

## ARTICLES

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### THE SEARCH FOR AN UNBIASED FIDUCIARY IN CORPORATE REORGANIZATIONS

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President Rejects GM, Chrysler Rescue Plans: Obama Warns Cash Infusion Could Be Last.<sup>1</sup>

*When a company experiences financial distress, a control contest often follows. Management fights to remain in control of the company, and shareholders, creditors and others try to influence management's exercise of that control—or wrest it away. This is not a new phenomenon. The degree of influence now exerted by corporate stakeholders in the distressed context, however, is strikingly different than in the past.*

*Headlines like the one above highlight that stakeholder control issues are at the forefront of financially distressed situations large and small. The U.S. government, as creditor, dictated the terms of Chrysler's and General Motors' bankruptcies. It also demanded and received preferred stock from several troub-*

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<sup>1</sup> Associated Press, *President Rejects GM, Chrysler Rescue Plans: Obama Warns Cash Infusion Could Be Last*, BOS. GLOBE, Mar. 31, 2009.

led financial institutions, giving those institutions little time or flexibility to consider or reject the terms of the government's offer. And the U.S. government is not alone in using high-pressure tactics with distressed companies; stakeholders—particularly lenders and other significant creditors—employ such tactics consistently and routinely.

This Article analyzes the intensified contest for control in corporate reorganizations and whether, as a result, existing bankruptcy laws adequately protect the interests of all of a debtor's stakeholders. Efforts by a stakeholder to influence control often lead to conflicts of interests and multiple, competing demands on bankruptcy fiduciaries, *i.e.* debtors in possession and statutory committees. In theory, these fiduciaries should shun their personal interests and any undue influence by particular stakeholders. In practice, however, debtors and committees frequently are unable or unwilling to do so, and bankruptcy courts often do not learn of conflicts, if at all, until it is too late. Accordingly, this Article suggests the use of a third-party neutral to correct information asymmetry and promote objectivity and fairness in the bankruptcy process.

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## INTRODUCTION

The *Washington Post* reported: “President Obama’s harsh attack on hedge funds [that] he blamed for forcing Chrysler into bankruptcy yesterday sparked cries of protest from the secretive financial firms that hold about \$1 billion of the automaker’s debt.”<sup>2</sup> The article was discussing the status of restructuring negotiations among the U.S. government, banks holding seventy percent of the secured debt, hedge funds holding a minority of the secured debt and Chrysler itself. The automaker filed for bankruptcy and ultimately sold most of its assets to the Italian automaker Fiat on terms negotiated by the U.S. and Canadian governments, the United Auto Workers, certain lenders and, to some extent, the company.<sup>3</sup>

The parties around the negotiating table in the corporate reorganization context certainly have changed. Traditionally, the distressed corporation, as a debtor in possession, sat at the head of the table and controlled the tenor and much of the substance of the negotiations.<sup>4</sup> The other parties included the corporation’s senior lenders

2 Steven Mufson & Tomoeh Murakami Tse, *In Chrysler Saga, Hedge Funds Cast as Prime Villain: Firms Say They Were Right to Hold Out*, WASH. POST, May 1, 2009, at A14.

3 See, e.g., Michael J. de la Merced, *Chrysler Appears Set to Leave Bankruptcy*, N.Y. TIMES, June 10, 2009, at B1 (explaining litigation regarding and final approval of Chrysler-Fiat transaction); Tomoeh Murakami Tse, *Chrysler Deal with Fiat Hits Legal Road Bump*, WASH. POST, June 4, 2009, at A17 (explaining terms of Chrysler-Fiat transaction); see also Affidavit of Ronald E. Kolka in Support of First Day Pleadings at 26–38, *In re Chrysler LLC*, No. 09-50002-ajg (Bankr. S.D.N.Y. Apr. 30, 2009) (explaining restructuring negotiations leading to Chrysler-Fiat transaction).

4 See, e.g., Douglas G. Baird & Robert K. Rasmussen, *Chapter 11 at Twilight*, 56 STAN. L. REV. 673, 675 (2003) (“Even in the cases most resembling the traditional reorganization, creditor control is the dominant theme. Indeed, if the experience of large businesses leaving Chapter 11 in 2002 is any guide, those at the helm do the bidding of the creditors throughout the case.”); see also M. Todd Henderson, *Paying CEOs in Bankruptcy: Executive Compensation When Agency Costs Are Low*, 101 NW. U. L. REV. 1543, 1558–64 (2007) (explaining creditor control opportunities in Chapter 11 and how that control affects the debtor’s conduct); George W. Kuney, *Hijacking Chapter 11*, 21 EMORY BANKR. DEV. J. 19, 24–25 (2004) (explaining the shift in control of restructurings to secured creditors and exploring the effects of that shift); Harvey R. Miller, *Chapter 11 in Transition—From Boom to Bust and into the Future*, 81 AM. BANKR. L.J. 375, 387 (2007) (explaining the gradual marginalization of the debtor’s role in Chapter 11 and noting that “[i]n 1978 Congress intended that the debtor-in-posses-

and representatives of its unsecured creditors. These parties typically were financial institutions and trade creditors who had an existing business relationship with the corporation and a vested interest in the continuation of the corporation as a going-concern.

Although the distressed corporation remains at the table, it no longer automatically assumes the lead role in the negotiations, and it frequently deals with strangers rather than familiar business partners.<sup>5</sup> Financial institutions and trade creditors are increasingly quick to sell their troubled credits.<sup>6</sup> They often exit the credit before a corporation can design and implement a restructuring plan. The buyers of this distressed debt include hedge funds, private equity firms, and claims traders.<sup>7</sup> These institutions focus on profit generation, whether through the reorganization or liquidation of the corporation's business, and generally achieve their goals by seizing control of restructuring negotiations.<sup>8</sup>

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sion would be the driving force of a chapter 11 reorganization"); James H.M. Sprayregen et al., *Chapter 11: Not Perfect, but Better Than the Alternatives*, 14 J. BANKR. L. & PRAC., No. 6, 2005 at 3–5 (explaining perceived changes in Chapter 11 process and theories supporting those changes). For a thoughtful analysis of the development of, and changes in, secured creditor rights in the insolvency context, see Thomas E. Plank, *The Creditor in Possession Under the Bankruptcy Code: History, Text, and Policy*, 59 MD. L. REV. 253 (2000).

5 See, e.g., Miller, *supra* note 4, at 385 ("The chapter 11 process, as contemplated in 1978, has been overwhelmed by marginalization of the debtor-in-possession, expansion of creditor (particularly secured creditor) control, the increasing imposition of creditor designated chief restructuring officers ('CROs'), claims trading, more complex debt and organizational structures, short-term profit motivation and, of course, greed gratified by claims trading, acquisitions and litigation.").

6 See Robert K. Rasmussen, *Where Are All the Transnational Bankruptcies? The Puzzling Case for Universalism*, 32 BROOK. J. INT'L L. 983, 1001 (2007) (observing that "[t]hose creditors who want no part of bankruptcy have an exit option: they can sell out to the various hedge funds that take a stake in many cases" and explaining debt strategies of hedge funds and similar investors).

7 See Douglas G. Baird & Robert K. Rasmussen, *The Prime Directive*, 75 U. CIN. L. REV. 921, 939 n.43 (2007) ("For those who fret that bankers have a culture that makes them overly cautious, one need only remember that many of today's lenders are not traditional banks. Private hedge funds are on the prowl for investments that promise above market returns.").

8 See, e.g., Douglas G. Baird, *Acceptance Remarks: Bankruptcy's Undiscovered Country*, 25 EMORY BANKR. DEV. J. 1, 7 (2008) ("The [new Chapter 11] process itself resembles the takeover battles we see outside of bankruptcy. Corporate raiders square off against each other in a bidding war, just as they would in a hostile takeover."); Douglas G. Baird & Robert K. Rasmussen, *Private Debt and the Missing Lever of Corporate Governance*, 154 U. PA. L. REV. 1209, 1226–28 (2006) (explaining the shift in control to creditors and illustrating effects of this shift through a case study of the Warnaco Chapter 11 case); David A. Skeel, Jr., *Creditors' Ball: The "New" New Corporate Governance*

The goals of the corporation and its new set of creditors can and often do conflict. In addition, intercreditor conflict can develop as creditors compete for control of the corporation's restructuring.<sup>9</sup> Consequently, the corporation's Chapter 11 bankruptcy case can become a battleground for resolving conflict rather than a neutral site for building consensus. This conflict can impair corporate value and potentially derail a corporation's restructuring efforts.

This Article analyzes the increasing conflict in corporate reorganizations and whether the fiduciaries designated by the U.S. Bankruptcy Code—i.e., the debtor itself, referred to as a debtor in possession (DIP), and statutory stakeholder committees—are equipped to protect the corporation and its stakeholders generally. A DIP assumes the role of a trustee under the Bankruptcy Code and is charged with acting in the interests of the bankruptcy estate.<sup>10</sup> Similarly, the DIP's board of directors owes its fiduciary duties to the corporate entity.<sup>11</sup> A statutory committee, on the other hand, owes fiduciary duties to the particular class of creditors or shareholders represented by the committee. Statutory committees of unsecured creditors are common in Chapter 11 cases, and these committees owe their fiduciary duties to the corporation's general unsecured creditors.<sup>12</sup>

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*in Chapter 11*, 152 U. PA. L. REV. 917, 931–33 (2003) (explaining ways that creditors seek to assert control over Chapter 11 debtors).

9 See discussion *infra* Part III; see also Stephen J. Lubben, *Credit Derivatives and the Future of Chapter 11*, 81 AM. BANKR. L.J. 405, 427–29 (2007) (discussing creditor conflicts created by hedging debt positions and other credit derivative practices, including empty plan voting).

10 See 11 U.S.C. § 1107(a) (2006) (providing that “a debtor in possession shall have all the rights . . . and powers, and shall perform all the functions and duties . . . of a trustee serving in a case under” Chapter 11); see also *In re Cenargo Int'l, PLC*, 294 B.R. 571, 599 n.32 (Bankr. S.D.N.Y. 2003) (“There is no question that a debtor in possession is a fiduciary, like a chapter 11 trustee, for the estate, creditors and shareholders.” (citing *CFTC v. Weintraub*, 471 U.S. 343 (1985); *In re Bidermann Indus., U.S.A., Inc.*, 203 B.R. 547, 551 (Bankr. S.D.N.Y. 1997))).

11 See Rutheford B. Campbell, Jr. & Christopher W. Frost, *Managers' Fiduciary Duties in Financially Distressed Corporations: Chaos in Delaware (and Elsewhere)*, 32 J. CORP. L. 491, 493, 509 nn.83–86 (2007) (“[W]hen the company enters bankruptcy and is operating under Chapter 11, the cases hold or suggest that the obligation [of the debtor's management] is to maximize the total interests of creditors and shareholders as a whole.”); A. Mechele Dickerson, *Privatizing Ethics in Corporate Reorganizations*, 93 MINN. L. REV. 875, 878–86 (2009) (explaining the fiduciary duties of directors and officers in and outside of insolvency); see also *In re Count Liberty, LLC*, 370 B.R. 259, 276 (Bankr. C.D. Cal. 2007) (“When the debtor is a corporation, the debtor in possession's fiduciary obligations to the corporation, its creditors and shareholders, fall upon the officers and directors.”).

12 See, e.g., *In re Fas Mart Convenience Stores*, 265 B.R. 427, 432 (Bankr. E.D. Va. 2001) (“Members of the committee also have another duty—a fiduciary duty to all

DIPs and creditors' committees are subject to self-interest and influence by outside pressures. Board members and corporate management may aggressively pursue a reorganization of the business to, among other things, preserve their jobs or attempt to salvage value for shareholders.<sup>13</sup> They may in turn cede to the demands of private funds to obtain postpetition or exit financing for the corporation.<sup>14</sup> Creditors' committees may support a plan that allows one or more of its members to obtain control of the reorganized corporation. Committee members also have access to and may use the corporation's confidential information to advance their own business agendas.<sup>15</sup>

The potential vulnerability of DIPs and creditors' committees raises the question of who is or should be protecting the bankruptcy estate. The estate is formed upon the corporation's Chapter 11 filing and includes, among other things, all of the corporation's legal and

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creditors represented by the committee." (citing *In re Pierce*, 237 B.R. 748, 758 (Bankr. E.D. Cal. 1999); *In re First Republic Bank Corp.*, 95 B.R. 58, 61 (Bankr. N.D. Tex. 1988)); *In re Firstplus Fin.*, 254 B.R. 888, 894 (Bankr. N.D. Tex. 2000) ("In a Chapter 11 case, an Unsecured Creditors' Committee is appointed by the Office of the United States Trustee and owes a fiduciary duty to act on behalf of all unsecured creditors.")).

13 See, e.g., Christopher W. Frost, *The Theory, Reality and Pragmatism of Corporate Governance in Bankruptcy Reorganizations*, 72 AM. BANKR. L.J. 103, 103 (1998) ("Protected from the normal contractual and market forces that restrain the behavior of managers of healthy companies, managers of firms in bankruptcy, the harshest critics charge, use delay and other strategies to enrich themselves and the shareholders at the expense of the firm's creditors.").

14 See Harvey R. Miller & Shai Y. Waisman, *Is Chapter 11 Bankrupt?*, 47 B.C. L. REV. 129, 170 (2005) ("Excessive creditor control remains undesirable because such influence may cause the debtor's operations to be managed solely in the interests of the particular controlling creditor group, thereby foreclosing the debtor's restructuring options.").

15 See, e.g., 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. INST. L. REV. 129, 129 (1997) (noting that a creditor's "acceptance of an active participatory role in a bankruptcy proceeding through service on a committee is most likely motivated by each committee member's interest in obtaining the maximum possible return on its claim"); Mark J. Krudys, *Insider Trading by Members of Creditors' Committee—Actionable!*, 44 DEPAUL L. REV. 99, 124–27 (1994) (explaining conflict and self-interest issues posed by committee members continuing to trade in the debtor's equity or debt); see also Kurt F. Gwynne, *Intra-Committee Conflicts, Multiple Creditors' Committees, Altering Committee Membership and Other Alternatives for Ensuring Adequate Representation Under Section 1102 of the Bankruptcy Code*, 14 AM. BANKR. INST. L. REV. 109, 120–26 (2006) (explaining potential conflicts for committee members, including competing fiduciary duties).

equitable interests in property.<sup>16</sup> The estate represents the primary source of recovery for the debtor's stakeholders. Although the bankruptcy court and the U.S. trustee oversee Chapter 11 cases, they often do not possess the information necessary to help the parties reach a consensual or value-maximizing resolution to the case.

This Article suggests an alternative approach for preserving estate value in the Chapter 11 context: a third-party neutral appointed by the court to participate in the process. The Article refers to this neutral as a "case facilitator."<sup>17</sup> The case facilitator would introduce an objective party into the restructuring process to facilitate (i) the flow of information among all parties and (ii) the ultimate resolution of the Chapter 11 case. This dual charge and the facilitative nature of the role distinguish the case facilitator from a traditional Chapter 11 trustee or examiner.

The case facilitator would, among other things, work with the DIP to gather information and explore restructuring alternatives; provide information to the debtor's stakeholders; act as a facilitator for negotiations among the debtor and its stakeholders; and report all relevant information to the bankruptcy court and U.S. trustee. The role of the case facilitator is crafted from elements of existing U.S. bankruptcy laws, as well as concepts incorporated into Canadian, French and U.K. insolvency laws.<sup>18</sup> It also draws on basic principles of mediation and other alternative dispute resolution techniques.<sup>19</sup> The primary goals of the case facilitator proposal are to correct information asymmetry and reduce conflict (and related costs) in Chapter 11 cases, thereby protecting and enhancing value for the benefit of all stakeholders.

Part I of this Article summarizes the nature and scope of the problems associated with creditor control, conflicts and self-dealing in

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16 See 11 U.S.C. § 541(a)(1) (2006) (explaining that the filing of a bankruptcy petition creates an estate comprised of, among other things, "all legal or equitable interests of the debtor in property as of the commencement of the case").

17 The case facilitator would not displace the DIP and would not have standing to file formal motions or litigation in the Chapter 11 case. See *infra* Part V (describing the case facilitator proposal). Rather, the case facilitator would perform the functions of a third-party neutral and serve primarily the court while assisting the debtor and its stakeholders. For a general discussion of the need for neutrality in bankruptcy, see Jay Lawrence Westbrook, *The Control of Wealth in Bankruptcy*, 82 TEX. L. REV. 795, 825–27 (2004). See also Michelle M. Harner, *Trends in Distressed Debt Investing: An Empirical Study of Investors' Objectives*, 16 AM. BANKR. INST. L. REV. 69, 74 n.23, 106–07 (2008) (discussing a concept similar to the case facilitator in context of empirical study regarding distressed debt investors and referencing the "neutral manager" posited by Professor Westbrook (citing Westbrook, *supra*, at 825–27)).

18 See *infra* Part IV.

19 See *infra* Part V.

Chapter 11. Part II places the problem in historical context by reviewing the development of U.S. bankruptcy laws and the traditional roles of the DIP and statutory committee. Part III then analyzes the increasing conflict and stakeholder control in Chapter 11 cases. This analysis leads to a discussion of the role of DIPs and statutory committees in Chapter 11 and the tools available to them and others to combat potential abuses of the process. Part IV explores alternatives to a U.S.-style corporate reorganization, focusing on Canadian, French, and U.K. insolvency laws. This comparative discussion lays the foundation for the case facilitator proposal.

Part V sets forth the basic elements of the case facilitator proposal. This Part explains the duties of the case facilitator, the mediation components of the proposal and how the concept could be integrated into existing U.S. bankruptcy laws. It also addresses potential concerns with the proposal and suggests ways the case facilitator could streamline the process and reduce administrative costs. This Article concludes by encouraging policymakers to adopt the case facilitator proposal as a way to level the playing field in Chapter 11 and provide the often under-represented bankruptcy estate and stakeholders a voice in the Chapter 11 process.

## I. THE NATURE AND SCOPE OF THE PROBLEM

The primary goals of Chapter 11 are to rehabilitate corporate debtors and maximize recoveries to creditors.<sup>20</sup> The Bankruptcy Code also generally seeks to level the playing field among a debtor's stakeholders, thereby providing a more equitable distribution.<sup>21</sup> Achieving one or more of the Bankruptcy Code's objectives is difficult in any individual or business bankruptcy case. That task is even more

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20 See, e.g., *Toibb v. Radloff*, 501 U.S. 157, 163–64 (1991) (discussing two traditional goals of Chapter 11); *In re Aurora Cord & Cable Co.*, 2 B.R. 342, 346 (Bankr. N.D. Ill. 1980) (“The essence of Chapter 11, however, is to prevent the unnecessary dismemberment of viable corporations and to provide a maximum distribution to creditors who would be likely to receive nothing in the event of liquidation.”); H.R. REP. NO. 95-595, at 220 (1978); S. REP. NO. 95-989, at 10 (1978); see also *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203 (1983) (“By permitting reorganization, Congress anticipated that the business would continue to provide jobs, to satisfy creditors’ claims, and to produce a return for its owners. Congress presumed that the assets of the debtor would be more valuable if used in a rehabilitated business than if ‘sold for scrap.’” (citation omitted)); Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 MICH. L. REV. 336, 419 (1993) (discussing traditional goals of Chapter 11).

21 For example, the Bankruptcy Code authorizes the DIP to challenge and avoid certain pre-petition transfers to creditors made within the ninety days before the filing of the Chapter 11 case (or one year for transfers to insiders) or made with actual or constructive intent to defraud creditors. See 11 U.S.C. §§ 547, 548.



onerous in a Chapter 11 case because the corporate debtor and its various stakeholders often have their own, competing agendas.<sup>22</sup>

Creditors are not benevolent by nature. Rather, they endeavor to maximize their individual returns.<sup>23</sup> If other creditors also benefit, that result typically is inadvertent and of secondary concern. Accordingly, as in *In re Foamex International, Inc.*<sup>24</sup> case, a creditor may seek appointment to a statutory committee and then resign upon having its contract assumed and performed by the debtor.<sup>25</sup> Likewise, as in the *In re Galey & Lord*<sup>26</sup> case, a creditor may use confidential information obtained by serving on a statutory committee to enhance its own trading in the debtor's securities;<sup>27</sup> or as in the *In re Kmart Corp.*<sup>28</sup> case, a creditor may use its position on a committee to gain ownership control of the reorganized company.<sup>29</sup> Counsel to the statutory committee may either ignore or facilitate a member's self-interested conduct

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22 See *infra* Part III.

23 See, e.g., Jonathan C. Lipson, *The Shadow Bankruptcy System*, 89 B.U. L. REV. 1609, 1662 (2009) ("In the old days, people wanted to see two things: to get paid and to see the company survive. Today, people only want one thing: to get paid." (quoting Interview by Jonathan C. Lipson with Private Investigator No. 3 (July 14, 2009))); Westbrook, *supra* note 17, at 844 (describing incentive problems inherent in creditor control: "creditor control risks realization of substantially less than the full value of the asset being sold"); see also Jamie Mason, *Every Man for Himself*, DEAL, Mar. 20, 2009, <http://www.thedeal.com/newsweekly/features/every-man-for-himself.php> ("Bankruptcies are negotiating bazaars. There are many constituencies—the debtor, lenders, creditors of all kinds, potential acquirers. . . . It's often a scrum, with every man and woman for themselves.").

24 368 B.R. 383 (Bankr. D. Del. 2007).

25 In *Foamex International*, Shell Chemical resigned from the creditors' committee after the debtor assumed its executory contract. See Order Pursuant to Section 365(a) of the Bankruptcy Code Authorizing Foamex L.P. to Assume an Executory Contract, as Amended, with Shell Chemical LP, *In re Foamex Int'l, Inc.*, 368 B.R. 383 (No. 05-12685-PJW); Amended Notice of Appointment of Committee of Unsecured Creditors, *In re Foamex Int'l, Inc.*, 368 B.R. 383 (No. 05-12685-PJW) (noting that it was "[a]mended to reflect resignation of Shell Chemical from the Committee as of December 1, 2006").

26 Ch. 7 Case No. 04-43098 (Bankr. N.D. Ga. Aug. 19, 2004).

27 David Wighton, *\$10.9m Settles Insider Trading Case*, FIN. TIMES, May 31, 2007, at 24 (describing the allegations against Barclays Capital regarding trading in Galey & Lord securities based on inside information).

28 No. 02-02474 (Bankr. N.D. Ill. Feb. 26, 2003).

29 Disclosure Statement with Respect to First Amended Joint Plan of Reorganization of Kmart Corp. & Its Affiliated Debtors & Debtors-in-Possession at 74, *In re Kmart*, No. 02-02474; see also Michelle M. Harner, *The Corporate Governance and Public Policy Implications of Activist Distressed Debt Investing*, 77 FORDHAM L. REV. 703, 725–27 (2008) (discussing ESL Investment's use of committee position to propose plan under which it acquired control of reorganized company).

because of loyalty to the member who secured or supported counsel's retention.<sup>30</sup>

Moreover, the activity of hedge funds and private equity firms in distressed debt complicates the problem. Similar to Goldman Sachs' investment strategy with AIG, these creditors can use derivatives, short-selling, empty voting and similar investment strategies to mitigate their economic exposure while making a control play for the debtor.<sup>31</sup> As observed in the *WorldCom*<sup>32</sup> case:

Because the long position in one proprietary account was offset by a short position in another proprietary account, Blue River had only a \$6.5 million face value claim against WorldCom. Had the U.S. Trustee known that Blue River's claim was \$6.5 million and not \$400 million, it is unlikely that Blue River would have been appointed to WorldCom's creditors' committee.<sup>33</sup>

Finally, management bias and alliance with friendly creditors can disadvantage others in the process.<sup>34</sup>

Self-dealing and control contests in corporate restructurings are becoming commonplace.<sup>35</sup> As a result, conflicts and costly disputes are on the rise, and the problems associated with information asymmetry are intensifying.<sup>36</sup> The current Chapter 11 process does not facilitate adequate monitoring of these disputes or provide a resolution mechanism, short of litigation before the bankruptcy court or

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30 See, e.g., Peter Lattman, *Bankrupt*, FORBES (Oct. 31, 2005), <http://www.forbes.com/forbes/2005/1031/060.html> (describing Chapter 11 examiner's criticism of committee counsel's role in creditors' disputes in the *FiberMark* case).

31 See Daniel Gross, *The Rise of the 'Empty Creditor'*, SLATE (Apr. 21, 2009, 3:01 PM), <http://www.slate.com/id/2216604> ("Goldman didn't care that it would wipe out its AIG arrangements, because it had already hedged its exposure to AIG—through contracts, credit-default swaps, or other derivatives."); see also Lipson, *supra* note 23, at 1648–49 (discussing emerging issues with empty voting and similar creditor strategies in Chapter 11).

32 Van D. Greenfield, Exchange Act Release No. 52,744 (Nov. 7, 2005) (remedial sanctions and cease-and-desist order), available at <http://www.sec.gov/litigation/admin/34-52744.pdf>.

33 *Id.* at 8.

34 See, e.g., *In re Exide Techs.*, 303 B.R. 48, 60 (Bankr. D. Del. 2003) (endorsing, in a valuation dispute between debtor and committee, committee's assertion that "plans providing management and/or senior creditors with the majority of stock or options in the reorganized company (as in the Debtor's Plan) is a strong indicator that the company is being undervalued, resulting in a windfall for management and the senior creditors"); see also *infra* Part III.B (discussing debtor-committee conflict).

35 See *infra* Part III.

36 See also Lipson, *supra* note 23, at 1624 ("[T]here are important gaps between the informational architecture of the Bankruptcy Code and the federal securities laws. Shadow bankruptcy exploits these gaps.").

displacement of the corporate debtor, to solve them.<sup>37</sup> The case facilitator proposal seeks to strengthen these aspects of the Chapter 11 process and promote greater efficiency in corporate restructurings.

## II. THE DEVELOPMENT OF U.S. CORPORATE REORGANIZATION LAWS

Early U.S. bankruptcy law did not address corporate reorganization.<sup>38</sup> The laws primarily focused on merchants and “straight” bankruptcy (i.e., liquidation). Troubled corporations thus were left to their own devices, negotiating workouts with their major creditors in a largely unsupervised forum. The Great Depression of the 1930s produced the first federal bankruptcy laws covering corporate reorganizations, and aspects of those laws continue under the U.S. Bankruptcy Code. An understanding of the law’s development is helpful in analyzing control contests and conflicts in bankruptcy and the role that DIPs and statutory committees do or should play.<sup>39</sup>

### A. *Equity Receiverships and Protective Committees*

In the late nineteenth century, creative lawyers and federal judges crafted a procedure to fill a void in U.S. bankruptcy laws and address the financial distress of the country’s railroads. The procedure, commonly referred to as an equity receivership, allowed a troubled railroad—with the assistance of its major creditors—to invoke the jurisdiction of the federal courts to achieve a restructuring of its debt.<sup>40</sup> Technically, the railroad’s creditors would petition the court

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37 See *infra* Parts II.B.3, III.C, V.E.

38 The U.S. Constitution grants Congress the power to “pass uniform laws on the subject of bankruptcy.” U.S. CONST. art. I, § 8, cl. 4. Congress made three early attempts at federal bankruptcy legislation before achieving long-term legislation under the 1898 Bankruptcy Act. These early attempts—the 1800 Act, the 1841 Act, and the 1867 Act—first targeted merchant involuntary bankruptcies, but then included voluntary and involuntary bankruptcies for all parties other than corporations. See Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 14–19 (1995). The 1867 Act eventually permitted corporations to act as debtors and introduced the concept of composition (i.e., debt repayment plans) as an alternative to liquidation. *Id.* at 19–20.

39 The history of U.S. bankruptcy law has been explored in depth in several excellent sources. See, e.g., DAVID A. SKEEL, JR., *DEBT’S DOMINION* (2001); CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* (1935); Tabb, *supra* note 38. Accordingly, this Article only highlights developments relevant to the balance of power between fiduciaries and beneficiaries in Chapter 11.

40 See SKEEL, *supra* note 39, at 56–60 (explaining development of equity receiverships); Tabb, *supra* note 38, at 21–23 (same); see also Donald R. Korobkin, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, 91 COLUM. L. REV. 717, 747–49 (1991) (describing development and use of equity receiverships); Bruce A. Markell, *Owners*,

to appoint a receiver and the receiver would take title to the railroad's assets.<sup>41</sup> The receiver's primary task was to find a buyer for the assets and to continue the railroad's operations until the time of the sale.

Although the basic description of an equity receivership leaves the impression that the railroad, its management and its creditors turned over control of the restructuring to a receiver, that result did not occur in most cases. Rather, management typically encouraged friendly creditors to petition for the appointment of a receiver, and then management and those creditors would negotiate a restructuring plan.<sup>42</sup> Those creditors were sometimes referred to as a protective committee or a reorganization committee. Those creditors also were frequently the only (and therefore successful) bidders at the sale of the railroad's assets.<sup>43</sup> Consequently, in most cases, the receiver played an insignificant role.

Other troubled corporations soon adopted equity receivership procedures similar to those invoked by the railroads.<sup>44</sup> The process not only provided a structured forum in which corporations could reorganize, but it also facilitated a quick restructuring with little interference from outsiders, such as the court, the receiver, and the Securities and Exchange Commission (SEC).<sup>45</sup> Corporate management thus frequently favored the process.

The insular nature of equity receiverships, however, lent the process to abuse and generated substantial criticism. The most notable critic was William O. Douglas. As discussed below, Justice Douglas launched his campaign against equity receiverships after the process

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*Auctions, and Absolute Priority in Bankruptcy Reorganizations*, 44 STAN. L. REV. 69, 74–77 (1991) (describing the development of the absolute priority rule with respect to railroads).

41 See Daniel J. Bussel, *Coalition-Building Through Bankruptcy Creditors' Committees*, 43 UCLA L. REV. 1547, 1553–55 (1996) (explaining general process followed in equity receiverships).

42 See Tabb, *supra* note 38, at 22 (“In form, the receivership resulted in the sale of the debtor's assets, with the proceeds distributed to creditors. In substance, however, the entire elaborate proceeding often resulted in old management retaining control of the enterprise, and dictating the terms of the sale.”).

43 See SKEEL, *supra* note 39, at 59 (“Counsel who have acted frequently for reorganization committees have spent a great many anxious hours preparing for the unexpected bidder, but in my own experience he has never appeared . . . Manifestly in most sales where the security holders . . . have . . . placed their interest in the hands of a committee there is not likely to be serious competition at the sale.” (quoting Paul Cravath, a lawyer who represented committees in equity receivership cases)).

44 See *id.* at 57–60 (explaining application of equity receiverships to general businesses); Tabb, *supra* note 38, at 21–23 (same).

45 See Tabb, *supra* note 38, at 22 (“In practice, the equity receivership came to be dominated by insiders, and was subject to much abuse.”).

was codified by Congress in 1934.<sup>46</sup> He asserted that management and those creditors aligned with management controlled most aspects of the equity receivership process, providing no representation for, and frequently small returns to, other creditors.<sup>47</sup> In fact, creditors not participating in the reorganization committee's plan could be cashed out for a fraction of their debt holdings.<sup>48</sup>

Justice Douglas also lamented the role of protective committees in the process. He complained that the committees often were self-selected and influenced, if not controlled, by management and the corporation's investment bankers.<sup>49</sup> Although he acknowledged the useful role that committees could play in reorganizations, he cited conflicts and other circumstances that, in his opinion, caused committee members to breach their fiduciary duties. He stated, "In the welter of conflicting interests, ulterior objectives and self-serving actions which flow from investment banker-management dominance over committees, these committees have frequently lost sight of their essential functions which they can perform to advance the interests of investors."<sup>50</sup> As discussed in Part III, several of Justice Douglas' criticisms might apply to the existing Chapter 11 process.

### B. *Federal Corporate Reorganization Law*

Equity receivership was the preferred means of corporate reorganization well into the 1930s. Congress even adopted key features of equity receiverships in the first U.S. corporate reorganization laws,

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46 See Bussel, *supra* note 41, at 1556–57 (explaining the abuse of equity receiverships and Justice Douglas's criticism of the process).

47 Justice Douglas conducted a study of equity receiverships during his tenure with the SEC. See SEC, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES (1937) [hereinafter SEC REPORT].

48 See SKEEL, *supra* note 39, at 60 (noting that creditors who did not support the proposed reorganization plan were entitled to receive their pro rata share of the "upset price," which typically was set at ten to eighty percent below the market value of the debt).

49 See SEC REPORT, *supra* note 47, at 315–16 (recommending that "measures be taken to free committees operating in that field from material conflicts of interest").

50 *To Amend the Securities Act of 1933: Hearing Before the H. Comm. on Interstate and Foreign Commerce*, 75th Cong. 24 (1937) (statement of William O. Douglas, Comm'r, SEC).

enacted in 1934 as section 77B of the 1898 Bankruptcy Act.<sup>51</sup> Congress enacted section 77B in response to the Great Depression.<sup>52</sup>

Under section 77B, management and a protective committee could still formulate the plan of reorganization and force dissenting creditors to accept the plan. They no longer had to implement the plan, however, under the guise of a receiver sale. Section 77B required only that the court determine that the plan “‘was fair and equitable,’ did not ‘discriminate unfairly,’ and ‘was feasible.’”<sup>53</sup> Consequently, the process remained subject to abuse and manipulation by management and key creditors.

The codification of equity receiverships generated substantial criticism from the SEC and others.<sup>54</sup> The result was a substantial overhaul of corporate reorganization laws, culminating in the Chandler Act of 1938.<sup>55</sup> What equity receiverships and section 77B gave management and key creditors’ groups, the Chandler Act essentially took away, at least with respect to public corporations.

## 1. The Chandler Act

The Chandler Act of 1938<sup>56</sup> established two business reorganization options—Chapter X for public companies and Chapter XI for

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51 See Bussel, *supra* note 41, at 1555–56 (noting that section 77B was “aptly described as the old equity receivership reorganization pressed upon a bankruptcy mold, with additions” (internal quotation marks omitted)).

52 See, e.g., *Barlow v. Budge*, 127 F.2d 440, 443 (8th Cir. 1942) (“The unfavorable business conditions which prevailed during the 1930s are a matter of common knowledge. Businessmen were urged to continue operations in the face of adverse conditions, to prevent further unemployment and in the hope that their businesses might survive. Legislation, both state and national, was enacted to prevent individuals and corporations from going to the wall.”). Notably, Congress adopted similar reorganization provisions for railroads in 1933 under section 77 of the 1898 Bankruptcy Act. See Bankruptcy Act of 1898, ch. 541, § 77, 30 Stat. 544 (repealed 1978); SKEEL, *supra* note 39, at 54, 106. For a judicial account of the development of the railroad provisions, see *Cont’l Ill. Nat’l Bank & Trust Co. v. Chi., Rock Island & Pac. Ry. Co.*, 294 U.S. 648, 670–75 (1935).

53 See Bussel, *supra* note 41, at 1556 (describing key elements of section 77B).

54 See SEC REPORT, *supra* note 47, at 84 (“[77B] preserved and, in some cases, even accentuated certain defects in the earlier procedures.”); see also SKEEL, *supra* note 39, at 101–13 (detailing Justice Douglas’ involvement in the campaign to reform section 77B and his role in the SEC Report); Tabb, *supra* note 38, at 28 (explaining the role of various bankruptcy studies and reports, in addition to the SEC Report, in the passage of the Chandler Act).

55 See Tabb, *supra* note 38, at 29.

56 Pub. L. No. 75-696, 52 Stat. 840 (repealed 1978).

small businesses.<sup>57</sup> Chapter X stood in stark contrast to equity receiverships and section 77B. For example, it mandated the appointment of an independent bankruptcy trustee, SEC involvement in the plan process and significantly increased court involvement in the solicitation of votes on, and approval of, the plan of reorganization.<sup>58</sup> Chapter XI, on the other hand, left most of the plan process to the discretion of the debtor and its unsecured creditors, with little involvement from the court and no requirement for trustee or SEC participation.<sup>59</sup>

Both Chapters X and XI contemplated creditors' committees, but they prescribed very different roles for those committees. Under Chapter X, creditors could still form protective committees.<sup>60</sup> These committees were limited, however, to providing information to the represented creditors and had no official standing in the bankruptcy case. Creditors' committees in Chapter XI did have standing and were elected at a meeting of creditors early in the case.<sup>61</sup> In fact, the Chapter XI creditors' committee was the primary party overseeing the debtor's conduct and negotiation of the plan.

Not surprisingly, public corporations resisted filings under Chapter X. Managers and large creditors disliked the loss of control and corresponding uncertainty.<sup>62</sup> Consequently, many corporations first tried to qualify for Chapter XI or negotiate a restructuring outside of the formal process.<sup>63</sup> They viewed Chapter X as a last resort. Nevertheless, it remained the primary reorganization option for public corporations for the next thirty years.

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57 For a judicial account of the development of the Chandler Act of 1938, see *SEC v. Am. Trailer Rentals Co.*, 379 U.S. 594, 603–07 (1965).

58 See Bussel, *supra* note 41, at 1557–58 (explaining key elements of Chapter X).

59 See *id.* (explaining key elements of Chapter XI); see also Dickerson, *supra* note 11, at 888–89 (describing treatment of debtors and their management under Chapter X versus Chapter XI).

60 See Bussel, *supra* note 41, at 1558 (explaining roles of committees under Chapter X and Chapter XI).

61 See *id.*

62 See SKEEL, *supra* note 39, at 123–27 (explaining the general negative corporate reaction to Chapter X and noting that “[t]he independent trustee requirement discouraged the managers of large firms from filing for bankruptcy if there was any way to avoid it”).

63 Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101–1300 (2006)); see *id.* at 125–27; see also Dickerson, *supra* note 11, at 890 (“The harsh treatment managers received in Chapter X discouraged managers from using that Chapter and ultimately caused Chapter XI to become the dominant reorganization vehicle for even large, publicly-traded companies that ostensibly should have filed under the trustee-controlled Chapter X.”).

## 2. Chapter 11 of the Bankruptcy Code

A sharp rise in consumer bankruptcy in the 1960s energized bankruptcy reform efforts that produced the Bankruptcy Code of 1978.<sup>64</sup> Corporate reorganization received substantial attention in the reform process as well. The Bankruptcy Code consolidated the business reorganization chapters into one chapter (i.e., Chapter 11) and eliminated what corporations found most offensive about Chapter X: the mandatory trustee and SEC participation.<sup>65</sup>

Notably, the two key proposals set forth during the bankruptcy reform process did not directly recommend the elimination of trustees and the SEC's involvement in the plan process.<sup>66</sup> For example, the proposal by the National Bankruptcy Review Commission contemplated a presumption in favor of a trustee in large cases and the appointment of a bankruptcy administrator to perform the tasks assigned to the SEC under Chapter X.<sup>67</sup> Similarly, the proposal by the National Conference of Bankruptcy Judges maintained the role of the trustee and SEC in public corporation cases.<sup>68</sup> The bankruptcy bar was, however, a strong proponent of a presumption that a trustee would not be appointed, leaving a corporation's restructuring in management's hands.<sup>69</sup>

Chapter 11 of the Bankruptcy Code adopted much of the flexibility built into Chapter XI.<sup>70</sup> Debtors (as DIPs) remain in possession of their assets and can operate their businesses and pursue their restructurings with oversight primarily from a creditors' committee. The Bankruptcy Code also created the U.S. trustee program, which serves some of the administrative functions assigned to the SEC under Chap-

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64 See SKEEL, *supra* note 39, at 136–41 (explaining events leading to enactment of the Bankruptcy Code); Tabb, *supra* note 38, at 31–37 (same).

65 See Tabb, *supra* note 38, at 35 (“Another notable feature of the 1978 law was the merger of the reorganization chapters into a single chapter.”).

66 See SKEEL, *supra* note 39, at 176–77 (explaining general proposals of the National Bankruptcy Review Commission and the National Conference of Bankruptcy Judges and noting that “[c]riticism by the bankruptcy bar and bench was muted at times, and the early hearings even included a few notes of support for the existing regime”).

67 See *id.* at 177 (“Similarly, there was broad support for the Bankruptcy Commission’s proposal to soften the requirement that trustees be appointed in large cases, by making the trustee presumptive, rather than mandatory.”).

68 See *id.*

69 See *id.*

70 See Bussel, *supra* note 41, at 1559 (explaining key elements of Chapter 11).



ter X.<sup>71</sup> The U.S. trustee oversees both individual and business bankruptcies and rarely plays a substantive oversight role in any particular case. In addition, Chapter 11 permits the appointment of a trustee or examiner under certain circumstances.

Overall, the Bankruptcy Code was largely viewed as prodebtor legislation at the time of its enactment. In early Chapter 11 cases, courts granted the debtor's management lengthy periods of exclusivity in which only the debtor could propose a plan of reorganization; allowed the debtor to defer decisions on the treatment of most all contracts and leases until plan confirmation; and enjoined most all actions against the debtor and sometimes its directors, officers and nondebtor affiliates.<sup>72</sup> The debtor's control of the process has weakened, however, as creditors have become more sophisticated, lobbied for favorable legislative amendments and created control opportunities.<sup>73</sup>

### 3. Bankruptcy Fiduciaries

As discussed above, Chapter 11 allows a DIP and its management to lead the debtor's restructuring efforts and contemplates the appointment of a statutory committee to oversee those efforts. Sec-

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71 See Tabb, *supra* note 38, at 35 (explaining that Congress rejected the Commission's proposal for a "Bankruptcy Administrator," but adopted "a pilot program utilizing 'United States trustees' as administrative officers").

72 See, e.g., Miller, *supra* note 4, at 387 (noting that Congress enacted certain provisions of the Bankruptcy Code to induce reluctant debtors to file Chapter 11 cases, including: "administrative provisions that provided protections for the debtor, including the automatic stay; the ability to use, sell or lease property, including the cash collateral and other collateral security of a secured creditor; the ability to assume or reject executory contracts and unexpired leases of non-residential real property; and, importantly, the ability to obtain credit and offer to lenders material enhancements for lending to a debtor-in-possession"). For example, prior to the 2005 amendments to the Bankruptcy Code, courts generally were very liberal in granting extensions of the debtor's exclusive period to file and solicit acceptances of a plan of reorganization. See, e.g., *In re Ionosphere Clubs, Inc.*, No. 89-10448 (Bankr. S.D.N.Y. May 12, 1999) (extending the debtor's exclusive period for approximately six years). The 2005 amendments to the Bankruptcy Code place a firm expiration on the debtor's exclusive periods—i.e., eighteen months for its exclusive period to file a plan and twenty months for its exclusive period to solicit acceptance of the plan. See 11 U.S.C. § 1121(d) (2006).

73 See, e.g., Kuney, *supra* note 4, at 24–25 (explaining creditor influence over bankruptcy legislation); Miller, *supra* note 4, at 387 ("Using that piece of special interest legislation [referring to section 1110 of the Bankruptcy Code] as a foundation, other creditor groups pressed Congress for legislative containment of the bankruptcy court and the debtor-in-possession's powers. Congress has been generous in responding to the 'needs' of these special interest groups.").

tions 1101 and 1107 of the Bankruptcy Code facilitate the DIP's role by recognizing the existence of a DIP and granting it "all the rights . . . and powers, and [authority to perform] all the functions and duties . . . of a trustee serving in a case under" Chapter 11.<sup>74</sup> Section 1102 in turn provides that, in all but a few excluded cases, "the United States trustee shall appoint a committee of creditors or . . . of equity security holders as the United States trustee deems appropriate."<sup>75</sup> The committee's duties are listed in § 1103 and include consulting with the DIP; investigating the DIP's prepetition and postpetition conduct and affairs; and participating in the plan process.<sup>76</sup>

The Bankruptcy Code itself does not use the term "fiduciary" or expressly designate either the DIP or the committee as a fiduciary.<sup>77</sup> Nevertheless, case law recognizes the fiduciary nature of both statutory representatives. Specifically, courts treat the DIP as a fiduciary for the bankruptcy estate, and the committee as a fiduciary for those it represents.<sup>78</sup> Courts also have suggested in certain circumstances

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74 11 U.S.C. § 1107(a); *see also id.* § 1101(1) (defining "debtor in possession").

75 *Id.* § 1102(a)(1); *see also id.* § 1102(b)(1) ("[A creditors' committee] shall ordinarily consist of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on such committee . . .").

76 *See id.* § 1103 (describing duties of statutory committees); *see also* Greg M. Zipes & Lisa L. Lambert, *Creditors' Committee Formation Dynamics: Issues in the Real World*, 77 AM. BANKR. L.J. 229, 231 (2003) ("Congress specifically allowed committees to 'consult with the trustee or debtor concerning the administration of the case,' to evaluate the debtor's financial dealings and current financial condition so the committee can evaluate the case's viability and the prospects for a plan, to negotiate plan terms, and to seek the appointment of a trustee or examiner." (quoting 11 U.S.C. § 1103(c)(1))).

77 *See, e.g., In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000) ("Section 1103(c) of the Bankruptcy Code, which grants to the Committee broad authority to formulate a plan and perform 'such other services as are in the interest of those represented,' has been interpreted to imply both a fiduciary duty to committee constituents and a limited grant of immunity to committee members." (quoting 11 U.S.C. 1103(c))); *In re Envirodyne Indus.*, 174 B.R. 955, 964 (Bankr. N.D. Ill. 1994) ("Both trustees and official committees are the creation of the Code and their duties are governed under the Code. In addition, both trustees and members of official committees owe fiduciary duties to their respective constituencies." (citation omitted)).

78 With respect to DIPs, *see, for example, Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 355 (1985), which noted that "if a debtor remains in possession—that is, if a trustee is not appointed—the debtor's directors bear essentially the same fiduciary obligation to creditors and shareholders as would the trustee for a debtor out of possession"; *Biltmore Associates, LLC v. Twin City Fire Insurance Co.*, 572 F.3d 663 (9th Cir. 2009), which stated that "the debtor in possession of the bankruptcy estate [is] empowered to act as a trustee and required to act as a fiduciary for its creditors and shareholders"; *In re Insilco Technologies, Inc.*, 480 F.3d 212, 215 n.3 (3d Cir. 2007), which noted that [w]hen acting as debtor in possession, the debtor is

that the committee's efforts must generally benefit the bankruptcy estate.<sup>79</sup>

A fiduciary relationship traditionally exists where "one party to a fiduciary relation (the *entrustor*) is dependent on the other (the fiduciary)."<sup>80</sup> The role envisioned for the DIP and the committee under the Bankruptcy Code certainly satisfies this basic definition. The debtor's stakeholders—i.e., parties with economic interests in the bankruptcy estate—rely on the DIP to propose and confirm a plan that maximizes

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bound by all of the fiduciary duties of a bankruptcy trustee"; *In re Cenargo International, PLC*, 294 B.R. 571, 599 n.32 (Bankr. S.D.N.Y. 2003), which stated that "[t]here is no question that a debtor in possession is a fiduciary, like a chapter 11 trustee, for the estate, creditors and shareholders." With respect to committees, see, for example, *Jacobson v. AEG Capital Corp.*, 50 F.3d 1493, 1500 (9th Cir. 1995), which stated that "[a] committee has a fiduciary responsibility to represent the best interests of their constituency"; *Westmoreland Human Opportunities, Inc. v. Walsh*, 327 B.R. 561, 573 (Bankr. W.D. Pa. 2005), noting general fiduciary duty of creditors' committees and explaining "the existence of a fiduciary relationship among the committee members as they are serving each other as well as the unsecured creditors not selected as members of the committee"; *In re Fas Mart Convenience Stores, Inc.*, 265 B.R. 427, 432 (Bankr. E.D. Va. 2001), which stated that "[m]embers of the committee also have another duty—a fiduciary duty to all creditors represented by the committee"; and *In re Firstplus Financial, Inc.*, 254 B.R. 888, 894 (Bankr. N.D. Tex. 2000), which stated that "[i]n a Chapter 11 case, an Unsecured Creditors' Committee is appointed by the Office of the United States Trustee and owes a fiduciary duty to act on behalf of all unsecured creditors." See also C.R. Bowles, Jr. & Nancy B. Rapoport, *Has the DIP's Attorney Become the Ultimate Creditors' Lawyer in Bankruptcy Reorganization Cases?*, 5 AM. BANKR. INST. L. REV. 47, 53–54 (1997) (explaining fiduciary duties of the DIP).

79 Cases suggesting that a statutory committee has some duty to the bankruptcy estate generally arise in the context of court approval of the committee's professional's fees or professional compensation for other parties in interest. See, e.g., *Mfrs. Hanover Trust Co. v. Bartsh (In re Flight Transp. Corp. Secs. Litig.)*, 874 F.2d 576, 581 (8th Cir. 1989) (ruling on a request for payment of an indenture trustee's professional fees and observing that "unlike the trustee, the debtor-in-possession and the official creditors' committee, which are entities with fiduciary obligations to the bankruptcy estate, an indenture trustee owes its fiduciary duty to the debenture holders, not the bankruptcy estate"). But see *Official, Unsecured Creditors' Comm. v. Stern (In re SPM Mfg. Corp.)*, 984 F.2d 1305, 1315 (1st Cir. 1993) ("While a creditors' committee and its members must act in accordance with the provisions of the Bankruptcy Code and with proper regard for the bankruptcy court, the committee is a fiduciary for those whom it represents, not for the debtor or the estate generally.").

80 Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 800 (1983); see also ERNEST VINTER, A TREATISE ON THE HISTORY AND LAW OF FIDUCIARY RELATIONSHIP AND RESULTING TRUSTS 1 (3d ed. 1955) (explaining nature of fiduciary relationship); Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1046 (1991) (noting different theories of fiduciary duties and observing that "[i]n any of these paradigmatic forms, a beneficiary entrusts a fiduciary with control and management of an asset").

the estate's value. Likewise, creditors or equity holders represented by a committee expect the committee to act in their best interests.<sup>81</sup>

A fiduciary owes certain duties to its beneficiaries, including the utmost duty of good faith and loyalty.<sup>82</sup> In the bankruptcy context, these duties generally require the DIP's management and the committee's members to put aside their self-interest and make decisions based on the collective best interests of their beneficiaries.<sup>83</sup> Identifying the restructuring course that best serves a particular beneficiary class can be challenging in and of itself. The DIP's and committee's task is even more onerous when the individual interests of management, committee members or outside parties infiltrate the decision-making process.<sup>84</sup>

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81 Unlike the beneficiaries of traditional fiduciary relationships, these stakeholders are not solely dependent on the DIP and the committee. A debtor's creditors, equity holders and other parties in interest have standing to appear and be heard on most any issue raised in the Chapter 11 case. *See* 11 U.S.C. § 1109(b). Nevertheless, not every stakeholder gets a seat at the negotiating table, and thus their practical ability to protect their own interests is limited by the process itself.

82 *See, e.g.,* *Lange v. Schropp* (*In re Brook Valley VII, Joint Venture*), 496 F.3d 892, 900 (8th Cir. 2009) (explaining that, in the bankruptcy context, "[t]he fiduciary obligation consists of two duties: the duty of care and the duty of loyalty"); *Ad Hoc Comm. of Equity Holders of Tectonic Network, Inc. v. Wolford*, 554 F. Supp. 2d 538, 558 n.135 (D. Del. 2008) (explaining the duty of good faith as a subset of the duty of loyalty in the bankruptcy context).

83 *See, e.g., In re Brook Valley*, 496 F.3d at 900–01 ("The duty of loyalty comes into play when there appears to be a conflict between the interests of the fiduciary and the entity to which he owes loyalty. For a debtor in possession, this duty 'includes an obligation to refrain from self-dealing, to avoid conflicts of interests and the appearance of impropriety, to treat all parties to the case fairly and to maximize the value of the estate.'") (quoting 7 COLLIER ON BANKRUPTCY § 1107.02(4) (Lawrence P. King ed., 15th rev. ed. 2006)); *Westmoreland Human Opportunities, Inc. v. Walsh*, 246 F.3d 233, 256 (3d Cir. 2001) ("A committee member violates its fiduciary duty by pursuing a course of action that furthers its self-interest to the potential detriment of fellow committee members."); *Official Comm. of Unsecured Creditors of Apex Global Info. Servs., Inc. v. Qwest Commc'ns Corp.*, 405 B.R. 234, 252 (Bankr. E.D. Mich. 2009) ("[I]t is evident that participation on the unsecured committee is accompanied and undergirded with fiduciary responsibilities which obligate members to 'act with undivided loyalty for the benefit of all of the unsecured creditors.'" (quoting *In re ABC Auto. Prods. Corp.*, 210 B.R. 437, 441 (Bankr. E.D. Pa. 1997))); *In re First RepublicBank Corp.*, 95 B.R. 58, 61 (Bankr. N.D. Tex. 1998) ("A conflict of interest that amounts to a breach of that fiduciary duty constitutes the type of conflict that would mandate removal of the creditor from the committee.").

84 *See, e.g., In re Brook Valley*, 496 F.3d 892 (affirming lower court's decision holding that debtor's partners breached fiduciary duty of loyalty by consenting to foreclosure sale of debtor's assets and then bidding on assets at sale); *Citicorp Venture Capital, Ltd. v. Comm. of Creditors Holding Unsecured Claims*, 323 F.3d 228, 234–36 (3d Cir. 2003) (affirming lower court's decision subordinating claims of insider/

Self-interest and conflict are potential hazards in any fiduciary relationship. The multiple interests, flexibility in valuation, and overall exigency of the situation intensify these hazards in the bankruptcy context.<sup>85</sup> As in other fiduciary relationships, identifying these

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director of debtor for breaching fiduciary duty by, among other things, purchasing claims against debtor at a discount price, withdrawing support for debtor's original bankruptcy plan and pursuing competing plan); *In re Nutritional Sourcing Corp.*, 398 B.R. 816, 835 (Bankr. D. Del. 2008) (denying plan confirmation where creditors' committee negotiated and approved settlement detrimental to a certain class of unsecured creditors not specifically represented by a committee member); *Official Comm. of Equity Sec. Holders of Aldelphia Commc'ns Corp. v. Aldelphia Commc'ns Corp.* (*In re Adelpia Commc'ns Corp.*), 371 B.R. 660, 673 (Bankr. S.D.N.Y. 2007) (affirming lower court's withdrawal of equity committee's derivative standing because "the Equity Committee is so far out of the money, it would have an inherent conflict of interest in controlling any litigation against the banks"), *aff'd*, 544 F.3d 420 (2d Cir. 2008); *In re Count Liberty, LLC*, 370 B.R. 259, 277 (Bankr. C.D. Cal. 2007) (holding debtor, through the conduct of its president, in contempt of cash collateral order, as evidence showed misappropriation of estate funds); *In re Adelpia Commc'ns Corp.*, 336 B.R. 610, 670-73 (Bankr. S.D.N.Y. 2006) (observing that "[d]ebtors also have the duty to avoid conflicts of interest and the appearance of impropriety, and to treat all parties to the case fairly" and, accordingly, granting ad hoc committee's motion to require recusal of debtors from litigation and negotiations among creditors regarding interdebtor disputes), *aff'd*, 342 B.R. 122 (S.D.N.Y.); *In re Fibermark, Inc.*, 330 B.R. 480 (Bankr. D. Vt. 2005) (describing dispute among creditors' committee members regarding alleged breaches of fiduciary duties and claims trading order); *In re Malkus, Inc.*, No. 03-07711, 2004 WL 3202212, at \*3-4 (Bankr. M.D. Fla. Nov. 15, 2004) (denying plan confirmation where debtor, through principals, ignored court orders and failed to adhere to duties under Bankruptcy Code); *In re Venturelink Holdings, Inc.*, 299 B.R. 420 (Bankr. N.D. Tex. 2003) (holding that creditors' committee member had a disqualifying conflict of interest where he received large sums of money prepetition while serving as the debtor's chairman of the board); *In re Coram Healthcare Corp.*, 271 B.R. 228 (Bankr. D. Del. 2001) (denying plan confirmation where the debtor's CEO also had a consulting contract with one of the debtor's largest noteholders); *Locks v. U.S. Tr.*, 157 B.R. 89, 91 (Bankr. W.D. Pa. 1993) (affirming lower court's holding that a creditors' committee member's "advocacy on behalf of [future asbestos claimants] violated his pre-existing fiduciary duty to prepetition claimants, posing a conflict of interest that required dismissal of his Motion").

85 See, e.g., *Mirant Ams. Energy Mktg., L.P. v. Official Comm. of Unsecured Creditors of Enron Corp.*, No. 02 Civ. 6274 (GBD), 2003 U.S. Dist. LEXIS 18149, at \*23 (S.D.N.Y. Oct. 9, 2003) (analyzing different interests represented by single creditors' committee and observing that "[s]uch conflicts are not unusual in reorganization" [and] [i]ndeed, 'they are inherent in all bankruptcy cases,' and 'inevitable' in complex cases, such as the jointly administered one at bar" (quoting *In re Altair Airlines, Inc.*, 727 F.2d 88, 90 (3d Cir. 1984); *In re Sharon Steel Corp.*, 100 B.R. 767, 770 (Bankr. W.D. Penn. 1989))); see also Harvey R. Miller, *Corporate Governance in Chapter 11: The Fiduciary Relationship Between Directors and Stockholders of Solvent and Insolvent Corporations*, 23 SETON HALL L. REV. 1467, 1468 (1993) ("The directors of the debtor as DIP continue to owe the twin fiduciary duties of care and loyalty to both the creditors and stockholders of the debtor corporation. However, these beneficiaries often

hazards is challenging.<sup>86</sup> The fiduciaries largely control the conduct and information evidencing the self-interest and conflict; the beneficiaries, the bankruptcy court, and the U.S. trustee may not be aware of the issue or only learn about it after the fact.

This dependency of beneficiaries, the bankruptcy court and the U.S. trustee on the DIP and the committee for information may, in part, explain why parties rarely seek or obtain the appointment of a Chapter 11 trustee.<sup>87</sup> Although use of a DIP is the default rule in Chapter 11, § 1104 does contemplate the appointment of a disinterested trustee under certain circumstances.<sup>88</sup> For example, the court may appoint a Chapter 11 trustee “for cause” or “if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate.”<sup>89</sup> Parties simply may not have the information they need to request a trustee. Parties also may use the information they do have to extract concessions from the DIP that benefit them personally, but not the bankruptcy estate generally.<sup>90</sup>

A Chapter 11 trustee, if appointed, serves the same type of role as a trustee under Chapter 7 of the Bankruptcy Code. The trustee displaces the debtor’s management and controls most decisions relating to the business and the bankruptcy.<sup>91</sup> The primary difference is that the Chapter 11 trustee must decide whether to pursue a plan of reor-

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have conflicting interests as to the administration of a bankruptcy case, the development of a plan of reorganization, or any alternative. These conflicts become even more aggravated when the corporation is insolvent.”).

86 See Alison Grey Anderson, *Conflicts of Interest: Efficiency, Fairness and Corporate Structure*, 25 UCLA L. REV. 738, 760 (1978) (proposing special conflict of interest rules because “violations of fiduciary duty are frequently very difficult to detect”).

87 See Dickerson, *supra* note 11, at 888–900 (explaining the requirements for appointing a Chapter 11 trustee and observing that “[t]hrough the Code provides that managers can be replaced or supervised by a public trustee, trustee appointments are, and always have been, rare”); see also Kelli A. Alces, *Enforcing Corporate Fiduciary Duties in Bankruptcy*, 56 U. KAN. L. REV. 83, 84–85 (2007) (noting the rarity of trustee appointments and arguing that Chapter 11 trustees, rather than derivative lawsuits, are a more effective means of disciplining management of a distressed company).

88 See 11 U.S.C. § 1104 (2006) (explaining grounds to support appointment of Chapter 11 trustee); see also *In re Sharon Steel Corp.*, 871 F.2d 1217, 1228 (3d Cir. 1989) (affirming lower court’s order appointing Chapter 11 trustee and explaining requirements of § 1104 of the Bankruptcy Code).

89 11 U.S.C. § 1104(a)(1), (2).

90 The stigma attaching to a bankruptcy trustee also may be to blame. This possibility and its relation to the case facilitator proposal is discussed *infra* Part V.E.

91 See 11 U.S.C. § 1106(a)(1) (defining a Chapter 11 trustee’s duties, in part, by reference to the duties of a trustee under Chapter 7 of the Bankruptcy Code).

ganization or convert or dismiss the case.<sup>92</sup> The Chapter 11 trustee also generally has more flexibility to continue to operate the business for a longer period of time.<sup>93</sup>

Although the DIP, the committee, and the trustee serve most fiduciary functions in Chapter 11, the Bankruptcy Code also permits the appointment of an examiner and subjects most meaningful transactions to bankruptcy court approval.<sup>94</sup> These provisions are important tools in protecting stakeholders' interests, but again their usefulness is limited by information asymmetry in most Chapter 11 cases. "[T]he bankruptcy judge can only act on information and transactions that are presented to her."<sup>95</sup>

The remainder of this article analyzes the roles of DIPs and committees in practice and alternatives to relying primarily on these two fiduciaries to protect stakeholders' interests. Not every Chapter 11 case is crippled by conflict and self-interest, but anecdotal evidence suggests that the problem is prevalent, costly and warrants fresh examination.

### III. CONFLICT AND CONTROL CONTESTS IN CHAPTER 11

Conflicts and self-interest are common in Chapter 11 cases.<sup>96</sup> For example, the debtor's management may try to compensate for prepetition decisions leading to the bankruptcy or salvage value for shareholders when those options in fact only delay the case and dissipate

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92 See *id.* § 1106(a)(5) (requiring Chapter 11 trustee to "file a plan under section 1121 of this title, file a report of why the trustee will not file a plan, or recommend conversion of the case to a case under chapter 7, 12, or 13 of this title or dismissal of the case").

93 Compare *id.* § 1106(a)(3) (giving Chapter 11 trustee discretion to continue to operate the debtor's business with no explicit time restrictions), with *id.* § 721 ("The court may authorize the [Chapter 7] trustee to operate the business of the debtor for a limited period, if such operation is in the best interest of the estate and consistent with the orderly liquidation of the estate.").

94 *Id.* § 1104(c) (providing that, under certain circumstances, "the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate").

95 Frost, *supra* note 13, at 114; see also Harvey R. Miller & Shai Y. Waisman, *Does Chapter 11 Reorganization Remain a Viable Option for Distressed Businesses for the Twenty-First Century?*, 78 AM. BANKR. L.J. 153, 189 (2004) ("Once the plan is presented, the bankruptcy court is without means to independently assess the plan's feasibility and overcome the weight of the combined creditors and submerged debtors appearing before it urging confirmation.").

96 See *supra* Part II.B.3; see also Eklund & Roberts, *supra* note 15, at 130 ("The problem is that although all creditors can understand and share the same basic goal of maximizing the estate and the return for their creditor class, there exists inherent conflicts between creditors.").

value.<sup>97</sup> If the debtor has new management put in place by or at the request of prepetition creditors, management may pursue options in the interests of only those creditors. Likewise, creditors, competitors and potential purchasers may try to influence the debtor, the committee and the overall process in a manner favorable to their interests, regardless of the impact on the bankruptcy estate generally.<sup>98</sup>

Moreover, conflicts and self-interest are occurring more frequently as debtors' key creditor relationships shift from traditional commercial banks to hedge funds, private equity firms and other non-traditional lenders. The problem relates in part to a break in "rela-

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97 See, e.g., A. Mechele Dickerson, *A Behavioral Approach to Analyzing Corporate Failures*, 38 WAKE FOREST L. REV. 1, 23 (2003) ("Moreover, even if market controls discourage directors from making decisions that cause the firm's insolvency, the 'final period' problem will make managers indifferent to market controls once the firm becomes insolvent. The final period problem arises when a person fears that she is about to lose her job and senses that she will be unable to secure equal or better employment."); Sean J. Griffith, *Deal Protection Provisions in the Last Period of Play*, 71 FORDHAM L. REV. 1899, 1947 (2003) (exploring how management self-interest biases affect decision making and stating that "[a]n analysis of management and director behavior reveals several cognitive biases that may contribute to sub-optimal decision-making in the last period of play"); Park McGinty, *The Twilight of Fiduciary Duties: On the Need for Shareholder Self-Help in an Age of Formalistic Proceduralism*, 46 EMORY L.J. 163, 208-09 (1997) (explaining structural bias and management bias toward either shareholders or creditors and how bias might impact corporate governance and insolvency); see also Stephen J. Lubben, *Some Realism About Reorganization: Explaining the Failure of Chapter 11 Theory*, 106 DICK. L. REV. 267, 292-93 (2001) (suggesting that management-shareholder bias is a myth, at least in the insolvency context where management likely will favor interests of creditors).

98 See, e.g., Martin J. Bienenstock, *Conflicts Between Management and the Debtor in Possession's Fiduciary Duties*, 61 U. CIN. L. REV. 543, 546 (1992) ("Second, if two or more classes of creditors exist to negotiate with, management may be more partial to the class that wants to retain management on the best terms to operate the business of the reorganized debtor. In both situations, management has a fiduciary duty to do what is best for the estate and creditors, and has a potentially conflicting interest in doing what is best for management."); Steve H. Nickles, *Behavioral Effect of New Bankruptcy Law on Management and Lawyers: Collage of Recent Statutes and Cases Discouraging Chapter 11 Bankruptcy*, 59 ARK. L. REV. 329, 379 (2006) ("Acrimony [and conflict between debtors and creditors] seem[ ] likely to increase if, as this article suggests, the new bankruptcy law increases the risks of liability for management. Creditors will become more emboldened and aggressive against management, and management will become more defensive with respect to creditors."); see also Eklund & Roberts, *supra* note 15, at 130 ("Creditors who serve on official committees, whose goal is to divvy an insufficient pie, are susceptible to the pressure of conflicts in their individual capacities."); Carolyn Okomo, *ALF to Send Plan to Creditors*, DEAL, Mar. 26, 2008 (noting that debtor was seeking to remove its former parent company from the creditors' committee for alleged breaches of fiduciary duty that included offering employment positions to the debtor's employees); cases cited *supra* note 84.



tionship lending” and in part to the motives and objectives of this new creditor body.<sup>99</sup> These creditors are increasingly using Chapter 11 to facilitate above-market returns on distressed investments, to influence governance or operational decisions, or to obtain ownership control of the debtor.<sup>100</sup>

### A. *Creditor Conflict*

Bankruptcy generally is viewed as a zero-sum game.<sup>101</sup> The debtor has a limited pool of assets, and creditors want to maximize their percentage share of those assets. Consequently, a larger percentage recovery to one creditor or class of creditors means a smaller share for others. Although the distribution order in bankruptcy technically is predetermined by the absolute priority rule, creditors frequently negotiate around this rule.<sup>102</sup> As a result, creditors use

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99 See *supra* notes 5–8 and accompanying text.

100 See, e.g., *Contrarian Funds, LLC v. Westpoint Stevens, Inc.* (*In re Westpoint Stevens, Inc.*), 333 B.R. 30, 34 (Bankr. S.D.N.Y. 2005) (describing costly control contest between one group of creditors led by investor Wilbur Ross and another group of creditors led by Carl Icahn); *In re A.V.B.I., Inc.*, 143 B.R. 738, 738–39 (Bankr. C.D. Cal. 1992) (describing control contest between former management and shareholders that resulted in an unconfirmable plan proposing only a nominal distribution to unsecured creditors); see also H. Slayton Dabney, Jr. & Richelle Eisendrath, *When Hedge Funds Compete*, AM. BANKR. INST. J., Dec. 2007/Jan. 2008, at 22 (describing control contests and related consequences in the Chapter 11 cases of *In re Delphi Corp.*, Ch. 11 Case No. 05-44481 (Bankr. S.D.N.Y. Oct. 14, 2005), *In re Dana Corp.*, Ch. 11 Case No. 06-10354 (Bankr. S.D.N.Y. Mar. 13, 2006), and *In re Granite Broadcasting, Inc.*, 369 B.R. 120 (Bankr. S.D.N.Y. 2007)); Edward B. Rock & Michael L. Wachter, *Corporate Control Transactions: Introduction*, 152 U. PA. L. REV. 463, 470 (2003) (noting prevalence of control contests in Chapter 11 cases).

101 A zero-sum game typically exists where a gain for one party necessarily results in a loss to another party. See, e.g., Teresa A. Sullivan et al., *Limiting Access to Bankruptcy Discharge: An Analysis of the Creditors' Data*, 1983 WIS. L. REV. 1091, 1096 (“The contest between debtor and creditor is almost always zero-sum . . .”); James J. White, *Failure and Forgiveness: A Review*, 73 AM. BANKR. L.J. 435, 447 (1999) (“[B]ankruptcy is usually a zero sum game, where more for me is less for you . . .”); see also David Gray Carlson, *Secured Lending as a Zero-Sum Game*, 19 CARDOZO L. REV. 1635, 1637 (1998) (explaining general theory behind zero-sum principle and its application in secured lending context).

102 See Donald S. Bernstein, *A Reorganization Lawyer's Perspective on Professor Warren's Vanishing Trials: The New Age of American Law*, 79 AM. BANKR. L.J. 942, 946 (2005) (“Though legal scholars have from time to time raised questions about why a senior class would compromise its right to invoke the absolute priority rule, the cost of litigating the issue, the delay involved and the uncertainty involved in valuation litigation without a market test often can be sufficient incentives to motivate the senior class to settle.”). But see *Motorola, Inc. v. Official Comm. of Unsecured Credits & JPMorgan Chase Bank* (*In re Iridium Operating LLC*), 478 F.3d 452 (2d Cir. 2007) (revoking

prepetition contract terms, postpetition financing and litigation threats, among other things, to negotiate for better treatment in the bankruptcy distribution.

In addition, certain investors target the debt of distressed corporations as a means to obtain control of the corporation or its assets.<sup>103</sup> These investors purchase debt at various levels of the debtor's capital structure and then use the terms of that debt instrument and their voting rights under the Bankruptcy Code to influence the debtor's restructuring.<sup>104</sup> Distressed debt investors successfully used this strategy in, among others, the Chapter 11 cases of *In re Allied Holdings, Inc.*,<sup>105</sup> *In re Granite Broadcasting, Inc.*,<sup>106</sup> *In re Kmart Corp.*,<sup>107</sup> *In re Radnor Holdings Corp.*,<sup>108</sup> and *In re Werner Holding Co.*<sup>109</sup>

Whether a creditor is seeking a larger return or control of the corporation, it tries to influence or control the restructuring process to achieve its objectives. The creditor's objective and pursuit of control in turn might conflict with the debtor's restructuring plan or the efforts of other creditors or shareholders to influence the process.<sup>110</sup> This conflict and self-interested conduct often lead to delay, additional costs and diminished returns to stakeholders.

For example, in the *Adelphia Communications Corp.*, Chapter 11 cases, conflict developed among the creditors of the debtor parent

settlement between committee and senior lenders that allocated estate funds to a litigation vehicle in violation of the absolute priority rule). The absolute priority rule, codified in §§ 1129(b) and 726 of the Bankruptcy Code, requires that claims and interests be paid according to their seniority in the debtor's capital structure and that a senior class be paid in full before any distributions are made to junior classes.

103 See Henderson, *supra* note 4, at 1568 & n.127 ("While the market for the debt and trade claims of distressed firms is growing, it remains a small component of traditional debt and equity markets, and is inhabited largely by firms that specialize in this type of investing."); see also Marjorie L. Girth, *Rethinking Fairness in Bankruptcy Proceedings*, 73 AM. BANKR. L.J. 449, 470-71 (1999) ("Another significant fairness concern arising in the context of claims trading is the buyer's potential to acquire enough claims to block the confirmation of any Chapter 11 plan that it deemed unsatisfactory.").

104 For a description of the strategies and objectives of distressed debt investors, see data and sources discussed in Harner, *supra* note 17.

105 Ch. 11 No. 05-1251 (Bankr. N.D. Ga. May 2, 2006).

106 369 B.R. 120 (Bankr. S.D.N.Y. 2007).

107 Ch. 11 No. 02-02474 (Bankr. N.D. Ill. Feb. 26, 2003).

108 353 B.R. 820 (Bankr. D. Del. 2006).

109 Ch. 11 No. 06-10578(KJC) (Bankr. D. Del. June 12, 2006).

110 See, e.g., Cynthia A. Baker, *Other People's Money: The Problem of Professional Fees in Bankruptcy*, 38 ARIZ. L. REV. 35, 52-53 (1996) (exploring committee member self-interest in the retention of committee counsel and noting that "[t]he personal interests of committee members may also lead to decisions to purchase professional services, where the benefit received is not shared by the entire constituency").

corporation and a debtor affiliate corporation regarding the sale of the debtors' assets and the allocation of the proceeds under a plan.<sup>111</sup> This conflict also involved the debtors, the official creditors' committee, and the official equity holders' committee and generated multiple, complex disputes that consumed and paralyzed the debtors' reorganization for almost five years.<sup>112</sup> The debtors ultimately consummated the sale of their assets and confirmed a distribution plan, but only after years of conflict and cost that depleted the estate value that otherwise would have been available to pay stakeholders.<sup>113</sup>

Similar intercreditor conflict arose in the Chapter 11 cases of *In re American Remanufacturers, Inc.*<sup>114</sup> and *Fibermark, Inc.*<sup>115</sup> In the *American Remanufacturers* case, a control contest between the senior secured lenders and two junior debtholders forced the debtor to convert its case to a Chapter 7 case.<sup>116</sup> A member of the senior lending group bought the debtor's assets in Chapter 7 for approximately \$7.7 million—substantially less than the value contemplated by the debtor's proposed restructuring strategy in Chapter 11.<sup>117</sup> The *Fibermark* inter-

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111 See Debtors' Motion Pursuant to Sections 105, 363, 365 and 1146(c) of the Bankruptcy Code and Rules 2002, 6004, 6006, and 9014 of the Federal Rules of Bankruptcy Procedure Seeking Approval of: (I) A Form of Notice Regarding Certain Hearing Dates & Objection Deadlines; (II) New Provisions for Termination and for the Payment or Crediting of the Breakup Fee; (III) The Sale of Substantially All Assets of Adelphia Communications Corp. & Its Affiliated Debtors to Time Warner NY Cable LLC & Certain Other Assets to Comcast Corp. Free & Clear of Liens, Claims, Encumbrances, & Interests & Exempt from Applicable Transfer Taxes; (IV) The Retention, Assumption &/or Assignment of Certain Agreements, Contracts & Leases; & (V) The Granting of Related Relief at 4–13, *In re Adelphia Commc'ns Corp.*, 336 B.R. 610 (Bankr. S.D.N.Y. 2006) (No. 02-41729 (REG)).

112 See *id.*; see also *In re Adelphia Commc'ns Corp.*, 359 B.R. 54, 58–59 (Bankr. S.D.N.Y. 2006) (detailing certain aspects of the intercreditor disputes).

113 See *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 242 (Bankr. S.D.N.Y. 2007) (holding that plan was fair and equitable in part because “[t]he expense and delay occasioned by the continued litigation . . . would prejudice”).

114 Ch. 11 No. 05-20022 (PJW) (Bankr. D. Del. Nov. 7, 2007).

115 No. 04-10463 (Bankr. D. Vt. Aug. 16, 2005), available at [http://online.wsj.com/public/resources/documents/WSJ-HarveMiller\\_report.pdf](http://online.wsj.com/public/resources/documents/WSJ-HarveMiller_report.pdf).

116 See Motion for an Order Pursuant to Sections 361, 363 & 364 of the Bankruptcy Code (1) Authorizing the Debtors to Obtain Postpetition Financing, (2) Authorizing the Use of Cash Collateral, (3) Authorizing Repayment of Certain Prepetition Secured Debt, (4) Granting Liens & Superpriority Administrative Expense Status, (5) Providing Adequate Protection & (6) Scheduling & Approving the Form & Method of Notice of Final Hearing at 7, *In re Am. Remanufacturers*, Ch. 11 No. 05-20022 (PJW); *In re Am. Remanufacturers, Inc.*, Ch. 7 No. 05-20022 (PJW) (Bankr. D. Del. Nov. 17, 2007) (converting Chapter 11 cases to Chapter 7 cases).

117 See *In re Am. Remanufacturers, Inc.*, No. 05-20022 (PJW) (Bankr. D. Del. Nov. 17, 2007) (converting Chapter 11 cases to Chapter 7 cases); see also FITCH RATINGS, A

creditor dispute cost the estate approximately \$60 million.<sup>118</sup> Other examples of control contests and intercreditor disputes include *In re Pliant Corp.*<sup>119</sup> and *In re eToys Direct 1, LLC*.<sup>120</sup>

### B. Debtor-Committee Conflict

Conflicting interests can place the debtor and the statutory committee at odds.<sup>121</sup> Although a committee's challenge to debtor con-

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CASE STUDY APPROACH TO U.S. SECOND-LIEN LEVERAGED LOAN RECOVERY EXPECTATIONS 5 (2007) ("A member of the company's senior lender group subsequently purchased the company's inventory assets at a fire sale for \$ 7.7 million."); David Peress & Thomas C. Prinzhorn, *Nontraditional Lenders and the Impact of Loan-to-Own Strategies on the Restructuring Process*, AM. BANKR. INST. J., Apr. 2006, at 48, 57 ("After four days of confusing disputes about definitions of third parties, priming and subordination, the company lawyers informed the court that the company had run out of cash and converted to a chapter 7 liquidation."). The sale proposed in the debtor's original Chapter 11 filing was valued at approximately \$32 million. See Motion for Order Authorizing & Approving (A) An Asset Purchase Agreement Subject to Higher & Better Offers, (B) Sale of Substantially All of the Debtors' Assets, Free & Clear of Liens, Claims, Encumbrances & Interests, (C) Assumption & Assignment of Certain Executory Contracts, (D) Assumption of Certain Liabilities, & (E) Granting Related Relief at 3, *In re Am. Remanufacturers, Inc.*, No. 05-20022 (PJW) (Bankr. D. Del. Nov. 7, 2005) (describing original sale terms).

118 See Report of Harvey R. Miller, as Examiner at 12, *In re FiberMark*, No. 04-10463.

119 Ch. 11 No. 09-10443 (Bankr. D. Del.); see Bill Rochelle, *Bashas', Flying J, Charter, Pliant, Tousa: Bankruptcy (Update 1)*, BLOOMBERG (July 15, 2009), <http://www.bloomberg.com/apps/news?pid=conewsstory&tkr=MSFT:US&sid=AssOhkekB0bI> (describing conflict between first-lienholders, second lienholders and unsecured creditors and competing plans).

120 Ch. 11 No. 08-13412 (BLS) (Bankr. D. Del. Feb. 23, 2009); see, e.g., Debtors' Motion to Convert Cases from Chapter 11 to Chapter 7 of the Bankruptcy Code, *In re eToys Direct 1, LLC*, No. 08-13412 (BLS) (explaining dispute among debtors, pre-petition first lienholders, prepetition second lienholders, creditors' committee, and post-petition lenders and requesting conversion of Chapter 11 cases as a result of the parties' inability to resolve dispute). The parties in the *eToys* Chapter 11 cases ultimately settled their dispute, allowing the sale of the debtors' assets to proceed in Chapter 11. See Order Approving Settlement Agreement with Mutual Release Among the Debtors, the Committee, & the Lenders at Exhibit A, *In re eToys Direct 1, LLC*, No. 08-13412 (BLS) (Bankr. D. Del. Mar. 18, 2009) (approving settlement agreement).

121 See, e.g., Marie Beaudette, *Calpine Urges Court to Keep Consulting Firm on Chapter 11 Case*, ASSOCIATED PRESS, Oct. 5, 2007 (shareholders' committee objected to debtor's retention of consulting firm because of alleged conflict of interest, which debtor and creditors' committee claimed was resolved); Okomo, *supra* note 98 (committee seeking appointment of trustee and debtor seeking to remove its former parent company from the creditors' committee for alleged breaches of fiduciary duty that included offering employment positions to the debtor's employees); Viewpoint, *Montgomery Ward: Genuine Reorganization or GECC's Fig Leaf?*, 34 Bankr. Ct. Dec. (LRP) 1 (Apr. 27, 1999) (detailing dispute between the committee, on the one hand, and the debtor and GECC (the debtor's controlling shareholder, postpetition lender and

duct is often appropriate and value generating, it also can be the result of individual preferences of committee members.<sup>122</sup> Likewise, when a committee rightfully objects to debtor conduct, it may be conduct motivated by management self-interest or outside influences over management.<sup>123</sup> And frequently, instability in committee membership (e.g., a member resigning from the committee once the debtor assumes its contract or pays its debt) can prevent the committee itself from being a meaningful check on conflicts and self-interest. Whether the case deals with management or committee member self-interest, the resulting conflict can impair value and confidence in the statutory representatives and the overall process.

Debtor and committee member conflict, particularly conflict accompanied by undue influence, is challenging for stakeholders both to detect and resolve. A large part of a Chapter 11 case is negoti-

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creditor), on the other); *Will Debtors Wielding Rule 2019 Prompt Hedge Fund Retreat*, 47 Bankr. Ct. Dec. (LRP) 4 (Mar. 27, 2007) (explaining conflict between debtor and ad hoc committee of shareholders regarding committee's disclosure obligations and noting that committee had objected to the debtor's request to extend exclusivity and valuation and was requesting the appointment of an examiner); Liz McKenzie, *Creditors Win Bid to End Fremont Plan Exclusivity*, LAW360 (July 15, 2009), <http://www.law360.com/articles/11532> (reporting that court granted creditors' committee's motion to terminate Fremont General Corporation's exclusive period to file a plan); Evan Weinberger, *Creditors Seek Block on Lyondell Exec Payouts*, LAW360 (July 20, 2009), <http://www.law360.com/articles/112218> (explaining basis of creditors' committee's objection to Lyondell Chemical Company's employee retention plan). Disputes between a debtor and one or more of its committees also can lead to the appointment of a Chapter 11 trustee or examiner. See, e.g., *In re Sonicblue Inc.*, No. 03-51775, 2007 WL 926871 (Bankr. N.D. Cal. Mar. 26, 2007) (order appointing Chapter 11 trustee where debtor's counsel issued a prepetition opinion letter to bondholders now controlling committee and whose claims were subject to challenge by the debtor and junior creditors); Shannon D. Murray, *Nellson to Seek End to Probe*, DEAL, July 12, 2007 (reporting that debtor and ad hoc committee of first lienholders were asking court to revoke appointment of examiner, which was triggered by dispute with creditors' committee).

122 See generally Michael P. Richman & Jonathan E. Aberman, *Creditors' Committees Under the Microscope: Recent Developments Highlight Hazards of Self-Dealing*, AM. BANKR. INST. J., Sept. 2007, at 22 (describing conflict between debtors and committees and among committee members and discussing cases in which committee member self-interest posed obstacles to the debtor's restructuring plan).

123 For example, in support of its objection to Lyondell's executive retention plan, the creditors' committee alleged that the debtor's management breached its fiduciary duties and was liable for mismanagement with respect to the debtor's prepetition business affairs. See Weinberger, *supra* note 121. Likewise, a committee can scrutinize a debtor's prepetition transactions and determine whether they contributed in an illegal or inappropriate way to the debtor's financial demise. See, e.g., Jamie Mason, *Steve & Barry's Back in Chapter 11*, DEAL, Nov. 21, 2008 (committee challenging prepetition transaction between debtor and private equity firm, in which the private equity firm acquired a fifty percent stake in the debtor).

ated behind the scenes—disputes typically reach the court’s docket only if there is a complete impasse, which may not occur if one party caves to the other’s demands.<sup>124</sup> Moreover, even once a dispute is before the court, the only public information about the conflict is that divulged by the debtor and the committee. The court and stakeholders not allowed in the negotiating room may never know the true nature or economic consequences of the dispute.

### C. *Weaknesses in Existing Chapter 11 Process*

A negotiated, consensual resolution generally is the desired result in a Chapter 11 case. That resolution should, however, strive to achieve the dual goals of the Chapter 11 process: rehabilitating the debtor and maximizing creditors’ returns. A so-called consensual resolution might not serve those goals if, for example, a group of creditors strong-arms the debtor into selling its assets or if management (perhaps together with a new equity sponsor) implements an over leveraged plan of reorganization.

The Bankruptcy Code seeks to protect against such abuses of the Chapter 11 process by imposing certain duties on the DIP and the committee; providing the bankruptcy court with substantial case oversight authority; requiring plans to be feasible and in the best interests of creditors; and facilitating the appointment of a trustee or examiner in extreme cases.<sup>125</sup> Yet, abuses of the process continue, and some commentators suggest that a complete overhaul or elimination of the existing structure is warranted.<sup>126</sup> The case facilitator proposal discussed here recognizes the substantial value in the existing structure and seeks to address its weaknesses.

Many Chapter 11 abuses occur because the key players in the case have a vested interest in the restructuring. Even the professionals retained by the debtors and the committee are not completely free of

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124 See Randall J. Newsome, *Vanishing Trials—What’s the Fuss All About?*, 79 AM. BANKR. L.J. 973, 973 (2005) (discussing decrease in bankruptcy litigation and the role of negotiation and compromise in that development); *Judge Barr Praises Professionals in Centis Bankruptcy*, 43 Bankr. Ct. Dec. (LRP) 5 (July 28, 2004) (“I appreciate all of the effort that went into the ‘behind-the-scenes’ process which is always necessary to the things the court doesn’t see but we sense . . . .” (quoting Judge James N. Barr)).

125 See discussion *supra* Part II.B.3.

126 See Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L. REV. 751 (2002) (exploring the shift from corporate reorganizations to corporate liquidations and causes underlying that shift); Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 YALE L.J. 1807, 1851 (1998) (“The Essay’s central claim is captured in a variation on a trendy slogan: Privatize bankruptcy.”); discussion *supra* Part II.B.3.

conflict and loyalty issues, depending on both professional and personal ties that exist prior to the case or are anticipated to develop after.<sup>127</sup> But each of these players, including the professionals, can add substantial value to the process. For example, the DIP and its management have the historical knowledge, business expertise and industry relationships that often are essential to a successful restructuring. Likewise, key creditors and shareholders have the ability to compromise claims and perhaps invest new capital.

Any workable solution should not exclude these key players or limit their roles. Rather, the solution lies in facilitating more meaningful, objective and efficient dialogue among the parties. To develop this solution, this Article draws on elements of existing U.S. bankruptcy law, as well as foreign insolvency law and alternative dispute resolution techniques.

#### IV. ALTERNATIVES TO CHAPTER 11

As explained above, the general rule in U.S. corporate reorganizations is that the corporate debtor stays in possession of its property and in control of its restructuring efforts with relatively little interference from the bankruptcy court or the U.S. trustee. This approach is commonly referred to as a U.S.-style or Chapter 11-style reorganization. Although some countries like Belgium, Canada, China, France, Germany, Italy, and the United Kingdom have adopted aspects of a Chapter 11-style reorganization, most countries balance the control retained by the corporate debtor with more intrusive governmental or judicial oversight.<sup>128</sup> Moreover, many countries mandate the appointment of an administrator, receiver or other trustee upon the commencement of any corporate bankruptcy.<sup>129</sup>

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127 A similar conflict issue exists for any professional manager retained by a company, commonly called a chief restructuring officer, at the behest of creditors. See Dickerson, *supra* note 11, at 918–27 (explaining use of chief restructuring officers, which Professor Dickerson characterizes as “private trustees” and potential issues with their retention).

128 See *infra* note 129; see also Ziad Raymond Azar, *Bankruptcy Policy: A Review and Critique of Bankruptcy Statutes and Practices in Fifty Countries Worldwide*, 16 CARDOZO J. INT’L & COMP. L. 279, 283, 289–302 (2008) (noting the adoption of Chapter 11-style provisions by several countries and analyzing, among other things, whether countries displace management completely or partially under corporate insolvency laws); Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276 (2000) (reviewing global bankruptcy reform measures).

129 For example, a trustee, receiver or other court-appointed official is mandated (either to displace or monitor the debtor) under the corporate reorganization laws of Belgium, Canada, China, France, Germany, Italy, Japan, Spain, and the United Kingdom. See, e.g., Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36, § 11.7(1)

This Part briefly explores alternatives to the DIP structure used in the United States. The Article does not endorse replacing the DIP. Nevertheless, analyzing alternative approaches can identify tools to enhance the DIP's restructuring efforts.

### A. *The Canadian Monitor*

The development of Canadian corporate insolvency law follows a pattern similar to the U.S. experience. Canadian insolvency law is federal law, and the Canadian Parliament enacted its primary corporate reorganization law—the Companies' Creditors Arrangement Act (CCAA)—during the Great Depression.<sup>130</sup> Corporations also can

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(Can.); (企业破产法) [Law of Insolvency] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective June 1, 2007) arts. 22, 73 (Chin.), *translated in* BANKR. LAW & RESTRUCTURING RESEARCH CTR., CHINA UNIV. OF POLITICS & LAW, ENTERPRISE INSOLVENCY LAW OF THE PEOPLE'S REPUBLIC OF CHINA (2007), *available at* [http://transnationallawblog.typepad.com/transnational\\_law\\_blog/files/ChinaBankoLaw2007.pdf](http://transnationallawblog.typepad.com/transnational_law_blog/files/ChinaBankoLaw2007.pdf); Insolvency Act, 1986, c. 45, §§ 1(2), 32, Sch. B1 (Eng.), *available at* *Insolvency Act of 1986*, LEGISLATION.GOV.UK, <http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=2519933>; CODE DE COMMERCE [C. COM.] arts. L621-8, L631-9 (Fr.), *available in English at* [http://195.83.177.9/upl/pdf/code\\_32.pdf](http://195.83.177.9/upl/pdf/code_32.pdf); Insolvenzordnung [InsO] [Insolvency Act], Oct. 5, 1994, BUNDESGESETZBLATT [BGBl.] at 2866, §§ 56, 274 1994 I (Ger.); VITTORIO LUPOLI & ANDREA DE TOMAS, GLOBAL LEGAL GRP., THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO CORPORATE RECOVERY AND INSOLVENCY: ITALY 132 (2008), *available at* <http://www.iclg.co.uk/khadmin/Publications/pdf/2012.pdf> (explaining that in Italy, “[t]he Bankruptcy Court appoints the judge in charge of the procedure and the official receiver. The judge directs the whole procedure and authorises the extraordinary administration acts proposed by the official receiver”); ALBERTO NÚÑEZ-LAGOS BURGUERA & ÁNGEL ALONSO HERNÁNDEZ, GLOBAL LEGAL GRP., THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO CORPORATE RECOVERY AND INSOLVENCY: SPAIN 215 (2008), *available at* <http://www.iclg.co.uk/khadmin/Publications/pdf/2024.pdf> (explaining that in Spain, “[d]uring the common phase, the Judge will appoint the members of the trustees panel, whose main function is to determine the debtor's estate and existing debts, and to control the management of the debtor's business”); European Judicial Network, *Bankruptcy—Belgium*, EUR. COMMISSION (May 31, 2006), [http://ec.europa.eu/civiljustice/bankruptcy/bankruptcy\\_bel\\_en.htm](http://ec.europa.eu/civiljustice/bankruptcy/bankruptcy_bel_en.htm) (last updated May 31, 2006) (stating that in Belgium, the Commercial Court designates at least one receiver pursuant to Judicial Administrative Act §15(1)(2) and the court designates at least one liquidator in the process of Bankruptcy pursuant to section 11(1) of the Bankruptcy Act of August 8, 1997, BELGISCH STAATSBLAD [B.S.] [Official Gazette of Belgium], Oct. 28, 1997).

130 See 2 MICHAEL J. MACNAUGHTON ET AL., DOING BUSINESS IN CANADA § 12.05 (2009) (“Originally enacted during the Depression and attaining new prominence in the 1980's, the CCAA currently is the primary restructuring statute used in Canada for large corporate enterprises.”). A corporation must be insolvent and have aggregate liabilities of at least \$5 million to commence a case under the CCAA. *Id.* The insolvency requirement is defined by reference to Canada's Bankruptcy and Insolvency



elect to liquidate their assets in a process akin to Chapter 7 under the Canadian Bankruptcy and Insolvency Act.<sup>131</sup>

Similarities exist between the CCAA and Chapter 11, and corporations in cross-border insolvency cases often pursue reorganizations under both statutes.<sup>132</sup> A corporate debtor under the CCAA can obtain a stay of proceedings, debtor in possession financing and certain other protections afforded debtors under Chapter 11. Those protections largely are crafted by the court and parties, however, under the general guidelines of the CCAA and are not necessarily imposed

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Act, R.S.C. 1985, c. B-3 (Can.), and Winding-Up and Restructuring Act, R.S.C. 1985, c. W-11 (Can.), which generally incorporate both the balance sheet and cash flow insolvency tests. In addition, “a debtor may be considered insolvent if the debtor faces a ‘looming liquidity crisis’ or is in the ‘proximity’ of insolvency even if it is making its obligations as they become due.” *Id.* “The principle purpose of the *Companies’ Creditors Arrangement Act* is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business.” *In re Federal Gypsum Co.*, [2007] N.S.J. 558 (Can. N.S.S.C.), 2007 NS.C. LEXIS 635, at \*7 (citation omitted) (quoting *In re Juniper Lumber Co.*, [2000] N.B.J. 144 (Can. N.B.C.A.)). Certain amendments to the CCAA went into effect on September 18, 2009. The amendments generally seek “[t]o encourage restructuring of viable businesses as an alternative to bankruptcy [and to] provide increased predictability and consistency while preserving its flexibility.” *Summary of Legislative Changes*, OFFICE OF THE SUPERINTENDENT OF BANKR. CAN., <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01782.html> (last updated Jan. 19, 2010).

131 See MACNAUGHTON ET AL., *supra* note 130, § 12.02 (discussing the Bankruptcy and Insolvency Act). A corporation also may reorganize its business under the Bankruptcy and Insolvency Act, but its structure is more suitable for smaller companies and less complex reorganizations. *Id.* § 12.05.

132 For example, Quebecor World Inc. and its affiliated debtors simultaneously received orders sanctioning their Second Amended and Restated Plan of Reorganization and Compromise (in Canada) and confirming their Third Amended Joint Plan of Reorganization (in the United States). See, e.g., Press Release, Quebecor World’s U.S. and Canadian Plans of Reorganization Approved by U.S. Bankruptcy Court and Quebec Superior Court (July 2, 2009), available at <http://www.reuters.com/article/pressRelease/idUS208777+02-Jul-2009+MW20090702>.

by federal statute as under Chapter 11.<sup>133</sup> Moreover, the CCAA mandates the appointment of a monitor in every case.<sup>134</sup>

The Canadian monitor is an officer of the court and typically a licensed bankruptcy trustee associated with a major accounting firm.<sup>135</sup> The monitor's duties include "monitoring the company's business and financial affairs . . . [and examining] the company's property, including the premises, books, records [and] data"; filing a report with the court "on the state of the company's business and financial affairs"; and communicating with the company's creditors.<sup>136</sup> As at least one court and commentator have explained:

[The monitor] is the court's eyes and ears with a mandate to assist the court in its supervisory role. The monitor is not an advocate for the debtor company or any party in the CCAA process. It has a duty to evaluate the activities of the debtor company and comment independently on such actions in any report to the court and the creditors.<sup>137</sup>

The monitor does not displace the debtor or its management team. In fact, the role of the monitor was developed by the Canadian Parliament as an alternative to the creditors' committees appointed in the Chapter 11 process.<sup>138</sup> Although some commentators question

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133 See MACNAUGHTON ET AL., *supra* note 130, § 12.05 (explaining how many critical components of a debtor's restructuring are left largely to the discretion of the court, with only vague, if any, statutory guidance). In general, a corporate debtor uses a CCAA proceeding to negotiate a plan of arrangement with its creditors that restructures its debt obligations. The plan must be approved by "[a] majority in number representing two thirds in value of the creditors, or class of creditors . . . present and voting either in person or by proxy" and sanctioned by the court. R.S.C. 1985, c. C-36, § 6 (Can.).

134 See R.S.C. 1985, c. C-36, § 11.7(1) (Can.) ("When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company.").

135 See PHILIP R. WOOD, PRINCIPLES OF INTERNATIONAL INSOLVENCY § 10-022 (2007) ("The monitor is usually an accounting firm."). The CCAA requires that the monitor be a licensed "trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*." R.S.C. 1985, c. C-36, § 11.7(1) (Can.).

136 See R.S.C. 1985, c. C-36, § 11.7 (Can.) (setting forth the role and duties of a monitor).

137 *In re Pine Valley Mining Corp.*, [2008] B.C.J. 637 (Can. B.C.S.C.), 2008 BC.C. LEXIS 702, at \*14 (quoting KEVIN P. McELCHERAN, COMMERCIAL INSOLVENCY IN CANADA 236 (2005)).

138 See Janis Sarra, *Ethics and Conflicts, the Role of Insolvency Professionals in the Integrity of the Canadian Bankruptcy and Insolvency System*, 13 INT'L INSOLVENCY REV. 167, 175 (2004) ("The introduction of the monitor in CCAA proceedings was in part a Canadian response to the US practice of having creditors' committees in Chapter 11 workouts . . . ."); see also Evan D. Flaschen, *Suggestions for the National Bankruptcy Review Commission and Congress: Independent Monitors in Chapter 11*, 4 AM. BANKR. INST. L. REV.

whether a monitor is really neutral in performing its duties, most courts and commentators believe the process works.<sup>139</sup> Commentators often cite the CCAA proceedings of Air Canada—a complex restructuring accomplished in eighteen months—to bolster their support for the process.<sup>140</sup>

### B. *The French Judicial Administrator*

A distressed corporation generally has three formal insolvency options under French law—a safeguard proceeding, a judicial reorganization or a judicial liquidation.<sup>141</sup> The corporation cannot be technically insolvent under French law to invoke the safeguard proceeding; in fact, French law requires corporations to commence a judicial reorganization or liquidation within forty-five days of becoming insolvent.<sup>142</sup> Rather, the safeguard proceeding is designed to help corporations anticipate and avoid technical insolvency, thereby preserving the value of the corporation's business for all stakeholders.<sup>143</sup>

514 (1996) (suggesting the appointment of a monitor with powers similar to a Chapter 11 examiner in Chapter 11 cases); Yaad Rotem, *Contemplating a Corporate Governance Model for Bankruptcy Reorganizations: Lessons from Canada*, 3 VA. L. & BUS. REV. 125, 150 (2008) (proposing the Canadian monitor as an effective example of hybrid (i.e., some combination of the roles of a DIP and bankruptcy trustee) governance in insolvency proceedings).

139 Rotem, *supra* note 138, at 147–50.

140 For a discussion of the results of Air Canada's restructuring, see Press Release, Air Canada Expects to Record an Estimated \$235 Million of Operating Income Before Reorganization and Restructuring Items for the Third Quarter 2004 (Oct. 27, 2004), available at <http://www.aircanada.jp/news/jpen-20041027.pdf>.

141 See Mark Broude et al., *An Overview of Global Insolvency Regimes*, in THE GUIDE TO DISTRESSED DEBT AND TURNAROUND INVESTING 31, 43–44 (2006) (explaining these three formal insolvency proceedings). French law also provides two additional pre-insolvency options, the *mandataire ad hoc* and the *conciliation*. See C. COM. arts. L611-3, L611-4 (Fr.). A *conciliation* also is commonly called a composition, as the Commercial Code only refers to a “composition procedure” and “conciliators.” See CLIFFORD CHANCE LLP, EUROPEAN INSOLVENCY PROCEDURES 14 (2010), available at <http://www.cliffordchance.com/showimage/showimage.aspx?LangID=de&binaryname=/hand-out%20euro%20insolvency%20procedures2.pdf> (“The Conciliation (*Proce' dure de Conciliation*) . . . was introduced in 1984 and is governed by articles L.611-4 *et seq.* of the French Commercial Code.”).

142 See C. COM. art. L631-4 (Fr.) (“The commencement of these proceedings must be requested by the debtor at the latest within the forty-five days following the cessation of payments if the debtor has not, within this time limit, requested the commencement of conciliation proceedings.”).

143 See CHANCE, *supra* note 141, at 14; Broude et al., *supra* note 141, at 43–44 (explaining objectives of the safeguard). Safeguard Proceedings are “aimed at recovery if the debtor establishes that, although not insolvent, he is facing difficulties which he is unable to overcome on his own”).

The safeguard proceeding “was inspired in part by U.S. chapter 11” and, accordingly, permits the debtor and its management to remain in place during the proceeding.<sup>144</sup> The debtor’s management may continue to operate the business, negotiate with creditors and employees and maintain its positions in the reorganized corporation.<sup>145</sup> The debtor is not the only party, however, with a key role in the reorganization process. The safeguard procedure contemplates significant participation by the court, a court nominee, controllers (who represent creditors), certain committees and a judicial administrator.<sup>146</sup>

The judicial administrator does not displace the debtor, but it “supervise[s] the debtor’s management operations . . . [or assists] the debtor in all or some of the management.”<sup>147</sup> The judicial administrator also has ongoing reporting obligations to the court and the court nominee and is charged with developing the debtor’s plan of reorganization.<sup>148</sup> Similar to the Canadian monitor, the judicial administrator

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144 ALLEN & OVERY BULLETIN, ROAD TESTING THE NEW FRENCH SAFEGUARD PROCEDURE (2006). Under a safeguard proceeding, the debtor works under the supervision of the court and the court-appointed officials to negotiate a restructuring plan. See C. COM. art. L621-4 (Fr.) (explaining court appointments in proceeding). The plan must be approved by the court, after it has been submitted to the court nominee, controllers and certain other parties and the necessary assents are obtained. *Id.* art. L626-2 (listing plan requirements); *id.* arts. L626-9 to L626-11 (plan confirmation process).

145 *Id.* art. L622-1 (“The management of the business shall be carried out by its manager.”); *id.* art. L622-3 (“The debtor shall continue to carry out acts of disposal and management over his personal estate as well as to exercise rights and actions not included within the administrator’s duties.”).

146 See *id.* art. L622-1 (“Where the Court, in accordance with the provisions of Article L621-4, appoints one or more administrators, it will assign them to jointly or individually supervise the debtor’s management operations or to assist the debtor in all or some of the management.”); *id.* art. L622-20 (“Only the court nominee appointed by the Court may act on behalf and in the general interest of the creditors.”). The court nominee is essentially a representative for the creditors and serves as a liaison between the controllers (i.e., creditors appointed by the court to serve in an official capacity) and the court. *Id.*; see also *id.* art. L621-10 (discussing appointment of controllers).

147 *Id.* art. L622-1. The provisions governing safeguard proceedings were amended in 2009 to, among other things, allow the debtor company to propose to the court the name of an individual to serve as the administrator. See, e.g., FRESHFIELDS BURCKHAUS DERINGER LLP, BRIEFING: FRENCH INSOLVENCY LAW (2009), available at [www.freshfields.de/publications/pdfs/2009/feb09/25197.pdf](http://www.freshfields.de/publications/pdfs/2009/feb09/25197.pdf).

148 *Id.* art. L623-1 (requiring the administrator to draft a report regarding the debtor’s economic and employment situation); *id.* art. L623-3 (requiring the administrator to consult with the court nominee and the court).

is appointed by the court and mandated in every safeguard proceeding.<sup>149</sup>

Eurotunnel was among the first distressed corporations to test the safeguard procedures. In 2007, Eurotunnel implemented its reorganization plan and, shortly thereafter, posted a small profit and issued dividends to shareholders.<sup>150</sup> Autodis, a French auto parts maker, also invoked the safeguard proceeding in 2009 to restructure its debt obligations through, among other things, a debt-for-equity exchange with its major lenders.<sup>151</sup> The Autodis safeguard procedure was completed in six weeks.

### C. *The U.K. Administrator*

Unlike Canada and France, the United Kingdom does not offer a formal corporate insolvency procedure that recognizes an official role for the corporate debtor in the restructuring process.<sup>152</sup> Rather, an administrator is appointed to assume the role and responsibilities of the debtor's management in every corporate reorganization case,

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149 *Id.* art. L621-4, at 204 (“[T]he Court shall appoint two court nominees, that is, a court nominee and an administrator . . .”).

150 Letter from Jacques Gounon, Chairman & Chief Exec., Group Eurotunnel, to Shareholders (Mar. 2009), available at <http://www.eurotunnel.com/NR/rdonlyres/C042C4A0-E42F-4040-AB6C-EDA5E1C1FA55/0/090310ETOnTrackMarch.pdf>.

151 See Laurent Assaya et al., *Autodis: A Surgical Restructuring à la Française*, JONES DAY COMMENT., July 2009, at 1, 1–3, available at [http://www.jonesday.com/pubs/pubs\\_detail.aspx?pubID=S6484](http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S6484) (explaining the Autodis restructuring). The provisions governing safeguard proceedings were amended in 2010 to, among other things, permit an accelerated or “pre-pack” filing, similar to that accomplished in the Autodis safeguard proceeding. See, e.g., Benoît Fleury, *The French Accelerated Financial Safeguard (the French “Prepack”)*, GIBSON DUNN (Oct. 14, 2010), <http://www.gibsondunn.com/publications/pages/FrenchAcceleratedFinancialSafeguard-FrenchPrepack.aspx>.

152 The United Kingdom's insolvency laws provide both rehabilitation and liquidation alternatives for insolvent corporations. The primary rehabilitation provision is administration, but corporations also may pursue rehabilitations using a composition (called a company voluntary arrangement (CVA)) or a scheme of arrangement. A CVA requires the appointment of a trustee to supervise the restructuring, as it proceeds largely as an out-of-court workout. See Insolvency Act, 1986, c. 45, § 1(2) (“A proposal under this Part is one which provides for some person (‘the nominee’) to act in relation to the voluntary arrangement either as trustee or otherwise for the purpose of supervising its implementation; and the nominee must be a person who is qualified to act as an insolvency practitioner [or authorised to act as nominee, in relation to the voluntary arrangement].”) A scheme of arrangement requires a separate judicial proceeding and, consequently, may be used by an administrator in an administration. Companies Act, 2006, c. 46, §§ 895–900 (Eng.); see also Highlands Ins. Co., Proposal in Relation to a Scheme of Arrangement 14–16 (May 1, 2009) (Eng.), available at <http://www.ukhighlands.com/circulars/Scheme%20Document.pdf> (explaining administration proceedings).

called an administration proceeding.<sup>153</sup> The administrator oversees virtually every aspect of the debtor's restructuring, including the development of a restructuring plan and the presentation of that plan to creditors.<sup>154</sup>

Nevertheless, the corporation, its directors or its secured creditors may appoint the administrator, which allows the corporate debtor to play at least an indirect role in the restructuring process.<sup>155</sup> Notably, most corporations entering administration elect this option and frequently appoint bankruptcy professionals associated with one of the large accounting firms.<sup>156</sup> An administrator also has the authority to, and in most cases does, retain existing management to help the administrator develop and implement a restructuring plan.<sup>157</sup>

An administrator is an officer of the court, and its general duties are detailed in the U.K.'s Insolvency Act.<sup>158</sup> The court generally has little involvement in the administration proceeding, giving the administrator significant discretion to achieve its statutory objectives. Administrators may pursue a going-concern or piecemeal sale of the

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153 See 1986, c. 45, sch. B1 (Eng.). "Administration replaces the existing management and has the effect of imposing a stay on the enforcement of security or any other legal proceeding against the debtor without the consent of the court or the administrator." Audrey Whitfill et al., *Jurisdiction Matters for Secured Creditors in Insolvency*, STANDARD & POOR'S (Apr. 13, 2006), <http://www2.standardandpoors.com/portal/site/sp/en/ap/page.article/2,1,1,0,1145997583489.html>.

154 See Broude et al., *supra* note 141, at 41 ("Once appointed, the administrator basically displaces the company's directors and assumes broad executive authority and powers.").

155 See 1986, c. 45, sch. B1 ¶ 14, 22 (Eng.).

156 See, e.g., David Jetuah, *Deloitte Called in for Wedgewood UK Administration*, ACCYAGE (Jan. 5, 2009), <http://www.accountancyage.com/accountancyage/news/2233270/wedgewood-goes-receivership> (Wedgewood UK selected four partners from Deloitte to serve as administrators); John Oates, *Nortel UK Goes into Administration to Save Itself*, ENTERPRISE (Jan. 15, 2009), [http://www.channelregister.co.uk/2009/01/15/nortel\\_europe\\_administration](http://www.channelregister.co.uk/2009/01/15/nortel_europe_administration) (Nortel appointed Ernst and Young as its administrators); *Setanta UK Goes into Administration*, IRISHTIMES (June 23, 2009), <http://www.irishtimes.com/newspaper/breaking/2009/0623/breaking63.html> (Setanta appointed Deloitte as its administrator).

157 See Broude et al., *supra* note 141, at 41 ("Under a court approved protocol, it is possible that the administrator may leave much of the day-to-day management decisions to existing management under the administrator's supervision . . .").

158 1986, c. 45, sch. B1 (Eng.). For example, the Insolvency Act instructs the administrator to pursue a reorganization of the company first, followed by a going-concern and then piecemeal sale of the company's assets. *Id.* § 3(1). The statute further requires the administrator to pursue the objectives in the stated order and to forego a particular objective only if she believes "that it is not reasonably practicable to achieve [the other objectives and she] . . . does not unnecessarily harm the interests of the creditors of the company as a whole." *Id.* § 3(4).

debtor or a stand-alone reorganization.<sup>159</sup> The latter typically is accomplished with the cooperation of management. Distressed corporations and their creditors may even work with an administrator prior to commencing an administration proceeding to facilitate a quick restructuring, similar to the prepackaged Chapter 11 cases used in the United States.<sup>160</sup>

#### D. *Observations Regarding Chapter 11 Alternatives*

The Canadian, French, and U.K. insolvency schemes discussed here each acknowledge limitations on the court's role in any given restructuring and the need for a meaningful check on the corporate debtor. Even under schemes like French insolvency laws that generally encourage significant involvement by the court, courts cannot participate in the negotiations and day-to-day affairs of the debtor for practical and other reasons.<sup>161</sup> Courts in turn must rely on third parties for accurate and timely information regarding the restructuring. Most countries, like Canada, France, and the United Kingdom, rely on a party other than the debtor to fulfill that role.<sup>162</sup>

The Canadian monitor, the French judicial administrator, and the U.K. administrator each have reporting obligations to the court and, to varying degrees, creditors, but there are notable differences among the three structures. For example, the Canadian monitor does not necessarily intervene in the restructuring negotiations and is not responsible for proposing the debtor's reorganization plan.<sup>163</sup> In contrast, the U.K. administrator is directly responsible for the reorganization plan, but the common practice of the administrator being appointed by or relying on management in that process suggests value to retaining the debtor's involvement at some level.

The French judicial administrator's primary charge is assisting the debtor, and it must coordinate negotiation activities with the court

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159 See Broude et al., *supra* note 141, at 41 (explaining the broad discretion granted to an administrator in pursuing reorganization or sale of the debtor or its assets).

160 See sources and examples cited in Harner, *supra* note 29, at 748–49 (discussing the use of prepackaged plans under U.K. insolvency laws).

161 See Broude et al., *supra* note 141, at 44 (“[T]he presiding judge in a French bankruptcy has extremely broad powers, both judicially and in the administration of the debtor’s business, as compared to a bankruptcy judge in the United States . . .”).

162 See *supra* note 130.

163 See MACNAUGHTON ET AL., *supra* note 130, § 12.05[6] (“The debtor and its creditors usually expect the monitor to comment on the plan, although commenting is not a requirement.”). *But see* Sarra, *supra* note 138, at 178 (“In some cases, the monitor has developed the plan of arrangement.”).

nominee and controllers.<sup>164</sup> Consequently, the judicial administrator's role provides a check on the debtor's conduct, but does not streamline the process itself. Moreover, the Canadian monitor and the U.K. administrator may not be truly independent or disinterested parties; for example, the monitor may be the debtor's auditor.<sup>165</sup> This lack of independence may create biases and increase rather than resolve conflicts in the restructuring.

These three insolvency schemes underscore the utility of objective oversight of the debtor and others involved in the restructuring; meaningful reporting to the court and stakeholders; and a facilitator to bring the parties together to negotiate and agree upon a restructuring plan. The noted differences suggest opportunities for improvement through the case facilitator proposal. Overall, this analysis supports viewing corporate restructuring more as alternative dispute resolution and less as traditional litigation.<sup>166</sup>

## V. THE CASE FACILITATOR PROPOSAL

Chapter 11 and the DIP model can add value to a corporation's restructuring efforts. A debtor's existing management and employees have the knowledge, expertise and relationships necessary to any corporation's successful reorganization.<sup>167</sup> They also often know best the corporation's weaknesses and what contributed to its financial distress. These individuals are vested, however, in the corporation, and they may lack the ability to assess objectively the corporation's financial options.

The case facilitator proposal recognizes the potential weaknesses in the DIP model and seeks to strengthen the model without discouraging its use. As discussed below, the case facilitator would not displace the debtor's management or receive any direct authority to act

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164 See *supra* Part IV.B (discussing the French judicial administrator's duties).

165 See, e.g., Sarra, *supra* note 138, at 176 ("In the past five years, roughly 33% of CCAA proceedings involved a monitor that had been the auditor of the debtor corporation . . ."); see also *supra* Part IV.C (discussing the debtor's ability to appoint the U.K. administrator). Notably, amendments to the CCAA, effective as of September 18, 2009, prohibit the debtor's auditor from serving as monitor, absent court approval. See Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, § 11.7 (Can.).

166 See Newsome, *supra* note 124, at 973 ("Compromise is what makes reorganization possible.").

167 See generally Miller & Waisman, *supra* note 14, at 169 (explaining the various virtues and value of the existing Chapter 11 process); see also Elizabeth Warren & Jay Lawrence Westbrook, *The Success of Chapter 11: A Challenge to the Critics*, 107 MICH. L. REV. 603, 634 (2009) (reporting empirical data showing strengths in the Chapter 11 process).



on behalf of the debtor.<sup>168</sup> Rather, the case facilitator would serve as the “eyes and ears” of the bankruptcy court and act as a third-party neutral and plan facilitator for the debtor and all of its stakeholders.<sup>169</sup>

The case facilitator proposal also introduces much-needed neutrality into the Chapter 11 process.<sup>170</sup> Neutrality in this context implies a participant without a vested interest in the prepetition relationships among the parties or the ultimate outcome of the case.<sup>171</sup> As Professor Westbrook explains: “If a bankruptcy involves competing

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168 See *infra* Part V.A.

169 See *supra* Part IV (discussing the Canadian monitor, the French judicial administrator, and the U.K. administrator); see also Bussel, *supra* note 41, at 1618 (“A substantial literature now exists confirming that third-party neutrals (or ‘mediators’ or ‘facilitators’) can be effective in bringing parties to agreement by managing the negotiation process.”). In most Chapter 11 cases, this independent representative is absent. This void not only leads to the type of conflict discussed *supra* Parts I.B.3, II, but also frequently puts the DIP’s counsel in the uncomfortable position of having to monitor and investigate the conduct of its debtor client. See generally Bowles & Rapoport, *supra* note 78, at 68 (“[S]everal courts have begun to impose yet another fiduciary duty on Estate Counsel—that of actively overseeing or policing the conduct of the Debtor during the pendency of a chapter 11 case.”).

170 As discussed in Part II, the balance of power and control in corporate restructurings has shifted from the debtor, to creditors, to an independent trustee and then back again. See *supra* Part II. The case facilitator proposal and its focus on neutrality would help reach a better equilibrium in this balance of power.

171 The Article does not invoke the concept of neutrality to suggest a particular theoretical model of the corporation in bankruptcy. Rather, the terms neutrality and stakeholders are used here in the context of resolving competing claims and disputes that may impede progress in a Chapter 11 case. The dynamics of insolvent firm governance may in fact inform the utility of various models of the corporation, but that discussion is beyond the scope of this current Article. See, e.g., Theresa A. Gabaldon, *Like a Fish Needs a Bicycle: Public Corporations and Their Shareholders*, 65 MD. L. REV. 538, 542 (2006) (explaining that, under options theory, “once a firm has issued debt, debtholders and holders of equity both share contingent control and bear residual risk”); Lynn A. Stout, *The Mythical Benefits of Shareholder Control*, 93 VA. L. REV. 789, 804–05 (2007) (discussing the team production model of corporate governance and noting that “while shareholders may share in the wealth when the corporation does well and suffer when the firm does poorly, so may employees, creditors, and other stakeholders”); see also Stephen M. Bainbridge, *Much Ado About Little? Directors’ Fiduciary Duties in the Vicinity of Insolvency*, 1 J. BUS. & TECH. L. 336 (2007) (arguing that zone of insolvency only applies in cases where the business judgment rule does not apply, shareholder and creditor interests conflict, and recovery goes directly to those with standing); Henry T.C. Hu & Jay Lawrence Westbrook, *Abolition of the Corporate Duty to Creditors*, 107 COLUM. L. REV. 1321 (2007) (arguing that the corporate duty to creditors doctrine should be abolished and imposing a duty arising only upon a formal bankruptcy proceeding); Frederick Tung, *The New Death of Contract: Creeping Corporate Fiduciary Duties for Creditors*, 57 EMORY L.J. 809 (2008) (proposing an approach called contract primacy as the default credit rule).

interests, then control may be exercised either impartially or with partiality to one interest or another. If the policymaker recognizes both interests as worthy of protection, then its policy requires neutrality in the default manager.”<sup>172</sup> Although the case facilitator would not assume control of a Chapter 11 case, she would provide a neutral perspective to the parties that is absent in the existing process. Moreover, as discussed below, the case facilitator’s ability to convey information to the court, including information concerning obstructionist or self-dealing behavior, would help her play a meaningful role in case resolution.<sup>173</sup>

### A. *The Basic Elements of the Proposal*

The appointment of a case facilitator would be mandatory in every Chapter 11 case, unless the court for cause waived the requirement.<sup>174</sup> The court would make the appointment from a panel of qualified third-party neutrals as soon as possible after the filing of the Chapter 11 petition. The debtor and other parties in interest could request a particular third-party neutral from the panel, but the ultimate decision would rest with the court.<sup>175</sup> The qualifications for the third-party neutral panel are discussed below.<sup>176</sup>

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172 Westbrook, *supra* note 17, at 825. Professor Westbrook acknowledges that exceptions may exist to the need for neutrality in a particular case, such as where the senior secured lender is significantly undersecured. The case facilitator proposal accounts for these scenarios by giving the bankruptcy court discretion to waive the appointment of a case facilitator. See Thomas H. Jackson & Robert E. Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors’ Bargain*, 75 VA. L. REV. 155, 159 (1989) (discussing tensions among claimants’ interests in Chapter 11 and observing that “the objective of the collective is never entirely congruent with the objective of any of the constituent parts”); *infra* Part V.A. The case facilitator proposal also may ameliorate concerns regarding the redistributive effects of collectivism in certain circumstances, including redistributions motivated by “errors and misperceptions owing to imperfections in legal rules; . . . strategic manipulation of the bankruptcy process; . . . [and] contribution among creditors to reduce ‘eve of bankruptcy’ conflicts of interest.” Jackson & Scott, *supra*, at 163.

173 See *infra* Part V.A.2.

174 For example, the court’s discretion in the appointment of a case facilitator would allow it to waive the appointment in small business cases, where the circumstances may not warrant an appointment.

175 The proposal does not support the election of the case facilitator by creditors, as can be done in the Chapter 7 and Chapter 11 trustee context, because the case facilitator is intended to be an independent representative of the court. See 11 U.S.C. § 702 (2006) (election of Chapter 7 trustee); *id.* § 1104(b)(1) (election of Chapter 11 trustee).

176 See *infra* Part V.B.

## 1. The Case Facilitator's Primary Objectives

Upon her appointment, the case facilitator's primary objectives would be to facilitate (i) the collection and sharing of information among the bankruptcy court, the debtor and the stakeholders; and (ii) negotiations among the parties regarding the debtor's reorganization or other appropriate resolution to the case. Accordingly, the case facilitator's first task would be reviewing the debtor's books and records, the events leading to the Chapter 11 case and the debtor's overall financial position.<sup>177</sup> The case facilitator would submit a factual accounting to the court and stakeholders based on this review,<sup>178</sup> and she would be obligated to update this report on a periodic basis, providing the court with information regarding the debtor's progress, potential issues and reorganization timeline.<sup>179</sup>

In addition to submitting factual reports, the case facilitator would be required to communicate with the key parties in the Chapter 11 case. The case facilitator should be in constant dialogue with the debtor and establish appropriate contact with representatives of the debtor's major stakeholder groups. The latter would include any official committee, as well as any ad hoc committees that are active in the case.<sup>180</sup> In fact, the case facilitator model may reduce litigation regarding official committee composition and requests for the

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177 The case facilitator's investigation powers would be similar to those of a Chapter 11 trustee or examiner. See 11 U.S.C. § 1104 (describing powers of trustee and examiner).

178 For example, the case facilitator could be required to submit its preliminary report within sixty days of the commencement of the case. This general timeframe would allow the case facilitator sufficient time to perform discovery and review of the debtor's books and records, yet present the report early enough so that the court and the parties can start to develop a meaningful exit strategy for the debtor. In addition, this timeframe could be expedited in a prepackaged Chapter 11 case. See *infra* Part V.C.

179 In general, quarterly reports likely would suffice, but this timeframe could be altered by the court on a case-by-case basis. In addition, the court could entertain requests to seal the reports, at least on a temporary basis, on a case-by-case basis to the extent that the reports contain sensitive, confidential or proprietary information. Although the Bankruptcy Code encourages full disclosure of all relevant information, the court may determine that information concerning potential claims, settlement negotiations and similar matters should be protected until an appropriate resolution of the matter is reached among the affected parties.

180 See Bo J. Howell, *Hedge Funds: A New Dimension in Chapter 11 Proceedings*, 7 DEPAUL BUS. & COM. L.J. 35, 46–51 (2008) (discussing participation of ad hoc committees in Chapter 11 cases).

appointment of additional official committees.<sup>181</sup> The case facilitator would be a contact point for all stakeholders.

## 2. The Case Facilitator's Role

The case facilitator would use her meetings with the debtor and stakeholders to gather and share information and assist the parties in assessing the strengths and weaknesses of their respective positions, the potential risks and costs associated with those positions, and other factors influencing the debtor's case. The debtor still would be the primary party responsible for developing and proposing a plan of reorganization.<sup>182</sup> The case facilitator would act primarily in its named role: reviewing the proposed plan options and working with the parties to help them identify the best option.<sup>183</sup>

Notably, the case facilitator would not independently assess or make recommendations to the bankruptcy court regarding the parties' positions or the debtor's reorganization options. This distinction is important to preserve the case facilitator's independence and avoid

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181 See, e.g., Kenneth N. Klee & K. John Shaffer, *Creditors' Committee Under Chapter 11 of the Bankruptcy Code*, 44 S.C. L. REV. 995, 1024–25 (1993) (“On the other hand, multiple committees can complicate negotiations, delay the reorganization process, and create additional administrative expenses to the debtor’s estate, particularly in terms of higher professional fees.”); Charles J. Tabb, *The Future of Chapter 11*, 44 S.C. L. REV. 791, 840 (1993) (“Within the creditor ranks, courts also can resist the temptation to appoint multiple committees. The savings would be in fees and in reducing bargaining costs.” (footnote omitted)); see also Gwynne, *supra* note 15, at 134 (explaining use of multiple committees and noting that “[o]ne of the main factors in decisions refusing to order the appointment of an additional committee is the expense associated with the additional committee, including the fees that would be incurred by the estate to pay for the committee’s professionals”).

182 The case facilitator proposal does not contemplate reducing the debtor's exclusive periods to file and solicit acceptances of a plan of reorganization. See 11 U.S.C. § 1121 (providing the debtor with an initial 120 days to file, and 180 days to solicit acceptances of, a plan of reorganization).

183 A “plan facilitator” concept was included in the recommendations of the Select Advisory Committee on Business Reorganizations (SABRE). See Karen M. Gebbia-Pinetti, *First Report of the Select Advisory Committee on Business Reorganization*, 57 Bus. LAW. 163, 167 (2001) (“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.”). The case facilitator's role in the plan process would be similar to the plan facilitator contemplated by SABRE's proposal, including in its functions to bring the parties to the negotiating table and make recommendations to the court regarding the debtor's restructuring options. See *id.* The case facilitator proposal would differ significantly, however, by introducing the neutral third party at the inception of the case and requiring that party to review and report on not only the circumstances surrounding the debtor's financial demise, but also the parties' disputes, progress, and related issues during the Chapter 11 case.

conflicts that might arise if she is asked to perform both judgmental and facilitative functions.<sup>184</sup> Although this type of hybrid role may be desirable in some cases, it would be the exception rather than the rule. As discussed below, this distinction also places the role of the case facilitator outside of that traditionally reserved for a trustee or examiner.

The limited role of the case facilitator in evaluating and recommending courses of action would not restrict the case facilitator's ability to signal information to the bankruptcy court and stakeholders. The case facilitator would necessarily evaluate the facts of the case in drafting her written reports for the court. The case facilitator's ability to send a negative signal to the court regarding a particular party or the process generally would encourage parties to cooperate more fully with the case facilitator.

The case facilitator would have the discretion to pursue her facilitator role in an informal or more formal mediation setting.<sup>185</sup> For example, if the parties are not cooperating as fully or timely as necessary, the case facilitator may elect to treat the matter as a formal mediation, requiring the affected parties to submit position statements.<sup>186</sup> These statements would identify the particular party's position, support for that position, suggestions for additional discovery, and the party's representative with authority to act on the party's

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184 See, e.g., Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 941 (1997) (discussing potential issues with a mediator serving both an evaluative and a facilitative function). The Article uses the term "judgmental" in lieu of "evaluative" in discussing the potential conflicts for a mediator in the bankruptcy context because any successful mediation in Chapter 11 will require the neutral to evaluate the merits and use her evaluative skills in fostering a consensus. Nevertheless, the Article does not contemplate an advisory role for the case facilitator in order to encourage more disclosure by the parties and mitigate concerns about adverse consequences from those disclosures. As discussed in Part V.E, this aspect of the case facilitator role distinguishes it from a trustee and examiner.

185 See discussion *infra* Part V.D; see also Robert E. Wells, Jr., *Alternative Dispute Resolution—What Is It? Where Is It Now?*, 28 S. ILL. U. L.J. 651, 652 (2004) (exploring status of alternative dispute resolution and describing alternative dispute resolution as "a large umbrella that encompasses numerous alternatives to litigation and contains too many permeations to fully enumerate"). According to Wells:

A sterile definition of mediation would read as follows: Mediation is a non-adversarial, non-binding and cooperative process for privately resolving disputes with the assistance of a trained, neutral third-party whose role is to promote communication between the parties to the dispute and to assist in the negotiation of the terms of resolution of that dispute.

*Id.*

186 See, e.g., ARIZ. LOCAL R. BANKR. P. 9072-8 (describing steps for formal mediation of dispute in bankruptcy case).

behalf.<sup>187</sup> The parties' representatives then would be required to attend one or more mediation conferences.<sup>188</sup> A failed mediation may require the court's intervention either to resolve the matter or, perhaps, to entertain motions to convert or dismiss the case or appoint a Chapter 11 trustee.

### 3. The Case Facilitator's Compensation

The case facilitator would be paid for her services from the bankruptcy estate and should be permitted to retain professionals to assist in performing her duties.<sup>189</sup> The terms governing case facilitator compensation and professional retention could be similar to those applicable to panel bankruptcy trustees.<sup>190</sup> For example, the compensation paid to the case facilitator could be tied to the value of the debtor's assets, and her ability to retain professionals and incur other expenses could be limited by the court based on the size and complexity of the case.<sup>191</sup> This type of scaled, flat-rate compensation scheme would help control costs. And like panel trustees, a case facilitator should be subject to removal for cause upon the request of the debtor or a party in interest or sua sponte by the court.<sup>192</sup>

#### B. *The Third-Party Neutral Panel*

The case facilitator proposal requires effective third-party neutrals. Effective third-party neutrals in turn need to be qualified and free from conflicts of interest. Accordingly, uniform standards should

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187 See, e.g., *id.* R. 9072-8(c) (stating “[n]ot less than seven days before the ADR Conference, each party shall submit directly to the mediator, and shall serve on all counsel and pro se parties, an ADR statement” and setting forth requirements for such submission).

188 See, e.g., *id.* R. 9072-8(d) (setting forth persons required to attend mediation conference).

189 See 11 U.S.C. §§ 327–328, 330–331 (2006) (describing a bankruptcy trustee's ability to retain professionals and those professionals' ability to seek compensation).

190 See *id.* § 326 (detailing compensation of bankruptcy trustees, which is tied in part to the amount of distributions to stakeholders); *id.* § 327 (authorizing bankruptcy trustees to retain professionals).

191 The Article suggests linking the case facilitator's compensation to the value of the debtor's assets (or alternatively the debtor's gross sales or revenues) rather than stakeholder distributions to avoid impairing the case facilitator's neutrality in the process. See *supra* Part V.

192 See 11 U.S.C. § 324 (providing for the removal of bankruptcy trustees); see also ARIZ. LOCAL R. BANKR. P. 9072-7(c) (setting forth circumstances that disqualify a mediator from service).

govern the third-party neutral panels established in each jurisdiction.<sup>193</sup>

The standards could follow those applicable to mediator panels under alternative dispute resolution programs. For example, licensed attorneys who practice in the bankruptcy field could apply to serve as a case facilitator. The applicant would be required to, among other things, certify that she is in good standing with the bar, has completed appropriate mediation training, and is willing to serve as a court-appointed case facilitator in at least one Chapter 11 case per year.<sup>194</sup> The third-party neutral panel could be an extension of the jurisdiction's existing panel of bankruptcy trustees.

Panel applicants also should understand that, when serving as case facilitators, they are an officer of the court, but they are *not* an advocate for any particular party in the Chapter 11 case. Panel applicants could be required to take an oath to that effect or certify their

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193 For example, the Bankruptcy Code provides uniform standards that govern the eligibility of a person to serve as a bankruptcy trustee. *See* 11 U.S.C. §§ 321–322.

194 For example, the alternative dispute resolution procedure adopted by the United States Bankruptcy Court for the District of Arizona sets the following criteria for mediators:

- (1) if the applicant is an attorney, be a member in good standing of the bar of any state or the District of Columbia, with at least five years of practice; or
- (2) if the applicant is an attorney, be a member in good standing of the bar of the Federal District Court of Arizona, with at least five years of practice; or
- (3) if the applicant is a panel trustee, be an active panel trustee in good standing with the office of the United States Trustee with at least five years of service as a panel trustee, or if retired, have been a panel trustee in good standing with the office of the United States Trustee with at least five years of service as a panel trustee;
- (4) not have been suspended, or have had a professional license or bond revoked, or have pending any proceeding to suspend or revoke such license or bond;
- (5) not have resigned from a professional organization or panel while an investigation was pending into allegations of misconduct which would warrant suspension, disbarment or professional license or bond revocation;
- (6) not have been convicted of a felony;
- (7) have completed appropriate mediation training, or have sufficient experience, in the mediation process;
- (8) be determined by the court to be competent to perform the duties of a mediator; and
- (9) be willing to serve as mediator in at least one matter during each quarter of each year, subject only to unavailability due to conflicts, personal or professional commitments, or other matters which would make such service inappropriate.

commitment to that charge on a periodic basis.<sup>195</sup> Any panel applicant who deviates from this basic principle should be removed from the panel and subjected to appropriate sanctions by the presiding court.

Once placed on the third-party neutral panel, panelists should be required to submit periodic disclosures to the court or the U.S. trustee regarding their active bankruptcy representations.<sup>196</sup> This disclosure will assist the court and the U.S. trustee in monitoring potential conflicts of interests. Moreover, if a panelist is approached to act as the case facilitator in a Chapter 11 case, she should be required to disclose immediately any actual or potential conflicts or relationships in the case. The case facilitator must be completely disinterested and free from conflict in any assigned case.

### C. Case Facilitator and Prepackaged Bankruptcies

The Bankruptcy Code permits debtors to solicit acceptances of a plan of reorganization prior to filing a Chapter 11 case.<sup>197</sup> This process commonly is called a prepackaged Chapter 11 case, and it typically results in a quick reorganization. Prepackaged Chapter 11 cases can be completed in as few as sixty days, provided there are no complications in the confirmation process.<sup>198</sup>

The case facilitator proposal does not undercut the value of prepackaged Chapter 11 cases. In fact, it may enhance that process and make it a more viable option for distressed companies. For example, the court could waive the case facilitator requirement in a prepackaged case. Alternatively, the debtor and its stakeholders could approach a member of its jurisdiction's third-party neutral panel prior to filing any case and seek her assistance in negotiating the prepackaged plan.<sup>199</sup> Debtors in the United Kingdom have invoked this type

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195 See *id.* R. 9072-6(e) (setting forth an oath for mediators).

196 A case facilitator should be a "disinterested person," as such term is defined under the Bankruptcy Code. See 11 U.S.C. § 101(14) (defining "disinterested person" to mean, among other things, that the person "is not a creditor, an equity security holder, or an insider" of the debtor).

197 See *id.* § 1126(b) (permitting prepetition solicitation of plan of reorganization under certain circumstances).

198 See generally Conrad B. Duberstein, *Out-of-Court Workouts*, 1 AM. BANKR. INST. L. REV. 347, 365 (1993) ("Since the prepackaged plan is negotiated *before* the Chapter 11 case starts, it can take advantage of all the benefits available under the Code without the detriments of a prolonged and expensive proceeding . . . ." (quoting Marc S. Kirschner et al., *Prepackaged Bankruptcy Plans: The Deleveraging Tool of the '90s in the Wake of OID and Tax Concerns*, 21 SETON HALL L. REV. 643, 663 (1991))).

199 See *supra* Part V.B.



of pre-filing involvement by a third party (i.e., the administrator) with some success.<sup>200</sup> A third-party neutral may even help the parties reach an out-of-court workout and avoid a Chapter 11 filing altogether. A third-party neutral would need to conduct any prepetition activities carefully and mindful of her duties as a potential case facilitator in the matter.

#### *D. Value of the Case Facilitator Proposal*

As a descriptive matter, the case facilitator proposal adds significant value to the Chapter 11 process. It provides the court with objective and timely status reports, which will help courts make more informed decisions. It provides an automatic investigation mechanism to uncover wrongful or illegal conduct that might have contributed to the debtor's financial distress. It allows more stakeholders to have a seat at the negotiating table by identifying a neutral court official to seek out, hear, and consider stakeholder concerns regarding the case. Finally, it enhances the alternative dispute resolution aspects of bankruptcy by introducing a trained mediator into the plan negotiating process.

As a practical matter, parties and critics likely will highlight the additional administrative layer added to the Chapter 11 process by the case facilitator proposal.<sup>201</sup> The proposal does add another party to the Chapter 11 process and imposes additional fees and expenses on the bankruptcy estate. The primary objectives of the proposal are, however, to streamline the process and improve communication, thereby fostering quicker reorganizations and less litigation. These objectives have the potential to reduce the overall cost of Chapter 11 cases and add value that offsets any expenses associated with the case facilitator's appointment.<sup>202</sup>

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200 See *supra* Part IV.C.

201 Chapter 11 cases are already extremely expensive, and the bankruptcy estate bears the overwhelming burden of these administrative costs. See STEPHEN J. LUBBEN, AM. BANKR. INST., CHAPTER 11 PROFESSIONAL FEE STUDY (2007) (extensive study of professional fees in Chapter 11 cases); see also 11 U.S.C. § 328 (providing that professionals retained by debtors, trustees and committees may be compensated by the bankruptcy estate).

202 See *supra* Part V.A; see also Flaschen, *supra* note 138, at 515 (“[A]n effective monitor could well *reduce* expenses in a case by substantially reducing the parties’ resort to expensive and wasteful adversarial litigation to resolve matters that would be addressed on a constructive basis in consideration of the independent appointee’s recommendations.”).

## 1. Using Mediation to Control Costs

Although not specifically contemplated by the Bankruptcy Code, courts have used techniques similar to mediation and plan facilitators in Chapter 11 cases.<sup>203</sup> Courts typically make these appointments pursuant to their inherent authority to manage their dockets, their limited equitable powers under § 105 of the Bankruptcy Code, and various rules encouraging alternative dispute resolution in the federal courts.<sup>204</sup> Some courts also allow the parties in bankruptcy cases to request mediation through their local bankruptcy rules.<sup>205</sup>

Courts typically invoke a mediation technique, either *sua sponte* or at the request of a party in interest, in cases where the parties have reached an impasse. For example, in the Chapter 11 cases of *In re R.H. Macy & Co.*,<sup>206</sup> the court appointed a third-party mediator after the debtor failed to propose a confirmable plan during the first two years of the case.<sup>207</sup> The court apparently was concerned that ongoing plan negotiations among the parties, without the intervention of an objective third party, would result in litigation and additional delay and expense.<sup>208</sup> Notably, the parties reached consensus on a plan of reorganization “[w]ithin approximately five months of the appointment of the mediator.”<sup>209</sup>

Courts also have used mediation techniques to resolve claims against the debtor, including in the *In re Lehman Brothers Holdings*

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203 See ROBERT J. NIEMIC, FED. JUDICIAL CTR., *MEDIATION IN BANKRUPTCY* (1998), available at [http://www.fjc.gov/public/pdf.nsf/lookup/bankrmed.pdf/\\$file/bankrmed.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/bankrmed.pdf/$file/bankrmed.pdf) (reporting results of survey regarding mediation practices in bankruptcy); Newsome, *supra* note 124, at 977–79 (discussing the increasing use of “case management and alternative dispute resolution . . . in the bankruptcy courts”); see also J. Thomas Corbett, *Mediation, Bankruptcy and the Bankruptcy Administrator*, 65 ALA. LAW. 410, 413 (2004) (describing use of mediation in bankruptcy cases); Gebbia-Pinetti, *supra* note 183, at 188–91 nn.41–47 (explaining use of mediation and alternative dispute resolution procedures in bankruptcy).

204 See Corbett, *supra* note 203, at 411–13.

205 ARIZ. LOCAL R. BANKR. P. 9072-1 (setting forth bankruptcy alternative dispute resolution program).

206 Ch. 11 No. 93 Civ. 4414, 1994 WL 482948 (Bankr. N.D.N.Y. Feb. 13, 1994).

207 *Id.*; see also *In re Eagle Picher Indus., Inc.*, 172 F.3d 48, 1998 WL 939869, at \*2 (6th Cir. Dec. 21, 1998) (unpublished table decision) (using mediator to facilitate plan negotiations).

208 See Harvey R. Miller, *The Changing Face of Chapter 11: A Reemergence of the Bankruptcy Judge as Producer, Director, and Sometimes Star of the Reorganization Passion Play*, 69 AM. BANKR. L.J. 431, 437 (1995); Cassandra G. Mott, *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, 207–10 (1998).

209 Corbett, *supra* note 203, at 412.

*Inc.*<sup>210</sup> Chapter 11 case and in the asbestos context.<sup>211</sup> These claims resolution facilities generally have enabled the bankruptcy estate to resolve a large number of claims on an expedited basis and at a cost-savings to the estate.<sup>212</sup> Although mediators do not always produce consensual or estate-maximizing resolutions, anecdotal evidence suggests that the potential benefits outweigh any potential burdens imposed by the additional administrative procedures.

## 2. Response to Potential Increased Costs

The case facilitator proposal seeks to draw on prior uses of mediation in bankruptcy and integrate mediation techniques into Chapter 11. The proposal would introduce mediation at the commencement of the case, and parties would expect and understand this element of the process. Consequently, Chapter 11 cases would not linger uncertainly for years before the court or an interested party introduced mediation concepts.

Overall, the case facilitator proposal has the potential to reduce rather than increase costs. The integration of mediation early in the Chapter 11 process could have substantial operational and cost-saving benefits for the debtor and the bankruptcy estate. In addition, as discussed in Part V.A.3, linking the case facilitator's compensation to asset value and limiting her expenditures would help ensure that costs correspond to the size and complexity of the Chapter 11 case.

### *E. The Case Facilitator Versus the Chapter 11 Trustee/Examiner*

Another potential critique of the case facilitator proposal is that the Bankruptcy Code already contemplates the appointment of a trustee if the parties act in bad faith or, in extreme circumstances, cannot

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210 Ch. 11 Case No. 08-13555 (JMP) (Bankr. S.D.N.Y.).

211 See Corbett, *supra* note 203, at 412 (explaining use of mediation to resolve claims disputes); Erin Marie Daly, *Mediation Ordered in Lehman Derivatives Feud*, LAW360 (Aug. 26, 2009), [http://www.law360.com/print\\_article/118654](http://www.law360.com/print_article/118654) (last visited Nov. 12, 2010) ("Judge James Peck of the U.S. Bankruptcy Court for the Southern District of New York agreed with Lehman Wednesday that compulsory mediation would reduce the number of disputes over the contracts . . ."); see also *A.H. Robins Co. v. Dalkon Shield Claimants Trust*, 164 F.3d 623, 1998 WL 726754, at \*1 (4th Cir. Oct. 16, 1998) (unpublished table decision) (explaining alternative dispute resolution procedures used to address products liability claims).

212 See Corbett, *supra* note 203, at 412 ("The claims resolution facility established in the *Greyhound* case resulted in 95 percent of more than 3,200 pre-petition tort claims being resolved through ADR.").

reach a consensus on a reorganization plan.<sup>213</sup> Alternatively, parties can request the appointment of an examiner to investigate the debtor's or other parties' conduct. In theory, courts simply could invoke these remedies more frequently. In practice, this expanded use of existing remedies—particularly Chapter 11 trustees—would meet intense resistance and would not enhance the communication and negotiation that are necessary to resolve Chapter 11 cases in an expeditious and cost-effective manner.

A Chapter 11 trustee, even when appointed with limited powers, is viewed as stripping the debtor of any meaningful say in the reorganization process and almost ensuring a sale or liquidation of the debtor's business.<sup>214</sup> Whether or not this perception is accurate, it permeates corporate America and much of the bankruptcy bar. This perception may relate to the history of Chapter 11, specifically Chapter X of the Bankruptcy Act.<sup>215</sup> Even if the role of the Chapter 11 trustee were changed substantively under the Bankruptcy Code, psychological barriers likely would prevent its successful implementation.<sup>216</sup>

More importantly, the case facilitator is significantly different in scope and purpose than a traditional bankruptcy trustee or examiner.<sup>217</sup> The appointment of a trustee or examiner involves finger-pointing and suggestions of misconduct; the appointment of a case

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213 See 11 U.S.C. § 1104 (2006) (grounds for appointing Chapter 11 trustee); Alces, *supra* note 87, at 136–37 (“The trustee remedy is specifically provided by the Code when the bankruptcy court or party in interest believes that the debtor’s management has engaged in ‘fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor.’” (quoting 11 U.S.C. § 1104(a))); see also discussion *supra* Part II.B.3.

214 See, e.g., Clifford J. White III & Walter W. Theus, Jr., *Chapter 11 Trustees and Examiners After BAPCPA*, 80 AM. BANKR. L.J. 289, 316 (2006) (explaining history to, and current status of, Chapter 11 trustees and observing that “[t]he distaste for chapter 11 trustee appointments shown by many bankruptcy courts early in the development of the case law under the Code was perhaps to be expected, given their experience in presiding over chapter XI cases under the Bankruptcy Act”); see also Alces, *supra* note 87, at 137 (discussing the flexibility in trustee appointments and the use of trustees with limited powers).

215 See Warren, *supra* note 20, at 371–73 (explaining the importance of perception in the utility of bankruptcy laws and noting that “[o]ne of the key reasons for the adoption of the 1978 Code was the widespread perception that the old Code was unworkable”).

216 See discussion *supra* Part II.B; see also Warren, *supra* note 20, at 371 (“In order to stimulate the debtor to initiate bankruptcy proceedings at an appropriate point when the business risks economic failure, there must be some incentive to attract the business into the bankruptcy process.”).

217 See *supra* Part V.A.2.

facilitator would not.<sup>218</sup> The case facilitator would not have authority to take control of the debtor's business or the Chapter 11 case. She likewise would not have authority to extinguish creditors' claims, convert the case to a liquidation or recommend a course of action to the court. Rather, her primary focus would be facilitating communication and negotiation among the parties. Consequently, the case facilitator should not be viewed as a threat to the autonomy of the DIP or any other party in the Chapter 11 case.

In addition, cases still may warrant the appointment of a traditional Chapter 11 trustee.<sup>219</sup> The case facilitator's reports may reveal facts supporting the appointment of a trustee or the pursuit of claims against certain parties. The case facilitator would not recommend or pursue those actions, but she may provide relevant information to the court and stakeholders. In that respect, the case facilitator may provide sufficient information to the parties that may eliminate the need for any examiner.<sup>220</sup>

#### *F. Fostering the Dual Goals of Chapter 11*

The goals of Chapter 11 generally are defined as rehabilitating the debtor and maximizing returns to creditors.<sup>221</sup> The case facilitator proposal would help courts and debtors achieve these dual goals. As discussed above, it would introduce an objective third party into the process at an early stage, providing all parties with more information and in turn a greater ability to assess the debtor's restructuring options.<sup>222</sup> This attribute alone may help avoid prolonged disputes about the basic question of whether the debtor should reorganize or liquidate.

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218 See *supra* note 174 and accompanying text.

219 The case facilitator's meaningful service to the court will turn, in part, on her receiving accurate and complete information from all parties. That type of full disclosure likely will not occur if information provided to the case facilitator might be used against the party by the case facilitator in a subsequent trustee role. See discussion *supra* Part V.A; see also 11 U.S.C. § 321(b) (2006) ("A person that has served as an examiner in the case may not serve as trustee in the case.").

220 Although the case facilitator would not judge the parties' conduct as often done by an examiner, other parties in the Chapter 11 case could perform that function with the information provided by the case facilitator. Consequently, the case facilitator proposal could eliminate the additional cost associated with a separate examiner but continue the benefits realized in cases from the appointment of examiners. See, e.g., *In re Adelphia Commc'ns Corp.*, 336 B.R. 610 (Bankr. S.D.N.Y. 2006) (reviewing the use of examiners in several large, complex Chapter 11 cases).

221 See *supra* Part I.

222 See *supra* Part V.A.

Moreover, the proposal's focus on conflict resolution may preserve value for the estate. Conflicts and competing restructuring plans among the debtor and the stakeholders can cost the estate millions; money otherwise available for investment in the debtor's operations or payments to creditors.<sup>223</sup> Either use would better serve the underlying goals of Chapter 11. In sum, the case facilitator proposal seeks to provide the court, the debtor, and the stakeholders with much-needed information and a dispute resolution framework to foster the parties' opportunities for success.

#### CONCLUSION

Chapter 11 and the U.S. DIP model are important tools for distressed corporations. They offer a debtor the ability to reassess its operational structure and financial obligations in a relatively safe and stable environment, at least at the outset of the case. This environment can change quickly on a debtor, however, under internal pressures from the board or management or, more likely, external pressures from key stakeholders. The Chapter 11 process and debtors could benefit from an objective reporting and mediation tool—i.e., a case facilitator.

The case facilitator proposal is based on a third-party neutral platform and would not displace the traditional role of DIPs or stifle the voice of stakeholders in the process.<sup>224</sup> Rather, it would place an objective party at the negotiation table to enhance communication among the parties themselves and the court, and it would integrate mediation techniques into the process to facilitate quicker and less litigious resolutions.<sup>225</sup> The case facilitator proposal would not eliminate all conflict in Chapter 11 cases. It would, however, better balance and mitigate competing interests in the case and better equip the court to evaluate any unresolved conflict.

Accordingly, as courts and policymakers consider the utility of Chapter 11, they should consider implementing the case facilitator proposal. Courts arguably could invoke this technique on a case-by-case basis under existing provisions of the Bankruptcy Code, but it would be a more effective mechanism if adopted on a uniform basis as part of the Bankruptcy Code itself.<sup>226</sup> The early intervention of a third-party neutral into the reorganization process could save critical time and money and, consequently, the debtors themselves.

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223 See *supra* Part III.

224 See *supra* Part V.

225 See *supra* Part V.

226 See *supra* Part V.D.