## Federal Cases



## State Cases



## Federal Statutes



## State Statutes



## Other Authorities

Liquidation, 75 Am. Bankr. L.J. 3, 17, 25 (2001) 214
Mary Josephine Newborn, The New Rawlsian Theory of Bankruptcy Ethics, 16 Cardozo L. Rev. 111 (1994) 215
Mass Tort Bankruptcy: A Preliminary Inquiry, 3 Chap. L. Rev. 43 (2000) 214
Natalie D. Martin, The Insolvent Life-Care Provider: Who Leads the Dance Between State Continuing-Care Statutes and the Federal Bankruptcy Code, 61 Ohio State L. J. 355 (2000) 214
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Robin L. West, The Literary Lawyer, 27 Pac. L.J. 1187, 1200 (1996) 207
Ronald J. Mann, Explaining the Pattern of Secured Credit, 110 Harv. L. Rev. 625, 633 (1997) 210
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Scott Cousins, Chapter 11 Asset Sales, 27 Del. J. Corp. L. 835 (2002) 212
Steven L. Harris & Charles W. Mooney Jr., Revised Article 9 Meets the Bankruptcy Code: Policy and Impact, 9 Am. Bankr. Inst. L. Rev. 85, 86 (2001) 219
Trading Claims: Participations and Disputed Claims, 15 Cardozo L. Rev. 773 (1993) 212
Twilight, 56 Stan. L. Rev. 673, 691 (2003) 211
William L. Fishman, Property Rights, Reliance, and Retroactivity Under the Communications Act of 1934, 50 Fed. Comm. L.J. 1 (1997) 220
Zero-Sum Game, 19 Cardozo L. Rev. 1635, 1741 (1998) 210

## A RESPONSE TO J.J. WHITE'S DEATH AND RESURRECTION OF SECURED CREDIT:

## FINDING SOME TREES BUT MISSING THE FOREST

KAREN GROSS*

In his paper "Death and Resurrection of Secured Credit" ("Death and Resurrection"), Professor White addresses the treatment of secured creditors under the Bankruptcy Code and how that treatment has changed over the life of the Code and, of equal importance, how that treatment differs from that which existed under the Bankruptcy Act.[1] Since I am responding to his paper's theses, I want to restate them as I understand them— since many of my observations are directed at not only the theses themselves but at some of the assumptions that I take to be underlying those theses.

As I understand his position, Professor White asserts that the "liberals" within the academy and in Congress, urged on by the Commission and significantly influenced by

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* This response was prepared for the ABI's celebration of the Bankruptcy Code's 25th birthday. I want to thank Professor Lois Lupica for her remarkable insights and suggest that many of the good ideas in this paper are hers, not mine – although I take the blame for anything that is wrong and "not good." JoAnn Brighton, Esq. also provided me with insights from the trenches. Finally, I want to thank my New York Law School student research assistants, Serena Sayani and Scott Morris, who worked with me on crafting this response.

[1] In any academic work comparing the Act with the Code, it is worth reviewing, yet again, DAVID T. STANLEY & MARJORIE GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM (Brookings Inst. 1971).

the NBC, wanted to diminish the role of secured creditors in large business cases under the Code.[2] They tried to achieve that result through, among other things, the expansion of the automatic stay and the discretionary use of adequate protection, the ability of debtors-in-possession to sell and use collateral with ease and often without judicial intervention, the limitations on interest payments for under-collateralized lenders, the protracted period of debtor plan exclusivity, the ability to "cramdown," the expansion of preference law, and the ability to prime existing lenders with post-petition liens, among other things.[3] Professor White then goes on to assert that the "liberals" got duped. Stated differently, over the life of the Code, for the past quarter century, the rights of secured creditors have expanded, not contracted. He specifically asserts that the rights of secured creditors are not only stronger than anticipated; their rights are greater than those that existed under the Act. That pro-secured creditor shift, I take it, is something as to which he approves.

In developing his argument, Professor White focuses primarily on (a) changing judicial attitudes toward chapter 11 publicly traded debtors (growing less sympathetic with the passage of time); (b) the role of securitization as an anti-bankruptcy device; (c) the use of leases as a substitute for secured debt given the Code's proffered benefits for lessors as distinguished from secured creditors; (d) the easy sale of assets outside the plan ("early liquidation"), which curbs costs; (e) availability but lack of utilization of the "cramdown" provisions; (f) the privately negotiated agreements between debtors-in-possession and Debtor-in-Possession ("DIP") lenders that, through clever legal devices, shore up old debt in exchange for DIP financing agreements that are then approved in friendly (and carefully selected) judicial fora; (g) the all but invisible role of the SEC to police DIPS and secured lenders; and (h) the advent of the CRO (Chief Restructuring Officer) as the secured creditors' eyes and ears.

At the end of Death and Resurrection, Professor White concludes that, in all actuality, the chapter 11 process is not a judicial process.[4] Instead, it is private marketplace for publicly traded companies to reorganize. In essence, he concludes that the sophisticated players in the game – the DIP, the secured lenders, the vulture funds, the lawyers and the bankruptcy professionals – have "captured the flag." Ultimately, he concludes, chapter 11 serves the needs and goals of private interests and the "pros" (which he takes to include the judiciary). The Code, he observes, has enabled those with economic power to prevail. Thus, the original quest of the "liberals" at the Code's inception has been defeated.

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[2] Professor White's paper is exclusively directed to those chapter 11 cases involving publicly traded companies. I could point out and develop the role of chapter 11 for non-publicly traded companies (indeed, the vast majority of chapter 11 cases do not involve publicly traded companies). Thinking about chapter 11 from this broader, more realistic perspective would certainly expand, and I think alter, the substance of the discussion. But, that would be another paper and another project. My goal here is to respond "on the merits" to what Professor White has set as his parameters. So, my remarks, like his, are directed largely at those "big" chapter 11 cases that capture the headlines.

[3] *See* James J. White, *Death and Resurrection of Secured Credit*, 12 AM. BANKR. INST. L. REV. 1, 139–53 (2004) (describing these identified items and detailing how they played out under early years of Code).

[4] White, *supra* note 3, at 187–92 (concluding chapter 11 process more closely resembles market fostered by Code).

Stated most simply, I am not convinced that Professor White has accurately described the dynamics of chapter 11. Nor am I convinced that what he accurately observes, as described in his many descriptive passages, means what he thinks it does. Moreover, I think that Professor White has carefully selected what he observes and has failed to note or factor into his analysis a host of others things that occur in chapter 11 cases. So, within the paper "Death and Resurrection," I see three kinds of problems: (1) misreadings of what is happening in chapter 11; (2) misplaced emphasis on what occurs and has occurred in chapter 11; and (3) failure to address other key aspects of chapter 11. It is these points that I will address, albeit briefly, in this response.[5] That said, I am not suggesting that chapter 11 is perfect as presently crafted or as crafted in 1978; those who have read my work on bankruptcy certainly know that I believe there is room for improving chapter 11 in a myriad of ways.

Before I turn each of these problems, I want to address one other feature of Professor White's paper and that is its sarcasm and cynicism—all reflected in its tone, word and phrase choice. As academics, we all choose how we want to present ideas, how we want to make our points, and how we want to convince others that we are right and they are wrong. Some of us use a pontificating tone; others use words that are largely inaccessible to the uninitiated (lawyers and judges and newer academics); others search for a more "down to earth" tone; still others use hyperbole; and some tell stories or reference anecdotes. I am not and never have been as fan of "nastiness" as a form of persuasion, although I know some academics have made a career of making their point (however good it is) at the expense of others.[6] Thus, it should not come as a surprise that I neither like, nor find persuasive, the "nastiness" in this particular paper of Professor White's; i.e. "employees . . . with tears in their eyes . . . ."[7] (suggesting that emotions are either unfelt or inappropriate); "the DIP cannot be a complete whore . . . ."[8] (suggesting that DIP's can be partial whores and hence sell themselves, at least in part); "to see the petit bourgeoisie—the trade creditors—do better . . . ."[9] (suggesting that trade creditors are not as worthy as other creditors). Perhaps some language in Death and Resurrection is an effort to create humor, i.e. "even the slowest DIP lawyer . . . ."[10] Some language choice might be viewed as favoring colloquialisms and informality, i.e. referencing bankruptcy professionals as "pros."[11] But, as I tell my first year students, and as Marshall McLuhan so successfully observed decades ago,

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[5] I use only selected examples herein and if readers have other examples upon reading this paper, I welcome them as "friendly" amendments.

[6] *See* Robin L. West, *The Literary Lawyer*, 27 PAC. L.J. 1187, 1200 (1996) ("The anti-positivistic literary lawyer runs the risk of distracting the lawyer not only from the political root of the law which surrounds her, but also of the particular ideal—justice—which remains her distinctive goal.").

[7] White, *supra* note 3, at 150.

[8] *Id*. at 190. At a minimum, Professor White might have considered employing the contemporary and more apt phrase "sex workers" to describe those who sell themselves.

[9] *Id*. at 140.

[10] *Id*. at 143.

[11] *Id*. at 140 and throughout the text.

word choice matters and language signals something in terms of meaning and intent.[12] So, apart from the actual legal arguments presented in Death and Resurrection, there is a lack of sympathy evidenced in this paper for a wide range of chapter 11 players. While reasonable people can differ regarding the legal merits of any particular constituency in chapter 11 cases, or in society as a whole for that matter, demeaning others does not prove that those demeaned deserve to be deprecated. Saying something is so does not make it so.

Professor White's entire paper rests on the assumption that the heart of chapter 11 is the resolution of the claims of secured creditors. Indeed, as he describes it, the heart of the chapter 11 game is the negotiation between the secured creditors and the DIP.[13] Everyone else whom he mentions—the trade creditors, the equity holders, the employees—are just bit players in a bigger drama. Based on my experience as a lawyer under both the Act and the Code (only briefly under the Act—I am not that old); my work as a Special Representative for almost four years in the *Integrated Resources* chapter 11 case; my role as an expert witness and consultant in large chapter 11 cases; my involvement with practitioners on various bar association committees, projects and studies; and last (although certainly not least) my work as an academic, that is *not* how many chapter 11 cases work. Yes, secured creditors clearly play a role in chapter 11 cases. Obviously they do. In certain cases, they *are* the central players. Yes, in some cases, the DIP financing order involves secured creditor control (and perhaps over-reaching). But, secured creditors are not the star players in the chapter 11 drama in many cases.[14]

Importantly, Professor White assumes that all secured creditors are in concert with each other and that while shareholders, employees, and unsecured creditors want to prolong cases, secured creditors all want speed and liquidity.[15] This position fails to recognize the lack of homogeneity among secured creditors, a result of a complex and changing marketplace of potential lenders. Not all secured creditors have the same motivations, the same incentives, and the same directives from their superiors.[16] Hence,

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[12] *See* MARSHALL MCLUHAN & QUENTIN FIORE, THE MEDIUM IS THE MESSAGE 45 (Ginko Press 1967) (stating meaning is determined by piecing together sequential facts or concepts, not by departmentalizing and isolating words).

[13] *See generally* White, *supra* note 3 (discussing relationship between secured creditors and DIP within chapter 11).

[14] *See generally* LYNN M. LOPUCKI, STRATEGIES FOR CREDITORS IN BANKRUPTCY PROCEEDINGS 675 (Aspen Pub. 2d ed. 1991) (discussing role of other players in proceeding such as debtor-in-possession, trustee, and committee of creditors). In a recent piece in THE DEAL, Harvey Miller observes that the role of the debtor and the inclination toward reorganization has diminished over time (ostensibly addressing large cases only) and that observation seems accurate to me; that said, the cause of that shift is not, *a fortiori*, the increased role and power of secured creditors. Matt Miller & Terry Brennan, *Creditors in Possession*, THE DEAL, Jan. 12, 2004, at 25–27; *see also* Harvey Miller, *The Changing Face of Chapter 11: The Reemergence of the Bankruptcy Judge as Producer, Director and Sometimes Star of the Reorganization Passion Play*, 69 AM. BANKR. L.J. 431 (1995).

[15] White, *supra* note 3, at 146 ("Long delays are hurtful to secured creditors . . . because they increase the risk that collateral will decline in value").

[16] *See, e.g.*, *In re* Pub. Serv. Co., 89 B.R. 1014, 1020 (Bankr. D. N.H 1988) (recognizing "diverse and sometimes conflicting interest[s]" of creditors in chapter 11 proceeding (citing *In re* Shaffer Gordon Assocs., 40 B.R. 956 (Bankr. E.D. Pa. 1984))).

even in those cases in which the "secured creditors" play a starring role, it is not necessarily *all* the secured creditors. Today, there are hard fought inter-se fights among secured creditors. For example, within the pool of lenders to a debtor entity, some lenders may have internal bank guidelines that differ from those of lenders who are not banks. Even among bank lenders, the approach for dealing with a company may not be identical depending on a particular bank's stake in the case, its own internal bank approach, its own financial stability.[17] In other words, a single debt tranche may have creditors with different motives, interests and policies.[18] A quick look at the docket sheets in many chapter 11 cases demonstrates that. But, that is not my main point.

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[17] *See* Kenneth N. Klee & K. John Shaffer, *Creditors' Committees Under Chapter 11 of the Bankruptcy Code*, 44 S.C. L. REV. 995, 1029 (1993):

> Of course, given that secured creditors generally have interests in discrete items of collateral, their interests often do not align well with other holders of secured claims. Moreover, with the exception of relatively small secured creditors, such as the typical holders of statutory liens, secured creditors often tend to be financial institutions that generally do not need (or want) an official committee to represent their interests. Nevertheless, a secured creditors' committee may be useful in some cases such as those with widely held secured debt.

*Id.; see also In re* Cumberland Farms, Inc., 142 B.R. 593, 595 (Bankr. D. Mass. 1992) ("The Lenders lack of commonality of security interests is simply inconsistent with any collective representation of their secured claims."); *In re* Wekiva Dev. Corp., 22 B.R. 301, 302 (Bankr. M.D. Fla. 1982) (declining secured creditor's committee because secured creditors interests are rarely identical).

[18] *See* LOPUCKI, *supra* note 14, at 683 ("Secured claims vary widely in their rights and vulnerabilities.").

My point is that the role of secured credit in the world of capital markets is not what it was when the Code was developed. Indeed, one of the huge changes in the world affecting publicly traded companies since the late 1970s is the type of debt that public (and private) companies carry.[19] Let me give one or two examples. Traditional secured lending (which is basically what Professor White describes) is asset- based lending used by companies to obtain (among other things) relatively short-term monies for working capital. But, conventional secured lending is not always available, particularly for companies where their current and future wealth is found in their cash flow, not their hard assets.[20] It is in this context that there has been enormous development in the bond market, particularly in the high yield debt market, and much of the high yield debt that is issued is unsecured.[21] Specifically, the market size of the U.S. high yield market in 1978, the year before the Code went into effect was $26 billion.[22] With some ups and downs, the market size of the U.S. high yield market in 1992 was $205 billion.[23] In 2000, the market size of the U.S. high yield bond market was $668 billion.[24] It is reported that somewhere around 20% of the corporate bond market is high yield debt.[25] And, perhaps equally significant for our purposes, there are defaults and distressed debt in the market.[26] Indeed, the work of Edward Altman, who studies the high bond market, shows that the size of defaulted and distressed high yield debt has increased above the early 1990 figures.[27] A quick look at a compendium of data related to bankruptcy published in *The Bankruptcy Yearbook and Almanac* signals the relevance of bond issues in corporate bankruptcy today.[28]

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[19] *See generally* David Gray Carlson, *Secured Lending as a Zero-Sum Game*, 19 CARDOZO L. REV. 1635, 1741 (1998) (critiquing secured lending as profitless transaction for all parties); Ronald J. Mann, *Explaining the Pattern of Secured Credit*, 110 HARV. L. REV. 625, 633 (1997) (expounding mechanisms "by which secured credit can lower and raise the costs of lending transactions"); Robert E. Scott, *The Truth About Secured Financing*, 82 CORNELL L. REV. 1436, 1464–65 (1997) (discussing political economy at time of enactment of Bankruptcy Code and subsequent application of Code). For a thoughtful discussion of this topic and the absence of empirical data on secured credit and bankruptcy, see Lois R. Lupica, *An Empirical Approach to Understanding the Impact of Revised Article 9* [hereinafter *An Empirical Approach*] (unpublished manuscript, on file with author).

[20] *See* Lynn M. LoPucki, *The Unsecured Creditor's Bargain*, 80 VA. L. REV. 1887, 1891 (1994) ("'[C]ash-flow surfing' occurs in the virtual absence of unencumbered assets or income."). *See generally* Peter A. Gish, *Project Financing of Renewable Energy Projects in Europe: An Improving Market*, 22 SUFFOLK TRANSNAT'L L. REV. 405 (1999); Ronald J. Mann, *Secured Credit and Software Financing*, 85 CORNELL L. REV. 134 (1999).

[21] *See* Edward I. Altman, THE ANATOMY OF THE HIGH YIELD BOND MARKET (1998), *available at* http://pages.stern.nyu.edu/~ealtman/anatomy.pdf (last visited May 2, 2004) (analyzing growth of high yield bond market from 1978 through to 1997).

[22] CREDIT SUISSE FIRST BOSTON, AN INTRODUCTION TO HIGH YIELD BONDS, Exhibit 18 (2001) *available at* http://www.rmf.ch/introduction_to_hig.pdf (last visited May 2, 2004) (depicting consistent yearly increase in market size and new issue volumes between years 1977 through 2000).

[23] *Id*.

[24] *Id*.

[25] *Id*. at Exhibit 19.

[26] *See* Altman, supra note 21, at Fig. 2.

[27] Professor Altman has written extensively on this subject. For a quick summary, see Edward I. Altman, *Deja Vu All Over Again*, STERN BUSINESS (Spring/Summer 2000), *available at* http://www.stern.nyu.edu/Sternbusiness/spring_2001/deja.html (last visited May 5, 2004).

[28] THE 2003 BANKRUPTCY YEARBOOK & ALMANAC (Christopher M. McHugh, ed., 13th ed. 2003).

What this means is that the real players in the chapter 11 game are not just the secured creditors. There was virtually no secured debt in the WorldCom chapter 11 case, to name just one example. Bondholders of various stripes have a role in large chapter 11 cases and bondholder participation, including through committees, is not uncommon.[29] Moreover, with complex corporate structures and new legal entities, such as LLCs, not even in the mind of those creating the Code and the creativity of those in the financial markets in terms of developing new products, there are a vast array of interests that must be balanced in contemporary chapter 11 cases.[30] These developments occurred not because of chapter 11; they occurred as a function of our capital markets and the development of those markets. They, indeed, have changed the nature of what occurs in chapter 11 cases; again, however, that is not a change necessarily based on the role of secured creditors.[31] So, today, real chapter 11 cases must deal with a vast array of new entities and new financial products that have matured or invented since the Code's enactment.[32]

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[29] This trend is revealed by looking at the websites of various law firms involved in large chapter 11 cases. These websites specifically mention representation of bondholder interests, sometimes mentioning the names of specific clients represented. See, for example, the website of Gibson Dunn & Crutcher at www.gdclaw.com, the website of Anderson Kill & Olick at www.andersonkill.com, the website of Vinson & Elkins at www.vinson-elkins.com. *See also* *In re* Marvel Entm't Group, Inc. 209 B.R. 832, 840 (Bankr. D. Del. 1997) (lifting automatic stay as to allow bondholders and Indenture Trustee capable of voting their pledged shares to replace debtor's board of directors); Don S. De Amicis, *Bondholder Workouts In and Outside of Bankruptcy*, 12 J. BANKR. L. & PRAC. 37, 39 (2003) ("It is not uncommon for bondholders to represent the bulk of the unsecured debt of a debtor, and getting a consensus from the bondholder group on how to proceed is often critical.").

[30] *See* *In re* Enron Corp., 279 B.R. 671, 690 (Bankr. S.D.N.Y. 2002) ("No two creditors have identical interests . . . and the Code implicitly recognized that fact by providing a procedural framework for handling the various divergent interest of the parties to a bankruptcy." (quoting Official Unsecured Creditors' Comm. v. Stern (*In re* SPM Mfg. Corp.), 984 F.2d 1305, 1317 (1st Cir. 1993)); *see also* Matt Miller & Terry Brennan, *Creditors in Possession*, THE DEAL, Jan. 12, 2004, at 25–27 ("[I]f the high yield [bond] market stops for any reason, we are going to see a lot of bankruptcies." (quoting Harvey Miller, former head of major bankruptcy department, now investment banker and adjunct professor at NYU School of Law)).

[31] *See* Douglas G. Baird & Robert K. Rasmussen, *Chapter 11 at Twilight*, 56 STAN. L. REV. 673, 691 (2003) ("[T]he dominant feature of the large corporate Chapter 11 today is the asset sale . . . . Asset sales preserve a business' going-concern value in a way that undercuts the liquidation/reorganization dichotomy that marks much discussion about bankruptcy law."); Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L. REV. 751, 751 (2002) ("Corporate reorganizations have all but disappeared. Giant corporations make headlines when they file for Chapter 11, but they are no longer using it to rescue a firm from imminent failure. Many use Chapter 11 merely to sell their assets and divide up the proceeds."). *See generally* *In re* Lionel Corp., 722 F.2d 1063 (2d Cir.1983) (discussing role of secured creditors in present-day bankruptcies); David A. Skeel, *Markets, Courts, and the Brave New World of Bankruptcy Theory*, 1993 WIS. L. REV. 465 (1993).

[32] *See* Lucian Arye Bebchuk, *A New Approach to Corporate Reorganizations*, 101 HARV. L. REV. 775, 777–81 (1988) (discussing division problem in corporate reorganization); Charles J. Tabb, *The Future of Chapter 11*, 44 S.C. L. REV. 791, 848 (1993):

> One device that has become more popular in the 1980s and 1990s is the prepackaged plan, or 'pre-pack.' In a pre-pack, the terms of the plan are agreed to, and the acceptances are solicited and obtained, prior to the filing of the bankruptcy case . . . The big advantage of a pre-pack is that the case can be in and out of bankruptcy court very quickly and thus the costs of the proceeding are correspondingly low.

*Id.*; Suniati Yap, *Investing in Chapter 11 Companies: Vultures or White Knights?* 2 SW. J. L. & TRADE AM. 153, 153–54 (1995):

There is an important related point. Professor White seems to assume that the players in the game remain constant. In other words, the secured and unsecured creditors who exist pre-bankruptcy exist post-bankruptcy. This is a flawed assumption. There is a remarkably robust secondary market for distressed debt.[33] There are a number of entities out there willing to purchase existing secured and unsecured creditor positions. These purchasers do not necessarily share the incentives or motives of the debt sellers. Indeed, while some vulture funds may favor speed and liquidity in a chapter 11 case and mark to market, others favor a longer-range strategy. Even within acquirers, there are not consistent positions. So, pre-petition lenders that seemingly had similar preferences in terms of outcome, now have very different incentives. This is relevant because Professor White assumes that secured lenders who lent pre-petition and seek to lend post-petition, have huge leverage over the debtor.[34] But, some of the acquirers of secured debt may have no interest in DIP lending. Indeed, some acquirers may not even be permitted to lend pursuant to their own institutional guidelines. Stated differently, some of the existing characters have been replaced by entities that can hardly be described as their "understudies;" the secured creditors of old are being replaced by a new breed of secured creditor.

There are then a host of new players in the chapter 11 drama. Claims acquirers are one such group, recognizing that there is not homogeneity within that group.[35] And, there are other new players in the drama. Entities are increasingly interested in acquiring a debtor's assets; these entities are not the original creditors. Instead, they are independent third parties seeking to acquire assets that may be put to other uses, such as combining them with the assets of healthier companies.[36] These asset-purchasers exercise real power in chapter 11 cases as the prices they are willing to pay and the conditions upon what they purchase affect the outcome of the chapter 11 case and

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> Huge leverage buyouts in the 1980's created the opportunity for investment in distressed companies. These "discount investors or security buyers" otherwise known as "vulture investors" acquired companies by the "purchase of debt or other securities for less than face value . . . . By acquiring claims against a company, these investors generally hope to profit by influencing, if not controlling the reorganization to ensure that their claims are treated favorably.

*Id.*

[33] *See* Salovaora v. Eckert, No. MRS C-29-94, 1998 WL 34075425, at *16 (N.J. Super. Ct. Ch. Div. July 14, 1998) ("'Distressed securities' funds invest in the debt (often in public secondary markets) of companies distressed by excessive debt burdens."). *See generally* Joy Conti Flowers et al., *Claims Trafficking on Chapter 11 – Has the Pendulum Swung Too Far?*, 9 BANKR. DEV. J. 281 (1992); Chaim Fortgang & Thomas Moers Mayer, *Developments in Trading Claims: Participations and Disputed Claims*, 15 CARDOZO L. REV. 773 (1993); Chaim Fortgang & Thomas Moers Mayer, *Developments in Trading Claims and Taking Control in Chapter 11*, 12 CARDOZO L. REV. 1 (1990). As an interesting aside, this secondary market is not limited to corporate debt; there is a growing market for trading of consumer debt. *See* www.debtmarketplace.com (last visited May 8, 2004).

[34] *See* White, *supra* note 3, at 175 (stating debtors often lack bargaining power when entering into contracts with secured lenders).

[35] *Id.; see also* 6 BANKR. SERV. L. ED. § 53:40 (2003) (noting acquisition of claims is common practice in bankruptcy proceedings).

[36] *See* discussion *supra* note 32 and accompanying text; 2C BANKR. SERV. L. ED. § 20:75 (2003) (stating court will approve assets purchase agreement by third party, absent showing of bad faith). *See generally* Scott Cousins, *Chapter 11 Asset Sales*, 27 DEL. J. CORP. L. 835 (2002).

define the surviving entity—if there is one that survives. So, negotiating with this proverbial "white" knight, whose motives may or may not be consonant with those of the DIP, is often critical to the secured creditor's repayment. So, in these instances, it is the asset purchasers, not the secured creditors, that exercise control.

While I am addressing market changes, let me make one additional related point regarding securitizations, which Professor White does mention and address. Securitization transactions and their proliferation are not the result of bankruptcy.[37] Securitizations were not specifically created (as I understand this industry) to deal with bankruptcy or to permit secured lenders to circumvent the Code. Indeed, the vast majority of securitization transactions operate just fine—if one defines "fine" as not being involved with defaults and bankruptcy. As I view this industry, it was created because it made economic sense in that it provided borrowers with cheaper ways to obtain monies and enabled lenders to lend with diminished risk.[38] Whether we have developed the best way of treating these transactions within bankruptcy is another question and one deserving of considerable thought.[39] But, to suggest, as does Professor White, that securitizations are what enabled secured creditors to "game" the chapter 11 system is to invert the cause/effect relationship. Chapter 11 is not the big fish here; how a chapter 11 debtors' assets and secured creditors with interests in those assets will be treated in chapter 11 are by-products of the securitization industry. Now, to be sure, there are recent efforts in proposed bankruptcy legislation to insulate these securitization transactions and to protect the bankruptcy remote entities that are in existence to support these transactions.[40] The wisdom of these approaches is worthy of our attention.

So, in addition to missing the changing state of the debt market, Professor White's approach fails to recognize some of the ways in which chapter 11 is now being used – ways that were not contemplated when the Code was crafted. For example, the use of chapter 11 as a vehicle for addressing mass torts cannot be ignored when one thinks about the Code and secured creditors. In cases involving mass torts, courts had to take into account the interests of "other" parties—parties deeply affected by the conduct of the debt, whether or not deliberate.[41] The creation of channeling injunctions, the role of

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[37] *See, e.g.*, Lois R. Lupica, *Circumvention of the Bankruptcy Process: The Statutory Institutionalization of Securitization*, 33 CONN. L. REV. 199, 200 (2000) (asserting recent modifications of Article 9 had significant impact on innovation of securitization).

[38] *See id*. at 204 (stating Article 9 facilitates commercial transactions).

[39] *See id*. at 225–42 (analyzing risks of proposed amendments allowing secured creditors to avoid bankruptcy proceeding). *See generally* Edward Janger, *Muddy Rules for Securitizations*, 7 FORDHAM J. CORP. & FIN. L. 301 (2002); *An Empirical Approach*, *supra* note 19; Lois R. Lupica, *Revised Article 9, The Proposed Bankruptcy Amendments and Securitizing Debtors and their* Creditors, 7 FORDHAM J. CORP. & FIN. L. 321 (2002); G. Ray Warner, *The Anti-Bankruptcy Act: Revised Article 9 and Bankruptcy*, 9 AM. BANKR. INST. L. REV. 3 (2001).

[40] *See* sources cited *supra* note 39.

[41] *See In re* Amatex Corp., 755 F.2d. 1034, 1043 (3d. Cir. 1985) (including future claimants in bankruptcy proceeding as parties in interest); *In re* UNR Indus., Inc., 725 F.2d 1111, 1119–20 (7th Cir. 1984) (refusing to order representation of future claimants); *In re* Johns-Manville, Inc., 36 B.R. 727, 742–43 (Bankr. S.D.N.Y. 1984) (rejecting motion to dismiss and finding future claimants interests will be significantly impacted by bankruptcy proceeding); Kathryn R. Heidt, *Products Liability, Mass Torts and Environmental Obligations in Bankruptcy: Suggestions for Reform*, 3 AM. BANKR. INST. L. REV. 117, 128–29 (1995) (discussing treatment of

the Special Representative, and the appointment of examiners to speak for those who were injured cannot be downplayed.[42] These added parties have played a significant role in how chapter 11 operates and the balancing of interests that have come into play. Consider the use of chapter 11 to deal with environmental hazards and the effort of courts to address abandonment of unsafe property, including property in which a secured creditor had an interest.[43] Consider the health care bankruptcies that are now in the chapter 11 process.[44] In addition to the "normal" chapter 11 issues, there are additional issues regarding preserving health care opportunities or benefits for literally thousands of people.[45] The use of chapter 11 to deal with utilities is yet another example. The recent successes in the Logan General Hospital case in West Virginia are a tribute to the recognition that a chapter 11 case involves more than a debtor and its secured creditors – which gets me to my next point.[46]

Professor White has a very narrow paradigm for thinking about the interests that need to be balanced in a chapter 11 case. While the interests of secured creditors are clearly in the mix, a growing number of scholars, judges and practitioners have recognized the importance of taking the public interest into account and balancing that interest with those of the other chapter 11 constituencies.[47] The role of employees,

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future claimants). *See generally* KAREN GROSS, FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM (Yale Univ. Press 1997); Frederick Tung, *Taking Future Claims Seriously*, 49 CASE W. RES. L. REV. 435 (1999).

[42] *See* Heidt, *supra* note 41, at 144 ("Representation and a trust mechanism are the keys to satisfying due process concerns . . . [t]he representative will be the voice of future claimants . . . [t]hus, future claimants will receive the same treatment as they would have received had they been given actual notice—provided that the representative adequately represents their interests"). *See generally* Frederick Tung, *The Future Claims Represenative in Mass Tort Bankruptcy: A Preliminary* Inquiry, 3 CHAP. L. REV. 43 (2000).

[43] *See* Heidt, *supra* note 41, at 129–42 (examining circumstances under which debtor has obligation to reimburse clean up costs).

[44] *See* Doctors Hosp. of Hyde Park, Inc. v. Daiwa Special Asset Corp. (*In re* Doctors Hosp. of Hyde Park, Inc.), 337 F.3d 951, 954 (7th Cir. 2003) (illustrating hospital in chapter 11 process); *In re* Sheenan Memorial Hospital, 301 B.R. 777, 778 (Bankr. W.D.N.Y. 2003) (discussing chapter 11 by non-profit health care facility); *In re* HMCA (Carolina), Inc., 301 B.R. 764, 768 (Bankr. D. P.R. 2003) (indicating financial woes of health care provider); *In re* Allegheny Health, Education & Research Foundation, 292 B.R. 68, 74 (Bankr. W.D. Pa. 2003) (stating debtors filed voluntarily for chapter 11 relief); *see also* Larry Rullison, *Bankruptcy May Hurt Local ERs*, BALT. BUS. J., Nov. 25, 2002, *available at* http://baltimore.bizjournals.com/baltimore/stories/2002/11/25/story3.html (discussing affects of bankruptcy filing by physician management group on staffing of emergency rooms). *See generally* Natalie D. Martin, *The Insolvent Life-Care Provider: Who Leads the Dance Between State Continuing-Care Statutes and the Federal Bankruptcy Code*, 61 OHIO STATE L. J. 355 (2000); Natalie D. Martin, *Noneconomic Interests in Bankruptcy: Standing on the Outside and Looking In*, 59 OHIO STATE L. J. 429 (1998).

[45] *See* Martin D. Gelfand, *How a Community Saved Their Hospitals From Unnecessary Liquidation*, 75 AM. BANKR. L.J. 3, 17, 25 (2001) (discussing how 570,000 residents of Cleveland would be affected by closing of St. Michael and Mt. Sinai-East Hospitals).

[46] Press Release, Proposed Logan Hospital Reorganization Includes up to $16 Million for New Health Care Foundation (Sept. 29, 2003), *available at* http://www.consumersunion.org/pub/core_health_care/000430.html (indicating success of Logan General Hospital reorganization).

[47] *See* GROSS, *supra* note 41, at 235 (discussing balancing of public interests with debtors and creditors in chapter 11); Karen Gross, *Taking Community Interests into Account in Bankruptcy: An Essay*, 72 WASH. U. L.Q. 1031, 1031 (1994) (indicating importance of community interests in corporate and personal bankruptcies); *see also* Peter C. Alexander, *Building 'A Doll's House': A Feminist Analysis of Marital Debt Dischargeability in*

unions, and pensioners has increased, yet further examples of potentially powerful constituencies that need to be taken into account in chapter 11 cases today. Now is not the time to demonstrate why a different vision of chapter 11 is preferable and why these added interests matter—as a matter of economics and as a matter of public policy.[48] Instead, I am only suggesting here that, for better or worse, the public interest, both broadly and narrowly defined, is being considered in chapter 11 cases and is affecting the power balance.

Thus far, my point is that, in today's world, chapter 11 is not the secured creditors' show for the reasons, among others, that I have just described. In his descriptions of chapter 11, Professor White has described *one* piece of chapter 11. But, I also want to address specifically the explanations underlying what Professor White finds. I am not convinced that he has correctly identified the causes of what he finds, in two senses – he attributes cause and effect where I do not see it and he omits potential and significant actual causes and effects. Several examples suffice.

Professor White places considerable emphasis on the role that academics played in shifting the chapter 11 process from one that favors debtors to one that favors secured creditors.[49] In particular, he singles out the work of Professor Michelle White, noting that her work, among others, made courts aware of the costs of reorganization, the inefficiencies of reorganizations and the lack of value in preserving a dying firm.[50] Others have challenged the underlying theory of Professor Michelle White's work and

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*Bankruptcy*, 48 VILL. L. REV. 381, 403–04 (2003) ("Judges are routinely influenced by community interests as they assess how to interpret the Code . . . and to respond with a solution that is often more sensitive to the facts at issue and more respectful of community interests beyond those of the debtor and the debtor's creditors."); Lawrence Ponoroff & F. Stephen Knippenberg, *The Implied Good Faith Filing Requirement: Sentinel of Evolving Bank Policy*, 85 NW. U. L. REV. 919, 960–61 (1991):

> [T]he financial collapse of a firm presents questions of loss allocation and community interest simply not implicated in individual debtor-creditor disputes. For this reason, the Traditionalists, believes that the bankruptcy system is and should be designed to address a broad range of interests affected by the collapse of the debtor enterprise.

*Id.*; Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 788 (1987):

> Congressional comments on the Bankruptcy Code are liberally sprinkled with discussions of policies to 'protect the investing public, protect jobs and help save troubled businesses' of concern about the community impact of bankruptcy and 'the public interest' beyond the interest of the disputing policies. These comments serve as reminders that congress intended bankruptcy law to address concerns broader than the immediate problems of the debtor and identified creditors.

*Id. See generally* Donald R. Korobkin, *Rehabilitating Values: A Jurisprudence of* Bankruptcy, 91 COLUM. L. REV. 717 (1991); Natalie Martin, *Noneconomic Interests in Bankruptcy: Standing on the Outside Looking In*, 59 OHIO ST. L.J. 429 (1998). For a more general discussion of how scholars fall into two schools with respect to the interests of community and the goals of chapter 11, see Douglas G. Baird, *Bankruptcy's Uncontested Axioms*, 108 YALE L.J. 573 (1998); Mary Josephine Newborn, *The New Rawlsian Theory of Bankruptcy Ethics*, 16 CARDOZO L. REV. 111 (1994).

[48] *See generally* JANIS SARRA, CREDITORS RIGHTS AND THE PUBLIC INTEREST: RESTRUCTURING INSOLVENT CORPORATIONS 233 (Univ. of Toronto Press 2003) (noting long-standing recognition of public interest in American bankruptcy).

[49] White, *supra* note 3, at 150.

[50] *See generally* Michelle J. White, *The Corporate Bankruptcy Decision*, 3 J. ECON. PERSP. 129 (1989); Michelle J. White, *The Washington University Interdisciplinary Conference on Bankruptcy and Insolvency Theory: Does Chapter 11 Save Economically Inefficient Forms?*, 72 WASH. U. L.Q. 1319 (1994).

still others suggest the need to abandon chapter 11 in favor of either auctions; still others favor abandoning chapter 11 altogether in favor of only chapter 7 liquidation cases.[51] That said, I am not convinced that academics are so influential in changing judicial attitudes toward chapter 11 practice. (Indeed, there is current academic work suggesting that the results of the earlier empirical work have not withstood the test of time. Chapter 11's are moving faster than before and are not being used to save the proverbial buggy whip manufacturer.)[52] I do not deny that academics try to change judicial attitudes, and perhaps academics have their greatest success when they proffer an approach to interpreting a particular statutory provision within the Code and argue for resolution among some well-known competing approaches. While I suspect that academics do play a role in lawmaking at some level (although I suspect we over-estimate our influence), I am not convinced that the academic writing and studies about the nature and function of chapter 11 are what move the bankruptcy judiciary. For starters, I am not sure how many of the approximately 300 plus sitting bankruptcy judges read the academic literature. I am not saying this to chastise the judiciary. I suspect that they have neither the time nor easy access to our work and that when they do read it, they are not convinced that it is relevant or accurate.[53] For those who actually read it, I am not sure they then move to the next step and seek to implement it. And, for the small subset of judges who actually read and implement our work, I am not sure of their influence over their contemporaries. In short, my experience with judges suggests that they are not particularly influenced by what we say—for better or worse. Professor White also notes the influence of the press on the judiciary,[54] and while I suspect that judges are not immune to outside influences,[55] I am hard pressed to believe that popular press reaction to chapter 11 is what dictates judicial behavior. Nor am I convinced that judicial behavior (in large numbers) is the result of judges "liking" the more interesting large chapter 11 cases and then employing policies to "court" those cases in an effort to get them in their region with the accompanying prestige.[56]

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[51] For a general discussion of available options, see Jean Braucher, *Bankruptcy Reorganization and Economic Development*, 23 CAP. U. L. REV. 499 (1994); David A. Skeel, *Markets, Courts and the Brave New World of Bankruptcy Theory*, 1993 WISC. L. REV. 465 (1993). Recent work on the value of a slow death in chapter 11 is worth considering. For some employees, a slow death accords them an opportunity to find alternative employment and rates of return may be improved when items are not sold under the hammer and good will is preserved.

[52] *See generally Chapter 11 at Twilight*, *supra* note 31.

[53] *See* Deborah J. Merritt & Melanie Putnam, *Judges and Scholars: Do Courts and Scholarly Journals Cite the Same Law Review Articles*, 71 CHI.-KENT L. REV. 871, 871 (1996) ("Outside academia, the reputation of legal scholarship is not as glossy. Several appellate judges have denounced contemporary legal scholarship as increasingly irrelevant to the bench and bar.").

[54] White, *supra* note 3, at 151.

[55] *See* Lorraine Bannai & Anne Enquist, *(Un)Examined Assumptions and (Un)Intended Messages: Teaching Students to Recognize Bias in Legal Analysis and Language*, 27 SEATTLE U. L. REV. 1, 4 (2003) (noting biases from life experiences and culture may influence how judges express themselves and make decisions); Rob Hanson, *Objective Decision Making in Lonergan and Dworkin*, 44 B.C. L. REV. 825, 854 (2003) (discussing possible bias of Justice Sandra Day O'Connor in her decision for Republican candidate, Bush).

[56] White, *supra* note 3, at 189. I do not deny that some judges in some regions may act in the described fashion but if the statement were correct, many more regions of the country would be courting and getting large chapter 11 cases.

Yes, there is some "courtship" I am sure, but I do not believe that chapter 11 policy is dictated by judicial desires for interesting cases. A particular judge's approach to managing chapter 11 cases, the ability to move the cases, the ability to help parties reach consensus, and the willingness to award fees at competitive rates for work done may contribute to why cases are filed in certain regions with greater frequency. If I were to sum up what I expect influences judges, as opposed to lawyers being influenced by them, it is that they are influenced by what they see in their courtrooms—the quality of the lawyering, the quality of the written product, the nature of the witnesses who appear before them, their own sense of a case based on experience.[57]

That said, I think that Professor White seems overly influenced by the media and seems to cherry pick examples and extrapolate theories based on them—with *Eastern Airlines*[58] being the prime example. Yes, the Eastern Airline case was a failure. The company was permitted to operate for too long a period and at the end of the day, there were vastly fewer assets to distribute. But, why use that example and extrapolate out to all of chapter 11 based upon that? Certainly, there are other cases that have influenced how we perceive chapter 11—try *Johns-Manville*,[59] *A.H. Robins*,[60] or *Texaco*,[61] and the list continues.

Professor White also places great emphasis on the diminished role of the SEC under the Code and his sense that that omission has led to increased bargaining power on the part of secured creditors. The demise of the SEC has been well chronicled by David Skeel in his book *Debt's Dominion*.[62] Interestingly, Professor White pays little attention to the ostensible replacement for the SEC—the Office of the U.S. Trustee. The role of the US Trustee in balancing power in large chapter 11 cases, both in theory and practice, is well worth exploring. I am not as confident as Professor White that the SEC was such a success as balancing power in chapter X cases.[63] For those practicing under chapter 11, the efforts of the U.S. Trustee have often not been well-received and

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[57] *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376–77 (1982):

> Many federal judges have departed from their earlier attitudes; they have dropped the relatively disinterested pose to adopt a more active, 'managerial' stance. In growing numbers, judges are not only adjudicating the merits of issues presented to them by litigants, but also are meeting with parties in chambers to encourage settlement of disputes and to supervise case preparation. Both before and after the trial, judges are playing a critical role in shaping litigation and influencing results.

*Id.*; s*ee also* Harvey Miller, *The Changing Face of Chapter 11: The Reemergence of the Bankruptcy Judge as Producer, Director and Sometimes Star of the Reorganization Passion Play*, 69 AM. BANKR. L.J. 431 (1995).

[58] *In re* Ionosphere Clubs, Inc., 111 B.R. 436 (Bankr. S.D.N.Y. 1990).

[59] *In re* Johns-Manville Corp., 36 B.R. 727 (Bankr. S.D.N.Y. 1994).

[60] *In re* A.H. Robins Co., Inc., 86 F.3d 364 (4th Cir. 1996).

[61] *In re* Texaco Inc., 254 B.R. 536, 541 (Bankr. S.D.N.Y. 2000).

[62] DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA (Princeton Univ. Press 2001). For another account of the role of the SEC, see Michael E. Hooton, *The Role of the Securities and Exchange Commission Under Chapter X, Chapter XI and Proposed Amendments to the Bankruptcy Act*, 18 B.C. INDUS. & COM. L. REV. 427 (1977).

[63] Indeed, *Death and Resurrection* is completely silent on chapter 12 cases where, in my personal experience, the rights of the debtor and secured creditors were balanced and navigated – all without the involvement of the SEC. *See generally* White, *supra* note 3.

indeed, there have been repeated efforts to evaluate how they spend their time—for example, spending time on large cases where the parties are in a position to monitor rights as opposed to in smaller chapter 11 cases where creditors do not appear.[64] I raise this because Professor White's point is that the "neutral" party went away; my point is that the neutral party did not vanish but instead was reconfigured, and no analysis of the loss of one can be properly figured into the chapter 11 equation without consideration of the legislative substitute. One should also ponder the rising presence of another governmental watchdog and creditor, the Pension Benefit Guaranty Corporation (PBGC), and its affects on the balance of power within chapter 11 cases.

So, what is happening in chapter 11 and who is driving the chapter 11 bus? To answer this question in full is obviously beyond the scope of this response, but a few comments are in order. First, chapter 11 is a sophisticated game for sophisticated players.[65] It is not as if the participants need to be educated about the tactics of those who do not share their position. For every power-grab by one side, there is a counter power-grab by the other side. It is not as if the evolution of events under the Code happened willy-nilly with one powerful player trampling over the rights of others. DIP Financing orders do not appear out of thin air; they are negotiated and the choice of some parties to "live with them" is a choice, in light of other alternatives.[66] And, if these financing orders become too over-reaching, new strategies to re-balance the playing field will have to be invented or pursued. Consider one concrete example of this. Originally, debtors who believed the secured creditors had over-reached tried employing relatively simple doctrines of lender liability. The debtors sought, in these instances, to equitably subordinate the claims of the secured creditors.[67] That doctrine did not seem as all-encompassing as perhaps was hoped or contemplated by the debtors

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[64] *See generally* Peter Alexander, *A Proposal to Abolish the Office of the Unites States* Trustee, U. MICH. J. L. REF. 1 (1996); Steven W. Rhodes, *Eight Statutory Causes of Delay and Expense in Chapter 11 Bankruptcy Cases*, 67 AM. BANKR. L.J. 287 (1993). For a general discussion of ethics issues in bankruptcy, see Nancy Rapoport, *Turning and Turning in the Widening Gyre: The Problem of Potential Conflicts of Interest in* Bankruptcy, 26 CONN. L. REV. 913 (1994). Whether the professionals in chapter 11 should watch over each other or whether this is a hen/chicken problem among people who work together in this and other cases is a topic for another day.

[65] *See* Sally S. Neely, *Investing in Troubled Companies and Trading in Claims and Interests in Chapter 11 Cases–A Brave New World*, 109, 123 (ALI-ABA Course of Study in The Fundamentals of Chapter 11 Business Reorganizations C836 1993) (stating in recent years bankruptcy interest has spread from "non-Wall Street types who were shrewd and sophisticated" to intellectuals on Wall Street who have taken interest in troubled companies and possibilities for profit through chapter 11).

[66] *See* Michael J. Reilly & Michael J. Sage, *Potential Leveraging and Overreaching by DIP Lenders: How to Level the Playing Field*, 612 PLI/Comm 109, 123–24 (1992):

> While most prospective DIP lenders have honest intentions, a confluence of many of the more onerous terms . . . (such as excessive DIP lender control, waivers of claims, validation of pre-petition liens, defaults triggered by the appointment of an examiner or trustee and 'sweetheart' adequate protection packages) could raise the court's suspicions. Using this uncertainly, an opposing creditor might attempt to negotiate a more acceptable DIP financing order in exchange for the creditor's agreement to support the good faith finding.

*Id*.

[67] *See* 11 U.S.C. § 510(c) (2002) (allowing equitable subordination).

and lenders got wise to conduct that could be deemed "controlling" so new doctrines were brought to the table. One such doctrine is debt recharacterization.[68] For this argument, originally applied in the context of insiders who were lenders as well, secured creditors may find themselves not just subordinated but recharacterized; what they held as debt become equity. A quick look at *Autostyle Plastics* gives one a good sense of this.[69] This doctrine did not invent itself. Good lawyers, looking at the balance or imbalance of power, found it and started using it. In other words, lawyers and their clients have found and will continue to find leverage —power—in the chapter 11 drama.

Second, I think much of the power of secured creditors in chapter 11 now and into the future is a product of Article 9, not the Bankruptcy Code.[70] It seems to me that one cannot address, at least prospectively, the role of secured creditor interests in bankruptcy without also addressing the significant gains secured creditors garnered under revised Article 9. Now, we can debate the extent of the Article 9 changes and their influence on bankruptcy and that debate has already begun.[71] But, whether or not we like the changes and consider them wise, we cannot ignore their potential impact on chapter 11. Lawyers in chapter 11 can become bold, creative and inventive. But, they always need to do so within the existing legal framework. So, consideration of lawyer influence without an accompanying assessment of the applicable legal regime is insufficient.

Third, I do not think one can look at chapter 11 as if it stands alone on the legal landscape. All chapter 11 cases involve the interplay of other bodies of law, other

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[68] *See* Bayer Corp. v. MascoTech, Inc. (*In re* Autostyle Plastics, Inc.), 269 F.3d 726, 751 (6th Cir. 2001) (noting when there is exact correlation between ownership interests of equity holders in debtor and their proportionate share of alleged loan to debtor, this factor, standing alone, is almost overwhelmingly evidence that alleged debt should be recharacterized as equity); *In re* Vanguard Airlines, Inc., 302 B.R. 292, 300 (Bankr. W.D. Mo. 2003) (listing factors courts should use in determining whether debt should be recharacterized); *In re* Outboard Marine Corp., No. 02 C 1594, 01 A 0471, 00 B 37405, 2003 WL 21697357, at *4 (N.D. Ill. July 22, 2003) (deciding bankruptcy court has power to recharacterize debt as equity); Jo Ann J. Brighton, *Is it a Capital Contribution or a Loan?*, 22 AM. BANKR. INST. J. 20, 54–55 (2003) (reviewing recent cases discussing recharacterization of debt to equity).

[69] *See In re* Autostyle Plastics, 269 F.3d at 747–49 (analyzing whether alleged debt should be recharacterized as equity).

[70] *See* LoPucki, *supra* note 20, at 1923 ("Article 9's drafters have repeatedly sought to expand both the use of secured credit and the rights of secured creditors. Further expansions of protection afforded secured creditors are proposed as part of the current round of revisions to Article 9."). The author further states:

> The express intention of the drafters of Article 9 of the Uniform Commercial Code has been to expand the amount of credit available to debtors by making it easier and less expensive to take security. The drafters also have sought to legitimize the use if virtually every kind of asset as collateral.

*Id*. at 1931–32.

[71] Lois Lupica, Ray Warner and Charles Mooney, among many others, have expressed their views on these matters in current and forthcoming pieces. *See* Steven L. Harris & Charles W. Mooney Jr., *Revised Article 9 Meets the Bankruptcy Code: Policy and Impact*, 9 AM. BANKR. INST. L. REV. 85, 86 (2001) (discussing security interests under Revised Article 9 and "policies underlying bankruptcy law"); Lupica, *supra* note 39, at 351 (concluding "changes to Article 9 will alter bankruptcy outcomes in ways inconsistent with many of bankruptcy's first principles"); G. Ray Warner, *supra* note 39, at 4 (analyzing effects Article 9 revision will have on "bankruptcy law and bankruptcy practice").

disciplines and the market.[72] Tax law, for example, may drive certain chapter 11 cases.[73] Other cases may be driven by accountants' views on valuation and going concern value. Other cases may be driven by market perception, the development of new financial products, and the possibility of new markets for goods, services or even debt instruments.[74] Professor White seems to see chapter 11 in isolation and chapter 11 does not occur in a legal or business vacuum. Let me add one further observation. Despite the narcissism of those of us who make our living thinking about financially troubled companies, at the end of the day, chapter 11 is not the center of the universe. Much like secured creditors, chapter 11 does not drive the economic or legal engine. Chapter 11 is a piece of a huge legal landscape but one needs to be mindful that it is not the dog; at best, it is the tail.

In closing, I think that Professor White has, in some instances, correctly described what has occurred with respect to secured credit in chapter 11 cases since the passage of the Code. Unfortunately, he has only described selected trees in the chapter 11 forest. As such, his account of the shift in balance with respect to secured creditors is incomplete. Yes, secured creditors did make some gains, some of which were not originally contemplated. Yes, they may control some cases through DIP financing packages. But, there are a host of other things that have been operating since 1978 that explain how large chapter 11 cases are working and why secured creditors have done that which they have done and why, in some instances, they are not the star of the show. At the end of the day, the "liberal conspiracy" did not find itself hoodwinked. At the end of the day, the world got more complex, new markets opened, new uses of

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[72]The academic literature abounds with examples of how bankruptcy law intersects with non-bankruptcy law, and at times that intersection leads to unsatisfactory results. *See, e.g.*, William L. Fishman, *Property Rights, Reliance, and Retroactivity Under the Communications Act of 1934*, 50 FED. COMM. L.J. 1 (1997); *see also In re* 995 Fifth Ave. Assoc., 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1989) ("[Corporate] principles have vitality by analogy in the Chapter 11 context."); Jack F. Williams, *Integrating American Indian Law Into the Commercial Law and Bankruptcy Curriculum*, 37 TULSA L. REV. 557, 558 (2001) (describing how Bankruptcy law can be integrated with Indian Law, Contracts, UCC, Banking and Corporations). *See generally* Jeffrey M. Levinsohn, *Intellectual Property Collaboration Stresses in Bankruptcy: Protecting the Rights of Nonbankruptcy Parties*, 54 HASTINGS L.J. 471 (2003).

[73] *See* Pension Benefit Guar. Corp. v. Belfance (*In re* CSC Indus.), 232 F.3d 505, 507 (6th Cir. 2000) (determining whether claim for "missed minimum funding contributions is entitled to a 'tax' priority"); Gilbert v. United States (*In re* Statmaster Corp.), 465 F.2d 978, 978 (5th Cir. 1972) ("This appeal presents an important question concerning the interplay between federal bankruptcy law and federal tax law."); Waugh v. United States (*In re* Waugh), 1995 WL 714457, at *8 (D. Minn. Sept. 12, 1995) (explaining relationship between filing of bankruptcy petition and tax claim priority); Peter C. Canellos, *Tax and Bankruptcy Policies in the Chapter 11 Context*, 609 PRACTICING L. INST. COM. L. & PRAC. COURSE HANDBOOK SERIES 273 (1992) ("Policies reflected in bankruptcy and tax laws play a vital role in regulating economic activity.").

[74] *See* Brian A. Blum, *The Goals and Process of Reorganizing Small Businesses in Bankruptcy*, 4 J. SMALL & EMERGING BUS. L. 181, 224 (2000):

> The debate on bankruptcy reorganization focused on Chapter 11 itself . . . . In addition, it was primarily concerned with large bankruptcies and for the most part either disregarded or touched only in passing the particular concerns applicable to the bankruptcy of smaller businesses. Much of what has been written covers rules and processes that are often not invoked in smaller cases and is based on studies or perceptions of the market forces, fiscal dynamics, and economic incentives that are peculiar to large bankruptcies.

*Id.*

chapter 11 were invented, new parties came to the table, lawyers and other professionals developed new strategies, and financial sophistication increased. At the end of the day, twenty-five years after the Code's passage, the secured creditor influence is but one of many influences. At the end of the day, secured creditors are one of the many players involved in a hugely complex drama. That is what twenty-five years, under the Code and in the real world, has given us.