REFLECTIONS ON BUSINESS BANKRUPTCY REFORM

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INTRODUCTION

Chapter 11 of the U.S. Bankruptcy Code[1] ("Code") is the "gold standard" of business financial reorganization laws. It introduced, among other things, the "debtor in possession" model[2] and a process by which business debtors could restructure their financial affairs with the input of,

† United States Bankruptcy Judge, District of Maryland. This essay is written for educational purposes only, and it does not express any opinions or positions regarding any issues that may arise, or any parties that may appear, in any cases before Judge Harner.

†† Mr. Hockenbury was a legal extern in Judge Harner's Chambers and worked collaboratively with Judge Harner on this essay. Although the narrative of the essay shares many of Judge Harner's experiences and reflections as Reporter to the ABI Commission, Mr. Hockenbury made meaningful contributions to the research and writing of this essay and, accordingly, is a co-author of this essay. All of Mr. Hockenbury's work on this essay took place prior to his appointment as a judicial clerk. Mr. Hockenbury was a law student at the University of Maryland Francis Carey School of Law when this article was accepted for publication and earned his juris doctorate in May 2021.

1. 11 U.S.C. §§ 1101–74 (2021).

2. The debtor in possession model allows the Chapter 11 debtor to stay in possession of its assets and in control of its business and reorganization efforts. § 1101. Section 1107 of the Code provides, in pertinent part, that

> [s]ubject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

§ 1107(a). Consequently, a debtor in possession, commonly called a DIP, generally has the powers and duties of the bankruptcy trustee. *Id.* Notably, the court may order the appointment of a trustee, in lieu of the DIP, under § 1104 of the Code. *See* § 1104.

but not control by, the entity's creditors.[3] Countries around the globe look to Chapter 11 of the Code for inspiration and guidance in developing and reforming their own business reorganization laws.[4] Yet many commentators and practitioners in the United States have identified flaws in the Chapter 11 model that arguably weaken its overall effectiveness.[5]

In fact, in late 2011 and early 2012, the American Bankruptcy Institute (ABI) formed a Commission to Study the Reform of Chapter 11 (the "ABI Commission" or "Commission").[6] I was privileged to serve as the Reporter to the ABI Commission,[7] and I worked closely with the Commissioners to research, deliberate on, and ultimately produce a 400-page Final Report and Recommendations in December 2014 (the "ABI Report" or "Report").[8] The primary objective of the ABI Report—at least from my perspective—was to provide information and to encourage a dialogue regarding the strengths and weaknesses of Chapter 11 approximately forty years after the Code's enactment. This essay considers whether the ABI Report achieved that objective, as well as the current state of Chapter 11 reform efforts.

The essay begins with a brief introduction of the ABI Report, including the process underlying the report and the general scope of the recommendations. The essay then discusses certain responses to the ABI Report, including further studies conducted by both domestic and international organizations and the use of the report by commentators and practitioners in educational and advocacy settings. The final part of the essay, and what I view as the essay's core purpose, is an analysis of change and serious conversations regarding change sparked at least in part by the ABI Report. This final part discusses both legislative and judicial change and considers potential implications for Chapter 11 practice going forward.

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3. For ease of reference, this essay refers to "entity" and not a particular kind of entity, such as a corporation or limited liability company, when discussing general provisions of the Code. Any potential difference in treatment of an entity debtor under Chapter 11 because of its organizational form is beyond the scope of this essay.

4. D.J. BAKER ET AL., COMMISSION TO STUDY THE REFORM OF CHAPTER 11: 2012–2014 FINAL REPORT & RECOMMENDATIONS, AM. BANKR. INST. 8 (2014) [hereinafter ABI REPORT] (citing Nathalie Martin, *The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation*, 28 B.C. INT'L & COMP. L. REV. 1, 4 (2005)).

5. ABI REPORT, *supra* note 4, at 11.

6. *See id.* at 2.

7. I worked with the Commission prior to my appointment to the bench in 2017. *See Michelle M. Harner*, AM. BANKR. INST., http://commission.abi.org/michelle-m-harner (last visited September 29, 2020).

8. ABI REPORT, *supra* note 4, at 1. A copy of the ABI Report is available at http://commission.abi.org/full-report (page references herein are to this version of the report, which accords with the printed version).

I. THE ABI COMMISSION REPORT

I was a professor of law at the University of Maryland Francis King Carey School of Law when I received a call from Sam Gerdano of the ABI. Mr. Gerdano asked me if I was interested in serving as the Reporter for a newly formed Commission charged with studying the Chapter 11 reorganization process and identifying potential areas for improvement or change. He casually suggested that the Commission would meet on a few occasions; there likely would be some public hearings; and then the Commission would produce a short report. Little did I know that the next three years of my life would be consumed by the ABI Commission's work or that I would have the opportunity to critically analyze every component of Chapter 11 reorganizations with some of the most talented, experienced, and dedicated professionals in the field.

The ABI Commission held its first organizational meeting in December 2011, and it issued the ABI Report in December 2014.[9] In the intervening three years, the Commission met on a monthly basis (often in person, though sometimes telephonically), and those meetings lasted until the business at hand was completed. Each one of the twenty-three members of the Commission[10] was dedicated to the study and the Commission's mission statement, which itself took hours to negotiate and draft.[11] The Commissioners agreed to leave their personal views and respective client interests at the door and to think about Chapter 11 objectively and from the perspective of the integrity and purpose of the bankruptcy system. Having been present at each of the Commission's meetings, I can attest that each Commissioner upheld his or her end of this bargain. I often would be caught off-guard and look up from my notes to confirm the voice of the person making, for example, a pro-debtor

9. ABI REPORT, *supra* note 4, at 3, 13.

10. The members of the Commission included: Baker, D. Jan; Berman, Geoffrey L.; Bernstein, Donald S.; Brandt, William A. Jr.; Butler, Jack; Ceccotti, Babette A.; Gerdano, Samuel J.; Gonzalez, Hon. Arthur J.; Hedburg, Steven, M.; Keach, Robert J.; Klee, Prof. Kenneth; Levin, Richard B.; Markus, James T.; Miller, Harvey R.; Millstein, James E.; Novikoff, Harold S.; Seery, James P. Jr.; Smith, Sheila T.; Sprayregen James H.M.; Togut, Albert; White, Clifford J., III; Whyte, Bettina M.; and Williamson, Deborah D. Additional information on the members of the Commission is available at http://commission.abi.org/commission-members.

11. The final language of the Commission's mission statement read:

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

ABI REPORT, *supra* note 4, at 3.

statement when that person's bread and butter was creditor representations. But the point being made undeniably was in furtherance of Chapter 11's goals and the Commission's mission statement. That was simply how this body of individuals approached the project and arguably why the Commission was able to reach a consensus report, with no dissenters.

The Commission took the first several months to research and identify broad topics (and issues within those topics) that warranted inclusion in the study. The Commission then developed an advisory committee structure to further broaden the perspective and enhance the depth of research performed on each chosen topic. The Commission ultimately named thirteen substantive topic advisory committees,[12] with an additional international working group, to support and contribute to the work of the Commission. The advisory committees began their work in April 2012.

Also in April 2012, the Commission held its first public hearing at the committee room of the U.S. House of Representatives Committee on the Judiciary in Washington, D.C.[13] The Commission thereafter held another sixteen public field hearings in eleven different cities, striving to gather as much information from as many different sources as possible within the parameters of the study.[14] The Commission heard from over 90 witnesses, who often not only testified in person but also submitted incredibly thoughtful written testimony. The public hearings were well attended and generated a great deal of feedback and conversation about potential Chapter 11 reform. The ABI also made all public field hearings and witness testimony available on its website so that parties who were not able to attend in person could still follow the work of the Commission.

At the end of the study phase of the project, the Commission met with each of the advisory committees and collected all of the valuable information provided by witnesses at the public field hearings. The Commission then began its deliberation process, which was often intense, sometimes heated, yet always professional and thorough. No one on the

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12. The advisory committees focused on the following topic areas:
(1) administrative claims and other pressures on liquidity; (2) avoiding powers (e.g., preferences and fraudulent conveyances); (3) bankruptcy-remote and bankruptcy-proof entities; (4) distributional issues under plans; (5) executory contracts and unexpired leases; (6) financial contracts, derivatives, and safe harbors; (7) financing issues; (8) governance and supervision of cases; (9) labor and benefits issues; (10) multiple entities and corporate groups; (11) procedural and structural issues under plans; (12) role of valuation; and (13) asset sales in chapter 11.
Id. at 13–14.

13. *Id.* at 15.

14. *Id.*

Commission ever lost sight of the ultimate goal: namely, to make Chapter 11 even more efficient and more effective for more companies.

Based on my recollection, the Commission debated and deliberated for approximately nine months (February through November of 2014) before reaching complete agreement on the content of the ABI Report. The Report contains approximately 200 discrete recommendations, including a proposal for revamping the reorganization process for small and medium-sized enterprise (SME) cases.[15] I can easily recall the duration of the deliberations because I spent Thanksgiving of 2014 on the phone, late into the evening, with several Commissioners trying to hammer out the details of a few final recommendations. Again, the dedication of the Commissioners was astounding. Each of the Commissioners, the Commission's Co-Chairs (Robert Keach and Albert Togut), and especially Sam Gerdano deserve tremendous credit for the personal time and energy they devoted to this project for the betterment of the bankruptcy system and profession.

I am not going to spend time in this essay reviewing each of the Commission's recommendations. Rather, I will simply say that the recommendations cover most key elements in a Chapter 11 case from the filing of the petition to the bankruptcy court's options for orders resolving the case (i.e., exit orders). I have included the Table of Contents to the ABI Report as Appendix A to this essay to give readers not familiar with the Report a sense of its scope. I also discuss certain recommendations of the Commission in more detail below in the context of reviewing responses to, and the impact of, the ABI Report.

II. REACTION & RESPONSES TO THE ABI REPORT

The high profile and public nature of the ABI Commission's study garnered considerable attention during the three-year study period. The discourse and debate intensified, however, with the release and roll-out of the ABI Report in December 2014. The ABI Report was the subject of many panel discussions at professional conferences, and it spurred various kinds of responses from professional organizations both domestically and internationally. This section summarizes several of those responses.

In general, the bankruptcy profession appeared to appreciate the time, energy, and thought captured by the ABI Report. Many judges, practitioners, and academics recognized the effort or incorporated the Report in their own work.[16] That is not to say that all agreed with the

15. *See id.* at 276–02.

16. *See, e.g.*, Melissa B. Jacoby & Edward J. Janger, *Tracing Equity: Realizing & Allocating Value in Chapter 11*, 96 TEX. L. REV. 673, 680 (2018) (acknowledging the value

Commission's recommendations; they did not. In fact, one particular industry group, the Loan Syndications and Trading Association (LSTA), opposed many, if not most, of the Commission's recommendations.[17] Yet even this opposition sparked constructive dialogue and, in my view, benefited all parties who were willing to come to the discussion table.

The conversation continued in various forms at professional conferences and academic symposia and in written publications. In addition to the ABI, organizations and institutions such as the American College of Bankruptcy (Fourth Circuit Program), Emory University School of Law (*Emory Bankruptcy Developments Journal*), and the National Bankruptcy Conference held programs to discuss the ABI Commission's recommendations or to consider alternatives for improving Chapter 11.[18] Over 200 law review and law journal articles

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in the ABI Report and using its recommendations as the foundation on which to propose additional reforms to Chapter 11 regarding redemption option priority); Josef S. Athanas et al., *Bankruptcy Needs to Get its Priorities Straight: A Proposal for Limiting the Leverage of Unsecured Creditor's Committees When Unsecured Creditors are "Out-of-the-Money"*, 26 AM. BANKR. INST. L. REV. 93, 95 (2018) (building on the Commission's recommendations relating to statutory committees).

17. David Griffiths, *LSTA to ABI Commission on Chapter 11 Reform: No Way, José*, WEIL RESTRUCTURING (Oct. 7, 2015), https://business-finance-restructuring.weil.com/abi-reform-commission/lsta-to-abi-commission-on-chapter-11-reform-no-way-jose/. The LSTA participated and was actively engaged in the ABI Commission study process. The organization presented both live and written testimony at the Commission public field hearings, and their representatives were willing to sit down and discuss the issues with the Commission. One significant point of contention between the ABI Commission and the LSTA concerned whether there was in fact a need to change Chapter 11 of the Code. Although the Commission and the LSTA parted ways on many of the Commission's recommendations, the LSTA's positions were fully evaluated by the Commission and enabled the Commission to consider more robustly all potential perspectives on the relevant issues. For summaries of the LSTA's response to the ABI REPORT, see *id.*; *The Trouble with Unneeded Bankruptcy Reform: The LSTA's Response to the ABI Chapter 11 Commission Report*, HARVARD L. SCH. BANKR. ROUNDTABLE (Nov. 11, 2015), https://blogs.harvard.edu/bankruptcyroundtable/2015/11/10/the-trouble-with-unneeded-bankruptcy-reform-the-lstas-response-to-the-abi-chapter-11-commission-report/. For the summaries of the ABI REPORT provided by these same publications, see *Stories under – ABI Reform Commission*, WEIL RESTRUCTURING, https://business-finance-restructuring.weil.com/category/abi-reform-commission/ (last visited Apr. 18, 2021); Jay M. Goffman et al., *Overview of ABI Commission Report and Recommendation on the Reform of Chapter 11 of the Bankruptcy Code*, HARVARD L. SCH. BANKR. ROUNDTABLE (Mar. 23, 2015), http://blogs.harvard.edu/bankruptcyroundtable/2015/03/23/overview-of-abi-commission-report-and-recommendation-on-the-reform-of-chapter-11-of-the-bankruptcy-code/.

18. *See* Symposium, *ACB 4th Circuit Program Considering ABI's Chapter 11 Reform Report*, AM. BANKR. INST. (Feb. 2015), http://commission.abi.org/acb-4th-cir-program-considering-abis-chapter-11-reform-report; Symposium, *Corporate Bankruptcy Panel: ABI Commission's Report on the Reform of Chapter 11: Small and Medium Businesses, Sales of Assets, Financing, and Plans*, 32 EMORY BANKR. DEV. J. 267, 270 (2016); *Rethinking Chapter 11 Before the H. Comm. On the Judiciary*, 114th Cong. 1 (2015), available at

cite to the ABI Report.[19] Moreover, ten briefs filed in the U.S. Supreme Court reference the ABI Report.[20] The ABI Report's impact on case law and legislation is discussed in Part III below.

The conversation also crossed borders. Not only did the Commission incorporate the work of its international working group into the ABI Report, but members of that working group and others have used some of the Commission's recommendations in a comparative context. INSOL International—an international federation of national associations for accountants and lawyers who specialize in turnaround and insolvency—published a summary of the current status of insolvency law in eleven countries and indicated that other countries are considering measures similar to those recommended in the Report.[21] Professors McCormack and Wan referenced the trends in American bankruptcy law identify by the Report in discussing aspects of American bankruptcy

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http://nbconf.org/wp-content/uploads/2015/12/NBC-Rethink-Conference-Materials-PDF.pdf.

19. Based on an online search performed on Mar. 3, 2020 through the Westlaw database with the search terms: "American Bankruptcy Institute," "Chapter 11," "Reform," "Report".

20. *See, e.g.*, Petition for a Writ of Certiorari, Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973 (2017) (No. 15-649), 2015 WL 7252903, at *26; Brief for the United States as Amicus Curiae, Sw. Sec., FSB v. Segner, 137 S. Ct. 2186 (2017) (No. 15-1223), 2017 WL 1488624, at *22; Brief for Petitioners, Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973 (2017) (No. 15-649), 2016 WL 4524347, at *8; Brief for Amici Curiae Law Professors in Support of Petitioners, Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973 (2017) (No. 15-649), 2016 WL 4651566, at * 21; Brief for Amici Curiae Law Professors in Support of Respondents, Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, (2017) (No. 15-649), 2016 WL 6081730, at *28; Brief for Defendant-Appellant Bokf, Na, *In re* MPM Silicones, LLC, 874 F.3d 787 (2d Cir. 2017) (No. 15-1682), 2015 WL 5210972, at *29–30; Petition for Writ of Certiorari, BOKF, N. v. Momentive Performance Materials, Inc., 138 S. Ct. 2653 (2018) (No. 17-1291), 2018 WL 1327117, at *12–13; Brief for Amici Curiae Law Professors in Support of Petitioners, Czyzewski v. Jevic Holding Corp., 137 S.Ct. 973 (2017) (No. 15-649), 2015 WL 9252253, at *2; Motion for Leave to File Brief as Amici Curiae and Brief Amici Curiae of the Honorable Eugene Wedoff (Ret.), the Honorable Leif Clark (Ret.), and a Group of Law Professors in Support of Petitioner, Ritter v. Brady, 139 S. Ct. 1186 (2019) (No. 18-747), 2018 WL 6839778, at *2; Reply Brief of Appellant, Patrick S. Layng United States Trustee, Cranberry Growers Coop. v. Layng, 930 F.3d 844 (7th Cir. 2019) (No. 18-3289), 2019 WL 1756985, at *22; Brief of Amicus Curiae the National Association of Consumer Bankruptcy Attorneys in Support of the Respondent, Daniel Lee Ritz, Jr., Husky Int'l Elecs., Inc. v. Ritz, 136 S. Ct. 1581 (2016) (No. 15-145), 2016 WL 322588, at *9 n.11. In addition, at least two briefs cited the LSTA's response to the ABI Report. *See* Brief of Amicus Curiae Arizona Bankers Ass'n in Support of Petitioner, First S. Nat. Bank v. Sunnyslope Hous. Ltd. P'ship, 138 S. Ct. 648 (2018) (No. 17-455), 2017 WL 4947329, at *18 n.28; Brief of the Loan Syndications and Trading Ass'n and the Commercial Finance Ass'n as Amici Curiae in Support of Appellants, *In re* Tousa, Inc., v. Official Comm. of Unsecured Creditors of Tousa, Inc., No. 17-11545 (11th Cir. Aug. 3, 2017), 2017 WL 3453619, at *9 n.3.

21. *See* INSOL INT'L, RESTRUCTURING OPTIONS FOR MSMES & PROPOSALS FOR REFORM 69–74 (2018) (suggesting that, inter alia, streamlining insolvency proceedings for small business would enable more efficient restructuring small business in a manner similar to those recommended by the Report).

adopted in Singapore.[22] Justice Edelman discusses the Report's treatment of the debtor in possession model in comparing American, Australian, and British insolvency laws.[23] In Canada, commentators considering reform of the Companies' Creditors Arrangement Act have raised questions similar to those considered by the Commission in its recommendations regarding section 363 sales.[24]

III. CHANGE CONVERSATIONS SPARKED BY THE ABI REPORT

The ABI Commission not only was interested in sparking a dialogue about reform, but it also hoped that the conversation eventually would rise to the level of meaningful change in the law. There are, of course, various ways to influence the law. A proposal can change the way that lawyers frame or argue their legal positions. It can inform how a court evaluates a dispute before it or interprets the statute at hand. And it also can encourage Congress to change the statute itself. The previous section identified a few instances of lawyers using the ABI Report to support their respective positions. This section highlights some of the notable uses of the ABI Report by the courts and Congress.

Courts have used the ABI Report in different ways. Some courts have cited to the Report to identify relevant research or the current state of affairs on a particular legal issue.[25] Others have used the Report to support the court's reasoning or position on a pending matter.[26] Most have referenced the Report and the work of the ABI Commission in a favorable manner.[27]

For example, since the ABI Report's publication, courts have considered the Commission's recommendations on credit bidding;[28]

22. Gerard McCormack & Wai Yee Wan, *Transplanting Chapter 11 of the US Bankruptcy Code into Singapore's Restructuring and Insolvency Laws: Opportunities and Challenges*, 19 J. CORP. L. STUD. 69, 92 (2019).

23. James Edelman, Henry Meehan & Gary Cheung, *The Evolution of Bankruptcy and Insolvency Law and the Case of the Deed of Company Arrangement*, 2019 LLOYD'S MAR. & COM. L.Q. 571.

24. Stephanie Ben-Ishai, *The American Bankruptcy Institute's Proposed Chapter 11 Reforms: Some Canadian Thoughts*, 57 CAN. BUS. L.J. 343, 343 (2016).

25. *See, e.g.*, *In re* Moore Props. of Person Cty., LLC, No. 20-80081, 2020 Bankr. LEXIS 550, at *3 n.6 (Bankr. M.D.N.C. Feb. 28, 2020).

26. *See, e.g.*, *In re* Slidebelts, Inc., No. 2019-25064-A-11 BMR-31, 2020 Bankr. LEXIS 1777, at *6 (Bankr. E.D. Cal. July 6, 2020) (quoting Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 979 (2017)); Blixseth v. Brown (*In re* Yellowstone Mt. Club), 841 F.3d 1090, 1095 (9th Cir. 2016).

27. *See e.g.*, *Blixseth*, 841 F.3d at 1095.

28. *In re* Aéropostale, Inc., 555 B.R. 369 (Bankr. S.D.N.Y. 2016) (holding that grounds did not exist to limit term lender's ability to credit bid). On this issue, the ABI Commission recommended:

financing contracts and safe harbors;[29] the definition of executory contracts;[30] the *in pari delicto* doctrine;[31] real property leases;[32] estate

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> In a sale under section 363 of the Bankruptcy Code involving a secured creditor's collateral, the secured creditor should be permitted to credit bid up to the amount of its allowed claim relating to such collateral unless the court orders otherwise for cause. For purposes of this principle, the potential chilling effect of a credit bid alone should not constitute cause, but the court should attempt to mitigate any such chilling effect in approving the process. Section 363(k) should be clarified accordingly.

ABI REPORT, *supra* note 4, at 146.

29. *See generally* PAH Litig. Tr. v. Water St. Healthcare Partners L.P. (*In re* Physiotherapy Holdings, Inc.), Nos. 13-12965(KG), 15-51238(KG), 2016 Bankr. LEXIS 2810 (Bankr. D. Del. June 20, 2016) (holding the safe harbor does not bar the litigation trust from asserting its state law fraudulent conveyance transfer claims on behalf of the senior noteholders). On this issue, the ABI Commission recommended, among other things:

- Section 546(e) of the Bankruptcy Code should be amended to remove protection from avoidance actions for beneficial owners of privately issued securities in connection with prepetition transactions using some or all of the debtor's assets to facilitate the transaction (e.g., leveraged buyouts).
- Section 546(e) should continue the existing protection from avoidance actions for (i) securities industries participants who act as conduits in both public and private securities transactions and (ii) public securities holders.
- Section 546(e) and the parallel provisions of section 546 applicable to other qualified financial contracts should continue to exclude from the safe harbors transfers made with actual intent to hinder, delay, or defraud, and such transfers should remain voidable under section 548(a)(1)(A).

ABI REPORT, *supra* note 4, at 95.

30. *In re* Byung Mook Cho, 581 B.R. 452, 461 (Bankr. D. Md. 2018) (Harner, J.) (holding that a non-executed settlement agreement from a state court action is an executor contract for purposes of section 365). On this issue, the ABI Commission recommended:

> The Bankruptcy Code should define the term "***executory contract***" for purposes of section 365 as "a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other," provided that forbearance should not constitute performance. Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 460 (1973). The contours of this definition are well developed under the case law and reflect an appropriate balance between the rights of a trustee to assume or reject contracts unilaterally under the Bankruptcy Code and the nondebtor's obligations and rights in those circumstances.

ABI REPORT, *supra* note 4, at 112.

31. Flaxer v. Gifford (*In re* Lehr Constr. Corp.), 528 B.R. 598, 614 n.7 (Bankr. S.D.N.Y. 2015) (holding that the *in pari delicto* doctrine prevents the estate from collecting against a former employee when the employee was engaged in employer's criminal enterprise), *aff'd*, 551 B.R. 732 (S.D.N.Y. 2016). On this issue, the ABI Commission recommended:

> The *in pari delicto* defense should be inapplicable to claims for relief that a trustee appointed under section 1104 in the chapter 11 case asserts against third parties under section 541 of the Bankruptcy Code. The absence of the *in pari delicto* defense should not otherwise affect the trustee's burden to establish the claims for relief under applicable law.

ABI REPORT, *supra* note 4, at 186.

32. *In re* Filene's Basement, LLC, No. 11-13511 (KJC), 2015 WL 1806347, at *7 n.10 (Bankr. D. Del. April 16, 2015) (holding that a landlord's claim is limited to 15 percent of the remaining term). On this issue, the ABI Commission recommended:

fiduciaries and the *Barton*[33] doctrine;[34] and structured dismissals.[35] Several courts invoking the ABI Report have done so on this last topic, structured dismissals. In fact, the U.S. Supreme Court, in reviewing the permissibility of structured dismissals in Chapter 11 cases, acknowledged the work of the ABI Commission.[36] The Court adopted the Commission's definition of a structured dismissal as a "hybrid dismissal and confirmation order . . . that . . . typically dismisses the case while, among other things, approving certain distributions to creditors, granting certain

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> The calculation of rejection damages for real property leases under section 502(b)(6) should be clarified as follows:
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> *The claim of a lessor for damages resulting from the termination of a lease of real property shall not exceed:*
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> *(i) The greater of (A) the rent reserved for one year under the lease following the termination date and (B) the alternative rent calculation; plus*
>
> *(ii) Any unpaid rent due under the lease on the termination date.*
>
> *For purposes of this section:*
>
> *The "**alternative rent calculation**" is the rent reserved for the shorter of the following two periods: (a) 15 percent of the remaining term of the lease following the termination date and (b) three years under the lease following the termination date.*
>
> *The "**termination date**" is the earlier of the petition date and the date on which the lessor repossessed, or the lessee surrendered, the leased property.*
>
> *In calculating the rent due or reserved under the lease, such calculation should be done without acceleration.*

ABI REPORT, *supra* note 4, at 129–30.

33. Barton v. Barbour, 104 U.S. 126, 128 (1881) (citing Davis v. Gray, 83 U.S. 203, 218 (1872)).

34. Blixseth v. Brown (*In re* Yellowstone Mt. Club), 841 F.3d 1090, 1095 (9th Cir. 2016) (holding that the Barton applies to members of the unsecured creditors' committee who are sued for acts performed in their official capacities). On this issue, the ABI Commission recommended:

> The doctrine set forth in *Barton v. Barbour*, 104 U.S. 126, 127–29 (1881) (which provides that to sue a court-appointed receiver, a party must obtain leave from the court that ordered such appointment) should also apply to the following parties in chapter 11 cases: trustees, estate neutrals, and statutory committees and their members, as well as professionals retained to represent any of the foregoing parties in their fiduciary capacity.

ABI REPORT, *supra* note 4, at 43.

35. Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 979 (2017); *In re* Johnson, 565 B.R. 417, 425 (Bankr. C.D. Cali. 2017) (quoting Kaylynn Webb, Comment, *Utilizing the Fourth Option: Examining the Permissibility of Structured Dismissals That Do Not Deviate from the Bankruptcy Code's Priority Scheme*, 33 EMORY BANKR. DEV. J. 355, 357–58 (2016)) (denying a structured dismissal when conversion to chapter 7 remained a valid option); *In re* Positron Corp., 556 B.R. 291, 285 (N.D. Tex. 2016) (denying the settlement agreement for being improperly negotiated sub rosa); *In re* Naartjie Custom Kids, Inc., 534 B.R. 416, 421–22 (D. Utah 2015) (holding that the bankruptcy court has the authority to approve a structured dismissal). On this issue, the ABI Commission recommended: "the Bankruptcy Code should be amended to clarify that a chapter 11 case can be resolved only in the following three ways: (i) confirmation of a plan under section 1129; (ii) conversion of the case under section 1112; and (iii) dismissal of the case subject to section 349." ABI REPORT, *supra* note 4, at 269.

36. *Jevic*, 137 S. Ct. at 979 (quoting ABI REPORT, *supra* note 4, at 270).

third-party releases, enjoining certain conduct by creditor, and not necessarily vacating orders or unwinding transactions undertaken during the case."[37] The full impact of the Supreme Court's decision in *Jevic* remains to be seen, but the Court was clearly aware of the Commission's recommendation on the practice of structured dismissals.[38]

Although courts have generally ruled in a manner consistent with the ABI Report, there are exceptions. The ABI Report recommends that the in pari delicto doctrine should be inapplicable to claims for relief that an appointed trustee asserts against third parties.[39] Nevertheless, both the bankruptcy and district courts in the Southern District of New York applied the doctrine in a case where the debtor and his employer engaged in a criminal scheme to defraud clients.[40] In so doing, the bankruptcy court explained the adverse interest exception to the doctrine turns on "the crucial distinction between conduct that defrauds the [debtor] and conduct that defrauds others for the [debtor's] benefit" and further notes that "it does not matter whether [debtor's controlling shareholder] knew of the scheme, would have tried to stop the scheme, or could have stopped the scheme, 'unless the adverse interest exception to the presumption of imputation applies.'"[41] As such, even though the *Flaxer* court and the ABI Commission reached different conclusions, they both recognized a potential deficiency in existing law.[42] This again reflects the kind of meaningful dialogue about issues—even if disagreement persists on the best solution—generated by the ABI Report.

In addition to the courts, Congress also took notice of the ABI Report. I testified before Congress on the ABI Commission's work prior to the publication of the Report in March 2014.[43] Commission Co-Chair Robert Keach then testified on the Report's SME recommendations on

37. *Id.*

38. *Id.* at 978 (holding that a bankruptcy court does not have the power to approve a structured dismissal that permits payment on claims inconsistent with the priorities under § 507 of the Code). For a description of the ABI Commission's recommendation on this issue, see ABI REPORT, *supra* note 4, at 269.

39. ABI REPORT, *supra* note 4, at 191. For a description of the ABI Commission's recommendation on this issue, see ABI REPORT, *supra* note 4, at 186.

40. Flaxer v. Gifford (*In re* Lehr Constr. Corp.), 528 B.R. 598, 611 (Bankr. S.D.N.Y. 2015), *aff'd*, 551 B.R. 732 (S.D.N.Y. 2016).

41. *Id.* at 611–13. (citing McHale v. Citibank, N.A. (*In re* 1031 Tax Grp., LLC), 420 B.R. 178, 203 (Bankr. S.D.N.Y. 2009) (quoting Ernst & Young v. Bankr. Serv. (*In re* CBI Holding Co., Inc.), 311 B.R. 350, 373 (S.D.N.Y. 2004)).

42. *Flaxer*, 528 B.R. at 614 n.7.

43. *Exploring Chapter 11 Reform: Corporate and Financial Institution Insolvencies; Treatment of Derivatives: Hearing Before the S. Comm. on Regul. Reform, Com. and Antitrust L. of the H. Comm. on the Judiciary*, 113th Cong. 129 (2014) (statement of Michelle M. Harner, Professor of Law, Director, Business Law Program, University of Maryland Francis King Carey School of Law).

two separate occasions (March 2018 and June 2019).[44] Mr. Keach's testimony and the Commission's work on SME bankruptcies apparently resonated with Congress. In July and August 2019, respectively, Congress passed, and President Trump signed into law the Small Business Reorganization Act of 2019 (SBRA).[45]

SBRA draws on the Commission's research and recommendations concerning the impact of financial distress on smaller businesses and how Chapter 11 of the Code is failing those businesses in several respects. For example, the ABI Report observes,

> [S]mall and middle-market enterprises are prone to preliminary setbacks and initial failures, and they can be among the hardest hit in economic downturns. . . . In addition, established small and middle-market companies can experience failed acquisitions, underperforming product lines, overcapitalization, and other factors that contribute to financial distress and threaten their survival. Yet many commentators and practitioners assert that the Bankruptcy Code no longer works to help rehabilitate these companies. As one witness testified, "Chapter 11 is now viewed as too slow and too costly for the majority of middle-market companies to do anything other than sell its going concern assets in a 363 sale or to simply liquidate the company . . . [usually] almost exclusively for the sole benefit of the secured lender."[46]

SBRA also incorporates several of the Commission's recommendations for reforming SME reorganizations. Rarely is a piece of legislation the result of one group's efforts, and SBRA is no exception. Other organizations, including the National Bankruptcy Conference, made meaningful contributions to the legislation and the efforts to get Congress to take appropriate action. SBRA, which went into effect in February 2020,[47] seeks to streamline the reorganization process for

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44. *Small Business Bankruptcy: Assessing the System: Hearing Before the S. Comm. on Oversight, Agency Action, Federal Rights and Federal Courts of the S. Comm. on the Judiciary*, 115th Cong. 2 (2018) (statement of Robert J. Keach, Co-Chair, American Bankruptcy Institute Commission to Study the Reform of Chapter 11); *Oversight of Bankruptcy Law and Legislative Proposals: Hearing Before the S. Comm. on Antitrust, Com. and Admin. L. of the H. Comm. on the Judiciary*, 116th Cong. 1, (2019) (statement of Robert J. Keach, Past President and Co-Chair, American Bankruptcy Institute Commission to Study the Reform of Chapter 11).

45. Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079 (2019) (codified primarily at 11 U.S.C. §§ 1181 et seq.).

46. ABI REPORT, *supra* note 4, at 276–77.

47. SBRA's amendments to the bankruptcy code have already been altered in light of the Covid-19 pandemic. The Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 amends the debt limit of a small business entity seeking relief under SBRA to $7,500,000. Pub. L. No. 116-136, § 1113(a)(1), 134 Stat. 281, 310 (2020). Changes to the bankruptcy code under the CARES Act have sunset provisions and offer only temporary reprieve; the change regarding SME debt limits is set to expire March 26, 2021. *Id.* §

smaller businesses, provide additional tools for those businesses in bankruptcy, and achieve more effective reorganizations.[48]

In addition to small business reorganizations, SBRA also tackles certain issues with preference law as applied in *all* bankruptcy cases. Under section 547 of the Code, a trustee or debtor in possession may recover certain payments made by the debtor prior to the filing of the bankruptcy case to the extent those payments prefer the creditor over other similarly situated creditors.[49] Preference law most frequently affects unsecured and undersecured creditors, unless the debtor is paying that class of creditors in full in the bankruptcy or the creditor can avail itself of one of the statutory defenses to the alleged preferential payment.[50] As the Commission explained,

> The trustee's ability to pursue preference claims under section 547 of the Bankruptcy Code preserves value for the estate and tempers the "run on the debtor" that may occur immediately prior to a bankruptcy filing. The avoiding power in section 547 may, however, be subject to abuse in certain cases. The Commission analyzed a variety of potential reforms to section 547, including refining elements of, or shifting the burden of proof for, certain defenses under section 547(c). After much research and deliberation, the Commission determined that the potential abuses under section 547 are addressed most effectively through the changes in small preference actions, pleading requirements, and

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1113(a)(5), 134 Stat. at 311. The CARES Act makes other temporary changes to the bankruptcy code, but they are beyond the scope of this article.

48. As Judge Clarkson explained in the first judicial opinion discussing SBRA, "certain 'legislative history' of H.R. 3311 exists, including the Report from the House Committee on the Judiciary (Report No. 116-54.) The report contains, inter alia, the following statement:

> NEED FOR THE LEGISLATION
>
> Notwithstanding the 2005 Amendments, small business chapter 11 cases continue to encounter difficulty in successfully reorganizing. Based upon their respective reviews of this issue, the NBC and the ABI developed recommendations to improve the reorganization process for small business chapter 11 debtors. H.R. 3311 is largely derived from these recommendations. As the bill's sponsor, Representative Ben Cline (R-VA), explained at the hearing held by the Subcommittee on Antitrust, Commercial, and Administrative Law on June 25, 2019 at which H.R. 3311 was considered, the legislation allows these debtors "to file bankruptcy in a timely, cost-effective manner, and hopefully allows them to remain in business" which "not only benefits the owners, but employees, suppliers, customers, and others who rely on that business."
>
> (citing Unofficial Transcript of Oversight of Bankruptcy Law and Legislative Proposals: Hearing Before the Subcomm. on Antitrust, Commercial, & Admin. Law of the H. Comm. on the Judiciary, 116th Cong. 27 (2019) (on file with H. Comm. on the Judiciary staff)).")

In re Progressive Sols., Inc., No. 8:18-BK-14277-SC, 2020 WL 975464, at *2 (Bankr. C.D. Cal. Feb. 21, 2020).

49. *See* 11 U.S.C. § 547 (2021). The ABI Report also notes that "[t]he primary goals of preference law are (i) to equalize distribution and (ii) to maximize estate value." ABI REPORT, *supra* note 4, at 149.

50. *See* § 547(c).

> demand requirements described in these principles, and continued judicial oversight in accordance with the Bankruptcy Code.[51]

Congress incorporated the first two of the Commission's recommended changes—i.e., changes in small preference actions and pleading requirements—in the 2019 legislation.[52]

Overall, there has been a great deal of discussion and some significant movement on the issues raised in the ABI Report. And the Report has only been in circulation for five years. Moreover, this essay captures only tangible indicators of change sparked by the ABI Report. It does not, and likely cannot, quantify whether the Report has changed people's minds more generally or at least encouraged them to be open to more possibilities. I hope that it has. The more discourse we have, the better informed we will be and the greater our collective impact.

IV. ONGOING IMPACT OF THE ABI COMMISSION REPORT

As is often said, "it is difficult to make predictions, especially about the future."[53] I do not know whether we will see additional legislative changes based on the ABI Report or further use of the Report by courts and commentators. I do know that there is much left untouched in the Report for people to study and consider. I also believe that the Report succinctly captures the history of Chapter 11 reorganizations and the important role of the United States reorganization law in the United States and global economies. As policymakers and practitioners endeavor to save viable businesses and maximize value for all stakeholders, I hope the Report continues to serve as a meaningful resource and valuable discussion point in those efforts.

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51. ABI REPORT, *supra* note 4, at 148.

52. *See* § 547(b); *see also* 28 U.S.C. § 1409(b) (2021).

53. For an analysis of the origins of this quote, see *It's Difficult to Make Predictions, Especially About the Future*, QUOTE INVESTIGATOR (Oct. 20, 2013), https://quoteinvestigator.com/2013/10/20/no-predict/.

APPENDIX A

The table of contents from the ABI Report. Page numbers refer to those in the print version of the report.