more debt to banks, and owes fewer lenders. Out-of-court restructuring is less likely to succeed if the firm has multiple, distinct classes of outstanding debt.[105] In the latter case, holdouts are more likely. If out-of-court restructuring fails, a traditional and typically more expensive chapter 11 filing may be necessary to address the holdout problem.[106] Once in chapter 11, these same complexities may increase costs.

Similarly, one study found that the ratio of secured to unsecured debt affects time in bankruptcy: "[A]s the size of secured claims increased, chapter 11 costs decreased. Conversely, as the size of an unsecured claim increased, chapter 11 costs increased. These results support the other findings that secured debt lowers chapter 11 costs while unsecured debt increases them."[107]

Both of these studies suggest that funded, institutional (typically secured) debt, held by a small number of sophisticated holders, is easier, faster, and cheaper to restructure than trade, tort, and other typically unsecured debt held by diverse, small, and unsophisticated holders.[108] This finding likely is intuitive to experienced bankruptcy practitioners.

Several studies found that cases with higher asset and debt levels take slightly longer to confirm.[109]

Taking these studies together, it would seem that (i) a debtor with primarily institutional debt should be able to reorganize faster than a comparably-sized debtor (in terms of assets and debts) with multiple classes of diverse, non-institutional, unsecured debt held by a large number of creditors, and (ii) a larger debtor (in terms of assets and debts) would take longer to reorganize than a smaller debtor that has a similar ratio of institutional to non-institutional debt.

5b. amount of unencumbered assets

No studies directly consider whether reorganization is faster or cheaper for entities with varying amounts of unencumbered assets.

5c. existence, nature, and amount of secured debt

A national sampling of chapter 11 cases found a strong, negative relationship between secured debt and bankruptcy costs. Specifically, the higher the ratio of secured debt to unsecured debt, the lower the attorneys' fees as a percentage of total distributions and the lower the total costs as a percentage of total distributions. The study found a moderate, negative relationship between secured debt and reduced bankruptcy costs. Specifically, the higher the average size of the secured claim, the lower the attorneys' fees as a percentage of total distributions and the lower the total costs as a percentage of total distributions.[110] The authors concluded that "as the size of secured claims increased, chapter 11 costs decreased. Conversely, as the size of an unsecured claim increased, chapter 11 costs increased. These results support the other findings that secured debt lowers chapter 11 costs while unsecured debt increases them."[111] This finding appears to be consistent with other studies that have found that institutional debt (typically secured) can be restructured more quickly (and, therefore, typically more cheaply) than diverse, unsecured debt.

Conversely, the study found a strong, positive relationship between secured debt and the effect of bankruptcy costs on non-secured creditors. Specifically, the higher the ratio of secured debt to unsecured debt, the higher the attorneys' fees as a percentage of non-secured distributions and the higher the total costs as a percentage of non-secured distributions. The authors concluded that: "secured debt lowers overall chapter 11 costs and that, as compared to secured creditors, unsecured creditors bear a disproportionate share of these costs."[112] "Thus, it appears that secured creditors are able to shift costs to creditors not holding collateral. Although the effect is not as great in magnitude as secured debt's lowering of overall chapter 11 costs, it does exist."[113]

5d. capital structure

Management experts examine the costs of bankruptcy reorganization to determine whether anticipation of those costs may cause business entities to modify their capital structure.[114] There are, however, no studies that comprehensively consider whether the capital structure with which an entity enters chapter 11 has any effect on the entity's ability to reorganize or the time and cost of reorganization.[115]

Some insights concerning the effect of some aspects of capital structure can be gleaned from existing studies. For example, one study of pre-packaged chapter 11 filings found no statistically significant difference in the (i) relative time that LBO and non-LBO firms spent in chapter 11 or negotiating before filing chapter 11, (ii) relative frequency with which LBO and non-LBO firms filed pre-voted versus post-voted cases or violated absolute priority, or (iii) percentage of direct costs, or total firm recovery rates for LBO versus non-LBO firms.[116] The study also concluded (based upon a review of other studies) that the tax consequences of debt forgiveness do not explain the choice between pre-packaged chapter 11 and out-of-court restructuring.[117]

5e. nature of business

In a national sample of business bankruptcy filings,[118] Professors Warren and Westbrook found:

Business	% of business filings under all chapters	% of chapter 11 filings
Retail / wholesale	38.2	
Real estate	17.8	29
Construction	18.3	
Professionals	9	
Manufacturing	6	11
Transportation	5.7	
Farming	4	
Railroad	<1	
Stockbroker	<1	
Commodity broker.	<1	

Studies examining a single industry or comparing different industries in reorganization suggest that the cost of reorganization, as a percentage of assets or firm value, is lower for the largest debtors and higher for the smallest debtors. In other words, the time and cost is more a function of the size of the business than the nature of the industry. These studies focused on both liquidating[119] and reorganizing debtors.[120] Studies examining reorganizing debtors and comparing very large public companies to small companies in the same industry might be useful.

5f. form of business

No studies directly examine the effect, if any, that the business form might have on an entity's prospects for reorganization or the time and cost of reorganization.[121]

5g. whether the business is publicly or privately held

There are no empirical studies that expressly compare public and private companies in terms of time and cost of reorganization. Several scholars have studied publicly held entities.[122] To the extent these studies examine the very largest cases, the distinctions discussed above between very large cases and smaller cases apply.

Professors Warren and Westbrook, in their recent study of businesses in bankruptcy, found that publicly held companies in chapter 11 accounted for only .0056% of all chapter 11 filings in 1994 and only .0062% of all of the business cases in the sample (under all chapters). The economic impact of public companies filing chapter 11 is, however, quite significant because of the large number of people they employ and the substantial amounts of assets and debt involved.[123]

A study by Professors LoPucki and Whitford found that large, publicly held companies achieve mixed results in chapter 11, that many large, publicly held companies emerge from chapter 11 with high debt-to-equity ratios, and that the rate of re-filing is high. The study suggests that a chief characteristic of chapter 11 is variety — no "typical" pattern emerged in chapter 11 cases involving large, publicly held companies.[124]

5h. other particular characteristics of the business

No studies reveal any other particular characteristics of businesses (other than as listed above) that appear to have a significant impact on the cost and time of chapter 11. There may be characteristics that have not been studied.

5i. reasons for filing

No empirical studies directly correlate the reasons for filing with the time and cost of chapter 11.[125]

5j. time spent negotiating before filing

There are several studies that compare the time spent negotiating before filing a traditional or pre-packaged chapter 11 case to the time spent negotiating an out-of-court restructuring. They show, generally, that out-of-court restructuring is faster and cheaper than chapter 11 and that pre-packaged chapter 11 filings are faster and cheaper than traditional chapter 11 filings but slower and more expensive than out-of-court restructuring.

A comparison of the empirical studies[126] shows:

Average time negotiating before filing:	
pre-voted pre-packaged cases	20 months
post-voted pre-packaged cases	14.9 months
cumulative (Tashijian)	18.3 months
traditional chapter 11 (Gilson)	8.1 months
Average time in chapter 11 after filing:	
pre-voted pre-packaged cases	1.9 months
post-voted pre-packaged cases	6 months
traditional chapter 11 (Gilson)	20.4 months
traditional chapter 11 (Weiss)	30 months
traditional chapter 11[(other studies)	10.4 to 24 months
Average total time from announcement of distress until resolution, including negotiating and chapter 11 or out-of-court:	
pre-voted pre-packaged cases	21.9 months
post-voted pre-packaged cases	20.9 months
out-of-court restructuring (Gilson)	15.4 months
traditional chapter 11 (Weiss)	28.5 months

5k. venue

Under current law, a business debtor may file a chapter 11 case in the district in which (a) for 180 days before the filing, the debtor had its (i) domicile (i.e., state of incorporation), (ii) principal place of business in the United States, or (iii) principal assets in the United States, or (b) there is pending a chapter 11 case of an affiliate, general partner or partnership.[127]

Bankruptcy commentators agree that the time and costs of business bankruptcy appear to vary from district to district, but they disagree concerning the effect that the choice of venue provision has on the time and cost of a chapter 11 case.[128]

Supporters of the current venue provisions argue that freedom to choose among venues decreases the cost and time of chapter 11 by allowing debtors to file in courts with a reputation for expeditious resolution of cases, particularly pre-packaged chapter 11 cases (specifically, Delaware), or with the type of expertise in complex commercial law that is essential for large debtors (specifically, the Southern District of New York).[129]

Critics argue that debtors employ the venue choice provisions to select a court that has a reputation either for being debtor-oriented or for liberally allowing attorney fees.[130] Some argue that the processes these courts follow may increase the cost and time of chapter 11.[131] Others contend that those courts that attract filings by resolving chapter 11 cases quickly (typically through pre-packaged plans) employ debtor-oriented procedures that result in re-filing rates that are substantially higher than re-filing rates in other districts.[132]

Not surprisingly, venue has been the subject of much scholarly and practical commentary,[133] and of several reform proposals.[134] For SABRE's purposes, the controversy and lack of consensus over venue issues renders the topic too uncertain to warrant major reform in the context of this Report.

6. Do any identifiable, substantive or procedural aspects of chapter 11 routinely affect the time and cost of chapter 11? Aspects to consider might include:

6a. debtor exclusivity to file a plan

Calls for limits on the debtor's exclusivity and extensions of exclusivity have reached a near crescendo.[135] Yet, empirical data on the actual effects of debtor exclusivity and extensions of exclusivity are scanty, at best. There is no doubt that the longer an entity spends in bankruptcy, the higher the cost.[136] Some commentators argue, and some data suggest, that excessive debtor control, as manifested in extensions of exclusivity, is a significant factor that causes longer chapter 11 cases and frequent violations of absolute priority.[137] Other data, however, suggest that, to the extent these are legitimate concerns, they arise not from exclusivity, per se, but from factors such as inadequate creditor involvement that tip the balance of control in favor of the debtor.[138] Indeed, some bankruptcy experts suggest that extensions of exclusivity enhance reorganization.[139]

6b. routine administrative matters (such as first day orders, debtor in possession financing, employment indemnification)

Studies do not reveal any particular delay or increased cost arising from routine administrative matters.[140] Several commentators, however, primarily including bankruptcy judges, have suggested that improved judicial case management procedures can reduce the time and cost of chapter 11.[141] SABRE intends to continue studying this issue.

6c. cramdown, absolute priority, and new value disputes

Many studies and commentary conclude that there are frequent violations of the absolute priority rule under the current Bankruptcy Code,[142] although at least one study finds that these violations are nominal in amount.[143]

No studies expressly consider whether litigation over cramdown, absolute priority, and new value issues increases the time or cost of chapter 11. Commentators assume, however, that absolute priority is often violated because creditors choose to allow equity to retain some value in order to avoid the cost and delay of litigation over whether equity is entitled to any value.[144]

6d. secured creditor litigation (such as automatic stay, cash collateral, financing)

Although commentators argue that automatic stay, cash collateral and adequate protection litigation increases the cost and time of chapter 11, there are no empirical studies of this issue and few suggestions for improvement, other than to encourage negotiation and to enforce pre-petition stay waivers.[145]

6e. other litigation

One empirical study found that claim litigation did not affect chapter 11 bankruptcy costs.[146]

Based upon practical experience rather than empirical data, bankruptcy experts have suggested that litigation arising from open legal questions, vague or ill-defined standards, and judicial discretion increases cost and delay in chapter 11 cases.[147] SABRE intends to study this issue further.

6f. level of participation and involvement of the creditors' committee, including the effect on litigation

The 1978 Bankruptcy Code fundamentally altered pre-Code reorganization practice by reducing the need for judicial intervention and implementing a private bargaining system in which the parties' agreement to the terms of the plan, supplemented by a few, critical, minimum treatment standards, largely governs the reorganization process.[148] The official creditors' committee is a critical component of this structure. Under the Bankruptcy Code, the committee is designed to counterbalance the power conferred on the debtor in possession under the Bankruptcy Code (including through the debtor in possession and exclusivity provisions), to consolidate creditors' multiple voices into one strong bargaining force, and to ensure adequate creditor representation.[149]

The Bankruptcy Code contemplated that active and representative committees of creditors would monitor the debtor and negotiate treatment terms on behalf of the committees' constituencies.[150]

Studies show that the idealized vision of self-monitoring chapter 11 cases in which active, yet restrained, committees serve an as equal counter-balance to the debtor has not been realized. In practice, committees frequently play an insignificant role or non-existent role in small chapter 11 cases because committees often are not appointed or do not operate effectively.[151] The inactivity of committees may create an imbalance of power in favor of the debtor.

Other bankruptcy experts have noted that, in large chapter 11 cases, committees may increase costs and delay, for a variety of reasons.[152]

SABRE intends to continue studying the role of creditors' committees and the absence of creditors' committees in many cases.[153]

6g. number and level of activity of other committees, including the effect on litigation

Several bankruptcy experts have argued that the existence of multiple committees unnecessarily increases cost and delay.[154] At least one study has concluded that the existence of equity committees may increase litigation or the threat of litigation and may lead to violations of the absolute priority rule in favor of equity holders and to the detriment of unsecured creditors in large, public company chapter 11 cases.[155] SABRE intends to continue studying these issues.

7. Does increased time and increased cost lead to a more feasible plan?

8. Does increased time and increased cost lead to a plan that protects the interests of a larger number of constituencies, that better protects those constituencies, or that provides higher distributions?

9. Does the time spent in bankruptcy or the cost of bankruptcy affect (positively or adversely) the treatment of shareholders or unsecured creditors?

[Note: Questions 7, 8 & 9 are considered together because of a significant overlap in the data and commentary.]

There is some empirical evidence that the judicial districts (Delaware and the Southern District of New York) that have the fastest and highest confirmation rates, at least for very large debtors, also have the highest re-filing rates. No empirical study expressly shows the contra-positive, however; i.e., that longer and more costly cases lead to the confirmation of more feasible plans. Moreover, this study suggests that the quick confirmation of plans that may not be feasible arises not from expedition, per se, but from debtor-oriented judicial practices that attract debtors to those districts.[156] Other studies have found that particular characteristics of the debtor tended to increase the time in chapter 11, but found no direct link between time in chapter 11 and plan feasiblity.[157] Commentary also suggests that the absence of a hearty creditor voice may contribute to non-feasible plans.[158] Indeed, several commentators have proposed to reduce this problem by requiring an early determination of viability.[159]

Similarly, data and commentary find that violations of absolute priority in favor of equity holders occur in many cases, and that inadequate creditor leverage contributes to such violations.[160] Some commentary suggests that such violations may be more prevalent in faster, pre-packaged chapter 11 cases.[161]

The lesson of these data and commentary is that costs and delay should be reduced without creating an imbalance of leverage in favor of the debtor (or any other party).[162]

10. Does the size of the case affect (positively or adversely) the treatment of shareholders or unsecured creditors?

The limited empirical data that is available on this topic suggests that that various factors other than case size, per se, may affect the allocation of distributions.[163] Similarly, although empirical studies find violations of absolute priority, there is no data expressly linking such violations to the size of the case.[164]

11. Which constituencies bear the costs of the bankruptcy case?

Most studies and commentary agree that secured creditors' contractual rights are generally upheld and that unsecured creditors bear the direct (as distinguished from indirect) costs of the restructuring.[165] Some argue that equity holders also bear the costs.[166] Because voluntary creditors and equity holders understand their place in the priority scheme, it is not generally considered to be "unfair" that they bear these costs. Charges of unfairness arise when equity receives a distribution in violation of absolute priority, particularly when involuntary unsecured creditors remain unpaid.[167]

12. Does the time spent in bankruptcy or the cost of bankruptcy affect the allocation of bankruptcy costs among the parties?

13. Does the size of the case affect the allocation of bankruptcy costs among the parties?

No empirical studies directly address Questions 12 or 13. One study did find, however, that higher levels of secured debt decreased overall costs but increased the degree to which unsecured creditors bore those costs.[168]

14. How do the costs of business reorganization compare (higher or lower than) to the costs of business reorganization out of bankruptcy?

Empirical studies find that the costs of a traditional chapter 11 reorganization case are generally higher than the costs of a prepackaged chapter 11 case or an out-of court restructuring.

One study sought to identify incentives for financially distressed firms to restructure outside of chapter 11.[169] Cost was a significant factor. The study found that chapter 11 is more costly because assets are more likely to be sold in chapter 11 to pay debt, which reduces going concern value, than in an out of court restructuring.[170]

The study also identified other, critical factors that affected the determination whether to restructure in or out of bankruptcy. An out-of-court restructuring would be possible, it concluded, only if the parties could agree on how to share the cost savings. It would not be possible if individual creditors held out for better treatment under chapter 11.[171] Holdouts are more likely, and an out-of-court restructuring is less likely, when there are more creditors, when the firm's capital structure is more complex with greater variety in seniority, security, etc. The holdout problem is greater with publicly traded bonds. Out-of-court restructuring is harder when relatively more debt is owed to trade creditors because trade debt is heterogeneous, there are a large number of holders, and the holders tend to be acrimonious and unsophisticated. The same reasoning applies to contingent creditors, such as product liability claimants. Bank debt tends to be easier to restructure. Holdouts are less common and out-of-court restructuring in easier when the firm's market value is high in relation to the replacement cost of the assets. Out-of-court restructuring is more likely to be successful if the firm's assets are intangible, and the firm owes relatively more debt to banks, and owes fewer lenders. Firms that restructure privately have higher market value/replacement cost of assets ratios; relatively more bank debt. These firms find bankruptcy more expensive, are less prone to hold-out creditors, are able to negotiate with fewer creditors and more sophisticated creditors, and have fewer types of debt to renegotiate. Firms that restructure out-of-court are generally larger (measured by book value of assets, number of employees and stockholders). Those that are successful out-of-court and those that file bankruptcy are similar in terms of overall leverage (total assets to total liabilities or long term debt to total assets) and mean stock price performance. Out-of-court restructuring is less likely to succeed if the firm has multiple, distinct classes of outstanding debt.[172]

A study (Tashijian) of pre-packaged chapter 11 cases found:

(a) average direct costs of restructuring as a percentage of book value of assets:

pre-voted pre-packaged cases: 1.65
post-voted pre-packaged cases: 2.31
all pre-packaged cases: 1.85
traditional chapter 11 (Weiss): 2.8
out-of-court restructuring (Gilson): .65[173]

(b) average time negotiating before filing:

pre-voted pre-packaged cases: 20 months
post-voted pre-packaged cases: 14.9 months
cumulative: 18.3 months
traditional chapter 11 (Gilson): 8.1 months

(c) average time in chapter 11 after filing:

pre-voted pre-packaged cases: 1.9 months
post-voted pre-packaged cases: 6 months
traditional chapter 11 (Gilson): 20.4 months
traditional chapter 11 (Weiss): 30 months[174]

(d) average total time from announcement of distress until resolution, including negotiating and chapter 11 or out-of-court:

pre-voted pre-packaged cases: 21.9 months
post-voted pre-packaged cases: 20.9 months
out-of-court restructuring (Gilson): 15.4 months
traditional chapter 11 (Weiss): 28.5 months[175]

(e) average % recovery rates:

all claims:
pre-voted pre-packaged cases: 75.1
post-voted pre-packaged cases: 69.2
all pre-packaged cases: 72.9
traditional chapter 11 (Franks & Torous): 50.9
out-of-court restructuring (Franks & Torous): 80.1

unclassified claims:
pre-voted pre-packaged cases: 100
post-voted pre-packaged cases: 100
all pre-packaged cases: 100
traditional chapter 11: na
out-of-court restructuring: na

priority claims:
pre-voted pre-packaged cases: 100
post-voted pre-packaged cases: 100
all pre-packaged cases: 100
traditional chapter 11: na
out-of-court restructuring: na

secured claims:

pre-voted pre-packaged cases: 100.9
post-voted pre-packaged cases: 95.8
all pre-packaged cases: 99.3
traditional chapter 11: na
out-of-court restructuring: na

unsecured claims:

pre-voted pre-packaged cases: 65.3
post-voted pre-packaged cases: 61.9
all pre-packaged cases: 64.0
traditional chapter 11: na
out-of-court restructuring: na

preferred stock:

pre-voted pre-packaged cases: 19.1
post-voted pre-packaged cases: 4.1
all pre-packaged cases: 15.9
traditional chapter 11 : na
out-of-court restructuring: na[176]

(f) violations of absolute priority:

unclassified claims:

pre-voted pre-packaged cases: 0
post-voted pre-packaged cases: 0
all pre-packaged cases: 0

priority claims:

pre-voted pre-packaged cases: 0
post-voted pre-packaged cases: 0
all pre-packaged cases: 0

secured claims:

pre-voted pre-packaged cases: -.91
post-voted pre-packaged cases: +.09

all pre-packaged cases: -.61 (i.e. they receive on average .61 % less than they would if absolute priority were strictly upheld)

traditional chapter 11 cases (Franks & Torous): -2.63
out-of-court restructuring (Franks & Torous): -3.54

unsecured claims:

pre-voted pre-packaged cases: -1.91
post-voted pre-packaged cases: -.57
all pre-packaged cases: -1.42
traditional chapter 11 cases (Franks & Torous): -.5
out-of-court restructuring (Franks & Torous): -4.39

preferred stock:

pre-voted pre-packaged cases: .47
post-voted pre-packaged cases: 1.44
all pre-packaged cases: .69

common stock:

pre-voted pre-packaged cases: 2.59
post-voted pre-packaged cases: .2
all pre-packaged cases: 1.71

traditional chapter 11 cases (Franks & Torous): 2.28
traditional chapter 11 cases (Eberhart): 7.57
traditional chapter 11 cases (Betker): 2.86
out-of-court restructuring (Franks & Torous): 9.51[177]

The study also concluded that the availability of the pre-packaged procedure seemed to address the holdout problem encountered in out-of-court restructurings because, in some cases, creditors were more willing to accept a pre-packaged filing on the same terms as an out-of-court restructuring. The principal difference was that all other creditors would also be bound in the pre-packaged filing, but not in the out-of-court restructuring.[178]

In summary, the cost of restructuring in chapter 11 probably exceeds the cost of restructuring out-of-chapter 11. Simple comparison tells only a tiny piece of the story, however. Not all business can or should reorganize out-of-court. Characteristics of businesses that can restructure out-of-court, as catalogued in these studies, include relatively higher percentages of funded institutional debt and lower levels of diverse, multi-creditor, trade and tort debt; fewer possibilities for hold-out creditors; more sophisticated creditors; higher asset levels; and higher solvency levels; etc. Characteristics of businesses that cannot achieve an out-of-court restructuring but may be successful in a pre-packaged chapter 11 include relatively low numbers of creditors, and relatively few different types of debt. The pre-packaged procedure often eliminates the hold-out problem, especially by creditors holding bond debt.

Characteristics of businesses that have little alternative but to file chapter 11 to reorganize include large numbers of different types of creditors, relatively less institutional debt, many prospects for hold-outs, etc.

15. Select Statistical Data

(from the Executive Office of the US Trustee / Administrative Office of the US Courts)

Total bankruptcy filings:
Rose from nearly 680,000 in 1989 to 971,000 in 1992; then dropped to between 832,000 and 926,000 from 1993 to 1995. 1996 filings were 1.17 million, 1997 filings were 1.4 million, 1998 filings were 1.42 million. In 1999 filings dropped to 1.3 million, still significantly higher than the 1989-1995 period.

Total chapter 11 filings:
Chapter 11 filings for the 1989-1999 period peaked in 1991 at 23,989. Between 1992 and 1998, filings steadily dropped from 22,634 in 1992 to 8,385 in 1998, with each intervening year showing fewer filings than the prior year. 1999 showed an increase to 9,315, but still far fewer filings (by at least one-half) than the 1989-1993 period. Filings totaled 18,281 in 1989, and 20,783 in 1990.

Estimated confirmation rates for chapter 11 cases:
Estimated confirmation rates between 1979/80 and 1985 ranged from 13.3% to 18.3%. Rates rose in 1986 to 22.4%. The 1979/80 to 1986 rates are based upon information contained in the AOUSC database. No data is available for 1987 and 1988. Confirmation rates for cases filed between 1989 and 1998 ranged from 26% to 31.8%. The rates for 1989 to 1994 ranged from 26% to 28.3%; the rates for 1995 to 1997 ranged from 29.7% to 31.8%. The 1989 to 1997 rates are based upon EOUST database.

Outcomes in chapter 11 cases:
For cases filed between 1/89 and 12/97, 35.59% were dismissed, 34.27% were converted, 27.33% were confirmed, 1.67% were still open as of 11/99, and 1.15% were closed with the disposition unknown. During this period, the percentage of cases converted has fallen steadily while the percentage of cases dismissed has risen slightly.

Median Time to Disposition:
According to the EOUST database, the median time to disposition has generally fallen from 1989 to 1999. Data is as of 11/99. The time to confirmation fell from 593 days in 1989 to 422 in 1998, and then increased slightly to 468 in 1999. The time to conversion fell from 370 days in 1989 to 254 days in 1999. The time to dismissal fell from 370 days in 1989 to 206 days in 1999.

Chapter 11 filings by individuals:
Chapter 11 filings by individuals rose from 28.2% of chapter 11 filings in 1989 to 36.1% of chapter 11 filings in 1994, and then fell dramatically. Between 1995 and 1998 chapter 11 filings by individuals ranged from 22.1% to 22.5% of chapter 11 filings.

AOUSC Data for the period March 31, 1999 to March 31, 2000:

Overall filings dropped by 8% from 1,419,199 to 1,301,205
Business filings fell from 41,128 to 38,109
Consumer filings fell from 1,378,071 to 1,263,096
Chapter 11 filings ROSE from 8,010 to 10,071 (25% increase)

AOUSC Data for FY 2000, September 30, 1999 to September 30, 2000:
Business filings fell 6.6% to 36,065
Consumer filings fell 6.8% to 1,226,037
Chapter 7 filings, which continue to lead all filings, fell 9.2% to 87,805
Chapter 13 filings, which constitute the second largest number of filings, fell 1.1%, to 380,880
Chapter 11 filings ROSE 9.9% from 8,982 in 1999 to 9,835 in 2000
Bankruptcy filings increased 72% between 1994 and 1998
The largest number of filings during FY2000 was in the Central District of California, with 85,728. The second largest was in the Northern District of Illinois, with 43,068.

ENDNOTES AVAILABLE ON REQUEST – CONTACT PROFESSOR GEBBIA-PINETTI: gebbia@hawaii.edu, 808-956-6543, fax 808-956-5569

(Footnotes)

[1] SABRE transmitted the Report to the -- members of the Business Bankruptcy Committee Council and approximately 75 other Consultants. This Report lists only the Consultants who responded.

[2] The members of the Business Bankruptcy Committee Council are listed at Appendix A.

[3] SABRE's proposals do not directly address questions concerning the efficacy of chapter 11, including topics such as confirmation rates, re-filing rates, or differences in chapter 11 statistics among judicial districts, although SABRE did consider how its proposals might affect these topics. SABRE may directly consider certain of these topics in a subsequent study and report.

[4] *See* NATIONAL BANKRUPTCY REVIEW COMMISSION, BANKRUPTCY: THE NEXT TWENTY YEARS 451 (1997).

(Endnotes)

[1] States will be bound to the same extent they are bound by the automatic stay. *See*, *e.g*., State of Georgia Department of Revenue v. Burke (*In re* Burke), 146 F.3d 1313, 1319-20 (11th Cir. 1998) (finding that the state's attempt to collect taxes after debtors' discharge violated the automatic stay); In re Sun Healthcare Group, Inc., 245 B.R. 779, 788 (Bankr. D. Del. 2000) ("The Constitution clearly states that federal law has supremacy. . . . This clearly includes bankruptcy law."); Kidd v. Driver Control Section Department of Finance and Administration (*In re* Kidd), 227 B.R. 161, 162 (Bankr. E.D. Ark 1998) ("The state and its agencies are bound by federal law, just as any other creditor. The state must respect and comply with the Bankruptcy Code, including provisions regarding the automatic stay."); International Heritage, Inc., v. Gilbert (*In re* International Heritage, Inc.), 239 B.R. 306, 310 (Bankr. E.D.N.C. 1999) ("the automatic stay protects the estate assets from the actions of all entities, including states).
But cf. 11 U.S.C. § 362(b)(4) (19--) (excluding certain governmental police and regulatory power enforcement actions from the scope of the automatic stay).

[2] Transfers made during the federal workout proceeding in exchange for value received prior to the federal workout proceeding are avoidable in a subsequent bankruptcy case to the extent provided under Bankruptcy Code sections 544, 545, 547, 548, or 553. See 11 U.S.C. §§ 544, 545, 547, 548, 553 (19--). In contrast, the Bankruptcy Code allows the court to avoid post-petition transfers made during the gap period in an involuntary case in exchange for value received before the case was commenced. *See* 11 U.S.C. §§ 549(a), (b) (19--) (providing for the avoidance of post-petition transfers but permitting such transfers made during the gap period if the estate received value after the case was commenced).

A notice, similar to a lis pendens, will be filed in the Bankruptcy Court so that entities that choose to deal with the debtor during the federal workout proceeding will be aware of the pendency of the proceeding and will understand the risks of dealing with the debtor.

After the federal workout proceeding has terminated, the court will have continuing jurisdiction to avoid transfers made and obligations incurred in violation of the federal workout proceeding stay (i.e., out of the ordinary course transfers and obligations).

[3] To obviate the need for disclosure and voting concerning stay extensions, the stay will be extended based upon these articulated standards rather than based upon super-majority creditor consent.

[4]

Certain foreign restructuring laws and the *Draft Proposed Framework for a Model Voluntary Cross Border Restructuring Statute* (on file with the Reporter) [hereinafter UNCITRAL Cross-Border Draft) (being considered by the U.S. Delegation to UNCITRAL's

International Insolvency Working Group) encourage out-of-court restructurings.
In France, for example, the Bankruptcy Law of 1985, 1985 Decree, and Bankruptcy Law of 1994 govern reorganization and liquidation proceedings. A separate law, the 1984 law relating to amicable settlements ("*loi relative a la prevention et au regelment amiable des difficultes des enterprises*"), provides an optional, judicially supervised process by which the debtor and its major creditors can attempt a non-bankruptcy workout. [NEED CITATIONS TO THE LAWS] *See generally* Henrot & Fatome, *Pre-Bankruptcy and Bankruptcy Processes in France* at 620-36; s*ee also* Koral & Sordino; *The New Bankruptcy Reorganization Law in France: Ten Years Later*; Lucheux & Sexer, European Corporate Lawyer, *Bankruptcy Law* at 37 (discussing the French Act of 10 June 1994, including the preventative procedures and enhanced creditor protections; noting that, as a preventative measure, the judge may appoint a "special (or ad hoc) agent" ("mandataires ad hoc") to resolve difficulties and a conciliator ("conciliateur") to mediate disputes; "The ad hoc mandate is a flexible, confidential and informal process which often precedes an agreed settlement, which is more formal but provides the participants with greater legal certainty." "The reform also introduces the temporary stay of action at the request of a conciliator." "This stay of action facilitates the negotiation of the agreement with the creditors. It prevents and stays enforcement measures and lawsuits against the debtor. The Presiding Judge's approval of the agreement will generally preclude any risk of liability on the part of the debtor or creditors."); Rouger, *Sept 1995 Lecture* (discussing the advantages of the French Act of 10 June 1994; the President of the Tribunal de Commerce de Paris notes that, before the 1994 law, there was only one case in which the president suspended a lawsuit to see if a conciliator could manage an out-of-court workout; the new law, however, allows the conciliator quickly to distinguish the delaying conciliation from the genuine search for an agreement); Eurotunnel articles (in French) (noting that, at the request of Eurotunnel, the President of the Tribunal of Commerce appointed two prominent people, Robert Badinter and Lord Wakeham, as "mandataires ad hoc" to mediate an accord among the parties (the banks and the 750,000 "actionaires"); one article describes one of them as a socialist, jurist, former president of the constitutional counsel, and man of the left from France (Badinter) and the other as a thatcherien, economist, and liberal (in US parlance, conservative, rightist) from Britain (Wakeham); their mission and strategy, it notes, are confidential).
Mexican bankruptcy law also provides an ad hoc workout process that permits the suspension of payments. *See generally* Kimberly Krawiec, *Corporate Debt Restructurings* (noting that the ad hoc nature of the out-of-court process often results in control by the banks, which creates problems for foreign creditors); Barrett, *Mexican Insolvency* (discussing the Mexican bankruptcy and suspension of payment laws, and comparing Mexican and US bankruptcy laws); Beckhan & Fernandez, *Cross-Border* (summarizing the Mexican bankruptcy and suspension of payment proceedings, and noting that the Mexican suspension of payment proceedings are expensive to administer and that expenses often consume the assets).

In Germany, where the law encourages out of court workouts, virtually all reorganizations occur out of court. *See* Kevin M. J. Kaiser, *European Bankruptcy Laws: Implications for Corporations Facing Finiancial Distress*, FIN. MGMT. Fall 1996, at 67 (finding that, as a result of poor reorgnization provisions in German bankrupcy law, banks often unilaterally take responsibility for organizing creditor/debtor negotiations, frequently hold equity stakes in the firms to which they lend, and are more willing to "rescue" ailing clients than banks in other countries; noting that only unsecured creditors are bound by the automatic stay and that secured and priority creditors may continue enforcement action; noting that, between 1985 and 1992, 60 percent of firms that entered composition proceedings successfully exited with the business intact; however, court compositions represented only 0.39% of all insolvency proceedings during this period); Narayanan Jayaraman Sanjiv Sabherwal, & Milind Shrikhande, *Do Country Specific Bankruptcy Codes Determine Long-Term Financial Performance? The Case of Metallgesellschaft AG and Columbia Gas System*, J. INT'L FIN. MGMT. & ACCT. (forthcoming) (cite page paren).

Unlike the proceedings contemplated by UNCTIRAL, the proposed federal workout stay would not provide a mechanism under which the debtor could bind dissenting creditors or a majority could bind the minority. Although all creditors are bound by the federal workout stay, individual creditors will be bound, in respect of treatment, only by the agreements they reach, individually, with the debtor. In contrast, under some UNCITRAL proposals and certain foreign proceedings, only certain types of entities or certain types of claims and interests (such as funded debt, bonds, and stock, but not trade debt, employee claims, or governmental claims) are eligible for the out-of-court workout process. [authority]

[5] In general, dissenters who are in the minority of a class are bound only if the majority of the class (in the requisite number and amount required by Bankruptcy Code section 1126) accepts the plan and the plan otherwise satisfies the requirements of the Bankruptcy Code. *See* 11 U.S.C. §§ 1126, 1129 (2000). Non-accepting classes are bound only if the "cramdown" requirements are satisfied. *See* 11 U.S.C. § 1129(b) (2000).

[6] Amendments would be required to 28 U.S.C. section 1334 (which grants the district courts jurisdiction over bankruptcy cases), 28 U.S.C. section 157 (which allows the district courts to refer bankruptcy cases to the bankruptcy courts), 28 U.S.C. sections 1408-10 and 1412 (which contain bankruptcy venue rules), and local district court orders (by which the district courts have referred all bankruptcy matters to the bankruptcy courts). *See* 28 U.S.C. §§ 157, 1334, 1408-10, 1412 (19--).

[7] *See, e.g.*, Edward I. Altman, *A Further Empirical Investigation of the Bankruptcy Cost Question*, 39 J. FIN. 1067, -- (1984) (defining direct costs to include legal, accounting, filing, and other administrative costs, and indirect costs to include lost profits, lost sales, higher cost of credit, and lost opportunity costs; noting that both companies that do fail and those that are expected to fail may incur indirect costs); Brian L. Betker, *The Administrative Costs of Debt Restructurings: Some Recent Evidence*, -- J. FIN MGMT. – (19--) (defining direct costs to include legal, accounting, and other professional fees and administrative costs of completig a debt

restructuring).

[8] *See* Elizabeth Tashjian, Ronald C. Lease & John J. McConnell, *Pre-Packs: An Empirical Analysis of Prepackaged Bankruptcies*, 40 J. Fin. Econ. 135, 136 (1996) (suggesting that an efficient reorganization is one that creates or preserves the greatest value net of all costs; noting that analysts are concerned with efficiency because inefficient reorganization processes may lead to inefficient allocation of capital or corporate resources; adding that factors such as time, direct costs, degree to which absolute priority is violated, and recovery rates by creditors are ways to observe efficiency indirectly).

[9] *See*, *e.g.*, Gordon Bermant, Arlene Jorgensen Hillestad & Aaron Kerry, Chapter 11 Venue Choice By Large Public Companies 39-40 (Federal Judicial Center, 1997) (concluding that the "academic consensus" is that pre-packaged cases cost more than out-of-court workouts but less than full chapter 11 cases); Conrad B. Duberstein, *Out-of-Court Workouts*, 1 Am. Bankr. Inst. L. Rev. 347, 347-48, 352-53 (1993) (arguing that the costs, delays and aggravations of a litigious chapter 11 can be avoided by an out-of-court workout; suggesting that the potential "slice-of-pie" available for the creditors is larger in an out-of-court workout than in chapter 11 because of the lower costs for all participants; noting that, in determining whether to proceed with an out-of-court workout or filing a chapter 11 petition, the debtor must consider the automatic stay, vulnerability to creditors' attacks during the workout, and whether or not it can obtain unanimous creditor approval and participation in the workout); Stuart C. Gilson & Larry H.P. Long, *Troubled Debt Restructurings: An Empirical Study of Private Reorganizations of Firms in Default*, 27 J. Fin. Econ. 315, 319 (1990) (noting that it is widely believed that the direct costs of chapter 11 are higher than the direct costs of private negotiation because the complexity and procedural demands of chapter 11 increase attorneys' fees (citing Stein); adding that chapter 11 may also increase indirect costs such as management time devoted to the restructuring.); Sol Stein, A Feast For Lawyers: Inside Chapter 11 – An Expose -- (1989) (--); notes – to – and accompanying text (summarizing studies of the costs of restructuring in and out of chapter 11).

[10] *See infra* notes -- -- -- and accompanying text, notes -- - -- and accompanying text (discussing empirical studies of the time and costs of restructuring in and out of chapter 11).

[11] *Id*.

[12] *See infra* notes -- - -- and accompanying text (discussing study reported at Tashjian, *supra* note 8, at –).

[13] *See* Gilson, *supra* note 9, at 318, 321-24 (reporting the results of a study of 169 publicly traded companies that experienced severe financial distress during 1978-1987; analyzing incentives for financially distressed firms to restructure outside of chapter 11; concluding that stockholders, management, and creditors fare better under an out-of-court restructuring than bankruptcy).

[14] *See*, *e.g.*, ...; *see also* Gilson, *supra* note 9, at 318 (citing economic factors that affect the choice between bankruptcy and-out-of court restructuring: "First, stockholders and creditors will collectively benefit from settling out of court when private negotiation generates lower costs than bankruptcy. Under the lower-cost alternative, the resulting value of the firm will be higher, and the firms' claims can be restructured on terms that leave each of the original claimholders better off. Claimholders' incentives to settle privately will increase with the size of the potential cost savings from recontracting outside of Chapter 11. Second, the lower-cost alternative will be adopted only if claimholders can agree on how to share the cost savings. Attempts to settle privately are more likely to fail when individual creditors have stronger incentives to hold out for more favorable treatment under the debt restructuring plan.").
The fastest and cheapest reorganization is not necessarily the most successful reorganization. *See infra* note 48.

[15] *See*, *e.g*., Tashjian, *supra* note 8, at --; Gilson, *supra* note 9, at --. It is impossible to determine how many workouts actually occur because private entities are not required to report workout efforts, successes or failures. (Certain public company workouts may be reportable, material events.) The number of workouts also depends in part on the breadth of the definition – which could include every forbearance, restructuring, and refinancing.

The bills introduced in Congress last session concerning consumer bankruptcy reform *require* pre-filing workout efforts, in certain cases. *See* H.B. 833, 106th Cong. §302 (1991) (requiring "credit counseling" as a condition to a bankruptcy filing); S. 945, 106th Cong. §301 (1999) (requiring that consumer debtors be advised of bankruptcy "alternatives," including by being given a list of credit counseling services); S. 3186, 106th Cong. §§111, 201 (2000) (requiring credit counseling for consumer debtors and encouraging alternative dispute resolution by permitting the reduction of the unsecured claim of a creditor who fails to negotiate in good faith for an alternative payment schedule proposed by a credit counseling agency).

[16] *See* Gilson, *supra* note 9, at 317 ("If bankruptcy is the alternative to private negotiation, then firms' incentives to settle with creditors out of court, and the settlement terms, will reflect the legal and institutional constraints of the bankruptcy process."); National Bankruptcy Review Commission, Bankruptcy: The Next Twenty Years 309 (October 20, 1997) (Report of the National Bankruptcy Review Commission, Prof. Elizabeth Warren, Reporter) [hereinafter, "NBRC Report"] ("Chapter 11 serves as a model for out-of-court restructuring. Parties negotiate in the shadow of Chapter 11, restructuring companies without taking them through a formal bankruptcy proceeding. . . . [A]ny changes to Chapter 11 will affect business workouts generally.").

[17] *See*, *e.g.*, Gilson, *supra* note 9, at 321-24, 332-33 (noting that an out-of-court restructuring will be achieved only if it is cheaper than the bankruptcy alternative and the stakeholders can agree on how to share the cost savings; concluding that "[a]ttempts to settle privately are more likely to fail when individual creditors have stronger incentives to hold out for more favorable treatment under the debt restructuring plan."); *id*. at 328 (finding that out-of-court restructuring is more likely to be successful if the firm's assets are intangible, and the firm owes relatively more debt to banks, and owes fewer lenders; out-of-court restructuring is less likely to succeed if the firm has multiple, distinct classes of outstanding debt); *id*. at 334-36 (concluding that firms that restructure privately have higher market value / replacement cost of assets ratios, have relatively more bank debt, find bankruptcy more expensive, are less prone to holdout creditors, are able to negotiate with fewer creditors and more sophisticated creditors, have fewer types of debt to renegotiate, and are generally larger (measured by book value of assets, number of employees and stockholders); firms that restructure out-of-court and that file bankruptcy are similar in terms of overall leverage (total assets to total liabilities or long term debt to total assets), and mean stock price performance); s*ee also id*. at 321-24, -- (discussing the holdout problem; concluding that a firm is more likely to have holdouts, and less likely to succeed out of bankruptcy, when there are more creditors, the firm's capital structure is more complex with greater variety in terms of seniority, security, etc., there are publicly traded bonds; out-of-court workouts are harder to achieve when there is more debt owed to trade creditors because trade debt is heterogeneous, there are a large number of holders, and the holders tend to be acrimonious and unsophisticated; the same reasoning applies to contingent creditors such as product liability suits; bank debt tends to be easier to restructure; holdouts are less common and out-of-court restructuring is easier when the firm's market value is high in relation to the replacement cost of the assets).
[insert other authorities]
The federal workout proceeding will not obviate characteristics of the business, capital structure, and debt that favor and inhibit out of court workouts. It may, however, foster out of court resolutions by giving the debtor and diverse creditors a period in which to focus their efforts on a negotiated solution, free of the fear that other creditors will enforce their claims.

[18] When a debtor files a bankruptcy case, the automatic stay prevents creditors from enforcing their claims. *See* 11 U.S.C. § 362(a) (19--). The Bankruptcy Code's voting and classification provisions allow the majority of a class to bind the dissenting minority. *See* 11 U.S.C. §§ 1123, 1126, 1129(a) (19--). The debtor, or other plan proponent, may bind dissenting classes through the cramdown provisions. *See* 11 U.S.C. §§1129(a), 1129(b) (19--). The automatic stay and ability to bind dissenters are two primary advantages of chapter 11 over out-of-court negotiations. *See*, *e.g.,* Gilson, *supra* note 9, at 319-20 (noting that the relative cost disadvantage of chapter 11 is offset by the automatic stay and the super-priority for new lenders). [insert others]

[19] [insert examples] [ny, cal, hi]

[20] [insert examples] [ny, cal, hi]

[21] England allows a similar pre-judgment injunction to prevent asset dissipation. *See* Supreme Court Act, 1981, c. 54, Pt. II, C. 002 § 37 (1991) (Eng.) (authorizing the High Court to order interlocutory or final or injunctions preventing a party from removing assets located within the jurisdiction, even when no judgment has been obtained). Section 37(3) provides:

> § 37 Powers of High Court with respect to injunctions and receivers.
>
> (3) The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.

Section 37(3) essentially codifies the result in Mareva Compania Naviera S.A. v. International Bulkcarriers S.A., 2 Lloyd's Rep. 509, 510 (1975) (issuing an injunction to protect a creditor before it obtained a judgment; reasoning "If it appears that the debt is due and owing—and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment—the Court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets."). For discussions of *Mareva* injunctions *see* Manuel Juan Dominguez*, Using Prejudgment Attachments in the European Community and the U.S*., 5 J. Transnat'l L. & Pol'y 41, 50-58 (1995); Howard Johnson*, Mareva Injunctions: Practice Makes Perfect*, Int'l Banking & Fin. L. (1994); Richard N. Ough & William Flenley, The Mareva Injunction and Anton Piller Order: Practice and Precedents (2d ed. 1993); Philip H. Pettit, *The Onward March of Mareva and Anton Piller Injunctions*, *reprinted in* Equity and Contemporary Legal Developments 793 (Heb. Univ. of Jerusalem 1992); Otto Sandrock, *Prejudgment Attachments: Securing International Loans or Other Claims for Money*, 21 Int'l Law. 1, 11-16 (1987).
Although similar forms of pre-judgment attachment exist under state statutes in the United States (*see*, *e.g.*, *supra* note 20), there is no federal statutory mechanism that permits pre-judgment attachment. The Supreme Court has declined to permit such an injunction in the absence of federal statutory authority. *See* Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 333 (1999) (concluding that federal courts' equity power does not extend to granting such an injunction; reasoning that "The debate concerning this formidable power over debtors should be conducted and resolved

where such issues belong in our democracy: in the Congress.").

[22] *See*, *e.g.*, Tashjian, *supra* note 8, at 153-55 (concluding that the availability of the pre-packaged procedure seemed to address the holdout problem encountered in out-of-court restructurings because, in some cases, creditors were more willing to accept a pre-packaged filing on the same terms as an out-of-court restructuring; noting the principal difference was that all other creditors would also be bound in the pre-packaged filing, but not in the out-of-court restructuring).

[23] For a summary of empirical studies of the direct costs of restructuring, see *infra* Part V.1.

[24] *See*, *e.g.*, Elizabeth Warren & Jay Lawrence Westbrook, *Financial Characteristics of Business in Bankruptcy*, 73 AM. BANKR. L.J. 499 (1999) (finding that most businesses cannot support the expense of the complex chapter 11 procedures and costs).

[25] *See* NATIONAL BANKRUPTCY CONFERENCE, REFORMING THE BANKRUPTCY CODE: FINAL REPORT, REVISED EDITION at 44 [hereinafter, NBC REVISED FINAL REPORT] (making recommendations to facilitate faster pre-packaged reorganizations); NBRC REPORT, *supra* note 16, at 451 ("The [Chapter 11] Working Group also developed recommendations that affirmatively would promote speed and efficiency within the current reorganization structure. Some recommendations, such as those to facilitate prepackaged bankruptcies and to authorize local mediation programs, should further these goals directly."); *id.* at 457, 589-98 (proposing changes to the standards for the pre-petition and post-petition solicitation of acceptances for a pre-packaged plan, to facilitate pre-packaged filings).

[26] [insert others]
[check Professor Gertner proposal in A. Pressman, Can Chapter 11 Be Put Back Together, Investment Dealer's Digest Apr 27, 1992 at 16]
JJ White, *Harvey's Silence* . . .
Bankruptcy experts have also recommended means of fostering negotiated resolution after a bankruptcy case has been filed. *Cf.* Martin J. Whitman, Stanley J. Garstka & Myron M. Sheinfeld, *A Rejoinder to "The Untenable Case for Chapter 11"*, 2 J. BANKR. L. & PRAC. 839, 860-63 (1993) (proposing changes to non-bankruptcy law, including changes in accounting principles, valuation, tax law, and marketability of securities, to make creditors more willing to accept payment other than in cash in order to enhance feasibility in chapter 11 [and facilitate out of court?]); Smith, *Possible New Procedures* at 547-48 (proposing a "self-effectuating discharge" under which the debtor will receive a discharge if it assigns its non-exempt assets for the benefit of creditors, provided that wage and priority claims are paid, unsecured creditors receive equal treatment, a simple majority of unsecured creditors accepts, a minimum percentage be paid to unsecured creditors, and all property except exempt property is transferred to the assignee; under this proposal, creditors presumably will receive more because the assets are transferred for their benefit before being dissipated and the costs of bankruptcy are avoided); Robert K. Rasmussen & David A. Skeel, Jr., *The Economic Analysis of Corporate Bankruptcy Law*, 3 AM. BANKR. INST. L. REV. 85, 110 (1995) (suggesting that a selective automatic stay be imposed on all small creditors but not on the debtor's large financing creditor in the bankruptcy cases of smaller, privately held corporations in order to give the lender and manager/owners an opportunity to restructure the debtor's major debt).

[27] *Cf. generally* Gerald K. Smith, *Pre-Filing Disclosures: Fairness to Creditors and Fraud and Criminal Implications of Nondisclosure of Financial Difficulty*, -- ANN. SURV. BANKR. L. 647 (1995?).

[28] Unlike an examiner, a facilitator does not conduct an investigation of the debtor or file a public report.

[29] The court might, instead, appoint an independent expert to make a recommendation concerning reorganization or liquidation. *See infra* Proposal 3.

[30] Under Chapter X, the trustee solicited suggestions or proposals in the form of a plan (Section 167(6)) and filed a plan (Section 169) (*see also* Rule 10-301). Notice was given of a hearing on the plan and others could file objections, amendments or plans (Id.). The court would approve (but not confirm) a plan or plans at the hearing if fair and equitable and feasible (Section 174). After approval, the plan or plans were sent out for vote along with the court's opinion and such information as the court deemed necessary or desirable (Section 175). The court would confirm an accepted plan if the applicable standards are satisfied (Section 221). The Chapter X Rules added a provision resolving what the judge does if more than one plan is accepted (Rule 10-307). [use proper citation form; check all cites]

Legislation implementing the plan facilitator proposal, or the court in each case, should specify whether the court shall consider and rule on each contested modification prior to the confirmation hearing or in the context of the confirmation hearing.

[31] *See* Peter S. Chantilis, Symposium, *Mediation U.S.A.*, 26 U. MEM. L. REV. 1031 (1996) (surveying court mediation programs within the United States); *AAA'S 1998 Case Filings Exceed 95,000*, DISP. RESOL. J. 5 May, 1999, at 5 (stating that the American Arbitrtaiton Association's case filings increased 21 percent during the period between 1997 and 1998); Richard C. Reuben, *The Lawyer Turns Peacemaker*, A.B.A. J., Aug. 1996, at 54 (noting the rise in mediation and probable future growth); Carol A. Wittenberg, Susan T. Mackenzie & Margaret L. Shaw, *Why Employment Disputes Mediation Is on the Rise*, 605 PLI/Lit 637, 637 (noting that Congress has

encouraged the use of mediation and arbitration in employment disputes, and that increasingly, federal district courts throughout the country are referring discrimination cases to mediation under judicially- initiated programs); Sharon Press, *Symposium*, 24 Fla. St. U. L. Rev. 903 (Summer 1997) (--); --, --,103 Harv. L. Rev. 1086 (1990) (--); Carrie Menkle-Meadow, 19 Fla. St. U. L. Rev. 1 (1991); Stephen McG. Bundy, 44 Hastings L. J. 1 (1992).

Mediation first became popular in labor disputes and family disputes, but has spread to other areas of civil dispute resolution. *See* Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 Ohio St. J. on Disp. Resol. 297, 309-24 (1996) (tracing modern ADR to the 1976 Pound Conference in St. Paul, Minnesota);

[32] [insert authority]

[33] In *In re R.H. Macy & Co*., 152 B.R. 869 (Bankr. S.D.N.Y. 1993), a large, complex chapter 11 case, Judge Burton R. Lifland appointed former Secretary of State, Cyrus Vance to mediator plan negotiation. Mr. Vance succeeded in mediating a plan that was confirmed. Although Mr. Vance filed a report concerning the ultimate settlement, the negotiation process remained confidential. *See* Cyrus Vance, *Final Report of Cyrus R. Vance, As Mediator, Pursuant to the Standing Mediation Order and the Mediation Order Entered in the Macy 's Reorganization Cases* (Dec. 8, 1994) (on file with the Reporter) (reporting attainment of consensual plan, fair treatment of creditors and employees, and significant cost reduction; noting that the goals of mediation were to confirm a plan within a year, reduce costs, provide fair treatment to parties in interest, achieve a consensual plan, and enhance court's mediation program; stating that all goals were achieved and that "There is broad consensus that the above would not have been achieved without the mediation process."; noting that the court had directed Vance "to develop and present to the Court an agreement on the principal terms and conditions of a plan of reorganization."; noting that the Report does not detail the particulars of the mediation process because confidentiality is critical even after the agreement has been reached; concluding that mediation saved substantial time and cost and can be a valuable part of reorganization). *See also* Ralph R. Mabey, Charles J. Tabb, Ira S. Dizengoff, *Expanding the Reach of Alternative Dispute Resolution in Bankruptcy: The Legal and Practical Bases for the Use of Mediation and the Other Forms of ADR*, 46 S.C. L. Rev. 1259, 1282-83 (1995) (discussing *Macy's* as an example of the use of mediation to effectuate a consensual plan); Cassandra G. Mott, *Note & Comment, Macy's Miracle on 34th Street: Employing Mediation to Develop the Reorganization Plan in a Mega-Chapter 11 Case*, 14 Ohio St. J. on Disp. Resol. 193 (1998) (--).

Cf. Unofficial Committee v. Eagle-Picher Industries, Inc., (*In re* Eagle-Pichter Industries, Inc.), No. 96-4309, 97-4260, 172 F.3d 48 (Table), 1998 WL 939869, at **2 (6th Cir. Ohio Dec. 21, 1998) (considering the complaint of the unofficial committee of entities who were co-defendants with Eagle Picher in asbestos litigation cases and who challenged the asbestos claims trust that was created under the plan because the unofficial committee was not been included in the mediation process; "The Bankruptcy Court appointed a mediator to assist in the negotiation of a consensual plan of reorganization for Debtors on June 5, 1992. The mediator, pursuant to the order, limited the participants to Debtors, the ICC, and the legal representative for future personal injury and property damage claimants ("Future Claimants' Representative"). Discussions were limited to these parties since, in the aggregate, the ICC and the Future Claimants' Representative held the most significant claims that needed to be addressed in the bankruptcy proceedings. Although they were permitted one informal meeting with the mediator, Co-Defendants were excluded from the discussions.").

[34] *See* A.H. Robins Co. v. Dalkon Shield Claimants Trust (*In re* A.H. Robins Co.), 164 F.3d 623 (4th Cir. 1998) (discussing ADR processes devised under the confirmed plan to resolve Dalkon Shield claims); *see also In re* Sargeant Farms, Inc., 224 Bank. 842 (Bankr. M.D. Fla. 1998) (appointing a mediator in a chapter 12 case to facilitate resolution of various issues including valuation; discussing bankruptcy court authority to use court-annexed mediation in chapter 12, including to require that the parties participate in mediation; noting that parties bear equally the costs of mediation; discussing role and process of mediation in bankruptcy; noting that mediators act with confidentiality and have quasi-judicial immunity in bankruptcy).

Cf. In re Cornell Co., 1998 WL 404281 (E.D. Pa. 1998) (declining to appoint mediator after plan was confirmed to resolve dispute when the request for mediation was essentially an attempt to bring in evidence not submitted at trial); Airline Pilots Assoc. v. Continental Airlines (*In re* Continental Airlines), 125 F.3d 120 (3d Cir. 1997) (confirming arbitrator's finding that a class had no standing in the bankruptcy case; holding that arbitration ruling was not reviewable by the bankruptcy court); Celotex Corp. v. AIU Insurance Company (*In re* Celotex Corp.), 196 Bankr. 602 (M.D. Fla. 1996) (barring debtor from re-litigating issues determined by arbitrator). [arbitration relevant?]

See also Mabey, Tabb & Dizengoff, *supra* note 33, at 1263 (arguing that mediation and ADR can reduce the time and cost of bankruptcy cases); *id*. at 1265-76 (finding that, in non-court-annexed mediation, bankruptcy courts use mediators to facilitate plan negotiations and liquidate claims); *id*. at 1270-73 (finding that, for plan negotiations, courts appoint paid mediators, settlement judges, or examiners; noting that, the court appointed a mediator in *El Paso Electric* to determine whether negotiations were at impasse and mediate negotiations and that a plan was confirmed but some parties were unhappy with the process and cost; noting that the district court appointed a sitting (not presiding) bankruptcy judge to mediate in *MCorp* at no cost to the estate; noting that the court appointed an examiner in *Public Service Company* to investigate and mediate); *id*. at 1273-76 (finding that mediators are used to resolve multiple claims of the same nature and single claims); *id*. at 1277-78 (noting that mediators or claims resolution facilities are used post-confirmation to resolve claims); Steven l. Schwartz, *Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach*, 85 Cornell L. Rev. 956 (2000) (suggesting mediation as a way to resolve disputes between a county and its creditors).

[see footnotes in Mabey, Tabb article]

[35] *See* Robert J. Niemic, Mediation In Bankruptcy: The Federal Judicial Center Survey Of Mediation Participants 2-3 (Federal Judicial Center 1998) [hereinafter, "FJC Mediation Report"]. The FJC conducted a Survey on mediation in bankruptcy at the request of the Judicial Conference's Advisory Committee on Bankruptcy Rules ADR Subcommittee to determine whether there were problems with bankruptcy mediation that should be addressed by rule changes. Although problems occurred infrequently, confidentiality and disinterestedness issues arose with greater frequency than other problems. "Other issues" of concern included that bankruptcy judges referred less than 24 percent of matters for mediation sua sponte, less than 7 percent of matters were referred over objection, the bankruptcy estate paid the mediator's fee in less then 21 percent of the mediated matters, and the mediator played a role in plan formulation in approximately 9 percent of the mediated matters.

Mabey, Tabb and Dizengoff found that, although mediation was used in bankruptcy cases, there is no consistent standard or unifying procedural framework for the use of mediation in bankruptcy. Mabey, Tabb & Dizengoff, *supra* note 33, at 1308.

[36] [describe existing bankruptcy connected mediation programs, or programs that can be accessed through district court, and where there is no program, existing laws that permits mediation]

A Federal Judicial Center study of mediation in bankruptcy suggested that the lack of clear rules and standards limits and complicates the use of mediation in bankruptcy cases. *See* FJC Mediation Report, *supra* note 35, at --; *id*. at 5-6 (finding, as of 1998, that at least 28 bankruptcy courts have local rules, general orders, or guidelines governing mediation; approximately 20 allow sua sponte referral; a few require parties' consent before referral; none require referral of particular types of matters to mediation; the Central District of California had the highest number of referrals to mediation; some courts without specific rules apply their district courts' rules or engage in ad hoc referrals); *see also* Mabey, Tabb & Dizengoff, *supra* note 33, at 1278 & app. (finding that, as of 1995, formal bankruptcy court-annexed ADR programs existed in 12 districts; that these programs are used to assist in the resolution of litigated matters); *id*. at 1279-83 (describing the characteristics of these programs); *id*. at 1283-1312 (discussing existing authority for ADR in bankruptcy and suggesting rule changes to facilitate ADR); id. at 1314 n. 202 (reporting results of an informal, comprehensive study of ADR programs in bankruptcy courts).

[insert discussion of Judicial Improvements Act, Bankruptcy Rule 7016, district court authorized programs]

[37] [insert authority]

[38] [insert authority]

[39] [insert authority]

[40] [add factors] [draw on other materials re why not used more widely in other types of cases also]

[41] [insert authority]

[42] *See* 11 U.S.C. § 1107, 1108 (199-); [legislative history and commentary]

See, *e.g*., Trost, King & Klee, The Proposed Federal Bankruptcy Reform Act (ALI-ABA 1978) (comparing the mid-1970s pre-Bankruptcy Code legislative proposals concerning administration and oversight in chapter 11 cases; noting that (i) the Commission on the Administration of the Bankruptcy Laws proposed that an administrative agency would serve as trustee and counsel in liquidation cases and wage earner cases except in the rare case in which creditors strongly desired a trustee; (ii) the bankruptcy judges proposed that trustees in liquidation and wage earner cases come from the private sector only, from a panel of private trustees and that no government employee would be involved in the administration of wage earner or liquidation cases; (iii) the National Bankruptcy Conference proposed a compromise under which trustees would be selected from a panel, which would include an "Official Trustee" – a government employee – who would be responsible for serving on the panel, coordinating panels of private trustees, and prescribing qualifications, standards and office methods for trustees, and who would presumably be the trustee in no-asset liquidation cases; the panel would serve in asset liquidation cases and creditors would have the right to elect a trustee if a majority in amount and 30 percent in number voted; (iv) in HR 6, Congress essentially adopted the compromise by creating the Office of the United States Trustee in the Department of Justice and providing that the US Trustee acts as trustee in chapter 13 cases (later amended to allow for standing chapter 13 trustees), appoints trustees in chapter 7 cases or serves as trustee in no one is willing to serve, and selects a trustee (subject to court approval) in chapter 11 cases if a trustee is ordered by the court; and (v) in HR 8200, Congress made some changes, including to allow creditors to elect a trustee in chapter 13 cases, and to modify the requirements for election in liquidation cases).

[43]

[44]

[45] *See*, *e.g*., ED FLYNN, STATISTICAL ANALYSIS OF CHAPTER 11 26-35 (1989) (ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS) (reporting the results of a July 1989 study by Ernst & Young of 2,395 confirmed chapter 11 cases in 15 districts, weighted to reflect national figures, combined with data compiled by the Administrative Office of the United States Trustee

Statistical Analysis and Research Division (AOUSC SARD); the study showed that (i) there is little relationship between time to confirmation and debt levels, except that cases with debts of 500,000 to 1,000,000 take slightly longer to confirm and cases with debts over 1,000,000 take substantially longer to confirm; (ii) there is little relationship between time to confirmation and asset levels, except that the very largest cases take longer than average to confirm and the very smallest cases take shorter than average to confirm; (iii) cases in which assets greatly exceed debts take slightly longer to confirm; (iv) there is a strong correlation between the amount of assets and the confirmation rate; cases with more than 1,000,000 in assets are at least several times more likely to be confirmed than cases with less than 100,000 in assets; Lynn M. LoPucki, Declaration dated April 1998 in *In re Dow Corning Corporation* Case No. 95-20512, United States Bankruptcy Court, Eastern District of Michigan (filed on behalf of the Tort Claimants Committee in connection with the Committee's Motion dated March 10, 1998 to Modify Exclusivity) (testifying based upon his experience, prior research, and two studies conducted for the case, Professor LoPucki concludes that modifying exclusivity in large chapter 11 cases fosters consensual resolution of cases by focusing the parties on realistic settlement values; (i) in study of 41 large, public company filings in which exclusivity was lifted, all but 4 resulted in a confirmed plan (95 percent); of the 4 remaining cases, 2 were pending, one resulted in a 363 sale, the other was converted for unrelated reasons; of the 37 confirmed, 22 were consensual, 9 were largely consensual (together 79 percent), one was unclear, and 5 were cramdowns; each was confirmed within 7-14 months of the lifting of exclusivity; (ii) in a study of 8 mass tort bankruptcy cases in his large, public companies database, he found that, in the 3 cases in which exclusivity was lifted, a plan was confirmed within 7-19 months after exclusivity was lifted; (iii) in a study of distributions to unsecured creditors and equity holders in cases in which exclusivity had been lifted and not lifted in large, public company cases, he found that, in the 8 cases in which exclusivity was lifted, distributions conformed closely to absolute priority, but that in the 32 cases in which exclusivity was not lifted, deviations from absolute priority were more than 4 times greater than in the lift cases).

[46] *See*, *e.g*., Bedoff, *Suggestions for NBRC* at 496 (arguing that extension of exclusivity is used as leverage for the debtor and its management in negotiating concessions from creditors for the benefit of management and equity holders, not as a tool to benefit the estate, and that extensions of exclusivity prolong chapter 11 and add to costs of administration); Raymond T. Nimmer & Richard B. Feinberg, *Chapter 11 Business Governance Fiduciary Duties, Business Judgment, Trustees and Exclusivity*, 6 BANKR. DEV. J. 1, -- (1989)
(considering a series of issues, all of which relate to who controls, or should control, the courses of action taken by the debtor-in-possession; arguing that courts should aggressively limit the debtor's right to retain exclusivity and should favor competing plan proposals); Lief M. Clark, *What Constitutes Success in Chapter 11? A Roundtable Discussion*, 2 AM. BANKR. INST. L. REV. 229, 53-54 (1994) (arguing that reducing the opportunities for the court to enlarge exclusivity will shorten the time debtors spend in chapter 11; suggesting that the exclusivity period should be keyed to either the amount of debt or whether the debtor is a private or public company; favoring a shorter period of exclusivity in cases with less debt and in private companies); Goldberger, *Suggestions for NBRC* at 520 (arguing that entity values will be enhanced for all creditors and interested parties if the Bankruptcy Code is modified or interpreted to encourage and facilitate the termination of exclusivity because that this will expose the entity to vigorous and competitive market forces); Eric W. Lam, *Of Exclusivity and For Cause: 11 U.S.C. Section 1121(d) Re-examined*, 36 DRAKE L. REV. 533, --- (1986-87) (noting that exclusivity is designed to adjust the bargaining power between creditors and the debtor and to provide flexibility, that current case law considers factors such as time in bankruptcy, size and complexity of the case, progress toward reorganization, and pendency of litigation that must be resolved prior to plan development in determining whether cause exists to enlarge exclusivity, and finding that courts have consistently rejected the last factor; proposing that courts consider legitimate creditor interests as well, including the amount of the creditors' investment, history of debt service, deterioration of collateral, erosion of equity cushion, secured status, and interests of stockholders; for example, a large creditor's objection to an extension should be given more weight than a small creditor's objection); Stephen P. Ferris & Robert M. Lawless, *The Expenses of Financial Distress: The Direct Costs of Chapter 11*, 61 U. PITT. L. REV. 629, at manuscript 22, 61-64 (forthcoming 2000) (reporting the results of a national study of chapter 11 cases, which found "a positive but statistically weak relationship between costs and time in bankruptcy."); *id*. at manuscript 64 (as for the relationship between time in chapter 11 and exclusivity, the study authors hypothesized that "if delay causes the costs to rise, exclusivity gives the debtor more bargaining leverage with creditors," and noted that proposals to shorten or end exclusivity might reduce costs, **if** shortening or ending exclusivity would expedite cases – which is not free from debate); Edward I. Altman, *Evaluating the Chapter 11 Bankruptcy-Reorganization Process*, 1993 COLUM. BUS. L. REV. 1, 2, 22-25 (1993) (noting that time in bankruptcy is obviously related to direct out of pocket cost; recommending reasonable exclusivity that cannot be extended unless the debtor shows that the firm is worth more as a going concern that liquidated; identifying the objective of reorganization as maximizing the value of the estate and arguing that this should be the directors' fiduciary goal); Richard M. Cieri, et al., *Applying an Ax When a Scalpel Will Do: The Role of Exclusivity in Chapter 11 Reform*, 2 J. BANKR. L. & PRAC. 397, 398-401, 411-15 (1993) (favoring a more judicious application of the existing exclusivity standards in order to remedy the problems that are caused by an unfettered judicial willingness to extend the debtor's exclusivity periods; noting that certain commentators favor dismantling chapter 11 and installing senior creditors to run troubled companies because they believe that chapter 11 is inherently unfair to creditors and that delay can often be attributed to imprudent discretionary extensions of exclusivity; rejecting these proposals and arguing that stricter application of the existing "cause" standard would resolve any problems and strike an appropriate balance between the competing interests of the debtor and its creditors; favoring consideration of factors such as time since filing, size of the case, progress toward reorganization, prospects for reorganization, debtor's motive, impact on creditors).

[47] *See* Lynn M. LoPucki & William C. Whitford, *Bargaining Over Equity's Share in the Bankruptcy Reorganization of Large, Publicly*

Held Companies, 139 U. PENN. L. REV. 125, 158 (1990) (arguing that, because attorneys are dependent upon each other for future work, they prefer to achieve settlement rather than litigate; consequently, despite the absolute priority rule, they convince their clients that settlements is preferred and that everyone at the bargaining table must be given a share, even if equity is not "entitled" to receive any value; because attorneys typically function as the parties' representatives, creditors have commonly allowed otherwise powerless equity interests to share in the distribution); *id*. at 125 (concluding that equity holders in large bankruptcies receive larger shares than allowed under the absolute priority rule because of a legal culture favoring consensual plans, equity's ability to use obstructionist tactics of delay, the relatively small sacrifices made by higher priority creditors to avoid delay, and the perceived uncertainty and high cost of cram down hearings; suggesting a preemptive cram down hearing in large cases to eliminate the need for equity holders' committees and their power to obstruct and to lead to a more streamlined plan confirmation process that is truer to the mechanics of priority rules); Lucian Ayre Bebchuk & Howard F. Chang, *Bargaining and the Division of Value in Corporate Reorganization*, 8 J. L., ECON. & ORG. 253, 274 (1992 (applying a sequential bargaining model to the plan negotiation process, arguing that the chapter 11 bargaining process (with the automatic stay and the threat that value will decline if the case drags or value may be reduced if the case fails and the entity is be liquidated) leads to violations of absolute priority of contractual rights; identifies aspects of strategic bargaining in chapter 11 that enable the equity holders to retain value even when the entity is insolvent (these are rooted in the need for equity consent); concluding that the amount equity holders receive increases with the volatility of the firm's asset values, the extent to which the reorganization imposes financial distress costs, the length of the reorganization process, the length of exclusivity, the extent to which liquidation imposes a loss in value, and the extent to which the value of the firm's assets covers its debts; as to whether the distribution of value to equity holders is unfair to creditors, the authors conclude that voluntary creditors likely take this into account in their contracts through higher interest rates, etc., but that retention of value by equity does transfer wealth from involuntary creditors to equity holders).
[add others; LoPucki statistics re absolute priority; Tashjian, etc.]

[48] *See* LoPucki & Whitford, *supra* note 47, at – (finding that . . . . , in a study of . . .); LoPucki supra note – at – (finding that . . ., in a study of . . .); Tashjian, *supra* note 8, at – (finding that . . . , in a study of . . .)
SABRE recognizes that a faster, cheaper process is not inherently a better process. Professor LoPucki's studies have shown that faster reorganizations sometimes have a higher failure rate, as measured by the percentage of entities that file a subsequent bankruptcy case. *See* Lynn M. LoPucki & Sara D. Kalin, *The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of a "Race to the Bottom"*, manuscript draft dated July 13, 2000 at manuscript 11-22 (reporting results of a study in which the authors compared the re-filing rate for each year to the background filing rate for all public companies; finding that re-filing rates for large public companies reorganized in Delaware and New York exhibit far higher rates of re-filing than companies reorganized elsewhere; the re-filing rate for all companies in the study was 3.1%, which is more than 4 times the weighted background filing rate (which ranged from .54% to 1.34% between 1983 and 1999, and averaged .84%; the weighted average was .77%); finding that 1.6% re-filed 1 year after emerging, 2.8% re-filed 2 years after emerging, 4.4% re-filed 3 years after emerging, 4.2% re-filed 4 years after emerging, 3.9% re-filed 5 years after emerging, 2.4% re-filed 6 years after emerging, 4.7% re-filed 7 years after emerging, and 2.1% re-filed more than 7 years after emerging (up to 17 years after re-emerging); finding that 32% of Delaware cases have re-filed, 28% of New York cases have re-filed, 10% of all other cases have re-filed, and that Delaware has a re-filing rate of 8.6% per year, New York has a rate of 5.2% per year, and all others have a combined rate of 1.7% per year; concluding that the re-filing rate for large, public companies in Delaware and the New York City is nearly 30%, and is 6-7 times as high as the re-filing rate for companies emerging in other districts; noting that the combined rate for all courts is 3.1%; if the study examines only those cases that emerged after 1990, the re-filing rate for Delaware is 7.9% per year, New York City is 4.8% per year, all other courts is 1.1% per year, and aggregate is 3.1% per year); i*d*. at manuscript 23-25 (the re-filing rate for all companies that emerged after 1990 was 14% while the rate for pre-packaged cases was 22%; for all cases from 1983 to 1997, the re-filing rate for pre-packaged cases confirmed in Delaware and New York was 33%, for all other courts it was 7%; the per year re-filing rate for Delaware pre-packaged cases was 9.2%, for new York was 6.4%, for all other courts was 1.4%; considering only that cases that emerged after 1990, the rates are Delaware 9.2%, New York 6.4%, all others 0%); i*d*. at manuscript 26-27 (finding that, overall, Delaware confirmed 79% of its large public company cases, all other courts confirmed 85% of such cases; concluding that competition among judicial districts for cases leads to lower success rates.) [cut down]; *id*. at – (suggesting that excessive debtor leverage and judicial favoritism toward debtors in certain districts are at the root of the failures in pre-packaged chapter 11 cases); s*ee also* FJC VENUE REPORT, [full cite], 39-40 ("[T]he greatest advantage for a debtor of the prepackaged option – speed through the bankruptcy process – can also be its greatest disadvantage. We have presented evidence that prepackaged claims [sic] are confirmed more quickly, but cannot comment on any negative outcomes that may have accrued to these debtors, their creditors, or other parties-in-interest." "Perhaps not enough experience with the prepackaged device has accumulated to arrive at a secure conclusion. A potential hazard is that some creditors will be forced to accept terms that they could have improved on during a more prolonged Chapter 11 process.").

In contrast, some finance and management scholars have argued that cheaper and faster processes may impair efficiency because they may allow non-viable firms to reorganize. *See* Michelle J. White, *Corporate Bankruptcy as a Filtering Device: Chapter 11 Reorganizations and Out-of-Court Debt Restructurings*, 10 J. L., ECON. & ORG. 268, 293-94 (1994) (applying a game theory model to evaluate the economic efficiency of chapter 11 and out-of-court restructurings and assuming that the purpose of corporate bankruptcy procedures is to ensure that economically inefficient firms liquidate under chapter 7 and economically efficient firms reorganize under chapter 11, the author concludes that both inefficient firms and efficient firms reorganize in chapter 11 and that the cost savings of out-of -court restructuring exacerbates this problem because it leads even more inefficient firms to restructure; favoring selling all firms as going concerns in chapter 11 if a plan proposed by management has not been approved within a short exclusivity period). These critics argue, essentially, that chapter 11 allows non-viable entities to survive by tipping the balance inappropriately in favor of the debtor. It may never be possible to devise a perfectly economically efficient system under which every viable entity survives and every non-viable entity fails. It might be possible to prevent non-viable entities from reorganizing by increasing the costs and hurdles of restructuring, but this might also cause otherwise viable entities to fail. The out-of-court workout proposal, however, obviates these concerns to some extent because it takes place in the context of non-bankruptcy law, which does not give the debtor the right to modify creditors' contracts. Also, if creditors believe that they will receive better treatment under a strict application of the Bankruptcy Code provisions than under an out-of-court workout, they have the option of declining to participate in the out-of-court workout. If the business does end up in chapter 11, the other Proposals advanced in this Report are designed to obviate some of the factors and concerns that foster the type of poor results that these studies reveal. Proposal 2 interjects a neutral plan facilitator to expedite stalled plan negotiations, test the plan's feasibility, and reduce the ability of any party in interest to employ the types of obstreperous tactics that may compel other parties to forego full achievement of their bankruptcy entitlements in favor of achieving confirmation, even of a less than feasible plan. Proposal 3 establishes a baseline of shared, neutral data upon which negotiations can proceed. These proposals also foster an expedited determination of viability and conversion of non-viable cases. *Cf.* LoPucki & Whitford, *supra* note 47, at 125 (reporting the results of a study of 43 largest bankruptcies of publicly held corporations between 1979 and 1988; finding that equity holders in large bankruptcies receive larger shares than allowed under the absolute priority rule; arguing that that is due to a legal culture favoring consensual plans, equity's ability to use obstructionist tactics of delay, the relatively small sacrifices made by higher priority creditors to avoid delay, and the perceived uncertainty and high cost of cram down hearings; suggesting a preemptive cramdown hearing in large cases to eliminate the necessity of equity holders' committees and their power to obstruct; arguing that this would result in a more streamlined plan confirmation process, which is truer to the mechanics of priority rules).

[add LoPucki *Preemptive Cramdown*] [insert others with other recommendations]

[49] *See*

[50] [works on strategic bargaining, game theory]

[51] [insert authority]

[52] For example, an FJC study found that chapter 11 cases were confirmed faster in Delaware than in other districts. FJC Venue Report, *supra* note 48, at 19-22, 31-41, 38-39 (reporting results of a survey that found that 76 percent of those cases that judges thought were wrongly filed in a district other than their own district were filed in the Southern District of New York (SDNY) or the District of Delaware; the Survey conducted a study of 77 public companies emerging from chapter 11 in 1994 or 1995 and 18 chapter 11 cases filed in Delaware; noting that commentators argue that New York is a favored district because the courts are willing to extend exclusivity repeatedly and to award higher professional fees than judges in other districts allow and finding that cases filed in SDNY took longer than cases in other districts; median days to confirmation in Delaware 38, in SDNY 756, in 26 other districts 473, in all cases 443; noting that corporate debtors who desire the benefit of a lengthy stay might be attracted to SDNY, but that extensions of exclusivity and the resultant prolonged period from filing to confirmation may be necessary to achieve an optimal commercial outcome and effective bankruptcy estate management and that the attraction to SDNY may be based, in part, on its status as a center of commercial financial activity). [add cites re Delaware filings]

A subsequent study suggested that the rate of subsequent reorganization through the filing of a subsequent bankruptcy case was much higher in Delaware than in other judicial districts. LoPucki & Kalin, *supra* note 48, at -- (arguing that the Delaware cases' high failure rate resulted from. . . .).

[53] *See*, *e.g*., Buccino, *Suggestions for NBRC* at 498 (proposing that the debtor be required to pass a viability test within the first 120 days before the court extends exclusivity; also proposing an evaluation of management by a competent outsider; arguing that, without these analyses, extended exclusivity will continue to be granted at the expense of creditors and shareholders); Edward S. Adams, *Governance in Chapter 11 Reorganizations: Reducing Costs, Improving Results*, 73 B.U. L. Rev. 581, 621-24 (1993)
(arguing that filings by companies that will eventually liquidate drive up the costs of bankruptcy; advocating replacing debtor-in-possession managers with trustees and establishing a methodology to help the trustee determine whether a company should continue in chapter 11 or be liquidated; proposing that management continue to make "business activity decisions" such as the use of assets and day-to-day business operations, but that the trustee make "fundamental bankruptcy decisions" such as mediating plan negotiations, shaping the tone and character of settlement discussions, allocating losses, and assessing the viability and validity of the reorganization; mixed or "non-polar" decisions, which involve balancing competing concerns regarding daily business activities and reorganization structure, such as whether to sell a subsidiary, will be more difficult to allocate; proposing that the US Trustee choose the trustee from a panel of qualified applicants with experience in the debtor's industry or business; the main task of the trustee would be to determine whether to liquidate or reorganize the company; the US Trustee and court would review the trustee's decisions to ensure that the trustee is not continuing the business simply out of self-interest); *id*. at 624-234 (proposing a methodology to assist the trustee in making the decision to liquidate or reorganize; comparing value-based and process-based approaches); *id*. at 584-92 (reviewing history of chapter 11, including allocation of control and decision-making, as context for the proposal); *id*. at 611-21

(considering how existing balances in the Bankruptcy Code would be affected by the proposal); Charles J. Tabb, *Symposium on Bankruptcy: Chapter 11 Issues: The Future of Chapter 11*, 44 S.C. L. Rev. 791, 859-61 (1993) (arguing that time and money are lost in cases before hopeless debtors are eventually liquidated and that an independent third party should be brought in to analyze feasibility of debtor; such a person can be more objective about feasibility and the debtor's chances of successfully reorganizing, will not have the same predisposition as entrenched management to try to reorganize the debtor, and can make an objective assessment that many of these cases should be liquidated earlier rather than later; the cost savings derived from earlier termination would offset the cost outlay involved in hiring the independent party; proposing that the court implement a series of steadily progressing steps of involvement by independent third parties if plan is not confirmed by a date certain; if a plan is not confirmed by 120 days, the court could appoint an examiner to investigate the debtor's business, the feasibility of an internal reorganization, and the possibility of a sale; after another 120 days, a trustee might be appointed; allowing discretionary override power by the court); Bettina M. Whyte & Patricia D. Tilton, *Impact on Plan Feasibility of the Compensation and Utilization of Professionals*, 1 Am. Bankr. Inst. L. Rev. 397 (1993) (arguing that communities of interest among the debtor and other constituencies outweigh the conflicts between them and that management entrenchment and failure to perform an appropriate analysis of the feasibility of the entity at the outset lead to non-feasible plans; proposing that the debtor be required to submit, early in the case, a detailed financial analysis of liquidation and a preliminary business plan showing how the company will be reorganized; proposing changes in the ways professional are used in chapter 11 cases, including the appointment of an overseer to hire and monitor shared professional for diverse constituencies, including not only financial advisors but also some aspects of legal work, such as legal research); Whitman, Garstka, Scheinfeld, *supra* note 26, at 839-42 (making several proposals including to award economic incentives to principal parties (especially senior creditors) to encourage them to support and promulgate feasible plans; agreeing with other finance and management experts that the objective of laws dealing with financial distress is to enhance social welfare by causing assets to be used most efficiently; suggesting that an ideal system would (1) be fast and inexpensive, (2) cause the players who made bad decisions to suffer the consequences, but not so much that it threatens their solvency and the fabric of the economy, (3) meet a standard of fairness and equity in accordance with absolute priority, (4) require feasibility and distinguish between those firms that should survive and those that should not, and (5) create optimal values and uses of assets but do not create so many advantages for the troubled firm that the playing field is no longer level).

[54] *See*, *e.g*., Small, *Suggestions for NBRC* at 550 (proposing separate voluntary chapter for small business reorganization modeled after chapter 12, including the use of a standing trustee to provide independent and impartial investigation, evaluation, and recommendation and to act as a mediator to facilitate resolution of disputes between creditors and debtor); NBRC Report, *supra* note 16, at 451 ("The [Chapter 11] Working Group also developed recommendations that affirmatively would promote speed and efficiency within the current reorganization structure. Some recommendations, such as those to facilitate prepackaged bankruptcies and to authorize local mediation programs, should further these goals directly."); *id*. at 454, 489-92 (recommending that Congress authorize courts to enact local rules to establish non-binding, confidential mediation programs that allow mediation on a party's request or *sua sponte*); *cf*. *id*. at 1220-33 (Commissioner Judge Jones agrees with the NRBC's acknowledgment that undue cost and delay plague the chapter 11 system, but argues that the NBRC Recommendations do little to reduce cost, delay and inefficiency; arguing that the Commission "neglects to deal with limits on exclusivity, plan mediators, incentives to efficiency built into attorney and professional fees, and other measures that would directly reduce cost and delay;" citing statements by Professor James J. White concerning the time and direct cost of chapter 11, the indirect cost of chapter 11, and proposals to "speed up" chapter 11 (appointing a trustee, modifying section 507(b) and perhaps (a), and reversing *Timbers* in order to require the debtor to pay for lost opportunity costs), statements by Dean Douglas Baird cautioning the NBRC to reduce costs by creating clear rules rather than open-ended tests, and statements by Mike Sigal arguing that chapter 11 takes too long and costs too much, and recommending termination of exclusivity after perhaps 6 months and appointment of a plan mediator) (Edith H. Jones, Dissent From Certain Commission Recommendations on General Issues in Chapter 11); *id*. at 311-13, 618-60 (recommending additional reporting requirements for small businesses ($5 million and single-asset real estate), additional grounds for dismissal, and additional United States Trustee and Bankruptcy Administrator powers, in order to allow the court to identify and dismiss cases that cannot be confirmed promptly); *id*. at 312 ("With some dissent, the Commission adopted a series of proposals to make Chapter 11 less hospitable for some small business, intended to force the dead or dying small businesses into liquidation more quickly. Unlike the 1994 Amendments, the proposed small business Recommendations would be mandatory for all small business, and they would increase rather than decrease some reporting requirements, heighten supervision, and shorten other deadlines."); *cf*. *id*. at 1031-33 (dissenting Commissioners contend that the NBRC recommendation "unnecessarily reduces the flexibility that is one of the most valuable features of Chapter 11 and substitutes case micro-management through statutory and rules requirements," and suggest that small cases can be handled successfully by judicial case management. (Babette Ceccotti & Robert Ginsburg, Dissent from Recommendation Regarding Small Business Chapter 11 Cases)); [NBC, Commission]; Trost, King & Klee, The Proposed Federal Bankruptcy Reform Act (ALI-ABA 1978) *supra* note 42, at -- (discussing the varying proposals for the administration of the bankruptcy system that led to the Bankruptcy Code); Barry L. Zaretsky, *Trustees and Examiners in Chapter 11*, 44 S.C. L. Rev. 907, 910, 937, 941 (1993) (surveying reported cases in which the court appointed a trustee or examiner; arguing that an independent third party can defuse contentious disputes among the parties and provide structure to a case to enable the parties to reach agreement on a realistic and appropriate plan for reorganizing the debtor; suggesting that recognition of a broad, flexible standard for the appointment of trustees and examiners in chapter 11 and imaginative use of these independent third parties can facilitate resolution of many chapter 11 cases; arguing that the appointment of an independent third party provides a benefit from intervention without incurring the costs, or creating the disruption, of a trustee, and that the third party may be able to defuse tensions among the various constituencies by mediating plan negotiations or other disputes, assisting the debtor with management or reorganization decisions, or

performing other tasks that can best be accomplished by a party unconnected with any of the constituencies in the case); *cf*. Clark, *supra* note 46, at 253 (arguing that having creditors' committees file plans within six months of the petition date will often end a large, complex case within one year rather than the normal two or three years, but suggesting that the benefits of this strategy are diminished by the prospective litigation costs in small cases).

Tabb, Smith, others

Other bankruptcy experts would go farther and install a permanent independent monitor or administrative agency to oversee chapter 11 administration. *See* Commission 1973; Tabb; Zaretsky; Smith, supra note –, [*Reorganizations*] at 608-17, 623-25, 628-30, 638 (proposing formulation of a plan in major cases by an independent plan trustee who does not operate the business; discussing the development of the roles of the trustee and examiner and comparing these to the role of a proposed plan trustee and historic proposals for bankruptcy administrators; noting that, with the SEC's withdrawal and Congress's refusal to designate an effective substitute, there is no unbiased agency to assure adherence to congressionally mandated standards of fairness); Richard B. Levin, *Towards a Model of Bankruptcy Administration*, 44 S.C. L. Rev. 963 (1993) (arguing that the Bankruptcy Code's simple administrative model, which bifurcated disputed (judicial) from non-disputed (administrative) matters, was implemented imperfectly; consequently, judges continue to be charged with responsibilities for "administrative" tasks that often do not involve dispute resolution, such as assumption and rejection of executory contracts and unexpired leases, matters that relate to the liquidation of the estate, and the employment and compensation of professionals; arguing that, even if the 1978 amendments to the Bankruptcy Code had been strictly and consistently implemented, they would still be inadequate to address the problems created by judicial involvement in administrative matters, because the Code failed to acknowledge or account for the large body of decisions that must be made even in the absence of a dispute; arguing that bifurcating decision-making based solely or primarily on whether the matter is disputed or undisputed, without regard to whether the decision is forensic (defined as a decision made by evaluating facts and events that have already occurred and applying governing law to those facts) or non-forensic (defined as a decision requiring the exercise of judgment as to the course of action that should be taken in the future) does not address who is best qualified to make the initial decision, to review the decision, or to supervise the decision-maker; proposing that authoritative (i.e., a decision that affects the progress of the case without intervention by other decision-makers) decisions about disputed forensic matters should be made by courts within the judicial system, that the estate representative (trustee or debtor-in-possession) is responsible for making first-level non-forensic decisions, such as day-to-day managerial decisions involved with running the debtor's business; and that an Administrative Officer, rather than the judge, supervise non-forensic decisions; Flaschen, *Suggestions for NBRC* at – (proposing that, in all chapter 11 case, the court appoint an independent monitor who would retain a single set of professionals for the benefit of all constituencies and the court and would reduce expenses by reducing the parties' resort to adversarial litigation).

[55] In France, for example. . . *See*, *e.g*., Rouger, *Sept 1995 Lecture* (discussing the French Act of 10 June 1994; noting that the law fosters compulsory immediate liquidation of certain entities in a country where 95% of business failures end up in liquidation and pay 7% of liabilities (under the old law, there were long delays before liquidation); noting that, prior to 1994, there was only one case in which the court imposed a provisory suspension of the lawsuit to see if a conciliator can manage an out-of-court workout but that the new law allows them quickly to distinguish the delaying conciliation from the genuine search for an agreement);

{add France cites; Mexico, etc.]

[56] For example, the legislative proposal or the court in each case might specify matters such as amount and payment of fees, whether the parties will be represented by counsel in mediation discussions, who shall and may be present, who has settlement authority, the extent to which proposals shall be in writing, how mediation shall proceed if one or more parties does not favor mediation, and the extent to which matters short of actual plans must be presented to the court. Such guidelines might specify whether there shall be fixed rules governing these and other topics, or whether these matters shall be resolved on a case-by-case basis, either by the court, or through a mediation agreement among the parties and the mediator. It may be useful to solicit the assistance of mediation professional, including the Federal Mediation Center, on these topics. *See*, *e.g*., Mabey, Tabb & Dizengoff, *supra* note 33, at – (--); The Judicial Arbitration and Mediation Center; Annotated Resource List at A.2.e; *ABA* Draft Local Mediation Rules (ABA Subcommittee's Draft local mediation rules include topics such as establishing a roster of mediators, selecting a mediator, handling conflicts of interest, maintaining confidentiality) [cites; insert others]

[57] *See* Hugh M. Ray, Jr., *Mediators, Egos and Common Coutesy*, Tex. Law., March 14, 1994 at 22 ("A mediator of powerful stature signals, 'You must respect me because you must care what I think about you. I cannot issue a binding decision, but if you behave in such a way that you dishonor me, because of my standing, you dishonor yourself.'").

[58] The specific rules might be designed to address issues identified in the FJC Mediation Report. *See* FJC Mediation Report at 8 (identifying a number of bankruptcy mediation concerns, including "potential problems with mediation in plan formulation vis-à-vis the role of an examiner," "lack of constraints over mediators/neutrals in the bankruptcy code and rules, whereas there are constraints governing examiners," "whether court ordered mediation works if the parties do not consent.").

[59] Under current law, the debtor is required to file a list of creditors and equity security holders, schedules of assets and liabilities, current income and expenditures, a list of executory contracts and unexpired leases, a statement of financial affairs, a list of its twenty largest creditors, and supplemental schedules of assets acquired or arising after filing of the petition (Rule 1007). At the court's

request, the debtor muc file a complete inventory of property, summaries of payments to employees, the amount of tax deductions and where they are deposited, summaries or copies of annual reports for publication or mailing to creditors, equity security holders, and indenture trustees (Rule 2015). The debtor is also required to report the location of real property in which the debtor has an interest and the name and address of every person holding money or property subject to the debtor's withdrawal if a schedule was not filed pursuant to Rule 1007, to cooperate with the trustee in preparation of an inventory, the examination of proofs of claim, and the administration of the estate, and to report any change of address (Rule 4002). F. R. Bankr. R. 1007, 2015, 4002. The United States Trustee imposes additional reporting requirements, which include . . .

To implement this Proposal, Congress might direct the United States Trustee (with input from bankruptcy practitioners, judges, and academics and financial and business experts experienced in bankruptcy matters) to develop national guidelines, criteria, and schedules concerning the types of historical, current, and projected factual information that should be made available to all parties. If the court so directs, the United States Trustee could work with the parties in interest to develop specific schedules and requirements in each case. The court would become involved if the parties are unable to reach an accord on scheduling and disclosure.

[60] The experts will serve as neutral advisors to the court and the parties, rather than fiduciary advisors to specific parties.

[61] Unlike an examiner, the expert is not appointed to investigate the debtor.

[62] Financial and business analyses and recommendations that may be required or useful in a case might include, without limitation: (i) financial projections, (ii) industry analyses, (iii) market analyses, (iv) profit and loss analyses, (v) whether the business is viable, (vi) whether the business should be liquidated or reorganized, (vii) valuation analyses and development of methodologies for valuation, (viii) analysis of financial information relevant to whether related entities should be substantively consolidated, (ix) analysis and valuation of assets and liabilities, (x) analysis of major claims that may impact allocation of reorganization values, (xi) analysis of the debtor's business plan, and (xii) analysis of the debtor's prospects for feasible reorganization.

Add – Republic of Phillipines, example of flexible use

[63] *See* 11 U.S.C. § 101(14) (1993).

[64] Federal Rule of Evidence 706 provides:

(a) Appointment. The court may, on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have an opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including the party calling the witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of Appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' Experts of Own Selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

FRE 706.

[65] Such compensation is permitted only "to the extent" that services provided a substantial contribution. *See* 11 U.S.C. § 330 (1993). Consequently, the court could determine that only a portion of the expert's services relating to specific aspects of the case generated a substantial contribution.

[66] *See, e.g.*, Karen Gross, *Suggestions for* NBRC, [full cite], 521 (proposing shared experts and accountants in chapter 11 cases; arguing that shared experts would curtail overlapping work, produce considerable savings, and alter the dynamics of the case; noting that various constituencies would have the burden of assessing and marshaling the data produced by the expert; cautioning that retained experts should be selected from a wide range of candidates); Tabb, *supra* note 53, at 840-41 (recommending that, if multiple committees are appointed, the court should reduce costs by authorizing or requiring the committees to share professionals; noting that much of the work of accountants and investment bankers overlaps and could be shared by different committees); Bettina M. Whyte & Patricia D. Tilton, *Response: Impact on Plan Feasibility of the Compensation and Utilization of Profesisonals,* 1 Am. Bankr. Inst. L. Rev. 397, 403 (recommending court appointment of an overseer who would hire a professional to be shared by the parties); c*f.* J. Bradley Johnston, *The Bankruptcy Bargain*, 65 Am. Bankr. L. J. 213, 241 (Winter 1991) (noting that parties rarely share their expert valuations with other parties voluntarily).

[67] *See*, *e.g*., Flaschen, [full cite], 514 (proposing that the court appoint an independent monitor who would retain a single set of professionals, which would reduce the parties' resort to adversarial litigation); Whyte & Tilton, *supra* note 66 (proposing that the debtor be required to submit, early in the case, a detailed financial analysis of liquidation and a preliminary business plan showing how the company will be reorganized; proposing also that an overseer hire and monitor shared professionals for diverse constituencies, including financial advisors and some aspects of legal work); Karaan E. Thomas, *Valuation of Assets in Bankruptcy Proceedings: Emerging Issues*, 51 Mont. L. Rev. 126, 156 (1990) (suggesting that court appoint neutral experts to distance judge from two-hatted role of bargain-maker and judge, and to avoid extreme differences in valuation figures that result from competing parties' experts); Jeffrey W. Warren, *Use of Court-Appointed Experts in Resolving Complex Claim Estimations*, 16-May Am. Bankr. Inst. J. 46, 48 (1997) (arguing that the appointment of experts under Rule 706 can "assist a bankruptcy court in addressing the most complex evidentiary issues that arise in claims estimation matters"); *cf*. Smith, *supra* note --, at 623 (proposing the elimination of official committees in order to reduce litigation and reduce the unnecessary proliferation of professionals and duplication of efforts).

[68] *See supra* note --. For discussions of the use of expert witnesses under Rule 706, see R.E. Barber, *Annotation, Trial Court's Appointment, In Civil Case, of Expert Witness*, 95 A.L.R.2d 390 (1999) (collecting cases; finding that experts are appointed most frequently in connection with medical/psychiatric evaluation, technical analyses (e.g., engineering), handwriting analysis, and eminent domain evaluations; not discussing any bankruptcy cases); Natasha I. Campbell and Anthony Vale, *Encouraging More Effective Use of Court-Appointed Experts and Technical Advisors*, 67 Def. C. J. 196, 197-198 (2000); Joe S. Cecil & Thomas E. Willging, *The Use of Court-Appointed Experts in Federal Courts*, 78 Judicature 41 (1994) (summarizing the results of interviews with judges who had appointed experts); Ellen E. Deason, *Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference*, 77 Oregon L. Rev. 59, 75 (1998); Samuel R. Gross, *Expert Evidence*, 1991 Wis. L. Rev. 1113 (1991) (discussing the use of experts under Rule 706 and its predecessors; noting that experts are not appointed frequently); Karen Butler Reisinger, *Court-Appointed Expert Panels: A Comparison of Two Models*, 32 Ind. L. Rev. 225 (1998); Jane F. Thorpe, Alvina M. Oelhafen & Michael B. Arnold, *Court Appointed Experts and Technical Advisors*, 26 no. 4 Litigation 31 (Summer 2000) (. . .); -----, *Judicial Education after* Markman v. Westview Instruments, Inc.*: the Use of Court-Appointed Experts*, 47 UCLA L. Rev. 1423, 1427 (2000); *see also* Reilly v. United States, 863 F.2d 149 (1st Cir. 1988) (recognizing courts' inherent power to appoint technical advisors).

[69] *See* Federal Rule of Bankruptcy Procedure 9017 ("The Federal Rules of Evidence and Rules 43, 44, and 44.1 F.R.Civ.P. apply in cases under the Code."). [also Bankruptcy Evidence Manual § 706]

[70] *See*, *e.g*., [check all cites] Computer Assoc. Int'l, Inc. v. Altai Inc., 982 F.2d 693 (2d Cir. 1992) (appointing expert to evaluate similarity of computer programs in copyright infringement case); Renaud v. Marin Marietta Corp., 749 F. Supp. 1545 (D. Colo. 1990) (appointing expert to evaluate admissibility of plaintiffs' expert opinions in toxic tort case); Knight v. Alabama, 900 F. Supp. 272 (1995) (appointing five, neutral, education experts to assist the court and parties in analyzing issues of racial discrimination in higher education); Harbor Software, Inc. v. Applied Systems, Inc., 936 F. Supp. 167, 169, n. 1 (1996) (appointing neutral expert to help court and parties understand complex technology in computer software copyright infringement case); San Francisco NAACP v. San Francisco Unified Sch. Dist., 576 F. Supp. 34 (N.D. Cal. 1983) (appointing experts in school desegregation case); In re Breast Implant Cases, 942 F. Supp. 958 (S.D.N.Y. 1996) (appointing expert panel to evaluate claims of systemic disease due to breast implants); *see also* sources cited *supra* note 68.

[71] [check all cites] *See* Wang v. Chen, [cite] 1991 U.S. Dist. LEXIS 4398 (1991) (appointing accounting expert in suit concerning break up of business relationship); New York v. Kraft General Foods, Inc., 926 F. Supp. 321 (1995) (appointing expert economist in antitrust merger suit); Reynolds v. Alabama, 996 F. Supp. 1156 (1998) (appointing expert to calculate back pay in employment case); *see also* Cary B. Cheifetz & William B. Shulman, *To Use or Not to Use Court-Appointed Accounting Experts?*, 13 No. 5 Fair Share 3 (May 1993) (identifying advantages of court-appointed experts as including impartiality, ability to achieve a settlement or stipulate as to value, lower cost, elimination of trial time, and reduction of trial calendar; but noting that court-appointed expert is not a panacea for every valuation problem in divorce litigation).

[72] *See generally* 9 Norton Bankr. L. & Prac. 2d, Fed. R. Evid. 706 Court Appointed Experts, at --; Robert P. Schweihs, *Litigation Support, Valuation-Related Dispute Resolution, and Expert Witness Services*, 12-Nov. Am. Bankr. Inst. J. 10 (1993); Thomas, *supra* note 67 (discussing use of court-appointed experts to establish property's future value); Warren, *supra* note 68.

See, *e.g*., *In re* TM Carlton House Partners, 93 B.R. 859, 862 (Bankr. E.D. Pa. 1988) (appointing an engineering firm as an independent expert to determine alleged defects in an HVAC system, after the parties failed to agree on an expert); In re Joint Eastern and Southern Districts Asbestos Litigation, 122 B.R. 6, 6 (E.D.N.Y. & S.D.N.Y. 1990) (appointing a law professor to help determine the "incidence of future disease and deaths due to asbestos exposure and volume and nature of claims that would be asserted against Chapter 11 debtor's personal injury settlement trust," and outlining the responsibilities of the expert). *See also* In re Joint Eastern and Southern Districts Asbestos Litigation, 129 B.R. 710 (E.D.N.Y. 1991), *vacated* 982 F.2d 721 (2d Cir. 1992); In re Joint Eastern and Southern Districts Asbestos Litigation, 982 F.2d 721, 725, 750 (2d Cir. 1992) (vacating judgment and remanding; holding that the district court had discretion to order the personal injury settlement trust to pay $60,000 for the court-appointed experts' studies); In re Joint Eastern and Southern Districts Asbestos Litigation, 1993 WL 207565, *3 (E.D.N.Y. 1993) (acknowledging the lower court's appointment of a panel of experts assembled by the court appointed law professor expert to determine the proper amount to be paid per

claim from the trust); In re Joint Eastern and Southern Districts Asbestos Litigation, 830 F. Supp. 686, 689-91 (E.D.N.Y & S.D.N.Y. 1993) (acknowledging the court-appointed panel of experts' "Interim Rule 706 Report," and ordering the experts to provide sworn testimony so that the parties could examine the experts and "present their own testimony and exhibits" regarding the number and value of future claims against the personal injury settlement trust); In re Joint Eastern and Southern Districts Asbestos Litigation, 151 F.R.D. 540 (E.D.N.Y. & S.D.N.Y. 1993) (granting the motion of the legal representatives of future claimants to quash notices of deposition for members of the panel of court-appointed experts; recapping the experts' responsibilities as outlined in the district court's original Rule 706 Order; discussing specific statutory authority for court-appointed experts and scope of disclosure of experts' findings, including Rules 706 and 102 of the Federal Rules of Evidence, Rule 16 of the Federal Rules of Civil Procedure, and 28 U.S.C. § 473(a)(3)(C)(i); (a)(4)); In re Joint Eastern and Southern Districts Asbestos Litigation, 878 F. Supp. 473 (E.D.N.Y. & S.D.N.Y. 1995) (setting forth extensive finding of the court-appointed panel of experts and outlining the final settlement terms). The *Manville* case is discussed in Steven L. Schultz, In re Joint Eastern and Southern District Asbestos Litigation: *Bankrupt and Backlogged – A Proposal For the Use of Federal Common Law in Mass Tort Class Actions*, 58 Brook. L. Rev. 553 (1992). The order quashing the deposition is discussed in Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 Yale L.J. 367, 402 n. 117 (1994).
unreported cases. . .

[73] In several bankruptcy cases, the court has noted its authority to appoint an independent expert, but has declined to do so, sometimes because the task at hand required an investigation of the debtor or other task more appropriate for an examiner. *See*, *e.g*., In re Landscaping Services, Inc., 39 B.R. 588, 591 n. -- (Bankr. E.D.N.C. 1984) (noting bankruptcy court's power to appoint an expert witness if necessary, but adding that, if appointed, the expert "would lack the investigative authority given to an examiner"); In re General Development Corp., 147 B.R. 610, -- (Bankr. S.D. Fla. 1992) (following the recommendation of a court-appointed special examiner, who later testified as an expert for the debtor); In re Chicago, Milwaukee, St. Paul & Pacific R.R. Co., 1992 WL 91806, * 1 (N.D. Ill. 1992) (determining that the complexities of the issues mandated the appointment of a "special master," rather than an independent railroad expert, which the railroad debtor had requested "to opine with respect" to the debtor's maintenance claim); In re Chateaugay Corp., 154 B.R. 29, 35 (Bankr. S.D.N.Y. 1993) (noting that the bankruptcy court previously had considered the *sua sponte* appointment of an expert to value bondholders' second quarter interest, and briefly discussing the court's decision not to appoint the expert); In re Hunt's Health Care, Inc., 161 B.R. 971, 980 n.5 (Bankr. N.D. Ind. 1993) (acknowledging court's authority, in appropriate cases, to appoint an expert to render an opinion concerning a fee application); In re Smith, 192 B.R. 563, 565 (Bankr. W.D. Okla. 1996) (reconsidering whether to appoint an expert witness to render an opinion concerning the sufficiency of the interest rate proposed in a chapter 13 plan); In re Dow Corning, 211 B.R. 545, 590-91 (Bankr. E.D. Mich. 1997) (considering whether to appoint a panel of experts to assist in a claims estimation hearings, but concluding that estimation was not necessary; briefly comparing the roles of special masters and experts); Midway Airlines, Inc. v. American Airlines, Inc., 211 B.R. 411, 417-18 (N.D. Ill. 1998) (considering appointing an expert if the parties continued to dispute certain matters or failed to agree on a mutually acceptable expert); Gold v. Dalkon Shield Claimants Trust, 998 WL 351456, * 3 fn.3 (D. Conn. 1998) (noting that the court denied the plaintiff's petition to appoint an independent expert witness because the "plaintiff failed to make a strong enough showing that the issues involved were so highly technical that it is necessary to interfere with the adversarial process by appointing an independent expert").

[74] Although it is important that all parties have full disclosure and access to an expert's reports and findings, where an expert has been characterized as a "technical advisor" to the court, rather than an expert witness in litigation, and the court is concerned that depositions of the expert may be designed to harass and delay rather than to discover information, the court may refuse to permit parties to depose the expert. *See* In re Joint Eastern and Southern Districts Asbestos Litigation, 151 F.R.D. 540 (E.D.N.Y. & S.D.N.Y. 1993) (discussing the interaction between Federal Rule of Evidence 706, which provides for disclosure of the expert's findings, and rules that protect the expert from harassment; granting a motion to quash notices of deposition for members of the panel of court-appointed experts).

[75]

National data collection; national sample if meets statistical requirements

[76] *See*, *.e.g*., Altman, *supra* note 7, at 1076-77; James S. Ang, [et al. – list others], *The Administrative Costs of Corporate Bankruptcy: A Note*, 37 J. Fin. 219, 219 (1982) (identifying three types of bankruptcy costs: direct costs, indirect costs (the shortfall in value when assets are liquidated or indirect costs when a firm is reorganized), and loss of tax credits).

[77] Altman found that indirect costs averaged 8.7% of firm value three years before filing and 12.2% just prior to filing for the retail firms, and 17.4% of firm value three years before filing and 23.7% just prior to filing for the retail firms. The combined average of direct and indirect costs for all 18 firms was 12.1% of firm value three years before filing and 16.7% of firm value at filing. Altman, *supra* note 7, at 1074, 1077-82. He concluded that bankruptcy costs and the expectation of bankruptcy costs could affect capital structure. *Id*. at 1086.

[78] *See*, *e.g*., Altman, *supra* note 7, at 1074, 1076-77 (examining 11 retail and 7 industrial firms that filed bankruptcy between 1970 and 1978 and liquidated; finding that the direct costs of bankruptcy averaged 6% of the firms' value both five years prior to bankruptcy and just prior to bankruptcy); Jerold B. Warner, *Bankruptcy Costs: Some Evidence*, 32 J. Fin. 337, 340-43 (1977) (examining direct bankruptcy costs in 11 railroad cases filed between 1933 and 1955; finding that direct administrative costs as a percentage of market

value at filing ranged from 1.7% to 9.1% with an average of 5.3%; direct administrative costs as a percentage of market value five years prior to filing ranged from .4% to 3.2% with an average of 1.4%; direct administrative costs as a percentage of market value seven years prior to filing ranged from .6% to 1.6% with an average of 1.0%); Karen Hopper Wruck, *Financial Distress, Reorganization, and Organizational Efficiency*, 27 J. Fin. Econ. 419, 426, 437 (1990) (consolidating data from five prior studies shows outcomes for 381 financially distressed publicly traded firms based upon stock performance; finding that 51% defaulted or restructured their debt. Of these, 47% resolved the default in an out of court restructuring; 53% filed chapter 11; of those that filed chapter 11, one study of 37 entities that filed chapter 11 between 1980 and 1986 showed that 95% emerged under a plan, 5% liquidated; of those that filed chapter 11, another study showed that 162 entities that filed chapter 11 between 1973 and 1982 showed that 60% emerged under a plan, 7% merged with other companies, 15% liquidated, and 17% not accounted; consolidating data from 4 studies of chapter 11 costs shows direct costs ranging from 3.1% of market value (Weiss 1990 study of 31 cases filed between 1980 and 1986 in 7 districts), 4% of market value (Warner 1977 study of 11 railroad cases filed between 1933 and 1955), 4.3% of market value (Altman 1984 study of 18 cases, 11 retail and 7 industrial, filed between 1970 and 1978), and 7.5% of liquidated value at end of process (Ang 1982 study of 55 Oklahoma cases filed between 1963 and 1978, all of which liquidated). (Id. at 437))

Steven Kaplan study of Federated suggests 2-3 % of asset value for professional fees
[add LoPucki large case data, trouble with chapter 11]
[add cost control data from private industry, corporate counsel]

[79] Ferris & Lawless, *supra* note 46, at manuscript 13-14, 17, 18, 47-55 (examining a random sample of chapter 11 cases filed in 6 cities; applying descriptive statistics and regression analyses to explain the relationship between costs and characteristics of the cases; finding that the average direct costs of chapter 11 were 17.6% of total assets at filing and 30.6 % of unencumbered assets at filing; [did they add filing fees or only professional fees?] Lawrence A. Weiss, *Bankruptcy Resolution: Direct Costs and Violation of Priority of Claims*, 27 J. Fin. Econ. 285, 289-90 (1990) (examining a sample of 37 New York Stock Exchange and American Stock Exchange firms that filed for bankruptcy between November 1979 and December 1986; finding that average direct costs were 20.6% of market value of equity (range from 2% to 63.6%), 3.1% of the book value of debt plus market value of equity (range from 1% to 7%), and 2.8% of the book value of total assets (range from .9% to 7%).

[80] Ferris & Lawless, *supra* note 46, at manuscript 13-14, 17, 18, 47-55 (examining a random sample of chapter 11 cases filed in 6 cities; finding that the average direct costs of chapter 11 were 7.6% of total distributions, and 30% of non-secured distributions); Robert Lawless, Stephen P. Ferris, Narayanan Jayaraman & Anil K. Makhija, *A Glimpse at Professional Fees and Other Direct Costs in Small Firm Bankruptcies*, 1994 U. Ill. L. Rev. 847 (examining 57 small firm bankruptcy cases filed in Memphis and closed in 1991 or 1992; finding that the average direct costs for the chapter 11 cases in the study were 26.19% of distributions and 36.65% of assets in chapter 11 cases and that professional fees account for 20.3% of distributions and 17.45% of assets in chapter 11; noting that studies of large cases show direct costs of only 2-6% of distributions).

Ferris & Lawless, *Chapter 11* at manuscript – (random sample drawn from 6 cities; cases confirmed at least 14 months prior to the study; study did not include any major metropolitan areas (New York, Chicago, Los Angeles) or Delaware. Over 65% of the cases were filed in 1991-1992; 94% were filed in 1990-1994. [Note: the LoPucki studies, which examine only very large public companies (over 100 million in assets in 1980 dollars) include more cases filed in major cities – compare conclusions.]

In some of these studies, the authors estimated the direct costs rather than actually examining the bankruptcy filings to determine the amounts of professional fees. Altman, at -- . Some mix reorganizing and liquidating entities or do not clearly specify whether the firms ultimately succeeded in reorganizing.

Most of the studies' authors conclude that the costs of reorganization under the Bankruptcy Code are relatively low, although several suggest that they could be lower.
See, e.g., Ferris & Lawless, *supra* note --, at manuscript 13-14, 17, 18, 47-55, 63 (concluding that direct costs are relatively low and are consistent with the LoPucki studies of costs in large publicly traded cases; finding little cross-district variation; concluding that costs are higher than prior studies, when viewed as a percentage of non-secured distributions, which includes unsecured and administrative priority distributions; finding that attorneys' fees are the bulk of the costs; and concluding that, for every year in chapter 11, direct costs consume another 2.1% to 2.2% of the total distributions in the case); Weiss, *supra* note --, at 285-90 (finding that the small direct costs have virtually no impact on the pricing of claims and capital structure before bankruptcy; as for studies prior to the Bankruptcy Code, notes that Stanley & Girth (1971 based on 1964 study) and Ang, et alia (1982 based on 1963-1978 study) used much smaller firms for their studies and found costs ranging from 7.5% (Ang) to 25% (S&G), Warner (1977 based on 1933 – 1955 railroad cases study) used larger firms (railroads) and, like this study, found much lower costs (4%); Warner, *supra* note --, at – (concluding that . . .); Altman, *supra* note --, at -- (concluding that costs have declined under the Bankruptcy Code but could be lower; arguing that the costs could affect capital structure decisions); *cf.* LoPucki *Trouble With Chapter 11* , *supra* note --, at -- (finding that 1964 to 1997 data shows 150% increase in the median time companies spend in chapter 11 but no corresponding increase in the median time for large, publicly held companies; concluding that the Bankruptcy Code decreased the time and cost of reorganization for the very largest entities but increased the time and cost of reorganization for most entities because the 1978 changes were well-suited only to the largest companies; recommending changes including separate procedures more appropriate to cases other than very large public

companies).

[81] *See supra* notes – to -- ; *infra* notes – to –; *see generally* Tashjian, *supra* note --, at 136-44 (examining 49 companies that filed pre-packaged chapter 11 cases between January 1980 and June of 1993; analyzing direct fee data for 39 cases, the bulk of which fees (garnered from public filings) are for financial advisors. [Note: They did not review court filings, so it is not clear whether this includes complete or accurate attorney fee information.]; finding that the average direct costs of restructuring as a percentage of book value of assets in pre-voted pre-packaged cases were 1.65, in post-voted pre-packaged cases were 2.31, in all pre-packaged cases were 1.85, in traditional chapter 11 cases were (Weiss) 2.8, and in out-of-court restructurings were (Gilson) .65).

[82]

Ang, *supra* note --, at 222-24 (examining 86 randomly selected closed business bankruptcy cases filed in the Western District of Oklahoma between 1963 and 1978; finding that 31% of the cases had no assets for distribution; finding average administrative costs of 7.5% of liquidated value, and median administrative costs of 1.7% of liquidated value); Daryl M. Guffey & William T. Moore, *Direct Bankruptcy Costs: Evidence From the Trucking Industry*, 26 Fin. Rev. 223, 225-26, 230-34 (1991) (examining 28 trucking firms that filed bankruptcy (liquidation) between 1970 and 1985; finding average direct costs of 9.12 % of pre-bankruptcy book value of total assets as of the year before filing; noting that these are higher than the costs shown in prior studies for retail firms (9.8%, Altman 1984), industrials (4%, Altman 1984), and railroads (5.3%, Warner 1970), but noting that the trucking firms are smaller than the retailers and much smaller than the railroads; concluding that, when the various measured are scaled, average direct costs were 9.12% for trucking firms, 0.53% for railroads, and 3.39% for retailers; attributing this to firm size because the larger cases demonstrate economies of scale); Robert Lawless, Stephen P. Ferris, Narayanan Jayaraman & Anil K. Makhija, *A Glimpse at Professional Fees and Other Direct Costs in Small Firm Bankruptcies*, 1994 U. Ill. L. Rev. 847 (examining 57 small firm bankruptcy cases filed in Memphis and closed in 1991 or 1992; finding average chapter 7 direct costs of 69% of distributions to unsecured creditors and 59.68% of unencumbered asserts at filing and that professional fees account for 60% of distributions in chapter 7 and 18.87% of unencumbered assets at filing); Lawless & Ferris, [*Professional Fees in Chapter 7] supra* note --, at 1219-1226 (examining 98 chapter 7 business bankruptcy cases filed between 1991 and 1995 in Atlanta, Boston, Kansas City, Seattle and St. Louis; finding that chapter 7 business bankruptcy costs averaged 13.5% of all distributions and 6.1% of assets at filing; finding median costs of only 2.1% of distributions and 1.1% of assets on filing; finding that attorneys' fees averaged 10.5% of distributions (1.5% median) and 3.8% of assets (.7% median); suggesting that distributions provide a better standard for measuring bankruptcy costs than assets at filing; concluding that only a few chapter 7 cases involve "out of control" costs; recommending that policy makers focus on these outliers rather than imposing stricter regulations on all chapter 7 cases).

[83] Ferris & Lawless, *supra* note –, [*Chapter 11]* at manuscript 56-61 (examining random sample of chapter 11 cases drawn from 6 cities; concluding that (i) no identifiable variables helped explain costs as a percentage of either total assets or unencumbered assets, (ii) with one exception, the data showed no scale effect (i.e., it did not show that costs decreased as a percentage of firm value as firm size increased); finding that attorneys' fees did not decrease as a percentage of total distributions as firm size increased; total costs did not decrease as a percentage of non-secured distributions as firm size increased; and total costs did not decrease as a percentage of total distributions as firm size increased; finding, however, that attorneys' fees did decrease as a percentage of non-secured distributions as firm size increased; in other words, in larger cases, attorneys' fees represented a smaller percentage of distributions to unsecured creditors (and other distributions not on secured debt) than in smaller cases; concluding that the effects of size on cost, under this measure, were modest.); *cf*. Lawless & Ferris, *supra* note --, at 1126-29. 1235 [*Professional Fees in Chapter 7]* (finding no scale effect in chapter 7 business bankruptcy cases; in other words, the proportion of direct costs to firm size did not decrease as firm size increased; rather, time in bankruptcy and the ratio of unsecured to secured debt were the most significant factors explaining chapter 7 bankruptcy costs. (Id. at 1126-29, 1235) [DELETE REST?]

The median total asset size in the sample was $107, 602. The median debtor "deployed" $42,357 of these assets in its business.

The average distribution to creditors was $107,994 (median $65,615). The definition of distributions is broad, and including abandonment and relief from the automatic stay. In most cases, nothing was distributed to unsecured creditors. The theoretical prototype of chapter 7, in which the assets are marshaled and sold to benefit all creditors not holding collateral is "more fantasy than fact."

Bankruptcy costs are not unreasonably high in chapter 7 business cases. The authors recommend that lawmakers should give courts discretion to control costs in individual cases rather than legislate bright line rules. Rules restricting bankruptcy costs would be overly broad for more than 75% of chapter 7 business bankruptcies in which costs are only 1.0-2.0% of the business's assets and distributions. There were no statistically-significant differences between the costs of cases converted to chapter 7 and the costs in non-converted cases. (Id. at 1219-1226)

The study identifies six variables affecting direct bankruptcy costs: length of time in bankruptcy, size of the debtor's attorney's law firm, the ratio of unsecured debt to total debt, the average size of unsecured claims and secured claims, and the number of claims. Of these, only time in bankruptcy and the ratio of unsecured to secured debt were statistically significant in explaining chapter 7 costs. (Id. at 1229-1234)

Study did not find a significant relationship between the average size of the unsecured or secured claim and chapter 7 costs. (Study of 98 Chapter 7 business bankruptcy cases in five cities: Atlanta, Boston, Kansas City, Seattle and St. Louis).

[84] *Cf*. Ang & -- , *supra* note --, at 224 (examining 86 randomly selected closed business bankruptcy cases filed in the Western District of Oklahoma between 1963 and 1978; finding a scale effect in which administrative costs (as a percentage of firm value) decline as firm size increases; extrapolating these data, estimating that costs would be less than 2% of liquidating value in firms valued at over $1 million); Guffey & Moore, *supra* note --, at 225-26, 230-34 (examining 28 trucking firms that filed bankruptcy (liquidation) between 1970 and 1985; finding average direct costs of 9.12% of pre-bankruptcy book value of total assets as of the year before filing; noting that these costs are higher than the costs shown in prior studies for retail firms (9.8%, Altman 1984), industrials (4%, Altman 1984), and railroads (5.3%, Warner 1970); but noting that the trucking firms are smaller than the retailers and much smaller than the railroads; finding that, when the various measured are scaled, he finds a comparison of 9.12% for trucking firms, 0.53% for railroads, and 3.39% for retailers; attributing the differences to firm size and concluding that larger cases demonstrate economies of scale); Warner, *supra* note --, [*Bankruptcy Costs: Some Evidence]* at 337-38 (examining direct bankruptcy costs of 11 railroad cases filed between 1933 and 1955; finding a scale effect in which the ratio of direct cost to firm value falls as the firm size increases; the costs, on average, are about 1% of firms' market value 7 years prior to bankruptcy; notes that the Stanley & Girth finding of higher cost/value ratio may be due in part to the fact that they studied smaller firms); Weiss, *supra* note --, at [*Bankruptcy Resolution: Direct Costs*] 285-90 (examining 37 New York Stock Exchange and American Stock Exchange firms that filed for bankruptcy between November 1979 and December 1986; as for studies prior to the Bankruptcy Code, notes that Stanley & Girth (1971 based on 1964 study) and Ang, et alia (1982 based on 1963-1978 study) used much smaller firms for their studies and found costs ranging from 7.5% (Ang) to 25% (S&G); in contrast, Warner (1977 based on 1933 – 1955 railroad cases study) used larger firms (railroads) and, like this study, found much lower costs (4%); finding no scale effect, but finding that direct costs are highly correlated with total assets but do not fit a concave function; in other words, direct costs are higher in cases that have more assets; the direct costs / assets ratio does not decline as the size of the entity increases. (Id. at 289-90) [Note: This study involves only large cases. The absence of a scale effect among these might not disprove a scale effect that distinguishes very large cases from very small cases.]

[85] For consistency, those studies that recorded time in numbers of days have been translated into 30-day months.
There is inadequate data to determine whether the year in which a case was filed has any impact on the time the case is in bankruptcy. *See*, *e.g*., Ferris & Lawless, supra note --, [*Chapter 11*] at manuscript 18 (finding no statistically significant relationship between when the bankruptcy was filed and the costs of bankruptcy in a study in which over 65 percent of the case were filed in 1991 or 1992 and 94 percent were filed between 1990 and 1994)

[86] Altman, *supra* note --, *Evaluating Chapter 11*, at 2, 22-25 (finding Bradley & Rosenzweig study to be biased, incomplete and otherwise problematic; noting that time in bankruptcy is obviously related to direct, out-of pocket cost; arguing for revision rather than scuttling of chapter 11; finding that time has decreased under the Bankruptcy Code, but arguing that it is still too long; noting that Professor LoPucki's studies show that the time difference lies in the size of the case and that chapter 11 had little impact on the time large companies spent in reorganization but that it more than doubled the time small companies spend in reorganization; recommending reasonable exclusivity that cannot be extended unless the debtor shows that the firm is worth more as a going concern that liquidated).

[87] Ang, et al., *Administrative Costs of Corporate Bankruptcy*, *supra* note --, at 221-24 (finding that over 80% of the cases were completed in less than 2 years, the longest lasted just over 4 ½ years; noting that each firm was liquidated).

[88]

[89] Flynn, *supra* note --, at 23-28 (finding that nearly 2/3 of confirmations occur in the 2d and 3d year and very few are confirmed after 5 years, the average time to confirmation was 740 days [approximately 24.6 30-day months] and median was 656 days [approximately 21.8 30-day months], it cannot be determined whether the time to confirmation is increasing or decreasing, in the 15 Ernst & Young districts, median time to confirmation ranged from 461 days to 941 days [approximately 15.4 to 31.4 30-day months], based upon a July 1989 study by Ernst & Young of 2,395 confirmed chapter 11 cases in 15 districts, weighted to reflect national figures, combined with data compiled by the AOUSC SARD).

[90] Franks & Touros, *Empirical Investigation supra* note – (finding, based upon a study of 30 large, publicly traded firms that filed for reorganization between 1970 and 1983 and emerged, that the framework of chapter 11 is complex, lengthy, and costly, violations of absolute priority in favor of shareholders are common, cases were completed in 37 days to more than 13 years, the average was 3.67 years and the standard deviation was 2.88 years, railroads spent the longest time in reorganization).

[91] Gilson, *supra* note --, at -- (reporting results of a study in which private restructuring took an average of 15.4 months, median of 11 months; publicly traded debt exchange restructuring took an averagte of 6.6 months, median 2 months; non-traded debt restructuring took an average of 15.9 months, median of 10.5 months; firms that filed chapter 11 spent an average of 8.1 (median 3) months out of court, then an additional average of 20.4 (median 18) additional months in chapter 11).

[92]

[93] Susan Jensen-Conklin, *Do Confirmed Chapter 11 Plans Consummate? The Results of a Study and Analysis of the Law*, 97 Com. L.J. 297 (1992) (reporting results of a study of a sample of 260 chapter 11 cases filed in the SDNY between 1980 and 1989 in which plans were confirmed (the Poughkeepsie Study); finding that, during the first five years of the study, the average time for confirmation was 22.09 months; during the second five years it was 19.36 months; overall it was 22.04 months; noting that the Flynn Study showed an average time to confirmation of 22 months).

[94] Jerome Kerkman, *The Debtor in Full Control: A Case For Adoption of the Trustee System*, 70 Marq. L. Rev. 159, 174 (1987) (reporting results of a study of 48 cases in Eastern District of Wisconsin during 1982 that showed an average of twelve months between filing and confirmation; also suggesting that the size of the business influences the decision to appoint a trustee because small businesses often cannot operate without a principal owner and may not generate sufficient income to support the expense of a trustee).

[95] Ferris & Lawless, *Chapter 11* supra note -, at manuscript 23-24, 27-29 (reporting results of a random sample drawn from 6 cities of cases confirmed at least 14 months prior to the study; finding mean time in chapter 11 of 437 days [approximately 14.5 30-day months], the median time in chapter 11 was 395 days [approximately 13 30-day months]; noting other studies that found averages of 429 days (Bermant & Flynn 1998) [approximately 14 30-day months], 525 days (LoPucki 1991) [approximately 17.5 30-day months]; 312 days (LoPucki 1983) [approximately 10.4 30-day months], and 377 days (Kerkman 1987) [approximately 12.5 30-day months]); *id*. at manuscript 22, 61-64 (finding "a positive but statistically weak relationship between costs and time in bankruptcy;" for every year in chapter 11, the total costs consume another 2.1% to 2.2% of the total distributions in the case).

[96]

[97]

[check Rasmussen & Skeel, The Economic Analysis of Corporate Bankruptcy Law at 89-90]

[98]

[99]

[100] Warner, *Bankruptcy Costs supra* note --, at 340 (studying direct bankruptcy costs in 11 railroad cases filed between 1933 and 1955; finding that the time in bankruptcy ranged from 4 years to 23 years, averaged 12.5 years, median was 13 years) [did they reorganize or liquidate?]; *id*. at 340-43 (finding a scale effect in which the ratio of direct cost to firm value fell as the firm size increased; the costs, on average, were about 1 percent of the firms' market value prior to bankruptcy; noting that the Stanley & Girth finding of higher cost/value ratio may be due in part to the fact that they studied smaller firms; finding direct administrative costs as a percentage of market value at filing ranged from 1.7% to 9.1% with an average of 5.3%; direct administrative costs as a percentage of market value five years prior to filing ranged from .4% to 3.2% with an average of 1.4%; direct administrative costs as a percentage of market value seven years prior to filing ranged from .6% to 1.6% with an average of 1.0%).

[101] LoPucki, supra note – at -- ; Theodore Eisenberg & Lynn M. LoPucki, Shopping For Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations, 84 Cornell L. Rev. 967, --(1999) (reporting forum-shopping data from 1980 through 1997 for large, publicly held companies in chapter 11, including data concerning number of large cases filed each year, number of large cases "shopped," rate of forum shopping, mean time to termination of large chapter 11 cases, use of pre-packaged plans in Delaware, rate of forum shopping in pre-packaged plan cases; finding that the mean time to termination in large, publicly traded companies in chapter 11 fell from approximately 1400 days in 1981 to approximately 300 days in 1996 and 1997.); Altman, Evaluating Chapter 11, supra note --, at – (. . . (citing LoPucki)); *see also* Edward Altman, Corporate Financial Distress 20-21 (1983) (noting that at least 50 firms with liabilities exceeding $1 billion had filed chapter 11 under the Bankruptcy Code as of 1992)

Bankruptcy experts have engaged in much discussion of whether a separate chapter or separate processes should be implemented to expediate the reorganizations of smaller business reorganization cases. *See*, *e.g*., A. Thomas Small, *Small Business Bankruptcy Cases*, 1 Am. Bankr. Inst. L. Rev. 305 (1993) (elaborating . . . and arguing . . .); NBRC Report at – (recommending . . .); [add others]; *cf*. Leif M. Clark, *Chapter 11: Does One Size Fit All?*, 4 Am. Bankr. Inst. L. Rev. 167, 167 (1996) (arguing that the "one size fits all" approach of chapter 11 is generally effective, although it could be enhanced by providing judges with more training about general aspects of business operations; noting that Judge Small has simplified disclosure statements and expedited the confirmation process in a successful effort to reduce the costs of chapter 11 cases for small businesses). The 19-- amendments to the Bankruptcy Code added optional procedures under which small businesses (defined as businesses with less than . . .) could . . . . *See* 11 U.S.C. § -- (19--).

[102] Other data show no differences in . . . based upon the size or nature of the case. *See*, *e.g*., FLYNN, *STATISTICAL ANALYSIS supra* note --, at 26-35 (reporting results of a study that showed (i) there is little relationship between time to confirmation and debt levels, except that cases with debts of $500,000 to $1,000,000 take slightly longer to confirm and cases with debts over $1,000,000 take substantially longer to confirm, (ii) there is little relationship between time to confirmation and asset levels, except that the very largest

cases take longer than average to confirm and the very smallest cases take shorter than average to confirm, (iii) cases in which assets greatly exceed debts take slightly longer to confirm, (iv) there is a strong correlation between the amount of assets and the confirmation rate; cases with more than $1,000,000 in assets are at least several times more likely to be confirmed than cases with less than $100,000 in assets); Fenning, *Measuring Chapter 11* at 123, 146 (reporting results of a study of 500 Los Angeles cases filed between 1991and 1994; finding no pattern linking size or type of business with the kind of plan confirmed or the economic outcom; finding no clear pattern linking the size of the case to the length of time from filing to plan confirmation, dismissal, or conversion; finding that the smallest and largest cases appeared to take slightly longer than the moderately-sized case to reach these milestones; suggesting that the study may not have an adequate number of cases in the smallest and largest categories to draw any conclusions); *cf.* (criticizing Flynn study methods).

[103] *See* LoPucki, *supra* note -- , at -- ; FLYNN, *STATISTICAL ANALYSIS supra* note --, at 26-35 [move note 102?]

In their recent report on the demographics of business in bankruptcy, Professors Warren and Westbrook found that most cases are small cases. *See* Elizabeth Warren & Jay L. Westbrook, *Financial Characteristics of Businesses in Bankruptcy*, 73 Am. Bankr. L. J. 499-590, 500, 521-29 (1999) (reporting results of a study finding that most businesses that file chapter 11 are small; suggesting that chapter 11 may be too expensive for most small businesses; noting that, if Congress enacted small business provisions, more than 90% of cases would be classified as small business – a change in rules for small business would make small business filing the norm with a special relaxation of rules for large businesses; finding that the average asset level for all business filings examined in the study (all chapters) was $671,397; the mean was $90,090; 52.8% of business filings had less than $100,000 in assets; 32.5% had $100,000 – $500,000 in assets, 5.6% had $500,000 – $1,000,000; 6.4% had $1,000,000 – $5,000,000; and 2.6% had over $5,000,000 and 85% of businesses with more than $500,000 in assets filed chapter 11 rather than 7; 95% of businesses with more than $1,000,000 in assets filed chapter 11 rather than 7, regardless of financial or business circumstances; concluding that chapter 11 may serve as the vehicle for both liquidating and reorganizing larger cases, while chapter 7 and 13 serve as alternative devices for liquidating or reorganizing the smallest cases; finding that nearly 30% of chapter 11 business cases have more than $1,000,000 in assets, more than 40% exceed $500,000, and 75% exceed $100,000; in contrast, nearly 75% of chapter 7 business cases have less than $100,000 in assets; looking only at the chapter 11 cases, the asset breakdown is as follows: 25.26% under $100,000, 32.49% $100,000 – $500,000, 13.2% $500,000 – $1,000,000, 20.55% $1,000,000-$5,000,000, 8.5% $5,000,000 or more; finding that the average debt of businesses in bankruptcy in the study was $919,087; the mean was $153,430; finding that 36% have debts less than $100,000; $44% have debts between $100,000 and $500,000; 21% have debts greater than $500,000; concluding that over 80% have less than $500,000 in debt (i.e., most are small), but 65% have debts greater than $100,000 (i.e., most are not very small); noting that in the 20% of cases that are over $500,000, the breakdown is as follows: 8.5% $500,000 – $1,000,000, 4.7% $1-2 million, 3.1% $2-4 million, .9% $4-5million, 3.1% $5 million or more; looking only at the chapter 11 cases, the debt breakdown is as follows: 11.78% under $100,000, 36.4% $100,000 – $500,000, 17.55% $500,000 – $1,000,000, 24.62% $1-5 million, 9.66% $5 million or more. (34.28% are over $1 million)). [CUT DOWN]

[104] *See infra* at notes – and – and accompanying text. *See also* Robert Lawless & Stephen P. Ferris, *Professional Fees and Other Direct Costs in Chapter 7 Business Liquidations*, 75 Wash. U. L.Q. 1207, 1214-1216, 1235 (1997) (reporting results of a study of business bankruptcy liquidation cases in 5 cities; finding that time in bankruptcy and the ratio of unsecured to secured debt were the most significant factors explaining chapter 7 bankruptcy costs; finding no scale effect; reporting that the median time spent in a chapter 7 from filing to closing was 335 days, with Atlanta showing the shortest median time at 176 days and Seattle showing the longest at 468 days; finding that Boston cases had lower costs, including lower attorneys' fees, and had a median time in bankruptcy of 353 days, which is close to the estimated national median; suggesting that the lower costs in Boston likely are due to the routine nature of the cases and higher volume of processed assets and distributions, rather than to lower hourly rates for attorneys in Boston; finding a "statistically significant relationships between chapter 7 costs and time in bankruptcy.").

[105] *See* Gilson, *Troubled Debt Restructurings supra* note --, at -- (analyzing 169 publicly traded companies that experienced severe financial distress during 1978-1987 to determine incentives to pursue out-of-court restructuring rather than chapter 11).

[106] *See* Gilson, *supra* note –, at – (. . .); ; Tashjian, supra note --, at 153-55 (noting that creditors in some cases were more willing to accept a pre-packaged filing on the same terms as an out-of-court restructuring where the principal difference was that all other creditors would also be bound in the pre-packaged filing, but not in the out-of-court restructuring).

[107] Ferris & Lawless, *Chapter 11* supra note --, at manuscript 65 (. . .).

[108] *See* LoPucki, . . . ; Lawless & Perkins, *Professional Fees supra* note 103, at 1207 (finding, in a study of 98 chapter 7 business cases filed in 5 cities, that time in bankruptcy and the ratio of unsecured debt to secured debt were the most significant factors explaining chapter 7 bankruptcy costs; finding no significant relationship between the average size of the unsecured or secured claim and chapter 7 costs)

See also Large-Public Companies Database (query run on the database on July 21, 2000 revealed 21 tort-caused cases, including pension, mass tort, fraud, environmental, other; the average time in bankruptcy for these cases (20 cases, data was not available for one case) was 3.2 years; all were confirmed except one, which was converted after an asset sale; none of the 21 tort-caused cases had re-filed bankruptcy as of July 21, 2000; in contrast, of the 229 non-tort-caused cases for which re-filing data was available, time in bankruptcy data was available for 238 non-tort-caused cases; for these cases, the time in bankruptcy (until confirmation, sale or conversion, omitting dismissals) was 1.6 years; this is half the time for the tort-caused cases, but these cases had a higher re-filing rate; 37 (16%) had re-filed by July 21, 2000) (KMG-P, L.M. LoPucki);

[109] FLYNN, *STATISTICAL ANALYSIS* supra note --, at 26-35 (

July 1989 study by Ernst & Young of 2,395 confirmed chapter 11 cases in 15 districts, weighted to reflect national figures, combined with data compiled by the AOUSC SARD showed that:

*there is little relationship between time to confirmation and debt levels, except that cases with debts of $500,000 to $1,000,000 take slightly longer to confirm and cases with debts over $1,000,000 take substantially longer to confirm (Id. at 26)

*there is little relationship between time to confirmation and asset levels, except that the very largest cases take longer than average to confirm and the very smallest cases take shorter than average to confirm (Id. at 27)

*cases in which assets greatly exceed debts take slightly longer to confirm (Id. at 27-28)

*there is a strong correlation between the amount of assets and the confirmation rate; cases with more than $1,000,000 in assets are at least several times more likely to be confirmed than cases with less than $100,000 in assets (Id. at 33-35)

other study -- insert

See also Lawless & Ferris, *supra* note 103, at 1214-16 (finding that the time in bankruptcy and the ratio of unsecured to secured debt were the most significant factors explaining chapter 7 business bankruptcy liquidation costs; finding no scale effect; finding that the median time spent in a chapter 7 from filing to closing was 335 days; Atlanta had the shortest median time at 176 days; Seattle had the longest at 468 days. Boston reported lower costs, including lower attorneys' fees; Boston's median time in bankruptcy was 353 days, which is fairly close to the median for the nation entire; concluding that the cost savings in Boston is likely due to the routine nature of the cases and higher volume of processed assets and distributions, rather than to lower hourly rates for attorneys in Boston.

Study expressly found a "statistically significant relationships between chapter 7 costs and time in bankruptcy." (Id. at 1235)

[110] Ferris & Lawless, *supra* note --, at manuscript 61-70 (. . .); *see also* Michelle J. White, *Bankruptcy Costs and the New Bankruptcy Code*, 38 J. Fin. 477, 484 (1983) (reporting results of a study of 90 liquidating and 96 reorganizing cases filed under the Bankruptcy Act and 88 liquidating and 33 reorganizing cases filed under the Bankruptcy Code in the SDNY; finding that the liquidating firms in her study had a higher percentage of secured debt relative to assets than reorganizing firms (.77 versus .20 under the Bankruptcy Act cases examined; .89 versus .48 under the Bankruptcy Code cases examined), that secured debt was a higher percentage of total debt in the liquidating firms versus the reorganizing firms (.34 versus .18 for the Bankruptcy Act cases; .55 versus .36 for the Bankruptcy Code cases), and that the total liabilities to total asset ratio was higher for the liquidating firms than the reorganizing firms (2.26 versus 1.09 under the Bankruptcy Act cases, 1.62 versus 1.32 for the Bankruptcy Code cases; finding that, for the Bankruptcy Act cases, the total direct bankruptcy costs averaged 1.3% of total liabilities for the liquidating cases and 1.6% of total liabilities for the reorganizing cases, and the total direct bankruptcy costs averaged 22% of distributions to creditors in the liquidating cases and 6% of distributions to creditors in the reorganizing cases); *cf.* Altman, ---, at – (disputing Professor White's findings regarding the effect of secured debt); Lawless & Ferris, *supra* note --, at – manuscript -- (finding . . .)

[111] Lawless & Ferris, *supra* note --, at manuscript 65.

[112] Lawless & Ferris, *supra* note --, at manuscript 61-70 (. . . quote from page 65).

[113] *Id*. at manuscript 69.

[114] *See*, *e.g*., Altman, . . . White, . . . Ang, . . . ; others . . . ; Tashjian, *supra* note --, at 136 (analyzing 49 companies that filed pre-packaged chapter 11 cases between January 1980 and June of 1993; noting that factors such as time, direct costs, degree to which absolute priority is violated, and recovery rates by creditors are ways to observe efficiency indirectly; defining an efficient reorganization as one that creates or preserves the greatest value net of all costs; noting that analysts are concerned with efficiency because inefficient reorganization processes may lead to inefficient allocation of capital/corporate resources).

[115] The capital structure of the debtor's competitors may affect their ability to take advantage of the competitive opportunities provided by the debtor's chapter 11 filing. *See* Robert M. Lawless, et al., *Industry-Wide Effects of Corporate Bankruptcy Announcements*, 12 Bankr. Dev. J. 293, 292?? (1996)

(finding, in a study of 274 publicly traded firms that filed chapter 11 bankruptcy between 1979 and 1989, little evidence that competitors enjoy advantages over a bankrupt rival, and only weak evidence that bankruptcy system harms competitors of a bankrupt firm); *id*. at 311-12 (noting that highly leveraged firms are unable to capitalize on rivals' bankruptcy, and competitor firms in capital-intensive industries generally experience a negative return).

[116] Tashjian, *supra* note --, at 152 (comparing 22 cases that had undergone a leveraged buy-out (LBO) within 7 years prior to filing to 27 cases that had not undergone an LBO, as part of a larger study of 49 companies that filed pre-packaged chapter 11 cases between January 1980 and June 1993).

[117] Tashjian, *supra* note --, at 153 (concluding also that it is unclear whether the net operating loss (NOL) rules affect the choice).

[118] *See* Warren & Westbrook, *supra* note --, at 529-32.

[119] *See* Altman, *supra* note --, at 1074-82 (examining 11 retail and 7 industrial firms that filed bankruptcy between 1970 and 1978 and liquidated; finding that direct costs of bankruptcy averaged 6% of the firms' value both five years prior to bankruptcy and just prior to bankruptcy; finding that indirect costs averaged 8.7% of firm value three years before filing and 12.2% just prior to filing for the retail firms, and 17.4% of firm value three years before filing and 23.7% just prior to filing for the retail firms; noting that the combined average costs for all 18 firms was 12.1% of firm value three years before filing and 16.7% of firm value at filing; concluding that bankruptcy costs and the expectation of bankruptcy costs could affect capital structure); Guffey & Moore, *supra* note --, at 230-34 (examining 28 trucking firms that filed bankruptcy (liquidation) between 1970 and 1985; finding average direct costs of 9.12 % of pre-bankruptcy book value of total assets as of the year before filing; noting that these are higher than the costs shown in prior studies for retail firms (9.8%, Altman 1984), industrials (4%, Altman 1984), and railroads (5.3%, Warner 1970); noting that the trucking firms are smaller than the retailers and much smaller than the railroads; concluding that, when the various measured are scaled, the costs were 9.12% for trucking firms, 0.53% for railroads, and 3.39% for retailers; attributing the differences to firm size and suggesting that larger cases demonstrate economies of scale).

[120] For example, several older studies examined different industries, but most examined public companies. Warner found a longer time to confirmation for railroads than Weiss found for other industries. [insert cites] Both found lower costs for large firms when compared with studies of small firms (*see* Ang, Stanley & Girth). [insert cites]; c*f*. Fenning, *Measuring Chapter 11 supra* note --, at 123, 146 (finding no pattern linking the demographic factors of size or type of business with the kind of plan confirmed or the economic outcome in a study of 500 Los Angeles cases).

[121] In their recent report on the demographics of businesses in bankruptcy, Professors Warren and Westbrook found that one-quarter of businesses in chapter 11 are individual sole proprietorships and that 40 percent of chapter 11 filings are by individuals, either as consumers (approximately 15 percent) or sole proprietors (approximately 25 percent). *See* Warren & Westbrook, *supra* note --, at 501.

[122] Ang, Altman, Warner, LoPucki, Tashjian, Gilson, etc [insert cites]

[123] *See* Warren & Westbrook, *supra* note --, at 546-50, 552. The study did not correlate demogrphics such as size, nature, or whether an entity was publicly or privately held to time or cost of reorganization. The public companies were the largest employers in the sample. Together, the 6 public companies in the sample reported an aggregate of 39,720 employees, or an average of 6,620 each. These are smaller than the public companies that filed in other years. The LoPucki studies found a mean of 10,768 employees for large publicly traded companies (with at least $100 million in assets in 1980 dollars) that filed between 1979 and 1997. Nevertheless, these 6 cases accounted for 39,720 of the total of 51,948 employees of the 961 chapter 11 cases in the sample (76.5%). The chapter 11 cases accounted for 94% of all the employees in the sample. Using a standard statistical model, the authors estimated that 2 million people were working for businesses that filed bankruptcy in 1997. They noted a positive correlation between the number of employees and the amount of assets and debt. In other words, entities with more debt and more assets also had more employees.

[124] *See* Lynn M. LoPucki & William C. Whitford, *Patterns in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 78 CORNELL L. REV. 597 (1993) (examining forty-three chapter 11 cases involving large (at least $100 million in assets) publicly held companies based upon (1) confirmation rate; (2) entity survival; (3) business survival; (4) reduction in asset size; (5) financial success after confirmation; and (6) changes in control of management; finding that some firms were "successful" by any measure; others by some measures but not others). Note – several other studies by loPucki and others of large publicly traded companies – list

[125] In their recent report on the demographics of businesses in bankruptcy, Professors Warren and Westbrook found that one-quarter of businesses in chapter 11 are individual sole proprietorships, that 40 percent of chapter 11 filings are by business or consumer individuals, and that three of every twenty business bankruptcy filings (all chapters) are initiated at least in part by personal reasons, such as the owner/manager's illness, divorce, etc. The study did not correlate reasons for filing with cost and time or success rates in chapter 11. Warren & Westbrook, *supra* note --, at 501.

[126] Two studies compared the costs of chapter 11 restructuring to the costs of out-of-court restructurings.

Professor Gilson, of Harvard's [business school], analyzed 169 publicly traded companies that experienced severe financial distress during the period 1978-1987. *See* Gilson, *Troubled Debt Restructurings*, *supra* note 9. He found that 80 successfully restructured out of bankruptcy (47.3%); 89 attempted to restructure but ended up filing bankruptcy (52.7%). *Id*. at 328. He found that private restructuring takes an average of 15.4 (median 11) months and that publicly traded debt exchanges take less time (6.6 months average, 2 months median) to restructure than non-traded debt (15.9 months average and 10.5 months median). Firms that file chapter 11 spend an average of 8.1 (median 3) months out of court, followed by an average of 20.4 (median 18) additional months in chapter 11, for a total average of 28.5 months restructuring. *Id*. at 336-38. [check pages]

Because firms that reorganize out of bankruptcy are not required to report costs, he was unable to perform a perfect cost comparison. He did, however, report the direct costs for 18 firms that restructured through exchange offers (including fees of exchange agent, information agent, legal accounting, brokerage, investment banking). These ranged from $200,000 to $2,500,000 with an average of $799,000 and a median of $424,000. Mean and median costs were .65 and .32 percent of book value; and 2.16 and 2.29 percent of the amount of debt. *Id*. at 336-38. He compared these to several older studies of the direct costs of restructuring under chapter 11 and its Bankruptcy Act predecessor. These studies found direct costs ranging from 2.9% of book value of assets prior to filing (Weiss's 1990 sample of 37 New York and American Stock Exchange listed firms that failed between 1980 and 1986) to 5.3 percent of firm value (Warner's 1977 study of railroad bankruptcies filed between 1933 – 1955). *Id*. at 337. A study of the costs of liquidation found direct costs equaling 7.5% mean and 1.7% median of liquidation proceeds (Ang 1982 study of 86 firms that filed bankruptcy and eventually liquidated in Oklahoma from 1963 to 1979). *Id*. Porfessor Gilson could not obtaining complete, comparable, empirical data on bankruptcy and out-of-bankruptcy costs such as legal fees and management time. He did, however, compare the bankruptcy and non-bankruptcy costs of lost going concern value when assets are sold to pay debt and remedy default. He concluded that chapter 11 is more costly because assets are more likely to be sold to pay debt than in an out-of-court restructuring. *Id*. at 320-21.

Professors Tashjian and Lease of the University of Utah business school, together with co-author Professor McConnell of the Purdue University Graduate School of Managment, analyzed 49 companies that filed pre-packaged chapter 11 cases between January 1980 and June 1993. See Tashjian, *supra* note 9. They concluded: "Based on our preliminary analysis, it is likely that prepacks lead to a reduction in time spent in court relative to a traditional Chapter 11 and to a reduction in the associated expenses." *Id*. at 140. They found that the average direct cost of restructuring as a percentage of book value of assets for the 39 cases for which direct fee data was available was 1.65 percent for pre-voted pre-packaged cases (i.e., those pre-packaged chapter 11 cases in which voting occurred before the chapter 11 filing), 2.31 percent for post-voted pre-packaged cases (in which voting occurred after the chapter 11 filing), and 1.85 percent for all pre-packaged cases. These compared to other studies finding an average direct cost of restructuring as a percentage of book value of assets of 2.8 percent for traditional chapter 11 cases (Weiss, 19--) and .65 percent for out-of-court restructurings (Gilson study). *Id*. at 136-44. Like most of the other studies, these figures provide a useful basis for comparison, but are somewhat imprecise because the bulk of the fees that the study counted were for financial advisors, whose expenses are publicly reported and accessible. Because the authors did not review court filings, it is not clear to what extent their figures include complete or accurate attorney fee information. It is also unclear to what extent these figures include pre-bankruptcy legal expenses.

The Tashjian study also found a significant difference in the time spent restructuring in pre-packaged and traditional bankruptcy cases. The average time negotiating before filing was 20 months for pre-voted pre-packaged cases, 14.9 months for post-voted pre-packaged cases, and 18.3 months for all pre-packaged cases. She compared this to the Gilson study, which show an average time of 8.1 months negotiating before filing for traditional chapter 11 cases. The Tashjian study found an average time in chapter 11 after filing of 1.9 months for pre-voted pre-packaged cases, and 6 months for post-voted pre-packaged cases. These figures compared to findings of an average time in chapter 11 after filing in a traditional chapter 11 case of 20.4 months (Gilson) to 30 months (Weiss). In summary, the Tashjian study found an average total time from announcement of distress until resolution, including negotiating and chapter 11 or out-of-court restructuring was 21.9 months for pre-voted pre-packaged cases, 20.9 months for post-voted pre-packaged cases, 15.4 months for out-of-court restructuring (Gilson), and 28.5 months for traditional chapter 11 (Weiss). *Id*. at 141-42. *See also id*. at 140-42 (finding that a plan was confirmed in each of the 49 pre-packaged chapter 11 cases examined; in 38 it was the first plan; in 9 it was the second plan; in 1 it was the third plan; and in 1 it was the fourth plan; in each case, the modifications to the initial plan were modest).

As for the cost comparision of pre-packaged chapter 11 restructurings, out-of-court restructurings, and chapter 11 restructuring, *see* Tashjian, *supra* note – at 136-39 (finding that pre-packaged filings lie between out-of-court and full chapter proceedings in terms of time, cost, violations of absolute priority, and distributions, but noting that this does not necessarily mean that pre-packaged filings are more efficient than chapter 11 but less efficient than out-of-court restructurings; rather, the study simply adds data on pre-packaged filings for comparison; finding that most pre-packaged bankruptcy cases in the study involved large publicly-traded debtors; specifically, of the 49 pre-packaged cases in the Tashjian study, 44 had at least one publicly traded security and 23 had publicly traded common stock; the largest had assets of $3.4 billion; the smallest had assets of $9.7 million; the mean book value of total assets at the end of the fiscal year before filing was $570 million; the median was $313 million); *see also* Gilson, *Troubled Debt Restructurings*, *supra* note – at 324-25 (noting that "In practice, successful prepackaged filings are extremely rare."; hypothesizing that, because pre-packaged plans are a hybrid, they reduce the time in chapter 11 and avoid costly creditors' committees, but cautioning that disputes over the plan are still possible; noting that a professional bankruptcy consultant estimated that only 5-10% of the largest bankruptcy cases begin as pre-packs and only one-half of those have a successful restructuring in which the original plan is accepted; the sample that Gilson studied included only pre-packaged plan case, which was *Crystal Oil*). [add others]

[127] 28 U.S.C. § 1408 (19--). *See* Executive Office of the United States Trustee, Administrative Office of the United States Courts Data (Chapter 11 filings in Delaware: 1989 were 41; 1990 – 1994 range from 75 to 173; 1995-1998 range from 189-362; 1999 were 2,103. Chapter 11 filings in the SDNY: steadily rose from 1431 in 1989 to 2604 in 1992; thereafter steadily fell from 2173 in 1993 to 722 in 1999. Chapter 11 filings in California steadily rose from 2748 in 1989 to 4384 in 1992; thereafter steadily fell from 4054 in 1993 to 821 in 1999).

[128] *See generally* Jay L. Westbrook, *Local Legal Culture and the Fear of Abuse*, 6 AM. BANKR. INST. L. REV. 25, 25 (1998) (arguing

that discretionary powers are given to the bankruptcy judge because of policymakers' fear that the right to discharge will be abused; considering whether these discretionary powers are applied differently in different districts as a result of "local legal culture," which he defines as "a systematic and persistent variations in local legal practices as a consequence of complex of perceptions and expectations shared by many practitioners and officials in a particular locality and differing in identifiable ways from the practices, perceptions and expectations existing in other localities subject to the same or a similar formal legal regime"; concluding that local legal culture dictates whether an individual debtor chooses to file a chapter 7 or chapter 13 case); *cf*. Lawless & Ferris, *Professional Fees* at 1207 (finding that chapter 7 business bankruptcy costs varied significantly across districts); Ferris & Lawless, *supra* note 46, at manuscript – (finding no cross-district differences in the cost of chapter 11); FJC 1997 Venue Report, *supra* note --, at -- (finding cross-district variation in time to confirmation, but not considering whether local legal culture was responsible).

[129] FJC 1997 Venue Report, *supra* note --, at 19-22, 31-41, 38-39 (reporting results of a study of 77 public companies emerging from chapter 11 in 1994 or 1995 and 18 chapter 11 cases filed in Delaware and of a survey of judges concernging venue choice; reporting that 76 percent of those cases that judges thought were wrongly filed in a district other than their own district were filed in the Southern District of New York ("SDNY") or Delaware; noting that the cases filed in SDNY took longer than cases in other districts -- median days to confirmation in Delaware 38, in SDNY 756, in 26 other districts 473, in all cases 443 – and that critics argue that New York is a favored district because the courts are willing to extend exclusivity repeatedly and to award higher professional fees than judges in other districts allow, but noting that a longer period from filing to confirmation may be necessary to achieve an optimal commercial outcome and effective bankruptcy estate management, and that the attraction to SDNY may be based, in part, on New York's status as a center of commercial financial activity); *id*. at 31-41 (finding that the large company cases filed in Delaware were confirmed faster than the other cases; noting that although this is expected from the data because the Delaware cases were newer and the study only examined confirmed cases, not pending cases, the magnitude of the difference was not expected; noting that many of the Delaware cases were pre-packaged; suggesting that Delaware's smooth pre-packaged filing and case-management processes might attract filings); *id*. at 27 n.26 (noting that one bankruptcy judge commented that the venue problem is one of public perception in which creditors wonder why they are forced to incur costs to pursue their claims in a faraway district); *id*. at 42-57 (developing a "distance index" to measure creditor inconvenience according to distance from the filing location by comparing the creditors' distance from the debtor's principal place of business to the creditors' distance from the debtor's place of filing; finding a wide range of results, the average of which was that creditors were farther from the place of filing than the principal place of business for the large cases filed in Delaware and that the average difference in cost for each creditor to fly to Delaware rather than to the debtor's principal place of business was $290 but that time-based fees of counsel and other variable costs might swamp the airfare costs; finding that the additional costs to travel to New York for the cases filed in New York rather than in the debtor's principal place of business were negligible and that, when these indices were applied only to the 20 largest unsecured creditors (who might be more likely to travel to participate in the cases), the results were more variable, but revealed virtually no inconvenience, on average, for the largest creditors to travel to Delaware than to the debtor's principal place of business, and greater convenience for the largest creditors to travel to (or remain in) New York than to the debtor's principal place of business); Skeel, *supra* note --, at -- arguing that Delaware venue solves the delay problem because cases are resolved faster there (many are pre-packs); citing reports from the Federal Judicial Center and Delaware on time spent in chapter 11); *cf*. Clark & Deutsch, *supra* note --, at -- (noting that the District Court withdrew the reference in Delaware bankruptcy cases; suggesting that this may have been due in part to allegations of possible improprieties in the bankruptcy court).

[130] LoPucki & Whitford, *supra* note 47, at 24-25, 39,42-43, 45 ((reporting results of a study of the 43 largest publicly held companies to file and complete chapter 11 cases between 1979 and 1988 (at which time New York was the forum of choice); concluding that debtors forum shopped in a substantial number of these cases, and that their motivation seemed to be to avoid courts with reputations for limiting extensions of exclusivity or limiting attorneys' fees; finding that creditors opposing forum shopping often failed to prosecute motions to transfer venue because of the cost involved in bringing and litigating such a motion; recommending policy changes that would limit the reasons for forum shopping by tightening statutory standards and narrowing judicial discretion in order to increase competition among different districts for the large bankruptcy cases).

[131] *See*, *e.g*., Alexander L. Paskay & Frances Pilaro Wolstenholme, *Chapter 11: A Growing Cash Cow, Some Thoughts on How to Rein in the System*, 1 Am. Bankr. Inst. L. Rev. 331, 335 (1993) (arguing, without citrng data, that the employment of out-of-town professionals by the debtor increases the costs of a chapter 11 bankruptcy, for three reasons: (1) the hourly rates charged by out-of-town professionals are typically higher than local counsel; (2) local counsel must be employed because the out-of-town counsel is generally not admitted to practice where the petition is filed; and (3) out-of-town professionals must travel to attend hearings and meetings; suggesting that the costs of hiring out-of-town professionals should be weighed against the debtor's right to hire counsel of its choice, the professional's ability, the reputation and skill of the law firm, and the debtor's pre-petition relationship with law firm).

[132] *See* LoPucki & Kalin, *Race to the Bottom*, *supra* note --, manuscript draft dated July 13, 2000, at 5, 11-15, 19-22 (examining 188 large, public companies that filed chapter 11 after October 1979 and emerged by December 31, 1996 to determine re-filing rates; finding that companies reorganized in Delaware and New York exhibited far higher rates of re-filing than companies reorganized elsewhere; specifically, finding that the background filing rate for all public companies ranged from .54% to 1.34% between 1983 and

1999, and averaged .84%; the weighted average was .77%;in contrast, the re-filing rate for all companies in the study was 3.1%, which is more than 4 times the weighted background filing rate; noting that, of the 188 cases in the study, 31 percent emerged in Delaware (16%), 36 emerged in New York City (19%), 121 emerged in other courts (64%), and the next most active court was Los Angeles with 12 (6%); finding that 32% of Delaware cases have re-filed, 28% of New York cases have re-filed, 10% of all other cases have re-filed; calculating that Delaware has a re-filing rate of 8.6% per year, New York has a rate of 5.2% per year, and all others have a combined rate of 1.7% per year; concluding that the re-filing rate for large, public companies in Delaware and the New York City is nearly 30%, and is 6-7 times as high as the re-filing rate for companies emerging in other districts; the combined rate for all courts is 3.1%; looking only at those cases that emerged after 1990, the re-filing rate for Delaware is 7.9% per year, New York City is 4.8% per year, all other courts is 1.1% per year, and aggregate is 3.1% per year; also finding that pre-packaged cases that emerged after 1990 re-filed more frequently than other cases, but the difference is not statistically significant; the re-filing rate for all companies during this period was 14% while the rate for pre-packaged cases was 22%. For all cases from 1983 to 1997, the re-filing rate for pre-packaged cases confirmed in Delaware and New York was 33%, for all other courts it was 7%. The per year re-filing rate for Delaware pre-packaged cases was 9.2%, for new York was 6.4%, for all other courts was 1.4%. Considering only that cases that emerged after 1990, the rates are Delaware 9.2%, New York 6.4%, all others 0%. (Id. at manuscript 23-25); noting that overall, Delaware confirmed 79% of its large public company cases, all other courts confirmed 85% of such cases. (Id. at manuscript 27); concluding that competition for cases leads to lower success rates. (Id. at manuscript 26); Eisenberg & LoPucki, *Shopping For Judges supra* note --, at -- (reporting forum-shopping data from 1980 through 1997 for large, publicly held companies in chapter 11, including number of large cases filed each year, number of large cases "shopped," rate of forum shopping, mean time to termination of large chapter 11 cases, use of pre-packaged plans in Delaware, rate of forum shopping in pre-packaged plan cases; finding that Delaware surpassed New York as the forum of choice; noting that reason for this shift included a change in the random assignment system of bankruptcy judges from New York to the administrative office of the United States Courts in Washington, D.C., a ruling by Delaware Bankruptcy Judge Helen Balick that the place of incorporation was a corporation's "residence or domicile" for venue purposes; also finding that purported reasons for forum shopping, efficiency and convenience, are not reflected in statistics that show old favored venue New York processes cases slower than other jurisdictions, and Delaware is a less convenient forum for New York-based attorneys . . . [insert]; concluding that the shorter time to confirmation in Delaware is a function of a high percentage of pre-packaged plans, not of efficiency, judicial expertise, a proclivity toward rapid confirmation, or experience in the arena, and that the real reason for Delaware filings is judge selection).

[133] *See* NBRC Report, *supra* note --, at – (Jurisdiction and Procedure, Proposal No. 2: Venue for Corporations and Partnerships) (proposing amending 28 U.S.C. § 1408(1) to prohibit corporate debtors from filing in a district solely because it is the state of incorporation, and amending § 1408(2) to prohibit filing in the district in which an affiliate has filed unless the affiliate is the prospective debtor's parent); Eisenberg & LoPucki, *supra* note --, at 1001 (suggesting incentives and opportunities for challenging venue on a case-by-case basis); Leslie R. Masterson, *Article: Forum Shopping in Business Bankruptcy: An Examination of Chapter 11 Cases*, 16 Bank. Dev. J. 65, 90 (1999) (proposing placing burden on debtor to show venue is proper when objection is raised and it appears debtor forum shopped, such as when debtor's chief address is in a different jurisdiction than the state of incorporation); Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 Cornell L. Rev. 1507, 1515-1516, 1529-1530 (1995) (arguing that transfer of venue motions counter forum shopping by plaintiffs, and finding that transfer motions do not lead to more litigation between parties.).

See also Ferris & Lawless, *supra* note 46, at 632, 635 (reporting results of a study of chapter 11 business reorganization cases in 6 cities; the study did not show cross-district variation in time and cost of chapter 11, but did not include cases filed in New York or Delaware).

[134] *See* LoPucki, *Chapter 11: An Agenda for Basic Reform*, *supra* note --, at 577-78 (arguing that exclusivity gives debtor control over the chapter 11 case so that it "goes forward on the debtor's terms or not at all," because debtors will forum shop for a venue in which the judge grants all extensions; also arguing that exclusivity extends the time a company is in chapter 11; advocating that a trustee be appointed in every case from a panel of licensed trustees).

[135] Altman, *supra* note 7, at 2, 22-25 (arguing for revision rather than scuttling of chapter 11; finding that time in reorganization has decreased under Bankruptcy Code, but arguing that it is still too long; recommending reasonable exclusivity that cannot be extended unless the debtor shows that the firm is worth more as a going concern that liquidated; identifying the objective of reorganization as maximizing the value of the estate and argues that this should be the directors' fiduciary goal); Raymond T. Nimmer & Richard B. Feinberg, *Chapter 11 Business Governance Fiduciary Duties, Business Judgment, Trustees and Exclusivity*, 6 Bankr. Dev. J. 1 (1989) (arguing that courts should aggressively limit the debtor's right to retain exclusivity and should favor competing plan proposals); Clark, *supra* note – [*Success in Chapter 11*] at 253-54 (arguing that reducing the opportunities for the court to enlarge exclusivity will shorten the time debtors spend in chapter 11; suggesting that the exclusivity period be keyed to either the amount of debt or whether the debtor is a private or public company; arguing for a shorter period of exclusivity in cases with less debt and in private companies); Tabb, *supra* note 53, at 825 (arguing that increasing debtor's exclusivity period drives up costs; identifying factors that increase the time and cost of chapter 11, including: debtor exclusivity, lack of an "absolute" absolute priority rule, too many players at the bargaining table all being paid by the estate, high professional fees, lawyers with no incentive to end a case quickly, chapter 11 is a safe haven for managers (although the reality is otherwise because many lost their jobs), debtors do not have to pay

interest during chapter 11, and judges may be lenient and unwilling to pull the plug on hopeless cases; recommending several cost and time saving devices including limiting the debtor's exclusivity; suggesting that a different rule for large and small cases may be warranted with an absolute cap for small, privately held entities but not for large publicly held entities); Bedoff, . . . Bucino, . . . LoPucki, . . . etc

[136] *See*, *e.g*., Altman, *supra* note 7, at 2 (noting that time in bankruptcy is obviously related to direct out of pocket cost); [others]; *see also* Ferris & Lawless, *supra* note 46, at manuscript 22, 61-64 (finding "a positive but statistically weak relationship between costs and time in bankruptcy;" hypothesizing that "if delay causes the costs to rise, exclusivity gives the debtor more bargaining leverage with creditors," and noting that proposals to shorten or end exclusivity might reduce costs, **if** shortening or ending exclusivity would expedite cases – which is not free from debate).

[137] *See* Bedoff, *Suggestions for NBRC*, [full cite], 496 (arguing that extension of exclusivity is used as leverage for the debtor and its management in negotiating concessions from creditors for the benefit of management and equity holders, not as a tool to benefit the estate, and that extensions of exclusivity prolong chapter 11 and add to costs of administration); Buccino, *Suggestions for NBRC* [full cite], 498 (proposing that the debtor pass a viability test within the first 120 days before extending exclusivity period and undergo an evaluation of management by a competent outsider; arguing that, absent such analyses, extended exclusivity will continue to be granted at the expense of creditors and shareholders); Cieri, Davido & Lennox, *Applying an Ax* . . . [full names and title] 399, 400, 412, 413, 415 (noting that critics argue that debtors have too much control and that the system under which the estate pays the fees of other parties creates disincentives for expeditious resolution of cases, but arguing that the present system creates a careful balance among the parties' divergent interests, particularly through the exclusivity provisions, and that the exclusivity provisions, if applied judiciously and creatively, or modified by Congress to create a more objective standard to extensions, can provide the means for harmonizing the conflicting interests and expediting plan confirmation; suggesting that factors upon which extension might be based might include time since filing, size of the case, progress toward reorganization, prospects for reorganization, debtor's motive, impact on creditors; arguing that a more judicious application of the existing exclusivity standards can remedy the problems that are caused by an unfettered judicial willingness to extend the debtor's exclusivity periods); Goldberger, *Suggestions for NBRC* at 520 (arguing that entity values will be enhanced for all creditors and interested parties if the Bankruptcy Code is modified or interpreted to encourage and facilitate the termination of exclusivity; arguing that this will expose the entity to vigorous and competitive market forces); LoPucki, *Comment, Chapter 11* (arguing that that (1) the one-size-fits-all approach adopted in 1978 lengthened the time for median-size business reorganization from about 8 to 22 months, (2) the NBRC should consider the excessive cost of chapter 11, (3) debtors' control results in liquidation of small cases and exclusivity extension and debtor's plan terms in large cases, and that the obvious solution would be to appoint a trustee in every case, and (4) the large majority of companies that file a chapter 11 case never confirm a plan); Lam, *Exclusivity and For Cause* (noting that exclusivity is designed to adjust the bargaining power between creditors and the debtor and to provide flexibility; noting that current case law considers factors such as time in bankruptcy, size and complexity of the case, progress toward reorganization, and pendency of litigation that must be resolved prior to plan development in determining whether cause exists to enlarge exclusivity, but courts have consistently rejected the last factor; proposing that courts should consider legitimate creditor interests as well, including the amount of the creditors' investment, history of debt service, deterioration of collateral, erosion of equity cushion, secured status, and interests of stockholders. For example, a large creditor's objection to an extension should be given more weight than a small creditor's objection); Lynn M. LoPucki, Declaration dated April 1998 in *In re Dow Corning Corporation* Case No. 95-20512, US Bankruptcy Court, Eastern District of Michigan (filed on behalf of the Tort Claimants Committee in connection with the Committee's Motion dated March 10, 1998 to Modify Exclusivity) (concluding, based upon experience, prior research, and three studies conducted for the case, that modifying exclusivity in large chapter 11 cases fosters consensual resolution of cases by focusing the parties on realistic settlement values (at 1); reporting results of one study in which he examined large, public company filings in which exclusivity was lifted and found that, in these 41 cases, all but 4 resulted in a confirmed plan (95%); of the 4 remaining cases, 2 are pending, one resulted in a 363 sale, the other was converted for unrelated reasons; of the 37 confirmed, 22 were consensual, 9 were largely consensual (together 79%), one was unclear, and 5 were cramdowns and each was confirmed within 7-14 months of the lifting of exclusivity; reporting results of a second study which examined 8 mass tort large pulbic company bankruptcy cases and found that, in the 3 cases in which exclusivity was lifted, a plan was confirmed within 7-19 months after exclusivity was lifted; reporting the results of a third study that examined distributions to unsecured creditors and equity holders in cases in which exclusivity had been lifted and not lifted in large, public company cases filed and concluded between October 1979 and March 1988; finding that in the 8 cases in which exclusivity was lifted, distributions conformed closely to absolute priority, but in the 32 cases in which exclusivity was not lifted, deviations from absolute priority were more than 4 times greater than in the lift cases); LoPucki & Whitford, *supra* note 130, at -- (concluding that debtors forum shopped in a substantial number of these cases, and that their motivation seemed to be to avoid courts with reputations for limiting extensions of exclusivity or limiting attorneys' fees; recommending policy changes that would limit the reasons for forum shopping by tightening statutory standards and narrowing judicial discretion in order to increase competition among different districts for the large bankruptcy cases); Tabb, *supra* note 53, at 825 (arguing that increasing debtor's exclusivity period drives up costs in bankruptcy proceedings; identifying several factors increase the time and cost of chapter 11, including: debtor exclusivity, lack of an "absolute" absolute priority rule, too many players at the bargaining table all being paid by the estate, professional fees are too high and lawyers have no incentive to end a case quickly, chapter 11 is a safe haven for managers (although the reality is otherwise because many lost their jobs), debtors do not have to pay interest during chapter 11, and judges may be lenient and unwilling to pull the plug on hopeless cases; recommending several cost and time saving devices including limiting

the debtor's exclusivity; suggesting that a different rule for large and small cases may be warranted with an absolute cap for small, privately held entities but not for large publicly held entities); White, *Harvey's Silence* (arguing that chapter 11 routinely prolongs the life of dying businesses and that the NBRC should focus on the costs of delay and related direct costs; offering options for reducing delay include limiting exclusivity, pay the true costs (i.e. reverse *Timbers*), cut off funding to professionals as the case drags on, initiate early assessment by a neutral non-party (variation of the French or Canadian system), appoint a trustee, reduce incentives to file, encourage liquidation, and consider radical proposals)

See also LoPucki & Whitford, *Bargaining Over Equity's Share* (concluding that (1) bargaining rather than adjudication (i.e. contested cramdown) determined outcomes, (2) shareholders nearly always participate in distributions, (3) the lawyers' culture of preferring a consensual plan is at least part of the reason shareholders received distributions in the cases of insolvent debtors, (4) where the debtor was marginally solvent, there were substantial deviations from absolute priority, (5) where the debtor was clearly solvent, the issue of post-petition interest was particularly important in determining whether creditors were paid in full; arguing that participation by junior claims and interests in violation of absolute priority may increase expense, complexity, and obstruction; proposing "preemptive cramdown" (i.e. an early valuation showing that equity has no entitlement to a share and therefore is not a party in interest) to obviate these problems); Klee, *Adjusting Chapter 11* (suggesting that the NBRC consider discrete amendments to streamline and improve chapter 11 but that the NBRC should not recommend radical reform; proposing changes including: (1) retain the ability to extend exclusivity for cause, but terminate exclusivity when a trustee is elected or appointed or the debtor proposes to cramdown a new value plan); Bebchuk & Chang, *Bargaining* at 274 (using a sequential bargaining model to examine the plan negotiation process; arguing that the chapter 11 bargaining process (with the automatic stay and the threat that value will decline if the case drags or value may be reduced if the case fails and the entity is liquidated) leads to violations of absolute priority of contractual rights; considering what aspects of strategic bargaining in chapter 11 enable the equity holders to retain value even when the entity is insolvent (these are rooted in the need for equity consent); concluding that the amount equity holders receive increases with the volatility of the firm's asset values, the extent to which the reorganization imposes financial distress costs, the length of the reorganization process, the length of exclusivity, the extent to which liquidation imposes a loss in value, and the extent to which the value of the firm's assets covers its debts; as to whether the distribution of value to equity holders is unfair to creditors, the authors conclude that voluntary creditors likely take this into account in their contracts through higher interest rates, etc. Retention of value by equity does, however, transfer wealth from involuntary creditors to equity holders. (Id. at 274)

[138] Karen Gross & Patricia Redmond, *In Defense of Debtor Exclusivity: Assessing Four of the 1994 Amendments to the Bankruptcy Code*, 69 Am. Bankr. L. J. 287 (1995) (examining the four provisions of the 1994 law that affect exclusivity (direct appeal of exclusivity orders, status conferences including to discuss exclusivity deadlines, small business exclusivity provisions, and single asset relief from stay provisions); concluding that, although the Amendments may have some impact on cost and speed, the main cause of delay and cost is not exclusivity but creditor apathy, especially in medium and small cases, and that, because most cases are not affected by the amendments, the amendments will do little to reduce expense and delay; arguing that exclusivity is rarely a true cause for delay in chapter 11 cases and that delay and increased cost will continue to be a problem as long as lack of creditor participation remains the norm).

[139] FJC 1997 Venue Report, supra note --, at 19-22, 31-41, 38-39 (noting that commentators argue that New York is a favored district because the courts are willing to extend exclusivity repeatedly and to award higher professional fees than judges in other districts allow; finding that the cases filed in SDNY took longer than cases in other districts (median days to confirmation in Delaware 38, in SDNY 756, in 26 other districts 473, in all cases 443); suggesting that corporate debtors who desire the benefit of a lengthy stay might be attracted to SDNY, but noting that extensions of exclusivity and the resultant prolonged period from filing to confirmation may not be a negative factor, and may be necessary to achieve an optimal commercial outcome and effective bankruptcy estate management; concluding that the attraction to SDNY may be based, in part, on New York's status as a center of commercial financial activity).

Kenneth N. Klee, *A Brief Rejoinder to Professor LoPucki*, 60 Am. Bankr. L. J. 583 (1995) arguing that (1) chapter 11 takes time because of the complexities of reorganizing businesses, chapter 11 can accommodate expedited processes for smaller cases, and the old Chapter XI and the proposed chapter 10 allowed streamlined processes but at too great a cost in fairness, (2) chapter 11 is expensive but empirical evidence is needed to show whether it is too expensive, and measures can be taken to reduce costs, (3) exclusivity provides the incentive for businesses to file before it is too late to save them, and that trustees will add expense and deter companies from filing until it is too late, and (4) maximizing societal benefit should be the test of success in chapter 11 -- suggesting that confirmation statistics alone can be misleading if this is the goal, and perhaps the solution is to bar companies from chapter 11 if there will be little societal benefit to their reorganization (such as real estate entities and small businesses with few employees).

[140] *See*, *e.g*., Lawless, Chapter 11, *supra* note 128[?], at 657.

[141] Samuel L. Bufford, *Chapter 11 Case Management and Delay Reduction: An Empirical Study*, 4 Am. Bankr. Inst. J. 85, 85 (1996) (arguing that modest judicial case management can reduce delay in chapter 11 cases; finding that the "fast track" case management program employed by Judge Mund, when applied to 81.2% of 758 chapter 11 cases filed in the Central District of California between 1998 and 1993, shortened by 24.1% the time to confirmation in a typical case, reduced by 44.1% the time to conversion, shortened by 53.5% the time to dismissal in a typical non-viable case, and caused an 18.5% increase in dismissals and similar percentage decrease in rate of conversions; concluding the primary beneficiary is the secured creditor, that benefits to unsecured creditors depend upon

circumstances, benefits to debtors are less clear, benefits to courts are clear); Clark, supra note --, success in chapter *11* at 247 (arguing that the time in chapter 11 could be reduced if the court identified issues early in the case, set reasonable deadlines for stay litigation, fixed dates for approval of disclosure statements, and expedited other procedural aspects of the case, in order to weed out the hopeless chapter 11 cases early); Rhodes, *Eight Statutory Causes of Delay and Expense supra* note --, at 307-15 (identifying eight statutory causes of delay and expense in chapter 11 cases: significant legal issues are left open in chapter 11, significant decisions concerning the course of a chapter 11 cases are left to the discretion of the bankruptcy judge, two appeals are necessary to produce precedent that is binding on the bankruptcy court, the provisions regarding jurisdiction and related matters are awkward and complex, certain factual issues can be litigated more than once in a case, neither the Bankruptcy Code nor the Bankruptcy Rules establish effective procedures for chapter 11 case management, the statutory requirements regarding disclosure statements cannot be justified in many cases, and the procedures set forth in the Bankruptcy Code and Bankruptcy Rules for requesting relief are unnecessarily complex; noting that there may be other, non-statutory reasons for delay and expense also, such as: attorneys who do not provide adequate representation, insufficient judicial resources, lack of respect for the plain meaning of the statute, and the role of personality traits of certain parties in interest (incompetence, corruption, ignorance, stubbornness, distrust, animosity, embarrassment, greed); arguing that some delay and expense results from the currently disjointed state of case management in which authority and responsibility for case management is currently scattered among the trustee, the creditors' committee, individual creditors, the debtor, and the bankruptcy judge; proposing that legislation similar to the Civil Justice Reform Act of 1990, which requires each United States District Court to implement a "civil justice expense and delay reduction plan," be instituted in bankruptcy cases); Small, *Small Business Bankruptcy Cases supra* note --, at 305 (arguing that the fast track method is effective in reducing the time to confirmation, although it has received only reluctant acceptance from courts hesitant to implement the process without express statutory authority).

Cf. Richard B. Levin, *Towards a Model of Bankruptcy Administration*, 44 S.C. L. Rev. 963, 967-88 (1993) (arguing that the Bankruptcy Code's simple administrative model, which bifurcated disputed (judicial) from non-disputed (administrative) matters, was implemented imperfectly because judges continue to be charged with responsibilities for "administrative" tasks that often do not involve dispute resolution; proposing that decision-making be bifurcated such that the court makes decisions about disputed factual matters and that the estate representative (trustee or debtor-in-possession) make decisions about day-to-day managerial decisions; the latter should be subject to external supervision, but by an Administrative Officer rather than by a judge; proposing the establishment of an Administrative Officer to supervise or review decisions of the estate representative in accordance with a "sound exercise of business judgment standard).

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See, *e.g*., Bebchuk & Chang, *Bargaining and the Division of Value in Corporate Reorganization supra* note --, at 274 (using a sequential bargaining model to examine the plan negotiation process; arguing that the chapter 11 bargaining process (with the automatic stay and the threat that value will decline if the case drags on or value may be reduced if the case fails and the entity is be liquidated) leads to violations of absolute priority of contractual rights; concluding that the amount equity holders receive increases with the volatility of the firm's asset values, the extent to which the reorganization imposes financial distress costs, the length of the reorganization process, the length of exclusivity, the extent to which liquidation imposes a loss in value, and the extent to which the value of the firm's assets covers its debts; concluding that voluntary creditors likely take the possibility of retention of value by equityinto account in their contracts through higher interest rates, etc., but that retention of value by equity does transfer wealth from involuntary creditors to equity holders); Franks & Touros, *An Empirical Investigation supra* note --, at 752-54 (examining 30 large, publicly traded firms that filed reorganization between 1970 and 1983; finding that the framework of chapter 11 is complex, lengthy, and costly, and frequently results in violations of absolute priority in favor of stockholders); LoPucki & Whitford, *Bargaining Over Equity's Share supra* note -- , at 143, 178, 186-87 (finding that, in 21 of 30 large, public company cases in which the companies were insolvent at confirmation, creditors agreed to allow shareholder recoveries ranging from $400,000 to $63 million, and that, if unsecured creditors recovered at least 14% of the claims, equity was permitted to share in the distribution. ; finding that, if the absolute priority rule had been strictly enforced in the cases of insolvent debtors, recoveries by shareholder in 21 cases totaling $154 million would have been eliminated; finding that deviations rarely exceed 10% of the entire distribution, but that the deviation in virtually every case was in millions of dollars; noting that the size of professional fees draining assets of creditors were "probably smaller" than deviations from absolute priority rule; proposing "pre-emptive cram down," under which deviations from absolute priority rule resulting from equity's obstructionist potential could be reduced or eliminated by obtaining a determination early in a chapter 11 case that equity had no plausible entitlement to share in the distribution, was not a party in interest, and any committee previously appointed to represent such holders should be dissolved); LoPucki & Whitford, *Preemptive Cramdown* (elaborating on the preemptive cramdown proposal first introduced in Lynn M. LoPucki & William C. Whitford, *Bargaining Over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 139 U. Penn. L. Rev. 125 (1990)).

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See Tashjian, *supra* note --, at – (. . .)

[144] *See* sources cited *supra* note --; LoPucki . . ; LoPucki & Whitford, *Bargaining Over Equity's Share supra* note --, at 146-47 (arguing that an attempt to cram down a plan against equity is not likely to result in litigation expense nearly as great as the distributions offered to equity in most cases and that, although the direct expense of litigating to cram down may be a factor that contributed to distributions to equity, it is not a predominant one; arguing that a predominant reason for distributions to equity was concern that delay of uncertain duration while confirmation or collateral issues were litigated could cause business losses far greater than equity's share of distributions).

[145] *See* Paskay, *Cash Cow supra* note --, at 338-40 (arguing that, in many single asset real estate cases, secured creditors challenge the legitimacy of the bankruptcy filing by seeking to dismiss the case for "bad faith" under § 1112(b) of the Bankruptcy Code; suggesting that "bad faith" litigation increases legal expenses, causes delays, and does not assist the debtor in rehabilitating; arguing that unnecessary automatic stay, adequate protection, and cash collateral litigation increases cost and delay in chapter 11 cases and suggesting that adequate protection issues could be resolved more economically by negotiation between the parties rather than by litigation); Robert K. Rasmussen & David A. Skeel, Jr., *The Economic Analysis of Corporate Bankruptcy Law*, 3 AM. BANKR. INST. L. REV. 85, 99 (1995) (suggesting that enforcing a stay waiver has the advantage of minimizing the costs of bankruptcy in single asset real estate cases); *cf*. LoPucki, *Bargaining supra* note --, at 146-47 (arguing that absolute priority litigation is not likely to be as costly as the distributions made to equity in violation of absolute priority; concluding that the direct expense of cram down litigation is not a predominant factor in distributions to equity; rather, a predominant reason for distributions to equity was concern that delay of uncertain duration while confirmation or collateral issues were litigated could cause business losses far greater than equity's share of distributions).

[146] *See* Ferris & Lawless, *supra* note 46, at 662 (. . .).

[147] *See*, *e.g*., Smith, *supra* note --, at -- ; NBRC REPORT, supra note --, at 451 ("The Recommendations set forth by the Chapter 11 Working Group and adopted by the Commission are aimed at enhancing return and lowering costs for many different types of creditors while embracing the basic goal in Chapter 11 to promote reorganizations. Many of the following Recommendations would resolve open legal questions that frequently cause litigation and delay. Clarification will minimize the time and money lost to repeated judicial disputes over issues such as the rules governing classification of claims, court review of creditors' committee appointment, and the permissibility of releasing claims against nondebtor parties. Because bankruptcy laws provide a backdrop for a broad range of out of court negotiations, increased certainty enhances the opportunities for out of court workouts."); Paskay, *supra* note --, at 340-41 (arguing that disclosure statement litigation fosters unnecessary and, at times, protracted litigation; contending that secured creditors raise disclosure statement objections as a delay tactic, and that the class of general unsecured creditors does not generally raise objections); Rhodes, *supra* note --, at 289-93, 294-96-- (arguing that some of the delay and expense associated with chapter 11 cases is the result of Congress's failure to provide statutory answers to certain common and recurring questions, including: (1) whether there is a new value exception to the absolute priority rule; (2) the definition of an executory contract; (3) when unsecured claims can be classified separately; and (4) whether bankruptcy judges have the statutory authority to conduct jury trials; arguing that some of the delay and expense associated with chapter 11 cases results from the fact that Congress left to the discretion of bankruptcy judges numerous significant decisions affecting chapter 11 cases; arguing that discretionary decision-making creates expense and delay because it becomes more difficult to predict the resolution of any issue committed to the judge's discretion, as compared to a resolution provided by statute, and that almost by definition, the resolution of an issue based on the judge's discretion requires litigation, with its inherent expense and delay; arguing that some of the delay and expense associated with chapter 11 cases results from the fact that two appeals are necessary to create precedent that is binding in a bankruptcy court and that substantial expense and delay result from this system because several parties in different bankruptcy cases may litigate a given legal issue many times before different bankruptcy and district judges before any one litigant has the time, resources, and motivation to obtain an authoritative decision from an appellate court that would be binding in future cases; arguing that this cause of expense and delay can be eliminated by establishing binding case law at the level of the first appeal. (Id. at 296-99); arguing that one cause of delay and expense in chapter 11 cases is the morass created by current laws regarding bankruptcy jurisdiction and that uncertain and confusing jurisdictional laws and rules result in substantial time and money expended by parties in litigating jurisdictional disputes; proposing to solve this problem by establishing Bankruptcy Judges as Article III judges. (Id. at 299-302); arguing that one cause of delay and expense in chapter 11 cases is that the Bankruptcy Code requires parties to litigate certain factual issues more than once in the same case, including value, feasibility and good faith; proposing to create a mechanism in the bankruptcy courts similar to Rule 65 of the Federal Rules of Civil Procedure, which essentially commits to the court record evidence presented at a hearing on a motion for a preliminary injunction for later use when the same issue arises on a trial on the merits. (Id. at 302-07); arguing that some of the delay and expense associated with chapter 11 cases results from the currently disjointed state of case management because authority and responsibility for case management is currently scattered among the trustee, the creditors' committee, individual creditors, the debtor, and the bankruptcy judge; proposing that legislation similar to the Civil Justice Reform Act of 1990, which requires each United States District Court to implement a "civil justice expense and delay reduction plan," be instituted in bankruptcy cases. (Id. at 307-15); arguing that the costs inherent in satisfying the statutory requirements of the disclosure statement that, in the appropriate case, creditors should be informed of the likely cost of preparing a disclosure statement and then be given the choice about whether and to what extent they need disclosure. (Id. at 315-18); arguing that some of the delay and expense associated with chapter 11 cases results from unnecessarily complex procedures for requesting relief; proposing a thorough review and revision of the Bankruptcy Rules to achieve clarification and simplification. (Id. at 318-22) [cut down]

[148] *See* Charles J. Tabb, *A History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 35 (1995) (noting that the enactment of the 1978 Bankruptcy Code relegated judges to a strictly judicial role, and prohibited them from attending the first meeting of creditors); Harvey R. Miller, 69 AM. BANKR. INST. L. J. 431, 431-432, 439 (1995) (noting that the 1978 Bankruptcy Code gave power and responsibility for formulating a reorganization plan to the debtor with appropriate oversight and input from

the creditors' committee; suggesting a recent trend in which bankruptcy judges have exercised increasing oversight, but arguing that leaving negotiations to creditors and debtors is better); *see also* 11 U.S.C. §§ 1126, 1129(a) (1993); First Merchants Acceptance Corp. v. J.C. Bradford & Co., 198 F.3d 395, 403 (3d Cir. 2000) (discussing committee's role in negotiating the plan and monitoring the debtor); In re Marin Motor Oil, Inc. 689 F.2d 445, 455-56 (3d Cir. 1982) (discussing committees' broad role); Official Unsecured Creditors' Committee v. Stern (In re SPM Manufacturing), 984 F.2d 1305, 1316 (2d Cir. 1993) ("The creditors' committee is not merely a conduit through whom the debtor speaks to and negotiates with creditors generally. On the contrary, it is purposely intended to represent the necessarily different interests and concerns of the creditors it represents. It must necessarily be adversarial in a sense, though its relation with the debtor may be supportive and friendly. There is simply no other entity established by the Code to guard those interests. The committee as the sum of its members is not intended to be merely an arbiter but a partisan which will aid, assist, and monitor the debtor pursuant to its own self-interest."); Phar-Mor, Inc. v. Coopers & Lybrand, 22 F.3d 1228, 1240 (3d Cir. 1994), *reh'g and suggestion for reh'g en banc denied* (1994) ("Under the 1978 Act, the courts have been relieved of most administrative matters, and the responsibility for monitoring the operations of the debtor and its compliance with appropriate bankruptcy procedures has fallen largely to the creditors' committee (although the United States Trustee has some role."); In re Penn-Dixie Industries, Inc., 9 B.R. 941, 944 (S.D.N.Y. 1981) (noting that the committee has "wide and important array of authority and responsibility . . . [and the] Bankruptcy Code contemplates a significant and central role for committee in the scheme of a business reorganization); In re Structurlite Plastics Corp., 91 B.R. 813, 818 (Bankr. S.D. Ohio 1988) ("The drafters of the Bankruptcy Code clearly envisioned a prominent role for creditors' committees in the reorganization process."); In re Western Pacific Airlines, Inc., 219 B.R. 575, 577-78 (D. Colo. 1998) (discussing committee's "watchdog" role); Triester, Fundamentals at 397 (ALI/ABA 1993) (. . .)

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See In re Daig Corp., 14 B.R. 41 (Bankr. D. Minn.1981) (noting that a creditors committee is not merely a conduit for communication between the debtor and creditors generally but is intended to represent the varying interests of its creditors; the committee is not an arbiter but a partisan monitoring the debtor in furtherance of its own self-interest); In re Advisory Committee of Major Funding Organization, 109 F.3d 219, 224 (5th Cir. 1997), *citing* In re AKF Foods, Inc., 36 Bankr. 288, 289 (Bankr. E.D.N.Y.1984) (noting that the responsibility of the creditors' committee is to protect the interests of the larger body of creditors it represents); In re Bohack Corp., 607 F.2d 258, 262 n.4 (-- 19--) (noting that the primary purpose of creditors' committee is to advise creditors of their rights and proper course of action in bankruptcy; committee also owes a fiduciary duty to safeguard the rights of minority as well as majority creditors); *see also* Johnston, *The Bankruptcy Bargain*, *supra* note ____, at 270 (arguing that the creditors' committee facilitates rather than discourages coalition building, and enables unsecured creditors to speak with one voice; "[b]y using creditors' committees, the bargaining difficulties inherent in consolidating the interests of numerous unsecured creditors is simplified, and the unsecured creditors' bargaining power is enhanced, by effectively treating unsecured creditors as one bargaining entity with a single bargaining agenda"); Harvey R. Miller, et al., *The Chapter 11 Players in Contemporary Bankruptcy Practice: Roles, Obligations, and Ethical Considerations of Debtors in Possession, Trustees, Examiners and Committees*, 668 PLI/Comm. 371, 478-79 (1993) (arguing that creditors' committees provide representation for both sophisticated lenders and small trade and individual creditors); Andrew DeNatale, *Powers, Functions and Duties of Creditors Committees*, 767 PLI/Comm 791, 802 (1998) (arguing that, through representation on the creditors' committee, "the interests of all constituents can be represented, and each constituent can enjoy the benefits of an active, organized, and official advocated, without actively participating in the process;" allowing participation by creditors who due to distance would be otherwise unable to have a voice in the process); Mark J. Krudys, *Article: Insider Trading by Members of Creditors' Committees---Actionable!*, 44 DePaul L. Rev. 99, 103 n.12 (1994) (noting that the Bankruptcy Code "significantly altered the function of creditors' committees from that enumerated under the provisions of the Bankruptcy Act of 1898," mostly by shifting the burden of overseeing the debtor from the bankruptcy judge to the creditors' committees); Dennis S. Meir & Theodore Brown, Jr., *Representing Creditors' Committees Under Chapter 11 of the Bankruptcy Code*, 56 Am. Bankr. L. J. 217, 217 (1982) (noting that the Bankruptcy Code reflects Congress's intention that bankruptcy judges serve a strictly judicial role, and that creditors' committees will monitor the debtor's activities; also suggesting that active and aggressive creditors' committees can significantly impact the course of a chapter 11 case); Marta Andrews, Note: *The Chapter 11 Creditors' Committee: Statutory Watchdog?,* 2 Bankr. Dev. J. 247, 247-248 (1985) (noting that the 1978 Code withdrew responsibility to oversee the debtor from the bankruptcy judge and gave sole statutory authority to scrutinize the debtor-in-possession to the creditors' committees, which conferred significant new powers on creditors' committees). *See also* H.R. Rep. No. 595, 95th Cong., 1st. Sess. 401 (1977) (legislative history of section 1102) ("This section provides for the appointment of creditors' and equity holders' committees, which will be the primary negotiating bodies for the formulation of the plan of reorganization. They will represent the various classes of creditors and equity security holders from which they are selected. They will also provide supervision of the debtor in possession and the trustee, and will protect their constituents' interests.").

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The Bankruptcy Code contemplates that a committee shall be appointed in every chapter 11 case (unless the debtor is a small business and the court, on request of a party in interest, finds "cause" not to appoint a committee). *See* 11 U.S.C. § 1102(a)(3) (1993). *See also* H.R. Rep. No. 95-595, page ____, ("Subsection (a) requires the court to appoint at least one committee. That committee is to be composed of creditors holding unsecured claims. The court is authorized to appoint such additional committees as are necessary to assure adequate representation of creditors and equity security holders."); Miller, *supra* note_____, at 432 (noting that the Bankruptcy Code contemplated that "active interaction of the creditors' committee with the debtor would produce the necessary resources and motivation to effect the efficient, expeditious, and economical rehabilitation and reorganization of distressed businesses"); Lynn M. LoPucki, *The Debtor in Full Control—Systems Failure of Chapter 11 of the Bankruptcy Code?—Second Installment*, 57 Am. Bankr. L. J. 247, 249 (1983) (noting that "in theory, the Bankruptcy Code has greatly expanded the role and power of creditors committees," and committees were expected to play a more active role in reorganizations than under pre-Code law); Peter C. Blain & Diane Harrison O'Gawa, *Creditors' Committees Under Chapter 11 of the United States Bankruptcy Code: Creation, Composition, Powers and Duties*, 73 Marq. L. Rev. 581, 581 ("In enacting the United States Bankruptcy Code, Congress relieved the bankruptcy court of the burdens of administering Chapter 11 cases, with the expectations that the creditor's committee would take a more active role in the day-to-day administration of the debtor's reorganization.").

[151] *See*, *e.g*., Marta Andrews, supra note 149, at -- (noting that the Bankruptcy Code consolidated old Chapters X, XI, XII, eliminated the bankruptcy judge's administrative role, and established the committees as "bankruptcy watchdogs" for the larger group of creditors they represent, but that committees have not lived up to this role; urging reforms designed to increase committee involvement and effectiveness); Curtin, Gross & Togut, *Debtors Out-of-Control supra* note --, at 88-89 (reporting the results of a 1986 survey by the ABA Task Force on Chapter 11 concerning how effective different monitoring devices were in facilitating reorganization and preventing dissipation of assets, to which 168 recipients responded (including 28% of sitting bankruptcy judges (62 judges), 47% of acting estate administrators (44 administrators), 44% of US Trustees (8 trustees), and 54 bankruptcy attorneys); concluding that, in smaller cases, that creditor portion of the checks and balances is non-existent or not working; noting that some argue that chapter 11 serves the interests of managers, who pick the table clean, then liquidate; concluding that the bifurcation of administrative and judicial functions had led to gaps in monitoring); Guzinski & LoPucki, Study of Rates of Formation of Committees (reporting results of a survey circulated to all US Trustee's Offices seeking data for the period July 1996 to June 1997) and other EOUST data; showing low committee formation rate); Kerkman, *Debtor in Full Control supra* note --, at 191 (finding a correlation between the size of case and opposition by creditors); Paskay, *Suggestions for NBRC, Reorganizing* at 540 (proposing eliminating, in small and single asset cases, the requirement that (1) an unsecured creditors' committee be appointed, and (2) the debtor file a disclosure statement); Hon. Steven W. Rhoades, *Eight Statutory Causes of Delay and Expense in Chapter 11 Bankruptcy Cases*, 67 Am. Bankr. L. J. 287, 309-11 (1993) (arguing that inactive and ineffectual creditors committees fail to perform any management function in a chapter 11 case and contribute to delay); Raymond T. Nimmer & Richard B. Feinberg, *Chapter 11 Buiness Governance: Fiduciary Duties, Business Judgment, Trustees and Exclusivity*, 6 Bankr. Dev. J. 1, 52-53 (1989) (arguing that committees can play an active, advisory role and influence the direction of the case); Johnston, *The Bankruptcy Bargain*, *supra* note ____, at 270-71 (arguing that creditors' committees fail to perform their responsibilities under the Bankruptcy Code because they are not appointed in all cases, and unsecured creditors are unwilling to serve); Blain & O'Gawa, *supra* note 153, at (noting that "in the majority of Chapter 11 cases, creditors' committee have fallen short of Congress' initial expectations and have failed to utilize the broad powers available to them").

For a discussion of the role of committees when there are conflicts among creditors see Daniel J. Bussel, *Coalition Building Through Bankruptcy Creditors' Committees*, 43 UCLA L. Rev. 1547 (1996) (arguing that committees can and should reconcile conflicts among creditor groups as well facilitate the formulation and confirmation of consensual plans, but noting that the US Trustee in the Central District of California views conflicts among creditors as a basis for appointing multiple committees; developing a model for committee appointments and operations); Carl A. Eklund & Lynn W. Roberts, *The Problem with Creditors' Committees in Chapter 11: How to Manage the Inherent Conflicts Without Loss of Function*, 5 Am. Bankr. L. Rev. 129 (1997) (suggesting means of reducing inherent conflicts among committee members).

[152] *See*, *e.g*., LoPucki and Whitford, *Venue Choice supra* note --, at 39 (arguing that lawyers retained by creditor or shareholder interests have little incentive to drive a hard bargain because the fees of the lawyers retained by official committees are paid by the estate); LoPucki and Whitford, *Bargaining Over Equity's Share supra* note --, at 138, 143, 146-47, 178, 186-87 (reporting results of a study of large public companies in chapter 11; finding that, in no case was a plan confirmed without the approval of at least a majority of the members of the creditors' committee, in only 9% of the cases in which equity committee existed at confirmation did the proponent of a successful plan secure confirmation without agreement of equity committee, only 0.8% of classes of creditors actively contested confirmation of a plan; concluding that there is an extraordinary high level of settlement; finding that, in 21 of 30 cases in which the companies were insolvent at confirmation, creditors agreed to allow shareholder recoveries ranging from $400,000 to $63 million and that, if unsecured creditors recovered at least 14% of the claims, equity was permitted to share in the distribution; suggesting that an attempt to cram down a plan against equity is not likely to result in litigation expense nearly as great as the distributions offered to equity in most cases; finding that, if absolute priority had been strictly enforced in the cases of insolvent debtors, recoveries by shareholder in 21 cases totaling $154 million would have been eliminated; although deviations rarely exceed 10% of total distributions, they probably exceed the total amount of professional fees draining assets of creditors; proposing to eliminate deviations from absolute priority rule resulting from equity's obstructionist potential by obtaining an early determination that equity had no plausible entitlement to share in the distribution, was not a party in interest, and any committee previously appointed to represent such holders should be dissolved); Martin J. Whitman & David M. Barse, *Professionals Paid by Debtors Ought to Represent the Debtors' Interests*, 1 Am. Bankr. Inst. L. Rev. 367 (1993) (arguing that the existence of committees paid by the estate increases litigation, fosters delay, and increases costs; proposing that the estate pay only for the debtors' professionals, unless professionals for another party make a substantial contribution); *cf*. Christopher F. Graham, *A Fair Chapter 11 Process Requires Organized Creditors' Participation*, 1 Am. Bankr. Inst. L. Rev. 389 (1993) (arguing that Whitman & Barse's proposal undermines creditors' rights and ignores the reality that funds paid to professionals representing creditors' committees ultimately belong to the creditors anyway); *see also* Clark, *supra* note --, at 253 [*Success in Chapter 11*] (arguing that having creditors' committees file plans within six months of the petition date will often end the case within one year instead of the normal two or three years when dealing with more sophisticated and larger debtors but that, in smaller cases, however, participant argues that the benefits of this strategy are diminished by the prospective

litigation costs).

[153] *See supra* Part 4.b. [DELETE?]

[154] *See*, *e.g*., Tabb, *supra* note 53, at 840-41 (arguing that bankruptcy courts should resist the demand to appoint multiple committees within a single case and that, if multiple committees are appointed, the committees should share professionals because much of the work of accountants and investment bankers overlaps); Miller, *supra* note ____, at 462 (arguing that multiple creditors' committees increase expense, divisiveness, and controversy among creditor groups); Kenneth N. Klee & K. John Schaffer, *Creditors' Committees Under Chapter 11 of the Bankruptcy Code*, 44 S.C. L. Rev. 995, 1024-25 (1993) (noting some benefits to multiple committees, but also noting that multiple committees "complicate negotiations, delay the reorganization process, and create additional administrative expenses to the debtor's estate, particularly in terms of higher professional fees;" also noting that courts are reluctant to appoint additional committees); *see also* Blain & O'Gawa, *supra* note 153, at 593 (noting that the party seeking appointment of an additional committee must show the need for an additional committee, the inadequacy of the official committee, and that the cost of the additional committee does not outweigh the concern for adequate representation and could not be accomplished by other means; adding that "the nature of the case, the composition of the committee, the presence of conflicts among creditors, and the delay and costs arising from duplication of professional services are among the factors the court weighs in determining whether to appoint an additional committee").

[155] *See* LoPucki & Whitford, *supra* note 137, at 138, 143, 146-47, 178, 186-87 (reporting results of a study of large public companies in chapter 11; finding that, in no case was a plan confirmed without the approval of at least a majority of the members of the creditors' committee, in only 9% of the cases in which equity committee existed at confirmation did the proponent of a successful plan secure confirmation without agreement of equity committee, only 0.8% of classes of creditors actively contested confirmation of a plan; concluding that there is an extraordinary high level of settlement; finding that, in 21 of 30 cases in which the companies were insolvent at confirmation, creditors agreed to allow shareholder recoveries ranging from $400,000 to $63 million and that, if unsecured creditors recovered at least 14% of the claims, equity was permitted to share in the distribution; suggesting that an attempt to cram down a plan against equity is not likely to result in litigation expense nearly as great as the distributions offered to equity in most cases; finding that, if absolute priority had been strictly enforced in the cases of insolvent debtors, recoveries by shareholder in 21 cases totaling $154 million would have been eliminated; although deviations rarely exceed 10% of total distributions, they probably exceed the total amount of professional fees draining assets of creditors; proposing to eliminate deviations from absolute priority rule resulting from equity's obstructionist potential by obtaining an early determination that equity had no plausible entitlement to share in the distribution, was not a party in interest, and any committee previously appointed to represent such holders should be dissolved); [CUT OR MOVE]

Cf. Bebchuk & Chang, *supra* note 137, at -- (examining factors that increase the likelihood of equity receiving a distribution in violation of absolute priority; concluding that voluntary creditors probably take this into account in their contracts, but that violations of absolute priority harm involuntary creditors).

[156] *See* LoPucki & Kalin, *supra* note 132, at manuscript -- (finding that large, public companies reorganized in Delaware and New York have far higher rates of re-filing than companies reorganized elsewhere; finding that the re-filing rate for all companies in the study was 3.1%, which is more than 4 times the weighted average background filing rate of .77 % for public companies (Id. at manuscript 11-15); finding that 31 percent of the 188 cases in the study emerged in Delaware (16%), 36 emerged in New York City (19%), 121 emerged in other courts (64%) and the next most active court after New York was Los Angeles with 12 (6%); finding that 32% of Delaware cases have re-filed, 28% of New York cases have re-filed, 10% of all other cases have re-filed, that Delaware has a re-filing rate of 8.6% per year, New York has a rate of 5.2% per year, all others have a combined rate of 1.7% per year, the combined rate for all courts is 3.1%, and that the re-filing rate for large, public companies in Delaware and New York City is nearly 30%, which is 6-7 times as high as the re-filing rate for companies emerging in other districts; finding that, for cases that emerged after 1990, the re-filing rate for Delaware is 7.9% per year, New York City is 4.8% per year, all other courts is 1.1% per year, and aggregate is 3.1% per year. (Id. at manuscript 5, 19-22); finding that pre-packaged cases that emerged after 1990 re-filed more frequently than other cases, but the difference is not statistically significant; the re-filing rate for all companies during this period was 14% while the rate for pre-packaged cases was 22%; for all cases from 1983 to 1997, the re-filing rate for pre-packaged cases confirmed in Delaware and New York was 33%, for all other courts it was 7%; the per year re-filing rate for Delaware pre-packaged cases was 9.2%, for new York was 6.4%, for all other courts was 1.4%; for cases that emerged after 1990, the rates are Delaware 9.2%, New York 6.4%, all others 0%. (Id. at manuscript 23-25); overall, Delaware confirmed 79% of its large public company cases, all other courts confirmed 85% of such cases. (Id. at manuscript 27); concluding that competition for cases leads to lower success rates. (Id. at manuscript 26) [CUT DOWN]

Cf. Large-Public Companies Database (A query run on the database on July 21, 2000 revealed 21 tort-caused cases. Tort included pension, mass tort, fraud, environmental, other. None of the 21 tort-caused cases had re-filed bankruptcy as of July 21, 2000. The average time in bankruptcy for these cases (20 cases, data was not available for one case) was 3.2 years. All 20 of these cases were confirmed except one, which was converted after an asset sale (MiniScribe). This is not surprising; most commentators assume that cases with large numbers of tort claims will take longer to resolve and will be difficult to resolve out of bankruptcy. In contrast, of the 229 non-tort-caused cases for which re-filing data was available, 37 (16%) had re-filed by July 21, 2000. This simple analysis did not include measure of time since emergence, etc. Time in bankruptcy data was available for 238 non-tort-caused cases. For these cases, the time in bankruptcy (until confirmation, sale or conversion, omitting dismissals) was 1.6 years. This is half the time for the tort-caused cases, but these cases had a higher re-filing rate. (KMG-P, L.M. LoPucki)

[157] *See*, *e.g*., Fenning, *Measuring Chapter 11 supra* note --, at 123, 146 (finding no pattern linking size or type of business to the length of time from filing to plan confirmation, dismissal, or conversion, but finding that the smallest and largest cases took slightly longer than the moderately-sized case to reach these milestones; finding no pattern linking the size or the type of business to the kind of plan confirmed, or the economic outcome, based upon a study of 500 Los Angeles cases filed between 1991-1994); FLYNN, STATISTICAL ANALYSIS *supra* note --, at 26-35 (finding that (i) there is little relationship between time to confirmation and debt levels, except that cases with debts of $500,000 to $1,000,000 take slightly longer to confirm and cases with debts over $1,000,000 take substantially longer to confirm, (ii) there is little relationship between time to confirmation and asset levels, except that the very largest cases take longer than average to confirm and the very smallest cases take shorter than average to confirm, (iii) cases in which assets greatly exceed debts take slightly longer to confirm, and (iv) there is a strong correlation between the amount of assets and the confirmation rate; cases with more than $1,000,000 in assets are at least several times more likely to be confirmed than cases with less than $100,000 in assets); Edith S. Hotchkiss, *Post-Bankruptcy Performance and Management Turnover*, 50 J. FIN. 3, 4, 19-20 (1995) (reporting results of a study of the performance of 197 publicly traded firms that filed for chapter 11 between October 1979 and September 1988 and emerged as public companies; finding that over 40 percent experience operating losses following bankruptcy, and that 32 percent restructured their debts through another bankruptcy or an out-of-court restructuring after the original bankruptcy case; concluding that chapter 11 has economically significant biases toward saving unprofitable firms; finding that poor performance in bankruptcy and post-bankruptcy is closely associated with the continuation of old management and speculating that this could mean either that firms with poorer prospects have a harder time attracting new management or that old management who stay are less able, or make inefficient decisions); Jensen-Conklin, *supra* note 157, at 316-19, 325-27 (reporting the results of a study of 260 chapter 11 cases filed in the SDNY during the period of 1980-1989 in which plans were confirmed; finding a 17.31% confirmation rate, 26% of which were liquidating plans, consistent with the Flynn Study (which found a 17% confirmation rate in a national 15 district sample, 25% of which were liquidating plans); finding that, during the first five years of the study, the average time for confirmation was 22.09 months, over the second five years it was 19.36 months, overall it was 22.04 months, the Flynn Study showed an average time of 22 months; finding that 58% of the plans in her sample were consummated (38% were reorganizing plans, 20% were liquidating plans) and that the plans most likely to consummate were those of larger debtors with creditors' committees, and plans with payment periods of less than one year).

See also Wruck, *supra* note --, *Financial Distress* at 426, 437 (reporting consolided data from five prior studies of outcomes for 381 financially distressed publicly traded firms based upon stock performance; finding that 51% defaulted or restructured their debt; of these, 47% resolved the default in an out of court restructuring, 53% filed chapter 11; of those that filed chapter 11, one study of 37 entities that filed chapter 11 between 1980 and 1986 showed that 95% emerged under a plan, 5% liquidated; of those that filed chapter 11, another study showed that 162 entities that filed chapter 11 between 1973 and 1982 showed that 60% emerged under a plan, 7% merged with other companies, 15% liquidated, and 17% not accounted); Tashjian, *supra* note 8, at -- (reporting results of a study of 49 public companies that filed pre-packaged chapter 11 cases between January 1980 and June of 1993; noting that an efficient reorganization is one that creates or preserves the greatest value net of all costs, that factors such as time, direct costs, degree to which absolute priority is violated, and recovery rates by creditors are ways to observe efficiency indirectly, and that analysts are concerned with efficiency because inefficient reorganization processes may lead to inefficient allocation of capital/corporate resources (Id. at 136); finding that pre-packaged filings lie between out-of-court and full chapter proceedings in terms of time, cost, violations of absolute priority, and distributions, but cautioning that this does not necessarily mean that pre-packaged filings are more efficient than chapter 11 but less efficient than out-of-court restructurings. (Id. at 136-37); examining recovery rate data for 41 cases and finding average % recovery rates for all claims of 75.1% for pre-voted pre-packaged cases, 69.2% for post-voted pre-packaged cases, 72.9% for all pre-packaged cases, 50.9% for traditional chapter 11 (Franks & Torous study), and 80.1% for out-of-court restructuring (Franks & Torous study); finding average recovery rates for unclassified and priority claims of 100%; for secured claims of 100.9% for pre-voted pre-packaged cases, 95.8% for post-voted pre-packaged cases, 99.3% for all pre-packaged cases; for unsecured claims of 65.3% for pre-voted pre-packaged cases, 61.9% for post-voted pre-packaged cases, 64% for all pre-packaged cases; for preferred stock of 19.1% for pre-voted pre-packaged cases, 4.1% for post-voted pre-packaged cases, 15.9% for all pre-packaged cases: 15.9) (Id. at 143-44, 146-47) [CUT]

[158] *See*, *e.g*., Graham, *supra* note 152, at -- (arguing that Whitman & Barse's proposal to allow committees to be paid only for substantial contributions to the case would not enhance plan feasibility, but rather, would facilitate confirmation notwithstanding the feasibility of a plan because no organized opposition to an unfeasible plan could form); Kerkman, *supra* note 151, at 165, 183 (concluding, based upon study of 48 cases in Eastern District of Wisconsin during 1982, that, as current operating expenses are incurred, (1) creditors are unable to close non-viable businesses; (2) creditors can rarely change management; (3) debtors could dictate terms of plan; and (4) debtors can obtain significant delays; and that the reasons for inadequate creditor control include: (1) creditors' committees failed to operate; (2) creditor opposition flourished in cases that were likely to succeed but creditors did not effectively organize to close nonviable business; (3) non-debtor plans provide no realistic control; (4) trustees and examiners were seldom used to investigate viability; and (5) preferences were not attacked). Add others

[159] *See*, *e.g*., LoPucki, *supra* note 159, at 633-35 (proposing early determination whether value of estate exceeds claims such that

equity has value and, if not, advocating extinguishment of equity interests); Newton, *Suggestions for NBRC* at 5-36 (proposing that debtor, or independent party, be required to present evidence of viability (of the business) within 30 days of filing, with viability being based upon cash flows, not the debt and equity structure); Tabb, *supra* note 135, at 835 (arguing that court should make threshold finding that chapter 11 case is feasible early in the case so that hopeless cases would be exposed early on and would not be dragged out for extended periods of time; noting that the dismal overall success rate of chapter 11 cases suggests that a veritable army of candidates for early dismissal exist); . .

[160] *See*, *e.g*., Bebchuk & Chang, *supra* note 137, at 274 (using a sequential bargaining model to examine the plan negotiation process; arguing that the chapter 11 bargaining process (with the automatic stay and the threat that value will decline if the case drags on or value may be reduced if the case fails and the entity is be liquidated) leads to violations of absolute priority of contractual rights; finding that the amount equity holders receive even when the entity is insolvent are rooted in the need for equity consent and increase with the volatility of the firm's asset values, the extent to which the reorganization imposes financial distress costs, the length of the reorganization process, the length of exclusivity, the extent to which liquidation imposes a loss in value, and the extent to which the value of the firm's assets covers its debts; concluding that voluntary creditors likely take the prospect of distributions to equity into account in their contracts through higher interest rates, etc., but that retention of value by equity does, however, transfer wealth from involuntary creditors to equity holders); LoPucki & Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, *supra* note ____, at 688-89 (finding that where unsecured creditors fail to participate in the case, management is able to dominate the process and demand creditor acquiescence in a plan distributing value to equity, in violation of the absolute priority rule); LoPucki studies . . . LoPucki and Whitford, *Bargaining Over Equity's Share supra* note --, at 178, 186-87 (arguing that enforcement of the absolute priority rule would have elminated recoveries of $154 million by shareholder in 21 cases; although these distributions rarely exceed 10% of total distributions, deviations totaled millions of dollars in each case; speculating that the professional fees were "probably smaller" than deviations from absolute priority rule; suggesting that deviations from absolute priority rule resulting from equity's obstructionist potential could be reduced or eliminated if it were possible to obtain a determination early in a chapter 11 case that equity had no plausible entitlement to share in the distribution, was not a party in interest, and any committee previously appointed to represent such holders should be dissolved).

[161] *See*, *e.g*., FJC 1997 Venue Report, *supra* note --, at 39-40 (concluding that the "academic consensus" is that pre-packaged cases cost more than out-of-court workouts but less than full chapter 11 cases; "[T]he greatest advantage for a debtor of the prepackaged option – speed through the bankruptcy process – can also be its greatest disadvantage. We have presented evidence that prepackaged claims [sic] are confirmed more quickly, but cannot comment on any negative outcomes that may have accrued to these debtors, their creditors, or other parties-in-interest." "Perhaps not enough experience with the prepackaged device has accumulated to arrive at a secure conclusion. A potential hazard is that some creditors will be forced to accept terms that they could have improved on during a more prolonged Chapter 11 process." [add others]

[162] Bufford, *supra* note --, at 85 (arguing, based upon study of Judge Mund's 758 chapter 11 cases in Central District of California from 1988 through 1993, that secured creditors are the primary beneficiaries of shortened chapter 11 cases, benefits to unsecured creditors depend upon the circumstances, benefits to debtors are less clear, and benefits to the court (judicial economy) are clear); Clark, *Success in Chapter 11* supra note --, at 238-39 (arguing that the trend in single asset real estate cases is to move the cases through as fast as possible and that the constituency that loses in this process is the original investors).

[163] [insert cites]

Cf. Lawless & Ferris, *Professional Fees In Chapter 7 supra* note --, at 1207 (finding that distributions to unsecured creditors were extremely rare in chapter 7 business bankruptcy cases; finding that, in over 90% of the cases studied, assets that were not distributed to secured creditors were used to pay bankruptcy costs; finding that the time in bankruptcy and the ratio of unsecured to secured debt, not the size of the case, were the most significant factors explaining chapter 7 bankruptcy costs).

[164] [insert cites]

See, *e.g*., Tashjian, *supra* note 8, at -- (examining absolute priority data for 38 public companies that filed pre-packaged chapter 11 cases; finding average deviations from absolute priority (dollar amount of deviation divided by the total value received by all claimholders in the firm) for unclassified and priority claims of 0%, for secured claims of -.91% in pre-voted pre-packaged cases, +.09% in post-voted pre-packaged cases, -.61% in all pre-packaged cases: -.61 (i.e. they receive on average .61 % less than they would if absolute priority were strictly upheld), -2.63% in traditional chapter 11 cases (Franks & Torous study), -3.54% in out-of-court restructuring (Franks & Torous study); for unsecured claims of -1.91% in pre-voted pre-packaged cases, -.57% in post-voted pre-packaged cases, -1.42% in all pre-packaged cases, -.5% in traditional chapter 11 cases (Franks & Torous study), -4.39% in out-of-court restructuring (Franks & Torous study), for preferred stock of .47% in pre-voted pre-packaged cases, 1.44% in post-voted pre-packaged cases, .69% in all pre-packaged cases, for common stock of 2.59% in pre-voted pre-packaged cases, .2% in post-voted pre-packaged cases, 1.71% in all pre-packaged cases, 2.28% in traditional chapter 11 cases (Franks & Torous study), 7.57% in traditional chapter 11 cases (Eberhart study), 2.86% in traditional chapter 11 cases (Betker study), 9.51% in out-of-court restructuring (Franks & Torous study); concluding that absolute priority is upheld in 22% of all pre-packaged cases, priority is upheld for secured but not unsecured creditors in 47% of all pre-packaged cases, priority is violated for secured creditors in 31% of all pre-packaged cases; finding that the frequency of deviations is high, but the dollar amounts are small; finding that aherence to absolute priority is lower for pre-voted pre-packaged cases than for post-voted pre-packaged cases (post-voted cases were 35% of the cases in the study, but constituted 64% of the cases in which priority was violated). The average dollar deviations in post-voted cases is "trivial." Weiss's study shows that priority is upheld in 22% of traditional chapter 11 cases; priority is upheld for secured but not unsecured creditors in 70% of all traditional chapter 11 cases; priority is violated for secured creditors in 8% of all traditional chapter 11 cases. This suggests that unsecured creditors fare better in pre-packaged cases but secured creditors fare worse. (Id. at 145, 147-49) [CUT DOWN]

[165] Weiss, *Bankruptcy Resolution: Direct Costs supra* note --, at 285-86 (reporting results of a study of a sample of 37 New York and American Stock Exchange firms that filed for bankruptcy between November 1979 and December 1986; finding that direct costs averages 3.1% of the book value of debt plus the market value of equity, that absolute priority was violated in 29 (78%) cases, that these violations occured among unsecured classes and between unsecured creditors and equity holders, and that secured creditors' contracts are generally upheld); *cf.* Steve H. Nickles & Edward S. Adams, *Tracing Proceeds to Attorneys' Pockets (and the Dilemma of Paying for Bankruptcy)*, 78 Minn. L. Rev. 1079, 1079 (1994) (arguing that expecting secured creditors to pay for attorneys fee costs in bankruptcy after the debtor has exhausted its equity is consistent with the language and purpose of the Bankruptcy Code and maximizes return for all parties; contending without data that many debtors sell pledged collateral subject to security agreements to finance pre-petition fees or to amass a war chest for post-petition legal expenses; arguing that the secured creditor has direct challenges (conversion allegations) and indirect challenges (voidable preference or fraudulent conveyance actions) at its disposal to recover its "protected" interest, and exploring defenses for the attorney holding such fees; concluding that, due to "inherent benefits of collective distribution," the creditor is better off funding the debtor's legal expenses under the bankruptcy alternative than other available remedies based on an economic balance of costs; applying explore game theory, which they contend illustrates that only cooperative participation in the bankruptcy forum by secured creditors can maximize economic efficiency; and secured creditors should accept the costs to them as a social cost of achieving an optimal course of action).

[166] Clark, *Success in Chapter 11 supra* note --, at 238-39 (arguing without data that the trend in single asset real estate cases is to move the cases through as fast as possible and that the constituency that loses in this process is the original investors).

[167] Insert cites; Douglas G. Baird & Thomas H. Jackson, *Bargaining After the Fall and the Contours of the Absolute Priority Rule*, 55 U. Chi. L. Rev. 738, 740 (1988) (noting that the initial bargain of contributing capital to a firm includes the understanding that one set of owners will take priority over others, and that debt will be repaid before equity) [?]; *see also* Roe, *Commentary* at 219 (argues that common disaster risks can be specified by contract, that parties might not agree to share common disaster risks or might not be able to reach agreement on sharing such risks, and that the fact that creditors do not share by contract might be explained by creditor indifference or creditor hostility to sharing rather than the costs of coordination; recommending a baseline sharing rule with an opt-out provision as a possible alternative to mandatory sharing rules in order to allow creditors to receive full priority if they prefer rather than being locked into mandatory sharing; noting that debtors may resist sharing because of adverse selection problems); *cf.* Jackson & Scott, *Nature of Bankruptcy* (evaluating attempts to accommodate the maximization and distributional goals in bankruptcy using a hypothetical creditors' bargain model premised on the assumption that pre-bankruptcy entitlements should be impaired in bankruptcy only when necessary to maximize net asset distributions to the creditors as a group and never to accomplish purely distributional goals; arguing that the "central challenge" in devising bankruptcy rules is to develop rules that reflect both maximization and distributional norms; arguing that attempts to redistribute bankruptcy assets in individual cases undermine this goal because such case-specific redistributions do not filter out disfavored redistributions; arguing that the best means of achieving bankruptcy's distributional goals is to impose what the authors conceptualize to be a kind of "bankruptcy distributional tax" which should be certain and horizontally equitable).

[168] Ferris & Lawless, *Chapter 11* supra note --, at manuscript 61-70 (finding a strong, negative relationship between secured debt and bankruptcy costs such that the higher the ratio of secured debt to unsecured debt, the lower the attorneys' fees as a percentage of total distributions and the lower the total costs as a percentage of total distributions; finding a moderate, negative relationship between secured debt and reduced bankruptcy costs such that the higher the average size of the secured claim, the lower the attorneys' fees as a percentage of total distributions and the lower the total costs as a percentage of total distributions; finding a strong, positive relationship between secured debt and the effect of bankruptcy costs on non-secured creditors such that the higher the ratio of secured debt to unsecured debt, the higher the attorneys' fees as a percentage of non-secured distributions and the higher the total costs as a percentage of non-secured distributions; concluding that "secured debt lowers overall chapter 11 costs and that, as compared to secured creditors, unsecured creditors bear a disproportionate share of these costs;" concluding that "as the size of secured claims increased, chapter 11 costs decreased. Conversely, as the size of an unsecured claim increased, chapter 11 costs increased. These results support the other findings that secured debt lowers chapter 11 costs while unsecured debt increases them." "Thus, it appears that secured creditors are able to shift costs to creditors not holding collateral. Although the effect is not as great in magnitude as secured debt's lowering of overall chapter 11 costs, it does exist.").

[169] Gilson, *supra* note 9, at 328 (analyzing 169 publicly traded companies that experienced severe financial distress during 1978-1987; finding that 80 successfully restructured out of bankruptcy 52.7%, and 89 attempted to restructure out of bankruptcy but ended up in bankruptcy).

[170] *Id.* at 319-21 (finding that the direct cost differential is difficult to measure because there is no way to measure the direct costs of legal fees and management time in an out of court restructuring; noting also that it is widely believed that the direct costs of chapter 11 are higher than the direct costs of private negotiation because the complexity and procedural demands of chapter 11 increase attorneys' fees (citing Stein 1989), that chapter 11 may also increase indirect costs, such as management time devoted to the restructuring, that the relative cost disadvantage of chapter 11 is off set by the automatic stay and the super-priority for new lenders, and that both firms and creditors expect chapter 11 to be more costly than out-of-court restructuring); *id.* at 336-38 (finding that the direct costs of 18 exchange offers (fees of exchange agent, information agent, legal accounting, brokerage, investment banking) ranged from $200,000 to $2,500,000 with an average of $799,000 and a median of $424,000; mean and median costs are .65 and .32 percent of book value; and 2.16 and 2.29 percent of the amount of debt; noting that direct costs of chapter 11 as measured by Warner 1977 for railroad bankruptcy cases filed from 1933 to 1955 were 5.3 percent of firm value; by Ang 1982 for 86 firms that filed bankruptcy and eventually liquidated in Oklahoma from 1963 to 1979 were 7.5% mean and 1.7% median of liquidation proceeds; by Weiss 1990 sample of 37 New York and American Stock Exchange listed firms that failed between 1980 and 1986 average direct costs were 2.9% of book value of assets prior to filing).

[171] *Id.* at 317 ("If bankruptcy is the alternative to private negotiation, then firms' incentives to settle with creditors out of court, and the settlement terms, will reflect the legal and institutional constraints of the bankruptcy process."); *id.* at 318 (citing economic factors that affect the choice between bankruptcy and out of court restructuring: "First, stockholders and creditors will collectively benefit from settling out of court when private negotiation generates lower costs than bankruptcy. Under the lower-cost alternative, the resulting value of the firm will be higher, and the firms' claims can be restructured on terms that leave each of the original claimholders better off. Claimholders' incentives to settle privately will increase with the size of the potential cost savings from recontracting outside of Chapter 11. Second, the lower-cost alternative will be adopted only if claimholders can agree on how to share the cost savings. Attempts to settle privately are more likely to fail when individual creditors have stronger incentives to hold out for more favorable treatment under the debt restructuring plan."); id. at 319, 332-33 (finding that stockholders, creditors, and management fare better under an out-of-court restructuring than bankruptcy).

[172] *Id.* at 315-16, 334-36; see also id. at 324-25 (noting that pre-packaged plans alter the analysis because pre-packaged cases are a hybrid; "In practice, successful prepackaged filings are extremely rare." They reduce the time in chapter 11 and avoid costly creditors' committees but disputes over the plan are still possible; noting that a professional bankruptcy consultant estimated that only 5-10% of the largest bankruptcy cases begin as pre-packs and only one-half of those have a successful restructuring with the original plan being accepted. [Note: the sample on which the study was conducted included *Crystal Oil* as the only pre-pack]

[173] *See id.* at – (finding average percentage recovery rates in 41 pre-packaged cases of 75.1 in pre-voted pre-packaged cases, 69.2 in post-voted pre-packaged cases, and 72.9 in all pre-packaged cases, for all claims; comparing these to average percentage recovery rates of 50.9 in traditional chapter 11 (Franks & Torous), and 80.1 for out-of-court restructuring (Franks & Torous), for all claims); *id.* at 143-44, 146-47 (finding average recovery rates by class of 100 percent for unclassified and priority claims in all pre-packaged cases; 100.9 in pre-voted pre-packaged cases, 95.8 in post-voted pre-packaged cases, and 99.3 in all pre-packaged cases for secured claims; 65.3 in pre-voted pre-packaged cases, 61.9 in post-voted pre-packaged cases, and 64.0 in all pre-packaged cases for unsecured claims; and 19.1 in pre-voted pre-packaged cases, 4.1 in post-voted pre-packaged cases, and 15.9 in all pre-packaged cases for preferred stock); *id.* at 152 (finding no statistically significant difference in the relative frequency with which the 22 LBO and the 27 non-LBO firms filed pre-voted versus post-voted cases, violated absolute priority, time spent negotiating before filing, time spent in chapter 11, percentage of direct costs, or total firm recovery rates; *id.* at 145, 147-49 (finding that, on average, the following deviations from absolute priority (dollar amount of deviation divided by the total value received by all claimholders in the firm; a negative figure means the stake holders received less than they would have if absolute priority had been strictly upheld, a positive number means they received more) occurred: for secured claims in pre-voted pre-packaged cases, -.91; in post-voted pre-packaged cases, +.09, in all pre-packaged cases, -.61; in traditional chapter 11 cases (Franks & Torous), -2.63; and in out-of-court restructuring (Franks & Torous), -3.54; for unsecured claims in pre-voted pre-packaged cases, -1.91; in post-voted pre-packaged cases, -.57; in all pre-packaged cases, -1.42; in traditional chapter 11 cases (Franks & Torous), -.5; in out-of-court restructuring (Franks & Torous), -4.39; for preferred stock in pre-voted pre-packaged cases, .47; in post-voted pre-packaged cases, 1.44; in all pre-packaged cases, .69; for common stock in pre-voted pre-packaged cases, 2.59; in post-voted pre-packaged cases, .2; in all pre-packaged cases, 1.71; in traditional chapter 11 cases (Franks & Torous), 2.28, (Eberhart), 7.57, (Betker), 2.86; in out-of-court restructuring (Franks & Torous), 9.51); *id.* (concluding that absolute priority is upheld in 22% of all pre-packaged cases; priority is upheld for secured but not unsecured creditors in 47% of all pre-packaged cases; priority is violated for secured creditors in 31% of all pre-packaged cases; the frequency of deviations is high, but the dollar amounts are small; adherence to absolute priority is higher for pre-voted pre-packaged cases than for post-voted pre-packaged cases (post-voted cases were 35% of the cases in the study, but constituted 64% of the cases in which priority was violated); the average dollar deviations in post-voted cases is "trivial;" Weiss's study shows that priority is upheld in 22% of traditional chapter 11 cases; priority is upheld for secured but not unsecured creditors in 70% of all traditional chapter 11 cases; priority is violated for secured creditors in 8% of all traditional chapter 11 cases; these data suggest that unsecured creditors fare better in pre-packaged cases but secured creditors fare worse in terms of violations of priority).

Tashjian, *supra* note 8 at 136-44 (noting that factors such as time, direct costs, degree to which absolute priority is violated, and recovery rates by creditors are ways to observe efficiency indirectly. An efficient reorganization is one that creates or preserves the greatest value net of all costs. Analysts are concerned with efficiency because inefficient reorganization processes may lead to inefficient allocation of capital/corporate resources. (Id. at 136) Although pre-packaged filings lie between out-of-court and full chapter proceedings in terms of time, cost, violations of absolute priority, and distributions, the authors do not suggest that pre-packaged filings are more efficient than chapter 11 but less efficient than out-of-court restructurings. The study simply adds data on pre-packaged filings for comparison. (Id. at 136-37)

Study was able to obtain direct fee data for 39 cases. The bulk of these fees (garnered from public filings) are for financial advisors. [Note: They did not review court filings, so it is not clear whether this includes complete or accurate attorney fee information.] (Id. at 143-44)

[174]Cf White, *Chapter 11 and Out of Court Debt Restructurings*

Uses a game theory model to evaluate the economic efficiency of chapter 11 and out-of-court restructurings. Assumes that the purpose of corporate bankruptcy procedures is to ensure that economically inefficient firms liquidate under chapter 7 and economically efficient firms reorganize under chapter 11. Does not find efficient firms liquidating under chapter 7. Does find both inefficient firms and efficient firms reorganize in chapter 11. Also finds that the cost savings of out-of-court restructuring exacerbates the problem because it leads even more inefficient firms to restructure. [Note: See notes under Working Paper Item VI for a discussion of this anomaly.]

By creating chapter 11 (rather than having only a chapter 7), US bankruptcy policy avoids the economic error of having efficient firms liquidate but adds the error of allowing some inefficient firms to reorganize. Out-of-court restructurings have the same effect. [Note: Logically, then, absent chapter 11, more firms would choose the lower cost option of out-of-court restructuring, but only those that meet the characteristics discussed above in Gilson's study would succeed. Presumably, other efficient firms would be forced to liquidate for lack of a legal means of dealing with hold-out creditors.]

Concludes that the economic costs of requiring every failing firm to liquidate, including economically efficient firms, would be higher than the economic cost of allowing some inefficient firms to reorganize either out-of-court or in chapter 11. (Id. at 293)

Argues that the way to improve chapter 11 without abolishing it is to sell all firms as going concerns in chapter 11 if a plan proposed by management has not been approved within a short exclusivity period. This, the author contends, would improve efficiency because it would bring in more buyers and increase sales values. (Id. at 293-94)

Of the 49 cases in the sample, 44 had at least one publicly traded security and 23 had publicly traded common stock. The largest had assets of $3.4 billion; the smallest had assets of $9.7 million. The mean book value of total assets at the end of the fiscal year before filing was $570 million; the median was $313 million. 22 of the firms had undergone an LBO within 7 years prior to the filing. (Id. at 139)

In all 49 cases, a plan was confirmed; in 38 it was the first plan; in 9 it was the second plan; in 1 it was the third plan; and in 1 it was the fourth plan. In all cases, the modifications to the initial plan were modest. "Based on our preliminary analysis, it is likely that prepacks lead to a reduction in time spent in court relative to a traditional Chapter 11 and to a reduction in the associated expenses." (Id. at 140)

See also FJC 1997 *Venue Report* at 39-40

Non-empirical survey of the literature concludes that the "academic consensus" is that pre-packaged cases cost more than out-of-court workouts but less than full chapter 11 cases.

[175] (Id. at 141-42)

[176] Id. at 143-44, 146-47 (reporting recovery rate data for 41 cases); *see also* Duberstein, *supra* note 9, at -- (arguing that the costs, delay, and aggravation of a litigious chapter 11 can be avoided by an out-of-court workout; suggesting that the potential "slice-of-pie" available for the creditors is larger in an out-of-court workout than in a chapter 11 bankruptcy because of the lower costs to all participants; noting that, in determining whether to proceed with an out-of-court workout or filing a chapter 11 petition, the debtor must consider the automatic stay, its vulnerability to creditors' attacks during the workout, and whether or not it can obtain unanimous creditor approval and participation in the workout.

Duberstein, *Workouts* at 365

Author suggests that, in a prepackaged bankruptcy, the debtor can take advantage of all the benefits available under the Bankruptcy Code without the detriments of a prolonged and expensive proceeding. (No data)

[177] She was able to obtain absolute priority data for 38 cases. It showed that, on average, the following deviations from absolute priority (dollar amount of deviation divided by the total value received by all claimholders in the firm):
The data shows that absolute priority is upheld in 22% of all pre-packaged cases; priority is upheld for secured but not unsecured creditors in 47% of all pre-packaged cases; priority is violated for secured creditors in 31% of all pre-packaged cases. The frequency of deviations is high, but the dollar amounts are small. Adherence to absolute priority is lower for pre-voted pre-packaged cases than for post-voted pre-packaged cases (post-voted cases were 35% of the cases in the study, but constituted 64% of the cases in which priority was violated). The average dollar deviations in post-voted cases is "trivial." Weiss's study shows that priority is upheld in 22% of traditional chapter 11 cases; priority is upheld for secured but not unsecured creditors in 70% of all traditional chapter 11 cases; priority is violated for secured creditors in 8% of all traditional chapter 11 cases. This suggests that unsecured creditors fare better in pre-packaged cases but secured creditors fare worse. (Id. at 145, 147-49)

[178] (Id. at 153-55)
[also Stein 1989]