THE JUDGE'S ROLE IN INSOLVENCY PROCEEDINGS: THE VIEW FROM THE BENCH; THE VIEW FROM THE BAR*

The following panel discussion took place in May, 2002, at a conference sponsored by the Insolvency and Creditors' Rights Committee (Committee J) of the International Bar Association (IBA). The conference, entitled "Insolvency Y2K2: Boom or Bust?," was held in Dublin, Ireland. The following discussion was described in the conference's brochure in part as follows: "Take five developed insolvency systems -France, Germany, Ireland, the U.K. and the U.S. - *and, from each, select one judge and one attorney with extensive experience making their insolvency systems work. Ask the judges what they think their role is in insolvency proceedings, and ask the attorneys whether, in reality, judges in general stick to that role….Judges and lawyers do not always agree as to how the insolvency system should work; and both groups certainly will have strongly-held opinions as to how their systems might be improved."*

Broude: The idea for this panel derived from a number of events over the past couple of years. First and foremost was a series of articles in United States legal journals commenting upon the number of corporations that, once having emerged from chapter 11, file again,[1] thereby fulfilling the greatest wishes of everybody

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[1] *See* Edward I. Altman, *Evaluating The Chapter 11 Bankruptcy- Reorganization Process*, 1993 COLUM. BUS. L. REV. 1, 6 (1993) (noting non-trivial number of emerged chapter 11's file for bankruptcy again);

from England, it seems to me. That got me thinking about why this is happening. The authors of these articles tend to believe that the parties in interest in chapter 11 cases, having reached a consensual resolution of the debtor's financial difficulties, parade into court, arms around each other in a veritable love-fest, present evidence as to why the plan is wonderful, why the projections that have been invented by the investment bankers are accurate rather than rosy, and why the debtor, once having emerged from chapter 11, will not need chapter 11 relief again. This led to discussions with various individuals about whether the judges in the United States courts are doing the right thing:[2] Do they have the resources to go behind the testimony presented at confirmation hearings and find out whether by signing an order confirming a chapter 11 plan they have done all they can to make sure that this debtor, turned lose upon the world, is financially viable? That led to a desire to present this panel of lawyers and judges from various developed insolvency systems to see whether they, the bar and the bench, are happy with their systems, the role of the judges in their systems, and whether they have the human and financial resources to do their jobs as they are supposed to, or least as they believe they are supposed to. We have panelists from France, Louis Buchman, who will introduce Judge Piot, Germany, Hans Jauch, who very kindly consented to replace Doctor Pannen at the last moment and will introduce Judge Vallender. Frank Sowman and Judge Peter Kelly from Ireland. John White is here by himself from England because Sir Colin Rimer's father died recently and he was unable to make it. And then, from the U.S., myself with Judge Judith Fitzgerald from Pittsburgh. I think most of you know the lawyers and I will not take our time introducing them. However, I think it's appropriate for you all to understand what a distinguished panel of judicial officers we have here, so I'd like to call upon Louis first to introduce Judge Piot.

Buchman: Thank you and good morning to all. I think we are very fortunate to have Judge Piot with us this morning. Judge Piot, first and foremost, has a career in banking. He served thirty-five years in banking, ending his career as General Counsel of the holding company of the Crédit Coopératif Banking Group, and he has been elected a judge. I'll come back to this. In 1984 he joined the Paris Commercial Court, which is the leading commercial court in France. He ended his career at the Commercial Court in 1999, as Vice President, having served two years as Vice President of the Court. After that he moved up the ladder, the judicial ladder, to the Competition Council, the "Conseil de la Concurrence," which is the main regulatory agency in France in charge of anti-trust matters, and he serves as one of the seventeen members of the Competition Tribunal at the moment. Judge

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Lynn M. LoPucki & William C. Whitford, *Patterns In The Bankruptcy Reorganization Of Large, Publicly Held Companies*, 78 CORNELL L. REV 597, 611 (1993) ("[M]any large, publicly held companies emerge from Chapter 11 with too much debt and refile for bankruptcy at a strikingly high rate.").

[2] *See* LoPucki & Whitford, *supra* note 1, at 608–09 (noting companies had financial difficulties at time of confirmation and questioning whether courts seriously considered likelihood of need for further financial assistance before confirming plan).

Piot has extensive experience in insolvency matters with which he dealt during his tenure at the Paris Commercial Court. I'd like to say that while elected judges do not have good press generally, it is one of the features of the French system that commercial judges are elected by their peers, and therefore have business instincts. They are knowledgeable about business, and this makes proceedings of commercial justice in France somewhat different from other countries. I also would like to say, by way of introduction, that one of my very first assignments as a junior attorney in '75 was to assist an American group of commodities traders during the sugar futures crisis in '75. At that point I realized how powerful French commercial judges are because the hearings were, at the time, before the President of the Paris Commercial Court, and I saw that magistrate basically ramming the heads together of people just to make them understand that they had no choice but to settle out-of-court, and believe me, that was an experience I will never forget. So, again, I think we are fortunate to have Judge Piot with us.

Broude: Hans will introduce Justice Heinz Vallender, a familiar face among Committee J members. We appreciate his having consented to appear today.

Jauch: Good morning. Let me go one step back to the predecessor of Justice Vallender which was Professor Humborg, the insolvency judge of Germany. Justice Vallender succeeded him and a lot of people were looking to see whether his feet would be big enough to slip into the shoes of Humborg. After a couple of years I can say they are big enough, but he is not only following Judge Humborg, he's also putting his own seal on all the things he is handling. Cologne is still one of the biggest bankruptcy courts nationwide and very important. At the same time Justice Vallender is presiding over the working group of insolvency law, he is holding lessons at the University. So I am expecting within the next few years to have a judge who is also a professor at my side. So I am very pleased to have him here. However, he is the judge of the court I am working for, so I am only telling the best things about him.

Broude: We will talk about awarding fees later.

Jauch: For the administrators, the judges in Germany are very powerful because they decide who is getting the case.[3]

Broude: Frank?

Sowman: Thank you Richard. It's my pleasure to welcome Mr. Justice Peter Kelly to our conference this morning. I first met Peter Kelly as he then was a senior officer in the High Court Office in Dublin and I was an inexperienced solicitor. At

[3] *See* Insolvenzordnung (InsO) [Insolvency Code] § 27(1) (F.R.G.) ("[I]f the insolvency procedure is opened, the insolvency court appoints an insolvency manager.").

that stage Peter answered my naive questions with great patience and courtesy. Little did he know at the time that he was going to have to do the same thing for another twenty years as a Barrister. Peter qualified at the Bar in 1973, and following a career as a Junior Barrister became Senior Counsel in 1986. He had a distinguished career at the Senior Bar in Dublin working in many of the major cases, particularly in the Chancery area, over a period of ten years. Many of my colleagues who are attending this conference with me would have had the experience of working with Peter as a Senior Counsel. It came as no surprise to any of us when in 1996 Peter was appointed judge of the High Court and became Mr. Justice Kelly, and in the period of over six-years which has passed since then, Peter has had a very eminent career as the High Court Judge. I am delighted that he is taking time to be with us this morning. Not only because he knows a lot more about the topics we're discussing than I do, but mainly because he is a very worthy representative here of the Irish judiciary.

Broude: I not only have the pleasure of moderating this program, but of introducing Judge Judith Fitzgerald who is the current President of the National Conference of bankruptcy judges. American bankruptcy judges come from many backgrounds; some qualify them for the job and some don't. She was a prosecutor for twelve years, engaging in criminal and civil litigation, which qualifies her eminently, it seems to me, for the job of bankruptcy judge. Much of what we will discuss later today involves presiding over complex financial litigation that takes place mostly by ambush, since there's not enough time to do discovery. One must control the court and the lawyers, and from what I'm told she does a terrific job at both. She has two wonderful daughters and a great singing voice as we discovered last night at the dinner. She sits in the Western District of Pennsylvania in Pittsburgh. In addition, in recognition of her qualities as a judge she's been appointed to sit temporarily in Delaware and is handling some of the more complex asbestos cases there as well as in Philadelphia. So I think we have a terrific panel of lawyers and judges and we should now proceed to get to the substance of the program. This is an investigation, as I mentioned earlier, of the role of judges in various insolvency systems and I think in order to appreciate the role one must first understand the systems of the five countries represented on today's panel. So for a few minutes, to sort of set the scene as it were, we'll have the lawyers on the panel give you an overview of their insolvency systems with a focus on reorganization, starting alphabetically with France and Louis Buchman.

Buchman: Thank you very much. I'll be extremely brief on this because I think that you have, first of all, in your folder various papers including mine, but I'd like to point out that at the end of Michael Steiner's paper there is a presentation of various actors in French bankruptcy proceedings or insolvency proceedings which is well-done and I would recommend that you read it at your leisure. You can refer to this paper for more precise information. I think that, in a nutshell, what you

should remember is that France, as a democracy is no different than others, and has to do something about reorganizations, and it does that in various ways. Some of them are fairly particular to France and Judge Piot will get into that later. But we have, of course, both reorganization and receivership and liquidation under our statutes and that is enough in a nutshell. I'll be happy to take questions later but I don't think this is really what we should focus on, with due respect to the Chairman.

Broude: You could have said that during our practice session this morning as opposed to doing it now, but that's o.k.

Buchman: You like being ambushed Richard.

Broude: That's right. My appreciation of the niceties of the constituent members of what remains of the British Empire is exceeded only by my lack of the grasp of the alphabet. John is not representing the U.K. today; he is representing England and Wales, and so, "E" coming before "F," I should have called upon him first which might have been a better way to start out, but we'll now have John White talk about England and Wales.

White: Good morning ladies and gentlemen. First of all I must congratulate the chairman on drawing this distinction between lawyers and judges. That's an absolutely fair point to make, I think, in this panel. My overview will be commendably short, because in England judges really only get involved in the insolvency process or the restructuring process by invitation. They are the least interventionist of any judicial body in any system that I know, and that of course makes the English system infinitely the most preferable of any of the developed systems because we all know that certainly workouts, and formal insolvency systems as well, proceed at their best with the fewest number of people involved. I'm going to talk very, very briefly just about two of our procedures. Administrative receivership,[4] which is the great floating charge remedy, I'm just going to mention briefly because it will shortly disappear for any new floating charges, but it will still be available for old floating charges and this isn't a court driven process at all. The administrative receiver is appointed by the floating

[4] In the United Kingdom a lender will obtain security by way of "a fixed and floating charge over all the present and future property, assets and undertakings . . . of the company." Michael G. Bridge et al., *Formalism, Functionalism, and Understanding the Law of Secured Transactions*, 44 MCGILL L.J. 567, 644 (1999). Once the money becomes payable, the debenture holder may enforce the security by appointing a licensed insolvency practitioner to realize the security for the benefit of the debenture holder. The person appointed is called an administrative receiver. *See id*. ("An administrative receiver is not just any receiver**,** but specifically one 'appointed by or on behalf of the holders of any debentures of the company secured by a charge which, as created, was a floating charge, *or by such a charge and one or more other securities*."); Shashi Rajani, *Cost-Effectiveness of Corporate Rescue and Insolvency Procedures in the U.K.*, 1 AM. BANKR. INST. L. REV. 441, 443–44 n.4 (1993).

charge holder,[5] but nonetheless, there are four or five occasions on which the receiver is actually entitled, if he wishes to do so, to apply to the court, but he is under no obligation and that theme sort of spreads through all our insolvency legislation. There are numerous statutory opportunities for office holders to apply to the court,[6] but very rarely any obligation on them to do so. The administrative receiver's most frequent opportunity to go to court is if he wants to seek the court's directions on any particular problems arising in the receivership he has the right to do it.[7] But it's very, very rarely exercised. The other procedure I want to talk about is administration,[8] which is our most popular and most effective rehabilitative procedure. It starts with a petition to the court[9] and the court, the judge actually, appoints the administrator.[10] The petition is normally made by the company (it can be made by a creditor but that's rare)[11] and the judge can make the administration order and appoint the administrator. Also, he can dismiss the petition or he can make an interim order. He can make any order he likes. If he is satisfied on two things, firstly, that the company is insolvent, and secondly, that the statutory objectives which the administrators are seeking to achieve are achievable, then he is entitled to make the order.[12]

Broude: Insolvent in what sense John?

White: Insolvent in the statutory sense. It's either a balance sheet insolvency or unable to pay your debts as they fall due, or likely to become insolvent, likely to become unable to pay your debts as they fall due. Those are the two tests. Once the administrator is in, his job is to prepare what the Americans would call a plan, a proposal to put before the creditors, which he has to do within three months.[13] Now, that plan goes nowhere near the court; it's approved by the creditors or disapproved

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[5] A "floating charge" is a security procedure in which a creditor has a claim against the debtor's assets that remains unattached to any particular piece of collateral during the operation of the company as an ongoing concern. The secured claim which "floats" over the changing assets will finally fix on those assets owned by the company upon its insolvency. The creditor appoints an administrative receiver to enforce security and obtain payment. *See* Bruce G. Carruthers and Terence C. Halliday, *Professionals in Systemic Reform of Bankruptcy Law: The 1978 U.S. Bankruptcy Code and the English Insolvency Act 1986*, 74 AM. BANKR. L.J. 35, 73 n.208 (2000).

[6] *See*, *e.g.*, Insolvency Act, 1986, c. 45, § 43(1) (Eng.) (stating administrative receiver may apply to court or dispose of charged property).

[7] *See id*. § 35(1) (describing administrators application to court for direction on matters in connection with performance of administrators functions).

[8] *See generally id*. §§ 8–27 (providing rules for administration procedure).

[9] *See id*. § 9(1) (establishing applications for administration orders are made by petition "either by the company or the directors, or by a creditor or creditors . . . or by all or any of those parties").

[10] *See id*. § 13(1) (declaring administrator is appointed by "administration order").

[11] *See id*. § 9(1) (stating different parties permitted to make petition).

[12] *See id*. § 8 (stating circumstances under which court has power to make administrative order).

[13] *See id*. § 23(1) (giving administrator three month period to file proposal for continuation with creditors); *see also Insurance Insolvencies*, INS. L. MONTHLY 14.8 (2) (August 2002) (stating within three months of appointment, administrator will set forth proposal to company's creditors for acceptance or rejection).

by the creditors.[14] The court doesn't get involved in that process at all. If the proposal is approved by the creditors then the administrator moves forward, realizes assets, and sells.[15] During that period the administrator also has the right to go to court if he wishes to do so for directions.[16] This is most frequently used when the administrator thinks that the best thing to do is to sell the business, but he hasn't had time to get his plan together to put to the creditors. He'll then push off to court for an order that he may sell ahead of getting the plan approved by the creditors. The court also has an overriding jurisdiction on fees, but somebody has to complain about fees before they actually get involved. So I say we have a very non-interventionist system and perhaps I can tell you one little story just to illustrate that.

We acted for the Government on the Administration of Railtrack.[17] For those not familiar with that dreaded word "Railtrack," Railtrack is the public company in the U.K. which owns the railway infrastructure, the track, the stations, the signaling, but not the trains. It became seriously, seriously insolvent and couldn't carry on without more government subsidy. So the Secretary of State decided to put it into administration.[18] It is actually a special railway administration procedure, but it's very akin to ordinary administration and for our purposes we can treat it as the same. And we got to the hearing and Gabriel Moss, acting for the administrators, asked Mr. Justice Lightman, after Mr. Justice Lightman had been persuaded that Railtrack was insolvent and he had made the administration order, Gabriel asked for what are called first day orders,[19] which are sort of crisis management orders that administrators like the court to make. The particular one that Gabriel was looking for was an order of the court that the administrators should continue to employ the directors for specific purposes. Now this gave Mr. Justice Lightman some considerable difficulty. You can see why the administrator wanted a mandatory order. If the directors subsequently proved negligent or made serious mistakes then the administrators could turn around and say, "well the court told us to employ these

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[14] *See Insolvency Act*, 1986, c.45, § 24 (providing creditors will meet then decide whether to accept proposal. Administrator is then responsible for notifying court of creditor decision.).

[15] *See id.* § 43(1) (stating administrative receiver is given broad authority to dispose of assets in manner that would better realize company's assets).

[16] *See id.* § 35(2) (stating upon application, court may issue directions or declare rights of parties involved).

[17] *See* BRITISH BROADCASTING COMPANY, *Railtrack in Administration, available at* http://news.bbc.co.uk/1/hi/business/1583675.stm (last visited Nov. 2, 2002) (stating Railtrack was put into Administration in October of 2001 after series of crashes accompanied by professional setbacks).

[18] *See Railtrack placed in administration Byers proposes a private company without shareholders but with the interests of the traveling public as its top priority*, DTLR, *available at* http://www.press.dtlr.gov.uk/pns/DisplayPN.cgi?pn_id=2001_0416 (last visited Nov. 2, 2002) (stating Transportation Secretary Stephen Byers successfully petitioned High Court to place Railtrack into administration).

[19] *See* Insolvency Act, 1986, c. 45, § 9(4) (Eng.) ("On hearing a petition the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make an interim order or any other order that it thinks fit.").

people, actually made a mandatory order."[20] Mr. Justice Lightman saw this coming a mile off and after a fairly spirited debate between him and Gabriel Moss he eventually made a discretionary order and said, "no." The administrators may,[21] if in their commercial view they think it right to do so, continue to employ the directors, but he was not going to make a mandatory order. That just exemplifies the lengths to which our judges will go not to get involved in the commercial aspects of insolvency.

Broude: Hans, would you give us a little insight into the German system please?

Jauch: To keep things short. Once a petition order is rendered to the court as an insolvency petition, it is basically a non-interventionist system as it is in England with some differences. In Germany, I would like to point out we had the big reform of the German Insolvency Law beginning in 1999.[22] Since then we have a unique proceeding in which the company can be reorganized or liquidated.[23] The role of the judges in Germany seems to be even a little bit weaker than in your country because the formal judge is only acting until the adjudication order. After that we have some graduated law clerks who are working in the function of judges. They do all the rest of the work, even holding the sessions, the creditors' meetings, and things like this.[24] The strongest role in German insolvency proceeding, to my impression, is with the administrator.[25] He is first appointed by the judge as an expert and has to render his opinion to the court whether the company is insolvent and whether they have sufficient liquid means to finance the proceeding. In the adjudication order,

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[20] *See id*. § 9(5) (providing, under § 9(4), court "may restrict the exercise of any powers of the directors or of the company").

[21] *See id*. § 14(2)(a) (authorizing the administrator to remove any director of the company and to appoint any person to be a director of it, whether to fill a vacancy or otherwise).

[22] *See The New German Insolvency Statute*, Burkard International Law Office, *available at* http://www.burkardlaw.com/newinsolvencylaw (last visited Nov. 2, 2002) (stating 1999 insolvency legislation created uniform insolvency regulations for all of Germany which allows creditor claims to be more effectively settled); *see also* Joachim Rudo, *Introduction to German Business Law*, *available at* http://www.germanbusinesslaw.de/introinhalt.htm (last visited Nov. 2, 2002) (stating new insolvency measures establish one uniform procedure either leading to re-organization or liquidation).

[23] *See* 2 COLLIER INTERNATIONAL BUSINESS INSOLVENCY GUIDE ¶ 23.04, at 23–16 (Alan N. Resnick and Henry J. Sommer eds., 1st ed. rev 2002)[hereinafter COLLIER INTERNATIONAL] (noting both liquidation and reorganization proceedings begin in the same manner but which path the case will follow is determined several months later); Gerald Lies, *Sale of a Business in Cross-Border Insolvency: The United States and Germany*, 10 AM. BANKR. INST. L. REV. 363, 377 (2002) (stating all proceedings under the new Code begin as liquidation proceedings but can be converted into reorganization proceedings); Christoph G. Paulus, *Germany: Lessons to Learn from the Implementation of a New Insolvency Code*, 17 CONN. J. INT'L L. 89, 96 (2001) (describing Code's "bifurcated" insolvency proceeding).

[24] *See* 2 COLLIER INTERNATIONAL, *supra* note 23, ¶¶ 23.04[5][d], 23.05[4], at 23-23 and 23-46 (describing active responsibilities of court appointed trustee and supervisory duties of the court itself).

[25] *See* Paulus, *supra* note 23, at 92 (attributing productive reorganizations as administrator successes and noting importance of administrator strategy from outset of proceeding).

normally, an expert is appointed as administrator.[26] After that it's generally in the hands of the administrator whether the company should be reorganized or liquidated. In Germany, by the idea of the law, it's a creditors driven proceeding: the creditors have to decide how they would like to sell the assets or to collect the money.[27] However, the administrator, who is part of the proceeding, strongly influences the decision of the creditors' meeting.[28] So the role of the judges in Germany is slightly different from other countries; however, we have specialized courts that only deal with bankruptcy matters.[29] We've got highly qualified judges in the bigger cities because they do nothing else. If you go to minor bankruptcy courts they do additional work that has nothing to do with bankruptcy and they just have less practical experience. For the moment, that would be enough.

Broude: Frank.

Sowman: Thank you Chairman. I shall endeavor to summarize the insolvency process in Ireland in the context of our topic today in examining the role of the judiciary in that process. Basically, in this country, in this jurisdiction, there are three areas in the insolvency process: liquidation,[30] receivership,[31] which still operates here, and as I might describe in broad terms, reconstruction.[32] Very briefly, our liquidation system is divided into two areas. First, I'm talking now obviously about insolvent liquidation,[33] namely what they describe as creditors voluntary winding-up which is a misnomer because its anything but voluntary, but it is a system of winding up a company which is conducted virtually entirely outside the courts and outside any judicial system. I think there's a broadly similar system used to operate in the U.K. The compulsory liquidation is where you have a winding up

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[26] *See* 2 COLLIER INTERNATIONAL, *supra* note 23, ¶ 23.04[5][a], at 23-21 (stating responsibilities of court appointed receiver including determining if grounds exist for insolvency proceeding); Paulus, *supra* note 23, at 96–97 (describing judge's discretion to evaluate administrator credentials and ultimately select administrator).

[27] *See* Manfred Balz, *Market Conformity of Insolvency Proceedings: Policy Issues of the German Insolvency Law*, 23 BROOK. J. INT'L L.167, 172–73 (1997) (stating creditors right to decide which proceeding serves their interests best); Lies, *supra* note 23, at 377 (differentiating creditor-driven German Insolvency Code from U.S. Bankruptcy procedures); Paulus, *supra* note 23, at 92 (citing creditor's choice to choose type of insolvency proceeding as illustrative of creditor's autonomy under Code).

[28] *See* 2 COLLIER INTERNATIONAL, *supra* note 23, ¶ 23.04[5][b], at 23-21 (acknowledging influence of administrator/trustee's advice in creditor's selection of insolvency proceeding).

[29] *See* 2 *id*. ¶ 23.03[1][c], at 23-14 (explaining exclusive jurisdiction of insolvency proceedings within civil department of district court).

[30] *See* 2 *id*. ¶ 27.04 (describing compulsory liquidation procedure under Irish regime); 2 *id*. ¶ 27.05 (describing voluntary liquidation proceedings).

[31] *See* 2 *id*. ¶¶ 27.01[3][d], 27.07[1], at 27-7–27-8 and 27-47 (acknowledging receivership as insolvency procedure because most cases require receiver to oversee insolvent entity).

[32] *See* Bernard J. Ward, *Theory And Pragmatism In Global Insolvencies: Choice Of Law And Choice Of Forum*, 65 AM. BANKR. L.J. 457, 485–86 (1991) (defining reconstruction as reorganization).

[33] *See* 2-18 DOING BUSINESS IN IRELAND § 18.03(2) (2002) (stating insolvent liquidations are compulsory or voluntary).

under the control of the court.[34] In contrast, this is a winding up which is entirely regulated by the court. The court's very active participation varies at stages of the process, which originates from a petition to wind up. If that petition is granted, an order is made appointing the official liquidator as an officer of the court and he has various reporting functions and effectively has to operate the winding up in conjunction with the court throughout the entire process.[35] So there is a very significant judicial input in that area. Those are the two areas of winding up, or liquidation, as we call them. Another, which can involve obviously reconstruction, is the receivership which operates under a floating charge in this jurisdiction also.[36] Again the role of the court is inclined to be quite intermittent and infrequent in that particular process because it depends on a situation where the receiver exercises his entitlement to apply to the court for directions in relation to any aspect of his activities as receiver. I think probably the most frequent occurrence for that would arise in a dispute between the receiver and perhaps the directors of the company with either regard to his powers or with regard to his manner of realizing the assets that are secured by the mortgage under which he's been appointed. So the broad power of application to the court is relatively infrequently used.

One then turns to the reconstruction side of the Irish insolvency system and that is based on what we call the Examiner under Irish Law, which was a concept introduced twelve years ago.[37] We did have, prior to that, schemes of arrangement which could be introduced under the Companies Act[38] which again had quite an amount of judicial input in the sense that it was a system whereby the court could give protection to a company to enable it to convene meetings with its creditors to propose a scheme of arrangement. But it fell into disuse because it had a requirement, as I recall it, whereby the scheme had to be approved by seventy-five percent of value of all the classes of creditors[39] so it's readily evident that, for example, if the preferential creditors didn't approve the scheme then it couldn't work, and if the revenue commissioners, who usually form the vast bulk of preferential creditors in an insolvency, decided that they didn't approve of it and voted against it then it couldn't be effective. So that system fell into disuse, and arising from that state of disuse in 1990 the concept of an Examiner was introduced into our system.

Basically, this is a situation where a company, or indeed a creditor, it's not limited to the companies themselves; it can be a creditor, or it can be the directors, or it can be indeed a group of shareholders, providing they control ten percent of the

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[34] *See* 2-18 *id*. § 18.03(2)(b) (noting compulsory proceedings are directed by court).

[35] *See* 2-18 *id*. § 18.03(2)(b) (discussing winding up process done by courts).

[36] *See* 2-18 *id*. § 18.06(1) (outlining process involved in receiverships).

[37] *See* 2-18 *id*. § 18.05(1) ("The court may appoint an examiner where it appears that a company is or is likely to be unable to pay its debts, no liquidation has commenced, and a receiver has not been appointed for a period in excess of three days.").

[38] *See* Companies Act (1990) (Ir.) *available at* http://193.120.124.98/zzA33y1990.html (last visited Nov. 6, 2002).

[39] *See generally* 2-18 DOING BUSINESS IN IRELAND § 18(1)(c), (2) (showing examiner must meet with creditors and come up with plan to submit to court).

share of capital, can apply to the High Court for the appointment of an Examiner and to place the company under protection for a limited period.[40] Two main steps in that role as far as the High Court is concerned is that initially in deciding whether to accede to the request to appoint an examiner to place the company under protection, the court has to decide that there is a reasonable prospect of the survival of the company[41] and in making that decision it is really making decision on evidence presented by the applicant. The court doesn't have any independent advice available to us in that category. If that request is granted then the next fundamental role, as far as the court is concerned, is what you might describe as the end of the process, when, if a scheme is approved by the creditors it still has to come back to the court, to the High Court for approval and that arises irrespective of the extent of support which it receives from the creditors. That is a definite second stage, you have to satisfy the High Court that the scheme should be implemented.[42] It would be very unusual, I think perhaps unique in a situation where a scheme receives support from various categories of creditors for the court to refuse it, but there is that power if the court felt that was appropriate. What is more likely to happen, is there will be minor modifications as a result of representations that may be made. But the protection that is meant to be given to creditors is that if some individual creditor feels that it has been unfairly prejudiced by the way a scheme has been formulated, that creditor has what might be described as a second bite at the apple. In other words, it can try to convince a judge that the scheme should be modified to minimize that prejudice which that creditor feels it has suffered. So that's the second step in the process in reconstruction. That's the main area of reconstruction really under our Irish law and it has operated in the last twelve years.

Broude: John, before I get to the United States you mentioned that administrative receiverships were going away. Could you expand on that please?

White: Yes, it's part of a deal really. We have an Enterprise Bill going through Parliament at the moment which will remove the ability of banks to appoint administrative receivers in respect to floating charges created after the bill becomes an act and comes into force. And the curiosity is that the banks will be given power to appoint administrators, but not administrative receivers. The logic being that the administrative receiver had limited duties to his appointer, whereas an administrator will have general duties toward the creditors as a whole. And the other part of the tradeoff is that Crown Preference is being abolished, not employees' wages and so forth. But Crown Preference will be abolished.

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[40] *See* 2-18 *id*. § 2(1)(c).

[41] *See* 2-18 *id*. § 2(2). *See*, *e.g*., Westport Prop. Constr. Co., [1996] 211 Ir. H. Ct. 14 (explaining court will approve placement of examiner if company will likely survive).

[42] *See* Companies Act, 1990, § 18(4) (Ir.) (showing examiner submits report to court for approval).

Broude: Is this bill likely to pass?

White: Yeah, it will.

Broude: So what's going to happen to crystallized floating charges from now on, will they crystallize anymore?

White: Well, there are lots of floating charges still out there that were created before this bill becomes an act. There is a theory that you could possibly create a whole series of shell companies and grant floating charges to another shell company and then you could sell these to banks after the bill becomes an act. You could then put their lending into the company that has already got a floating charge. This is a Michael Prior invention.

Broude: Is there a constitutional reason why it applies only to post-facto floating charges or is this just part of the deal?

White: It's part of the deal.

Broude: The United States of course has a Bankruptcy Code that was enacted in 1978 and became effective in 1979.[43] We've now been operating under it for twenty-three years, give or take. Unlike other systems, we have a system of judicial precedent and we now are up to Volume 279 of the bankruptcy judges' decisions under this statute. So there is a lot of learning that goes on. Chapter 7 is liquidation and having said that I'll ignore it. The important operation from our perspective, and from the perspective of this program, is chapter 11 entitled Reorganization.[44] I've come to conclude that after many years of membership in this organization that each country gets the bankruptcy law it deserves. I think we deserve chapter 11. Bankruptcy does not exist independent of the social system that exists in each nation. The United States has little in the way of governmental sponsored programs to compensate people for the dislocations caused by financial failure. So every financial problem, and that's not hyperbole I think that's almost true, every consequence of every financial problem is thrown into our bankruptcy system: environmental problems, mass tort problems, business failure problems, failure of companies properly to fund their retirement plans.[45] Whatever the reason for financial failure, the only place we have to put it is in bankruptcy. We have no great laws for replacing wages of people thrown out of work so they are given a

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[43] *See* 11 U.S.C. §§ 101–1330 (2000).

[44] *See* 11 U.S.C. §§ 1101–1174 (2000).

[45] *See*, *e.g.*, *In re* Bicoastal Corp., 169 B.R. 445 (Bankr. M.D. Fla. 1994) (providing example of retirement funds seeking recovery of losses by way of bankruptcy court); *In re* Virginia Builders, Inc., 153 B.R. 729 (Bankr. E.D. Va. 1993) (showing example of environmental issues addressed by bankruptcy court).

priority for the wages in our bankruptcy system. The list is endless. Thus, we have an extraordinarily complex reorganization statute.

Secondly, that in turn leads to the creation of a system of specialist judges, who are generalists, and we'll get to that when Judge Fitzgerald talks about her role in the bankruptcy system. We have a history of reorganizing companies rather than liquidating them. That history goes back to the fact that our country was settled by, in large part, settlers fleeing from financial problems in their homelands. There's a history of attempting to salvage companies, and I'm pleased to see that England is moving in the same direction in fits and starts, and screaming and muling, on the part of the banks I'm sure.

That means that over the years, starting in the 1850's, we have focused on reorganization in situations governed by statutes that become increasingly complex every time they are amended. Chapter 11 is run by the debtor in possession,[46] unless a trustee is appointed,[47] and as we get to that you'll see that's an unusual circumstance.[48] The debtor in possession in other countries has a bad reputation. How can you have the bankruptcy being administered, people say, by the same directors and officers that brought you the disaster? And the answer is: it's not. In public companies we have now twenty-three years, as I indicated, of history under the statute. With public companies in large chapter 11 cases, management is replaced 90% of the time. Those of you, and I think that includes almost all of you who travel from time to time on business to the United States, know that we have an industry of turnaround specialists; people who are installed as interim management to replace the people that didn't do very well. And so while the debtor in possession administers the case, and is the fiduciary, the people who are the debtor in possession, for the most part are not the ones who put the debtor there. We'll go into a little more about chapter 11 as we progress this morning, but the point really is, it's an overly complex, expensive, time consuming procedure, but one I think that is required by the history that stands behind it.

Enough of my soapbox. I'd like to start out with the judges now. You've heard some of the lawyers describing specialist versus generalist courts. I think we need to know something about the type of judicial officer that administers the case. In the case of England and Wales, John said the judges are not interventionist and they are brought into the case upon request of the lawyers. Well John, what are these judges? They are not a specialist commercial or insolvency court, are they?

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[46] *See* 11 U.S.C. § 1108 (explaining, unless court orders otherwise, trustee may operate debtor's business); *id*. § 1107(a) (providing debtor in possession with all rights, powers, and duties of trustee except right to compensation and duty to investigate debtor).

[47] *See id*. § 1104 (setting forth circumstances under which court may appoint trustee); *see also In re* Savino Oil and Heating, Inc., 99 B.R. 518, 526 (Bankr. E.D.N.Y. 1989) (explaining if debtor in possession defaults in its fiduciary responsibilities, § 1104(a)(1) requires independent trustee be appointed); *In re* Microwave Prods. of Am., Inc., 102 B.R. 666, 670 (Bankr. W.D. Tenn. 1989) (stating Bankruptcy Code prefers allowing debtor to remain in possession, unless party-in-interest can prove appointment of trustee is warranted).

[48] *See* Schuster v. Dragone, 266 B.R. 268, 271 (D. Conn. 2001) ("[A]ppointment of a trustee under Chapter 11 is the exception rather than the rule and…this is an extraordinary remedy available to creditors.").

White: No, they're not and this is where I regret the absence of Sir Colin Rimer, because I think we may have had a debate about it. We do not have specialist bankruptcy judges or a specialist bankruptcy court. Insolvency matters are allocated to the Chancery Division[49] as opposed to the Queen's Bench division which deals with personal injuries, common law matters, P.I. stuff, or of course the admiralty court which deals with ships, or the construction and technology court, or the family court. The Chancery Division is a sort of elite division of our court system. It's the S.A.S. of the royal courts of justice, if you like, and insolvency matters are allocated to that division and will be dealt with by the Chancery judges. There is not, though, a specialist bankruptcy judge. There have been judges in the past who have taken insolvency to their bosoms because they like the intellectual challenge and then curiously found themselves allocated with the majority of the bankruptcy and insolvency cases. One thinks of Leonard Hoffman, and after him Peter Millett, but we don't have anybody quite like that today, so the bankruptcy and insolvency matters will be allocated generally across the Chancery Division judges.

Broude: Who does the allocation?

White: I think it's probably the Court Clerk. I think it's the Listing Clerk. It is. Right, thank you for that, not being a litigator. I'm obliged to my learned friend [in the audience].

Broude: Will a case be allocated to a judge, or just a specific matter? When you go to the court, and you want to request judicial intervention, and a judge is appointed to hear that matter, the second time that you come back in the same case, is it before the same judge?

White: Not necessarily, you can in major matters ask the Lord Chancellor to allocate a particular judge who will have the carriage of all matters arising within that particular insolvency but that only happens in the mega cases. Otherwise you can find yourself dealing with three or four different judges in the case of an insolvency.

Broude: Do you like that?

White: Yes, you get a fresh view and if you lose first time around you may come back for another bite.

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[49] *See* 2 COLLIER INTERNATIONAL, *supra* note 23, ¶ 21.03[1], at 21-15 ("Corporate insolvency proceedings in the High Court are handled within the Chancery Division by the Companies Court.").

Michael Steiner: They are increasingly retaining them. I mean, I was before a deputy judge last week and he was desperate to retain it. That happened to be Gabriel Moss, but he was desperate to retain it and he's a well-known bankruptcy and insolvency Q.C. In Maxwell, for example we had an allotted judge all the way through and we did actually, contrary to in that particular case, go back to see the judge regularly for clearances on various deals we were doing. He forgot that later on and then decided that we had been responsible for various steps that he decided he didn't approve of.

Broude: Assuming a competent judge, or judges, who would handle the matter, isn't it more efficient to appear before the same judge who has a history and some knowledge of the case, or is that thought to be inappropriate?

White: It is in the interlocutory stage, yes. And more and more at the interlocutory stage you're keeping the same judges, but you won't have the same judge for the main trial.

Broude: Judge Fitzgerald?

Judge Fitzgerald: We are a specialist court by definition because our jurisdiction in the United States is limited to handling bankruptcy matters.[50] The only matters that we are not permitted, however, to handle within that definition of "specialty," are personal injury actions and criminal cases.[51] Although we're defined as a specialist court, and it wouldn't seem that, for example, trying civil rights litigation or an arson case would come before a bankruptcy court, in fact they do, and I have tried those cases as a bankruptcy judge in claims litigation primarily where we're determining who is entitled to share in the distribution that's going to be created through the reorganization process. So, I think maybe that's one of the dichotomies in our statute that sort of defines us as specialist judges and then provides the opportunity for the bankruptcy court to be the focus for all litigation that affects the company or that affects the assets of the company.

Broude: It really is a staggering breadth of jurisdiction that is afforded bankruptcy judges. We have some constitutional problems in the United States. Our Constitution provides for a system of federal judges who are appointed for life

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[50] *See* Querner v. Querner (*In re* Querner), 7 F.3d 1199, 1201 (5th Cir. 1993) (noting bankruptcy courts are courts of limited jurisdiction with statutorily defined scope); FDIC v. Majestic Energy Corp. (*In re* Majestic Energy Corp.), 835 F.2d 87, 89–90 (5th Cir. 1988) (explaining how Bankruptcy Amendments and Federal Judgeship Act of 1984 allows district courts to refer core proceedings to bankruptcy judge for full adjudication as well as non-core proceedings over which bankruptcy judge may exercise only limited power).

[51] *See* 28 U.S.C. § 157(b)(5) (2000) ("The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending"). *See*, *e.g.*, *In re* UNR Indus., Inc., 45 B.R. 322, 325 (N.D. Ill. 1984) (stating § 157(b)(5) requires any order for trial for personal injury or wrongful death claim is to be made by district court).

and whose compensation cannot be reduced.[52] One of the huge battles that took place in the 1970's when the bankruptcy legislation was working its way through Congress had to do with jurisdiction of bankruptcy judges. Would they be afforded the full breadth of federal jurisdiction by being appointed under Article III of the Constitution for life and with non-reducible compensation? The federal judiciary, the sitting judges, would not hear of it. They did not care for the concept of what used to be called bankruptcy referees being afforded the same sort of constitutional protection that they had. So we had a system that was enacted in 1978 and that was declared to be unconstitutional by the Supreme Court.[53] For two years we survived without a judiciary that had any constitutional jurisdiction. We pretended the Supreme Court opinion didn't exist. Then finally in 1984 Congress enacted legislation,[54] not because Congress cared about bankruptcy but because Congress wanted to reverse a Supreme Court decision dealing with collective bargaining agreements and bankruptcy.[55] Labor wanted the change. So Congress figured, what the hell, as long as we're passing legislation about collective bargaining agreements for unions, let's fix the bankruptcy system as well. The debate raged a second time. Congress was looking for a way to construct a system that didn't afford lifetime compensation, lifetime jobs, and un-reducible compensation to bankruptcy judges, and they didn't. Once again they passed a statute that provides for bankruptcy judges having fourteen year terms and who are appointed by the members of the Courts of Appeal.[56] Blatantly unconstitutional again because they put jurisdiction in the bankruptcy judges again.

Judge Fitzgerald mentioned the breadth of litigation she handles. It's unconstitutional, so Congress created a silly system in which they vest all of the jurisdiction under the Bankruptcy Code in the federal district court, these Article III judges.[57] But then they provide that if the judges want to, they can delegate all of this responsibility to the bankruptcy judges, which they do.[58] So Judge Fitzgerald

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[52] U.S. CONST. art. III, § 1, cl. 2 ("The Judges . . . shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

[53] *See* N. Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 87 (1982) (holding broad grant of jurisdiction to bankruptcy courts was unconstitutional).

[54] *See* Laura Bartell, *In Defense of Language:The Supreme Court and Congress: A Reply to Professor Chemerinsky,* 71 AM. BANKR. L.J. 131, 134 (1997) (noting Congress' response to *Marathon* culminated in Bankruptcy Amendments and Federal Judiciary Act of 1984).

[55] *See* Michelle Rait, *Rejection of Collective Bargaining Agreement Under Section 1113 of the Bankruptcy Code: The Second Circuit Enters the Arena*, 63 AM. BANKR. L.J. 355, 363 (1989) (noting conference committee produced compromise adopted by both houses of Congress as part of Bankruptcy Amendments and Federal Judiciary Act of 1984).

[56] *See* 28 U.S.C. § 152 (2000) ("The United States court of appeals for the circuit shall appoint bankruptcy judges . . . and] [e]ach judge shall be appointed for a term of fourteen years").

[57] *See id*. § 1334(a)–(b) (providing district courts shall have original jurisdiction over bankruptcy cases); *id.* § 157(a) (giving district courts authority to transfer all applicable cases to bankruptcy courts).

[58] *See id*. § 157 (authorizing district courts to transfer control of bankruptcy cases to bankruptcy courts); John P. Hennigan, Jr., *The Appellate Structure Regularized the NBRC's Proposal*, 102 DICK. L. REV. 839, 854 (1998) (citing National Bankruptcy Review Commission, Final Report, *Bankruptcy: The Next Twenty*

and her colleagues handle all kinds of cases involving millions and billions of dollars, while these federal judges handle statutory litigation involving tens of thousands of dollars. The minimum to get into federal court is seventy-five thousand dollars.[59] Bankruptcy judges don't waste their time on such small cases. So we have this terrible constitutional problem. The Supreme Court has refused a couple of times to review this legislation with respect to its constitutionality so we're laboring, and have labored since 1984, under an unconstitutional system that works.

Judge Fitzgerald, you might want to expand a little bit because I want to ask the other judges, as to other than handling the case itself, you mentioned you handle litigation civil rights claims and arson cases. Could you just expand a little bit about the breadth of the kind of litigation that you handle, in addition to the specific bankruptcy matters that are set out in the statute?

Judge Fitzgerald: The United States bankruptcy system developed because of the fifty states. Each state had its own laws dealing with insolvency and there is still a throwback in each state where creditors can essentially force a debtor into a composition or an arrangement for the benefit of creditors without ever invoking the bankruptcy process. That is a less expensive process but requires, generally speaking, one hundred percent acceptance by creditors.

The bankruptcy system was enacted as a commercial means of keeping commerce floating between the states, and as a result, Congress decided that although the composition and assignments for benefit of creditors could continue in the bankruptcy arena debtors would be able to file plans that could be accepted by fewer than all the creditors, and the words are "crammed down" on the non-accepting classes.[60] In order to determine who is going to share in the distribution of those estates, the Bankruptcy Code tries to balance two things: the discharge of the debtor, that is, the debtor's ability to have a fresh economic start going forward after the bankruptcy proceeding is over with, the rights of creditors to share in the debtor's assets that are available for distribution. As a result, all of the litigation is supposed to be focused on those two things. Has the debtor in good faith come before the bankruptcy court, committed his assets to whatever the process is that you're invoking (there are several mechanisms in the bankruptcy arena for liquidating assets and reorganizing an estate), and who are the creditors who are entitled to share and in what distribution priority? The Bankruptcy Code lists priorities very specifically[61] and there can, in a chapter 11, be some bargaining that

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Years, Recommendation 3.1.3, at 731 & n.1773 (1987) (noting all district courts, except for Delaware, automatically refer cases to bankruptcy courts)).

[59] *See* 28 U.S.C. § 1332. *But see id.* § 1331 (granting federal courts jurisdiction over federal questions regardless of amount in controversy).

[60] *See* 11 U.S.C. § 1129(b) (2000) (providing officially for "cramdowns"). *See*, *e.g.*, *In re* Trevarrow Lanes, Inc., 183 B.R. 475, 479 (Bankr. E.D. Mich. 1995) (noting confirmation of plan may take place without credit class acceptance).

[61] *See* 11 U.S.C. § 507 (listing priorities and specifying necessary claim amounts).

will change those priorities.[62] In the other chapters there cannot be that bargaining and they have to be followed literally. So the bankruptcy judge is, I would say, compared to these other systems, pretty actively involved in a case but we do not have investigative functions and we are adjudicators. We are not parties in interest in the case. We get information by motion or by some complaint that is brought before us by someone who wants adjudication. Within that, however, we also conduct status conferences[63] in cases to make sure that the case is headed toward a reorganization within some reasonable time frame, and as you can imagine, when you are dealing with a business pretty much every issue that comes up on a day to day operational basis requires somebody to say, "Yes, you can take that step" or "No, you can't." So we deal on two fronts. We deal with the reorganization as it's going forward from a business perspective and then we deal with the actions that the debtor either wants to commence against entities or that entities want to commence against the debtor in a typical litigation environment that would be litigated whether there was a bankruptcy going on or not.

Broude: Mr. Justice Kelly, how do you view yourself? As a specialist? As a generalist? And how active a role do you play in reorganization of the kinds that Frank Sowman described?

Justice Kelly: Well, one of the more monstrous legal fictions that exists in this jurisdiction is that upon appointment to the High Court bench, the practicing lawyer is automatically metamorphosed into an expert in every branch of the law, and a High Court judge in theory should be able to sit and deal with every piece of business that comes before the High Court. The practice is somewhat different. I for example, after six years on the bench have never been trusted to conduct a criminal trial, mercifully, and for the most part I've confined myself to the Commercial Court or to judicial review and, de facto, that is what has happened. The court, unlike the English situation, is not, either by statute or by court regulation, divided up into divisions de facto.

Consequently, all of the liquidation work, receivership work, and reconstruction work would come before a number of judges who specialize in that area, although they are expected to, and do sit, to deal with other business from time to time. When one gets to the reconstruction applications, which we call examinations, it's even more confined because a panel of three out of the twenty-five serving High Court judges is designated by the President of the Court to deal with applications

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[62] *See*, *e.g.*, *id.* § 1123(a)(4) (providing for equal treatment of classes except as altered by agreement); *id.* § 510(a) (permitting appropriate subordination agreements). *See generally* Robert A. Zinman, *Under the Spreading Bankruptcy: Subordinations and the Codes*, 2 AM. BANKR. INST. L. REV. 293 (1994) (discussing subordination and its effects).

[63] 11 U.S.C. § 105(d)(1) (providing court may hold status conference regarding any case or proceeding under title 11).

for reconstruction, in turn.[64] And once one such application begins before one of those three judges, he remains in charge of the case until its conclusion. So, it's specialist to that extent. We do of course, occasionally, go on holidays and the Vacation Judge is truly the expert on everything, because into the vacation list comes all of the business: bankruptcy, crime, bail, judicial review. When that happens, of course, interesting situations arise. I'm put in mind of an instance that occurred about thirty years ago, where a very complicated bankruptcy application came before the Vacation Judge, who knew nothing about bankruptcy law and who was serviced on this occasion by a registrar who knew just as little. And counsel made this very complicated application. The judge looked wisely, considered it, and said, "very good Mr. So-and-So, you may take your order." And counsel looked up at him rather quizzically because the proposition he put to the court permitted one of six orders to be made. And he said, "Which order is that my lord?" Slight panic broke out on the judicial face. So he did what judges always do, he tapped the registrar's shoulder and said "Which order Mr. So-and-So?" And the equally inexperienced, but very wily, registrar looked up and said "The usual order." (laughing).

Broude: Mr. Justice Kelly, let's say that during the course of a reorganization the examiner wishes to sue a third party, say to collect a debt. Would that litigation come before the same court that is handling the bankruptcy case-in-chief?

Justice Kelly: No, it would not.

Broude: Where would that go?

Justice Kelly: That would be dealt within the ordinary Commercial Court. But it wouldn't necessarily have to form part of the examination. If, for example, he felt it desirable to go and get permission to commence such litigation, he would make that application to the Examination Judge. But the litigation itself, for the recovery of the debt, would, generally speaking, be outside the examination process.

Judge Fitzgerald: In the United States, I was reading with interest the literature that was put together by these groups of people about the numbers of cases that are filed. We have 330 Bankruptcy judges across the United States and last year we had one million four hundred thousand bankruptcy cases filed.[65] So that shows you what the quantity of work is that the bankruptcy courts face there. Now, of those, probably 96 or 97% are liquidation proceedings which require very little judicial

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[64] *See generally* 2 COLLIER INTERNATIONAL, *supra* note 23, ¶ 27.03[1][b], at 27-21 (explaining structure of High Court in which President of High Court leads team of twenty-four judges).

[65] *See* ABI World, U.S. Bankruptcy Filing Statistics, *available at* http://www.abiworld.org/stats/newstatsfront.html (last visited Nov. 2, 2002) (listing total number of filings per quarter for 2001 as 366,841 first quarter, 400,394 second quarter, 359,518 third quarter, and 364,971 fourth quarter).

time and the rest are reorganization proceedings. Even so, when you're dealing with that many cases per judge, it's a very busy court and I think that may be one reason why cases start with and stay with the same judge, essentially from beginning to end. It's very difficult to get embedded in a business reorganization and then have someone else making rulings in a case. It's much easier to the learning curve, I suppose, when the same judge handles the case from beginning to end. Thank you.

White: Richard, you did note "getting embedded in the reorganization process," which absolutely makes my point.

Judge Fitzgerald: No, getting "embedded." I'm sorry. That doesn't mean that the judge, I think, has any special relationship with any party. We're there to be neutral observers and finders of fact. But nonetheless, being involved in the process is much different from being involved with the parties and the outcome of the case.

White: I wasn't suggesting for one moment that embedding meant anything to do with getting involved with the parties. It wasn't my choice of phrase. (laughing). But it does, I think, illustrate the difference in approach. Even getting embedded in the process is something which the English judiciary would throw up their hands in horror at. But I have already covered that.

Broude: The venue bouts fought in the United States, which Judge Fitzgerald was too kind to mention, unfortunately, to my way of thinking, help make John's point. Every bankruptcy court in the United States has jurisdiction over every case; it's a federal statute with a federal system. However, there are certain provisions in the legislation dealing with venue.[66] Where is a proper court? In which court of these 330 judges should the case be filed? Delaware, in which most U.S. companies are incorporated, has become the venue of choice for big chapter 11 cases. Why? Because the judges on that court are thought to be particularly debtor-friendly to the point where it is seriously bruited that not filing in Delaware could be malpractice. Judges in other districts, upset over the big cases going to Delaware, try to be perceived as debtor-friendly as well. There may be people who disagree with my view of the world, but bankruptcy is Delaware's second biggest business after Dupont. Amtrak is kept alive by lawyers coming down from New York to go to Delaware bankruptcy cases. If you follow the papers you see some cases now are being filed in New York City with a friendly judiciary and the judges in Delaware are so overworked that they can't handle the cases that are filed. I mentioned that Judge Fitzgerald has been specifically assigned to Delaware. A bankruptcy judge from Oakland has been assigned to Delaware to handle the cases. So John made a point, maybe not the way he wanted to make it. The interval judges don't become embedded in the case, but some judges are perceived of as being particularly debtor-friendly, and if that's embedded, then they're embedded. They

[66] *See generally* 28 U.S.C. § 1409 (2000) (explaining venue of proceedings which arise under title 11).

don't talk to the parties, at least not anymore, and they don't decide cases based upon the personalities of the lawyers in the case, but they are perceived of as being friendlier to reorganization than judges in other places. And we'll circle back because I mentioned these articles lately about recidivism of debtors. A lot of it may have to do with Delaware. Question?

Judge Leif Clark: I'd like to suggest a slightly different take on that.

Broude: This is Judge Leif Clark, for those of you who don't know, and he's a bankruptcy judge in Texas.

Judge Clark: . . . that will perhaps unite those two nations that are divided by a common language. That is, that the American statute may not necessarily be so much debtor-friendly as it is professional friendly. And in that regard, it may not be all that different from the administration system in England and Wales, which is also professional friendly. One of the reasons that I suggest is, as you correctly pointed out, about 90-95% of the public companies that enter the reorganization process in the United States, either by the time they enter, or within a very short time after they enter the proceeding, will have different management. In other words, the management that steered the ship onto the shoals is not the management that will have the privilege of running the company through the bankruptcy process, which means that debtor-friendly really is a little misleading, I think, because it's really not the debtor that we all knew and loved as the nice folks who drove us onto the shoals and wrecked the boat. No, it's generally the turnaround managers who are now being paid a very large fee for the special services that they're offering, and the lawyers, who are being paid a very large fee for the services that they're offering, and the accountants, and the investment bankers, and any other professionals who may be involved in that process. And in that regard, those professionals have a very high desire of making sure that: a) whatever it is that they deem is best for the enterprise is in fact approved by a court, to the extent that a court approval is needed at all, and b) that no one is going to fiddle with their fees. I suggest that, in that regard, our insolvency system in the United States may not be particularly different from the insolvency system in Germany, or the insolvency system in the United Kingdom. Now I'll throw that ball up in the air and let you kick it around.

Broude: Judge Clark, you pass on fees to professionals in your cases. Do you examine them independently if there are no objections being made to the fees?

Judge Clark: Generally not.

Broude: Judge Clark, do you sometimes, sitting in court, in a case with a big law firm which brings seven lawyers to court, do you say Judge Clark, "Why do you have seven lawyers here today, and are all of them billing on this case?"

Judge Clark: Did I perhaps push a button?

Broude: No. (laughing) Do you ask those questions Judge Clark?

Judge Clark: Well, I really would prefer to hear the panel deal with the question that I posed. So by all means, you first.

Broude: We'll come back to the department of fees, and I'll push those questions because one of the issues we'll have here is, who are the police people? Who are the police that are policing the system about fees? Everybody complains. Let's see later who does something about it. Yes, and you did push a button. I don't hide those buttons very well, do I? Judge Piot, really, what is the situation in France with respect to the nature of the court?

Judge Piot: May I ask Mr. Buchman to answer for me?

Mr. Buchman: Thank you Judge Piot. Just perhaps, it's better to say that, as I mentioned before, the Commercial Court is really the court in charge of running the bankruptcy proceedings in France,[67] and as distinguished from the Civil Court, we have two concurrent systems. But when I'm talking about the Commercial Court, really it's misleading because I should distinguish between three separate jurisdictions of the Commercial Court. You have, on the first hand, a collegial formation of the court in large courts like the Paris court where there is a division that deals with bankruptcies, the division of the court which is called "La Chambre Des Procedures." The collegial formation of the court really declares the company is in cessation of payments, which means by definition that the company is unable with its available liquid assets to face its due and payable debt. And then it appoints an overseeing judge, the "Juge-Commissaire." It appoints creditors' representatives and it appoints, as the case may be, either a receiver or a liquidator, and it sets also the date for the cessation of payments. That's the main role of the collegial formation. Then you have the separate jurisdiction of the presiding judge of the Commercial Court[68] and Judge Piot will certainly get into that later in more detail. I won't preempt his presentation. Then you have, as I mentioned just a second ago,

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[67] 2 COLLIER INTERNATIONAL, *supra* note 23, ¶ 22.05[1], at 22-18 (noting Commercial Court's involvement in every step of bankruptcy proceeding including appointment of judicial representatives and deciding fate of enterprise).

[68] *See* 2 *id*. ¶ 22.03, at 22-9–22-10 (stating commercial courts have jurisdiction over all litigation between merchants, bankers, shareholders and matters of commercial nature).

the overseeing judge, the Juge-Commissaire,[69] who will be in charge of listening to any problems that arise during the course of either the reorganization or liquidation and will have to deal with petitions from the creditors or the debtor, or from the receiver or liquidator. That overseeing judge is very important too. That is, in a nutshell, what I think you should know about the Commercial Court and how it's organized.

Broude: Thank you. Justice Vallender?

Justice Vallender: It's totally different from what we have in Germany. We have had a special bankruptcy court since the nineteenth century.[70] When the Bankruptcy Code started, they established a special bankruptcy court, but the judges who are working for this court wanted to be occupied totally by the cases in bankruptcy. They also did litigation and crime and other things. But since we've had the insolvency statute of 1999,[71] we concentrate much more now on insolvency proceedings and the law was changed. They have a concentration now that the local courts are responsible for all the insolvency proceedings of the regional court district.[72] That means that the judges who are working for this court have to be much more trained and educated than they had been before. So this is a task we have to fulfill. I wouldn't say that we reached a point where we could be satisfied with that, but the Ministries of Justice in Germany offer these training programs for the judges and I'm within this training program, so two or three times a year we come together and then we are discussing the actual problems. This helps us and is going well. So my personal opinion is, since we have this concentration, the judges' work has become better. There are more judges, for example, who are publishing in law magazines and this shows that they are much more interested in the subject. Since we have these mega cases in Germany this year,[73] I found out, for example, that the public interest has become much larger as well. For example, take my

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[69] *See* 2 *id*. ¶ 22.05, at 22-18–22-19 (indicating role of bankruptcy judges is to supervise receiver and creditors' representative as well as oversee and accelerate bankruptcy proceedings); JOHN BELL ET AL., PRINCIPLES OF FRENCH LAW 457 (Oxford University Press 1998) (explaining once courts are satisfied business is insolvent, they make orders commencing rescue proceedings and appoint judge acting as Juge-Commissaire to oversee what is done).

[70] *See generally* DROSTE, ET AL., BUSINESS LAW GUIDE TO GERMANY ¶ 1616 (3d ed. 1991) (stating German Bankruptcy Code was enacted in 1877, providing for appropriate proceedings to distribute debtor's assets to creditors).

[71] *See* Joachim Rudo, *Introduction to German Business Law*, *available at* http://www.germanbusinesslaw.de/introinhalt.htm (last visited Nov. 2, 2002) (discussing German insolvency statute (effective January 1, 1999) which replaced previous statutes and created uniform insolvency statute for Germany) (last visited Nov. 2, 2002).

[72] *See generally* 2 COLLIER INTERNATIONAL, *supra* note 23, ¶ 23.03, at 23-14 (explaining exclusive jurisdiction rests with district courts in insolvency proceedings).

[73] *See, e.g., Kirch Files for Insolvency* (Apr. 8, 2002), *available at* http://dw-world.de/english/0,3367,1439_A_492842,00.html (last visited Nov. 2, 2002) (describing insolvency declaration by KirchMedia, whose assets include Germany's biggest commercial broadcaster, Europe's largest film archive and massive publishing interests, as largest declaration of bankruptcy in Germany since World War II).

students at the University. When they came to insolvency lessons, there were normally forty students, and Cologne University is one of the biggest in Germany. When the semester started in April, I came into the hall and suddenly one hundred and fifty pupils were sitting there, and I was really astonished and I asked them why? And they said, well, insolvency had become much more interesting. This shows that it goes back, really, to the students' interest.

Broude: Could you expand a little bit more on the roles of the judge and the graduated law clerk?

Justice Vallender: Yes, this is a really funny situation. We have these insolvency proceedings run by the judges. We have an education, we have to go to a university. We have to pass two examinations and then we can decide if we want to become a judge, which is different from your system, or if we want to become an attorney or a prosecutor. Whether you are able to do public service or not depends on the results of the examination. And the graduated law clerks have a different education, which is a lower education. It's a question of money. The German government thinks if it can pay them, we'll have to pay less to the judges and that's why we have a big controversy, whether for example, these graduated law clerks should oversee the whole proceeding. It's incredible. The other day I was talking to a public audience and I said, "You can't imagine what's going on." We are sitting here on a panel listening to what a French, an Irish, an American and an English judge will tell, and we Germans are thinking about giving these insolvency proceedings over to a graduated law clerk. It's incredible. I mean, in America there are federal judges, and in Germany there might be a graduated law clerk managing mega cases. My personal opinion is that they shouldn't. What we should do is get back the positions we had in former times. Well, the thing is, when the case has been opened, the case goes onto the graduated law clerk. This decision is my responsibility. If I want to go on, I could do that. I have the power to say, "I want to go on," but I have to work on 800 cases a year. If I would work on the case from the beginning up to the end, I wouldn't have found the time to go on. So that's a habit. Up to the opening decision, it's the judge's work. Perhaps the most interesting part of the work, the reorganization by a reorganization plan, is conducted by the graduated law clerk. It's a funny situation. I'm working on it, but am sure I can't change it.

Broude: You see there are buttons, and there are buttons that we are finding out about this morning.

Jauch: That's not comfortable for the administrators. It's much easier in the pre-bankruptcy proceeding, if we have problems, to deal with a judge who has the same education as you have then later with very complicated problems and

proceedings with somebody who has a much lower education. It makes it very complicated sometimes. We have good guys there too, but not in all cases.

Broude: If the parties in the case don't care for a decision or an act of the law clerk, are there rights of appeal to the judge?

Jauch: Yes, if they render the decision and the parties do not agree then the judge will be involved again.

Broude: At the risk of alienating law clerks if you appeal too much?

Justice Vallender: No. Normally the judge doesn't overrule his law clerk because he has to work together with him on a day-to-day basis. But sometimes it happens you know (laughing).

Jauch: But, you do it. But most judges don't do it because they don't want to spoil the relationship and they give it to the regional court.

Broude: How many bankruptcy specialist judges are there in Germany?

Justice Vallender: Well, it's difficult to say. At our court, for example, we have four judges in Cologne, which has about 1.7 million inhabitants. There are 19 insolvency courts with about 60 judges. So all over Germany there are maybe about 200. I don't know the real number, but there are about 200 judges who are working exclusively on insolvency cases.

Broude: Would it be worthwhile to have appeals from law clerks to go to a different judge than the one with whom that law clerk is working so you get away from this personality problem that Hans just talked about?

Judge Fitzgerald: You still have to work with your colleagues on the bench.

Justice Vallender: Exactly. I mean, if a case requires a different judgment then you have to do it. I mean, this is our task, but of course you want to have a good atmosphere at the court. What I say is, we are all sitting in the same boat and we have to row together.

Broude: Even if you're rowing in the wrong direction?

Justice Vallender: (Laughing). No, as long as it really isn't wrong, it may be fine.

Broude: Louis, does the Paris Commercial Court have nationwide jurisdiction, or is it restricted to the Île de France?

Buchman: No. It's not even restricted to the Île de France; it's restricted to Paris proper. The second largest Commercial Court in France, sits right next door to Paris, in Nanterre and has jurisdiction over the business district of Paris which is La Défense. So these are the two largest commercial courts in France and they handle about one-third of all bankruptcy cases in the whole of France.

Broude: But if a company in Marseille, for example, wanted to file a proceeding, it would stay in the Marseille area, it couldn't shop for a judge elsewhere?

Buchman: No, there's no forum shopping. It really depends on where the registered office of the failing company is.

Broude: Judge Piot will describe now how a case progresses. Once a case is filed, what is the role of the judge, how does a case proceed, and what does a judge do or not do in a case? France, however, has an unusual proceeding and Judge Piot will describe this, I guess pre-bankruptcy judicial intervention may be a way to put it, that seems to be unique to France, at least among the countries at this table. Judge Piot.

Judge Piot: You have my paper in the folder.[74] In March 1984, the Parliament in France initiated a law relating to the prevention and amicable solution of corporate difficulties that allows the presiding judges of the Commercial Courts to set up preventive treatments for companies undergoing difficulties in their operations before they cease payments.[75] The CEO may also take the initiative of requesting the initiation of amicable solution proceedings.[76] The Law of 1984 and its implementing decree were amended in 1994.[77] To present these two parts, in first part, I shall set forth how prevention is organized within the Commercial Courts and the way in which the presiding judges of these courts exert their powers to be

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[74] Unpublished manuscript on file with editor.

[75] *See* CHRISTOPHER JOSEPH MESNOOH, LAW AND BUSINESS IN FRANCE: A GUIDE TO FRENCH COMMERCIAL AND CORPORATE LAW 149 (Martinus Nijhoff Publishers 1994) (stating procedure of amicable resolution aims to remedy businesses which have not yet ceased paying debts and whose situation is not dire enough to justify judicial reorganization); James J. White, *Harvey's Silence*, 69 AM. BANKR. L.J. 467, 477 n.31 (1995) (explaining French law is designed to provide businesses assistance before bankruptcy becomes necessary and provides "preventive maintenance" which involves use of business experts who monitor financial statements of businesses and offer help at first sign of trouble).

[76] *See* 2 COLLIER INTERNATIONAL, *supra* note 23, ¶ 22.04[3], at 22-16 (noting management of company undergoing financial difficulties may seek appointment of a conciliator through petition to Commercial Court).

[77] Law No. 94-475 of June 10, 1994 (Fr.).

informed, to prod or incite, and to take initiatives, conferred upon them by the law. In second part, I shall deal with amicable solution proceedings.

The Law of June 10, 1994 and its implementing decree grant the presiding judge of the Commercial Court the possibility of summoning the CEO of a company which appears experience "difficulties likely to jeopardize its operation continuity" in order to discuss with the latter measures necessary to revert to normalcy.[78] This procedure is intended to alert the CEO to those telling signs which forecast the first difficulties, to raise his/her consciousness level if need be, and to examine with him/her the orientations to be taken in order to find improvement solutions. To be practical, I shall explain the steps set up by the Paris Commercial Court, with which I was associated for several years on its bench. We shall examine, in turn the summoning of the CEO, the hearing, and the follow-up of the hearing.

First, the summoning. The presiding judge of the Commercial Court may summon any CEO of a commercial corporation, of an economic interest grouping, or of a sole proprietorship which undergoes difficulties likely to jeopardize its operational continuity.[79] The presiding judge may in his/her sole discretion decide whether summoning the CEO is appropriate or not.[80] The selection of the businesses to be summoned is made in accordance with specific criteria which are collected and computer-processed by the office of the Clerk of the Court. You will find the criteria in my paper. These criteria have been selected because the relevant data are normally available with the registry and experience proves that they reveal corporate difficulties.

Second, the hearings. This is a direct, informal, and strictly confidential hearing.[81] The CEO may appear, either alone or assisted by counsel, and/or by a CPA. The judge informs the CEO of the elements collected by the officials, the Clerk of the Court, which tend to indicate that the business is experiencing some operational difficulties. The judge inquires about types of measures he, the CEO, feels the firm should be taking to remedy these difficulties and invites him/her, as the case may be, to get in touch with a lawyer or an accountant able to advise the CEO. If necessary, the judge draws his/her attention to the personal liability a CEO

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[78] *See* Richard L. Koral & Marie-Christine Sordino, *The New Bankruptcy Reorganization Law in France: Ten Years Later*, 70 AM. BANKR. L.J. 437, 446 (1996) (noting president of commerce tribunal may summon company's president to appear in chambers in order to have personal discussion regarding problems company appears to be experiencing and of possible solutions).

[79] *See id.* (noting courts scrutinize reports which are required to be submitted by companies "for evidence of weakness on part of any company in the region . . . [for] tell-tale signs of trouble, such as changes in management, changes in location, increased litigation, and the like. This evidence . . . is brought to the attention of the president of the Commerce Tribunal.").

[80] *See id*.

[81] *See id.* at 447 (noting process is secret and revealing information is punishable by criminal sanctions).

incurs by carrying on a loss-making operation, or a business in cessation of payments.[82]

Three, the follow-up on the hearing. After the hearing the judge has several possibilities available. (1) If the measures contemplated by the CEO seem adequate or the situation of the company within a group doesn't present any risk of insolvency for a third party, the case is closed.[83] (2) If the situation of the business in light of the elements before him makes it necessary to gather additional information, the presiding judge is fully empowered, "notwithstanding any law or regulations to the contrary," to obtain from the Statutory Auditors, the employees, and the members of the works committee, the public administrations as well as the social security and provident bodies, and the services in charge of centralizing banking risks and payment incidents "data the nature of which will give precise information on the economic and financial situation of the debtor."[84] (3) The CEO decides to file an ex parte motion for appointment of an ad hoc court agent or of a conciliator.[85] The matter, in such an event, will produce further proceedings described hereunder. (4) Finally, the presiding judge takes note either immediately or after receiving additional information that the company is evidently in cessation of payments.[86] In such a case he urges the CEO to file for protection with the Clerk of the Court. Failing that, the presiding judge, on his/her own motion, initiates a receivership proceeding.[87]

Broude: I have one question to ask. The presiding judge can him or herself force the company into a proceeding?

Judge Piot: Yes.

Broude: And does that judge also handle the proceeding once it's filed or will it go a different judge?

Judge Piot: No, not the presiding judge of the Court. Handling the proceedings is a special jurisdiction of the court. He asks the Clerk of the Court to lodge a claim if he has sufficient elements to do that. If he thinks that a company is in cessation of payments and the case is clear in the hearing, then there are three judges to decide if the company really is in cessation of payment, and who then open the proceeding.

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[82] *See* JEAN-PIERRE LEGALL & PAUL MOREL, FRENCH COMPANY LAW 292–93 (2d ed. 1992) (explaining personal liability may be imposed if defendant was in control of the company and there was actionable mismanagement).

[83] *See* Koral & Sordino, *supra* note 78, at 448 (summarizing various forms of judicial action).

[84] *See id*. at 445 (explaining the information gathering process).

[85] *See id*. at 450 (discussing the role of the court appointed agent).

[86] *See* LE GALL & MOREL, *supra* note 82, at 287 (explaining court may order compulsory liquidation if there is a declaration of cessation of payments).

[87] *See* JOHN BELL, ET AL., *supra* note 69, at 457–58 (1998) (noting court will appoint liquidator whose task it is to retrieve assets of business and to pay creditors).

Broude: We have just heard from Judge Piot that he has the power to invoke the assistance of the statutory auditors, employees, works committee, public administrations, and other bodies to assist the judge in making the determination. I put it to the other judges on this panel: Would you like to have similar powers to force companies to face up to the realities at a time when it may be propitious to do so? Judge Kelly?

Judge Kelly: I think I probably would, provided that I have the necessary back-up to enable me to do so effectively and in this jurisdiction there is no such back-up available at present. I think if one were to get involved in that one would want to do so with a state of knowledge that is not readily available under the present regime.

Broude: Judge Fitzgerald?

Judge Fitzgerald: I second that.

Broude: Justice Vallender?

Justice Vallender: Me too. If we had this system, I think it would cause a lot of work . . . more work to the judges, then we have right now. If I look on the cases we have to work on, we have a really large increase of cases and, honestly speaking, I'm not really looking forward to that. I mean, it's certainly a good idea, but it's connected with a high responsibility at least.

Sowman: Can I just add to that, Chairman? To say that it's certainly one of the difficulties we face with reconstruction, I think, in Ireland is the fact that the situation hasn't been faced up to early enough, because there's always a cavalry coming over the hill. Very often an organization that is capable of reconstructing just leaves it too late and one of the pluses of the system that operates in France is that you're compelled to address situations if your CEO is bought to account. You have no other option but to deal with it and so that it could possibly have that benefit, but as Judge Kelly said, certainly with the way we're currently structured we really have to struggle to manage the role that the judiciary has at the moment because of resources and so we'd have to radically restructure that. I think it would be in the interest of the rescue culture. It definitely has a plus in that respect.

Broude: John, the early warning systems in England seem to be related to the personal liability of directors, if they continue trading, and Judge Piot's paper mentions the personal liability of the CEO. Do you get the idea that this potential personal liability has the effect of forcing company directors to face up to financial realities in a timely fashion?

White: Well, that was why, certainly, the wrongful trading provisions[88] in the Insolvency Act of 1986 were introduced. The idea was that directors should make sure they were aware when the company was getting into difficulties and should take all appropriate steps to avoid creditors being disadvantaged.[89] What in fact happened is that it's used as a two edged sword and what directors now do is to turn around to their financers and say, "We believe we are facing personal liability, lend us more money so we can carry on, otherwise we're going to put the company into an insolvency process." So it's actually used as a weapon.

Broude: Well, that's terrific, isn't it?

White: Well, not if you're a bank. So it is undoubtedly a useful warning flash on the dashboard for directors, but our directors of course can be subjected to all sorts of horrors, because once the company's actually gone into an insolvency process then, in certain of them, the office holders have to report on the conduct of the directors. If the report presented by the office holder to the DTI[90] is adverse to the director then they can be disqualified. And one of the points that was going through my mind yesterday when we were talking about bankruptcy regulation is, assuming you have a main proceeding in England, and it is one of those proceedings where the office holder is required to report, he's obviously going to be required to report on the foreign directors; if they have behaved improperly they will be disqualified from holding offices as directors for a period of time under English law. But does that enable them to hold an equivalent office with a foreign company? I don't know the answer. I'm just throwing it out.

Justice Vallender: Well, you are talking about one of the most serious issues that we are discussing now in Germany, you know. When we had the insolvency statute we were really hopeful. We thought the directors of the companies would go to the court and would file a petition. They are forced to do that, and if don't they can be punished by law. What I realize is, they don't come. They really work up to the end when the company is really at the bottom, and then they come and they are wondering why the prosecutor, at the end of the proceedings, accuses them for not having acted at the proper time and it's so funny. I mean the insolvency statute gives a lot of possibilities for the debtors to go to the court, at an early time and if they come early (that's my personal opinion), you can manage a lot of things. But if there are no assets anymore what can a good administrator do?

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[88] *See* Insolvency Act, 1986, c. 45, §§ 214–215.

[89] *See id*. § 214. *See generally* Paul R. Ellington, *Responsibilities and Liabilities of Directors and Officers of Insolvent Corporations in U.K.*, 16 INT'L BUS. LAW 491, 492 (1988) (offering suggestion directors should be personally liable).

[90] *See* E. Bruce Leonard, *The International Year In Review*, 2002 AM. BANKR. INST. J. 34, 44 (2002) (defining "DTI" as U.K. Department of Trade and Industry).

White: You find that bad directors are always overly optimistic.

Broude: As one judge put it, they have an abiding faith in miracles.

White: That's correct.

Judge Fitzgerald: I think early recognition is something that the American judges are concerned with too because many times the companies simply wait too long to file and then it's too late. They may even get some post petition financing for a period of time, but literally the writing is on the wall that failure is imminent. I'm curious with respect to Judge Piot how the French system finds out about this early warning system. Do you have a responsibility to review published financial reports for all companies so that you see that there is some problem, and are your reports different from what we might have expected, for example, in the Enron case so that there is actually some basis upon which you could make a decision that a company is facing some insolvency?

Judge Piot: Firstly, in the big jurisdictions the presiding judge can delegate this work. In Paris we have one delegate and 30 judges to help him to collect information and to work on this preventive treatment and amicable solution because we think an initial act before is a better way than the bankruptcy proceeding, and we give all means that is possible to do this work. We also have the help of the Clerk of the Court because the Clerk of the Court centralizes all privileged information about companies.[91] With this information, and also with the information coming from the prosecutor and all from the central databases, we can have a good view of the situation of the company in difficulty. We can also designate a special examiner to do a pre-examination and report to the judge and only then do we launch an action.[92]

Buchman: I would like to add something to what Judge Piot just said, and that is that the system is fairly automated in France because the Clerk of the Commercial Court is also basically the Registrar of Companies. Therefore, the information is centralized at least territorially for the companies that have their registered office in that jurisdiction and all of this information; privileges, preferences, liens, any inscriptions, mortgages, and the like, is seen by the office of the Clerk of the Court and the criteria are fairly simple. When there is a piling up of say, filings for bounced checks and things like that, or that the tax authorities or social security file privileges against the company because the company hasn't been paying when due the social charges or taxes. All of this is immediately seen and those companies that are in that situation are reported.

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[91] *See* 2 COLLIER INTERNATIONAL, *supra* note 23, ¶ 22.04[2] (explaining obligations to make financial disclosure to clerk of Commercial Court).

[92] *See* 2 *id*. ¶ 22.04[3] (explaining appointment of conciliator).

Jauch: Judge Piot, what I want to know is, since you got this kind of system, has the satisfaction of the creditors become better? For me, that's a basic question in every proceeding. We are responsible for the best satisfaction of the creditors, and this one, let's say, does it cause greater satisfaction?

Judge Piot: If we give attention to the results of this procedure we see that it's a good result because by this proceeding we have better results than by the bankruptcy proceeding. What does it mean? It means that in bankruptcy only 5% of procedures introduced can have rehabilitation, reconstruction solution, and we don't know how long this reconstruction can last. With preventive treatments we have 50%, with good reason. This is because the treatment comes in before that company is in cessation of payments. It's very difficult to explain to the CEO that he must come to see the presiding judge of the tribunal before difficulties are too significant. It is the key to the results of the proceeding.

Justice Vallender: Give me an example. For example, if the creditor is executing on the assets of a debtor, is it a sign for you to interfere, to start your investigation, or when do you feel obliged to do something?

Judge Piot: We have no one criteria, like the loss of capital, because in France we have special provisions on the loss of capital, i.e. if you lose at least 50% of your capital you have to declare it at the registry[93] and you have to take a decision in an assembly. We also have all the claims for payment against the debtor so we in the court know all these proceedings. We collect all this information because the Clerk of the Court is under the control of the court. So we give instructions to the Clerk to report.

Unidentified Speaker: It's well known in the U.K. that 50% or more of inland revenue prosecutions of tax evaders are generated by the disgruntled wife or the upset mistress. I just want to ask Judge Piot if the French Court would take notice of a whistle blower, somebody within the company, who passed information to the court about the company's finances that may not have been picked up by your system already, would you take any notice of that?

Judge Piot: Yes. We do. We receive information and claims not in a proceeding but by letter from secretaries of companies or creditors. We check the information.

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[93] *See* 2 *id*. ¶ 22, at 22-13–22-18 (explaining the procedures for rescue under French bankruptcy law including requirement that French businesses disclose "certain financial information which allows some insight into the health of the business"); *see also* LE GALL & MOREL, *supra* note 82 at 284–85 (discussing "internal warning" procedures).

Unidentified Speaker: Have there been complications arising from the situation where subsequently it may be alleged that you have intervened when you didn't or that you intervened when you ought not to?

Judge Piot: Certainly we have. But in France the judge's responsibility is the responsibility of the state. But if it is the fault of the judge, it is rare. (laughing)

Unidentified Speaker: I believe in the United States what we are finding, particularly with the Enron matter and other matters since and before that, that we have a massive failure on the part of the management and the board of directors in order to be able to run the affairs of the corporation, and get proper reports, and to understand exactly what their business is about, and what the report that they are getting means. So we have the theory, the policing of the operation of a public corporation or a private corporation that has failed in the United States and what I'm hearing is that at least in France, this policing is met by saying, "We are going to step in and see whether these companies are being properly managed when certain lights go off, when certain key points are reached." How do you reconcile that in a, I hate to put it this way, a free economy like the United States where sometimes we look back at it in retrospect and see that maybe instead of having a economic society that works we have a cowboy society that nobody is watching? Or that the wrong people are there, or do not know the right questions to ask? And that's the problem we're running into.

Broude: Maybe the books are better maintained in France. If somebody wanted to file fraudulent financial reports in France, they can do it. I guess if the judges don't pick up and say "is this true" they call the CEO down to see if it is true.

Buchman: No, I agree, the system is far from perfect, obviously. But I would like to point out some differences with the U.S. system. The main difference is the rule of the "statutory auditor"[94] which is very different from the auditors you have in the States for public corporations.[95] The statutory auditor in France is called statutory because it is appointed, not by the directors, not by the board, but by the general assembly of shareholders and is there for 6 years. It's an appointment for 6 years, and it's very difficult to get rid of a statutory auditor before the term expires, so there is stability for the statutory auditors. So they're not under the threat of not being reappointed year-by-year. And secondly, they have a statutory duty to report to the management any questions that they feel are not addressed in the accounts that they are there to review and certify. This is called in French "Procedure D'Alerte"[96]- which means an early warning system, and if the management is not

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[94] *See* 2 COLLIER INTERNATIONAL, *supra* note 23, ¶ 22.04[2][b]–[c] (explaining role of statutory auditor).

[95] *See* Bily v. Arthur Young & Co., 3 Cal. 4th 370, 399–400 (Cal. 1992) (explaining role of auditor in United States).

[96] *See* INTERNATIONAL CORPORATE INSOLVENCY LAW 179–80 (Dennis Campbell ed. 1992).

forthright in its answers to the statutory auditors, and doesn't actually reply to the questions put to the management by the statutory auditors, the auditors have a further duty which is very important, and is actually implemented, to report to the public prosecutor which is a very serious thing in France. This means there is some hanky-panky going on within the corporation. Management takes this early warning system very seriously. So all of these built-in systems make the certified accounts by the statutory auditors somewhat more reliable. I wouldn't say 100% reliable, but certainly more reliable.

Michael Prior: Louis, is it not also true, because I remember speaking at a conference you chaired in Madrid about five years ago on this very question of accountants' and auditors' responsibility, that the auditor can offer no other financial advice or financial service in any way to the company other than the audit? This is one of the major problems with the larger firms of accountants who are auditors, or who could be auditors and financial advisors, and the argument was, "Could you be advisory and supervisory?" This brings us back to Enron and the point you were making.

Buchman: Well, you have a very good memory, Michael. The fact is that the question was hotly debated at the time and is still unresolved because, I don't want to point a finger, but the "Big Five" have a way of circumventing this by just giving work, when they are statutory auditors of a publicly quoted corporation, to a separate entity within their nebular of companies. So they are not technically advising, themselves, but they are giving advice through an affiliated company and this is obviously wrong because it creates conflicts of interest.[97] The position taken at that conference, and you will remember that it was shared not only by me but by a very distinguished commercial judge who rose through the French judiciary to become chair of the commercial division of the Supreme Court in France, Mr. Bezard, and he had this marvelous formula that I think is very right, that the statutory auditor is the judge of the accounts and as a judge he cannot be partial. And, therefore, there cannot be any conflict of interest. Well, we saw what has happened with Enron. In an ideal world those words of wisdom would have been heard but not necessarily in this world.

Unidentified Speaker: I spent a week before last with one of the judges from the commercial court in New York and he seemed concerned about public

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[97] *See* Lawrence J. Fox, *Accountants, the Hawks of the Professional World: They Foul Our Nest and Theirs Too, Plus Other Ruminations on the Issue of MDPs*, 84 MINN. L. REV. 1097, 1097–1100 (2000) (discussing rise of consulting practices within accounting firms and conflicts of interest that ensue); Robert A. Prentice, *The Case for Educating Legally-Aware Accountants*, 38 AM. BUS. L. J. 597, 610–11 (2001) (explaining why multidisciplinary practices within accounting firms are problematic). *See generally* Peter Sinton, *No Simple Solutions to Conflicts by Auditors: Proposals to Fix System Also Come With Problems*, SAN FRANSCISCO CHRONICLE, Jan. 27, 2002, at G1 (addressing conflicts of interest arising when accounting firms provide financial consultation for companies they are auditing).

revelations during the period prior to the opening of any proceeding. He's very, very concerned about confidentiality and I think that the Judge's remarks indicated that once a CEO comes before him those proceedings are confidential. And I'm looking at the criteria on the second page of the Judge's paper, and my question is, I guess: when the judge sends the letter to the CEO summoning him to appear, is there any publication of that? Is the CEO obliged, as a CEO may be obliged in the U.S. when he receives a SEC subpoena, for example, to make public disclosure that he's been summoned? Does the summoning have an affect on the capital structure of the company or the value of the stock? Those kinds of concerns.

Buchman: Just confirming our experiences, certainly from a company law point of view, the CEO is under no obligation, and I have not seen any case law on this point, to reveal to anyone, including to the board of directors, that he has received a subpoena or a summons to appear before the presiding judge of the Commercial Court. This is really very confidential.

Broude: I think we'll move along. There is a lot of food for thought obviously, on this procedure. Is anybody here from a country that has anything like this? We only have five countries up here. Is there anybody from Australia or Switzerland that has anything like this at all? Denmark probably has no procedures at all because they opted out of the E.U. convention anyway. Austria? Nothing? OK.

Let's proceed forward in other systems for the time being to see how we can catch up to the French. I mean, they are way ahead of us right now. We have to figure out how we are can come to a resolution of our companies' financial difficulties without these early warning systems. Indeed, in the United States, and Enron aside, which will make law on the duty of directors certainly, directors for the most part do not expose their personal estates to creditors of the company of which they are directors.[98] Most litigation against directors is brought under the Securities Act[99] and the plaintiffs' lawyers are interested only in how much directors' and officers' insurance the company carries. They are not in the litigation to foreclose on the director's house that is probably in Texas anyway and therefore is exempt from creditors' claims, as they are in collecting from the insurance company. So, unlike any of the continental systems, a director who oversees a failing company is certainly free to, and indeed does, act as a director of other failing companies, or successful companies for that matter. There is no striking the director off the list and placing a black mark on his or her forehead as there is in England. I don't think there is any opprobrium to directors who with white heart and

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[98] Corporate directors' personal assets are often protected due to the corporation's purchase of Director & Officer's Liability Insurance (D&O) which will cover claims against a director by a creditor or shareholder. *See* MODEL BUS. CORP. ACT § 8.57 (1984) (stating corporations may maintain insurance against liabilities asserted against individual for acts arising under his capacity as director or officer).

[99] *See* GREGORY V. VARALLO & DANIEL A. DREISBACH, FUNDAMENTALS OF CORPORATE GOVERNANCE: A GUIDE FOR DIRECTORS AND CORPORATE COUNSEL, 154 (A.B.A. ed. 1996) ("[T]he federal securities laws constitute one of the primary sources for director and officer liability . . . .").

empty head permit their company to go into bankruptcy. Enron is a litigation that happens to be litigation in a bankruptcy court and I'm not quite sure there are any lessons to be learned from Enron that are applicable to a normal business failure although it does turn out that the financial boom of the '90s was financed by fraudulent accounting. But that's a different issue.

I'd like to pursue, number one, in Ireland, and maybe some of this has been touched upon and we'll go through this briefly, must the judge approve the petition for insolvency before the case can go forward under the examinership or the other procedures that you have described Frank?

Sowman: Yes, the petition, if you take the rescue system under the examinership, the petition[100] is really the crucial stage. It is the first and fundamental step. The court must approve a petition, irrespective of what its source is and the criterion that applies must be a reasonable prospect of the survival of the company. That test, since we introduced this rescue culture into Ireland, has varied. It used to be a judicial interpretation ultimately, and there just had to be a prospect of survival. That effectively meant that you can bring any company forward on a prospect of survival basis. That had to be toned down because a whole lot of inappropriate cases arose out of that. Now there has to be a reasonable prospect of survival.[101] That is the basis on which the petition is presented. That's the decision the court has to make and the presiding judge has to make, but when considering that, what he's faced with is the evidence of the petitioner to a large extent and the evidence of any opposition to a petition that may be, very often, the secured creditors, but can be other creditors. One of the issues that I think is fundamental to the rescue system is whether in these situations it is either desirable or necessary that the court should have some assistance in assessing it because, obviously, the evidence that is produced by the petitioner is going to be from a particular angle. That has been addressed to some extent because now you have to produce, with the petition seeking the protection of the court in the Irish system, you have to produce fairly significant financial information[102] which is meant to emanate from an independent accountant setting out a basic relationship to the statement of affairs expressing the view that this company is capable of survival. The bar has been put higher, so to speak, to get the protection. It is a decision that has to be taken by the presiding judge and is based on his assessment of the evidence of the parties who appear before that judge.

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[100] *See* Companies Act 1990 § 3 (Ir.) (discussing mechanisms for filing petition and court's acting on same); *see also* 2 COLLIER INTERNATIONAL, *supra* note 23, ¶ 27.09[2] (providing general description of petition process).

[101] *See* Companies Act 1990 § 3; *see also* 2 COLLIER INTERNATIONAL, *supra* note 23, ¶ 27.09[2] (explaining reasonable prospect of survival standard).

[102] *See* 2 COLLIER INTERNATIONAL, *supra* note 23, ¶ 27.09[2] (detailing information that must be submitted to court).

Broude: Justice Kelly, do you feel comfortable in making those kinds of economic decisions? Have you been trained to make your own investigations or to do your own cross-examination, as it were, of the accountant who is testifying about the financial status of the petitioner?

Justice Kelly: No. We have the adversarial system and you would expect the opponents to come in and to try to test up. I would have to say that the vast majority of these petitions are heard without a word of oral evidence being given; it's on affidavit. There has been an improvement in the situation because of the requirement now that the independent accountant must put his name to this proposition. That is only as a result of the 1999 legislation. And that has given rise to a decrease in the number of petitions, the raising of the threshold, and the necessity at the very outset to have this view of an independent accountant prepared to sign his name has brought about a substantial reduction in the number of petitions being presented. Unlike the continental judge, and very similar to what obtains in the United Kingdom, the adversarial system is transmuted into the liquidation, and the insolvency, and the reconstruction process so the judge, usually, is the quietest person in court, or ought to be.

Selinda Melnik: Yes, I just wanted to ask a follow up question about the role of the attorney in making these presentations and the impact. I'm not surprised to hear that the impact has been a reduction in the number of petitions, with the role of the accounting firm, but is there a role for the attorney, and is the attorney involved put at a greater risk of liability? Judge Fitzgerald, maybe you would discuss some of the pending bankruptcy reform legislation which, at the moment, really has more to do with the consumer end but it does involve individuals who might be sole practitioners as well and I think it's a precursor potentially to what might happen with business bankruptcies in the states. As a follow-up to their answer I think it would be extremely helpful. Thank you.

Judge Fitzgerald: I'll answer that in relation to the role of the attorney and because of the fact that the bar has been lifted, so to speak, in order to get or persuade a court to give you an order. It is obviously imperative that the client company looks at the situation realistically before any application is made because the two criteria that really one has to present are, one, the ability to restructure a balance sheet and hopefully get creditors' support for that. But the second criterion that you have to have is the source of the necessary finance to meet the restructuring requirements of the company. If you really don't have those in some shape or form before you start in the exercise is not feasible, and indeed, you won't find that you can get an independent accountant's report saying that it believes this company can survive. The other duty of the attorney obviously is an application in which there is an obligation to disclose all relevant information[103] and there is one authority in this

[103] *See* FED. R. BANKR. P. 2014(a) requiring application for order of employment to state:

legislation where somewhere, not very far down the road, a petition and a rescue scheme was terminated by the court on the basis that it became clear that the actual facts bore scant resemblance to the information which was presented when the application for protection was made. There is an obligation on all concerned, particularly the lawyers involved, to ensure that a correct and accurate picture is presented even if that may not necessarily always be in the best interest of the company, that there is full disclosure at the outset.[104]

Audience Member: In that regard there is always an obligation to act in good faith.[105] That has now received an expressed statutory recognition in the reforming legislation and the court specifically is empowered by statute to dismiss a petition if it satisfied that good faith was not exercised or that there was suppression in information that ought to be put before the court.

Steiner: We have legislation now pending in England whereby the accountant's report will no longer be a requirement because the government makes the whole process too expensive. And a company will be able to appoint an administrator without going to the court if there is certainly no floating charge. The government believes this is brilliant because it will save court time and it's going to save on the accountants' fees. A lot of lawyers have a great deal of concern about that. Would you have a concern if you had a system of going to examinership without any accountant's report, without even having the court having to approve anything?

Broude: I was going to ask Judge Fitzgerald a question. In the United States, for a voluntary petition, there is no financial standard.[106] You don't have to be equitably insolvent or balance sheet insolvent. There are certain financial tests with

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> specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

Id.; *see also* 9 COLLIER ON BANKRUPTCY. ¶ 2014.05 (Alan N. Resnick and Henry J. Sommer, 15th ed. 2002) (discussing duty of attorney under Fed. R. Bankr. P. 2014 to disclose all facts bearing upon eligibility of employment).

[104] *See*, *e.g*., Futuronics Corp. v. Arutt, Nachamie & Benjamin (*In re* Futuronics Corp.), 655 F.2d 463, 469 (2d Cir. 1981) (noting law firm disregarded disclosure requirements by informing of retainer agreement four years after order was approved); *In re* Lee, 94 B.R. 172, 176 (Bankr. C.D. Cal. 1988) (failing to make required disclosure under Rule 2014 where retainer agreement was disclosed only in response to order to show cause).

[105] *See* 11 U.S.C. § 1112(b) (2000) (providing authority to court to dismiss chapter 11 petition for cause); *see also* 7 COLLIER ON BANKRUPTCY ¶ 1112.07 (Alan N. Resnick and Henry J. Sommer, 15th ed. 2002) (stating court may dismiss chapter 11 case for lack of good faith although it is not expressly stated in Code). *See*, *e.g*., Furness v. Lilenfield, 35 B.R. 1006, 1011 (Bankr. D. Md. 1983) (dismissing for lack of good faith where debtor filed petition solely to delay litigation).

[106] *See* 11 U.S.C. § 301(explaining how to commence voluntary case); *see also* 7 COLLIER, *supra* note 105, ¶ 1100.03[1] (discussing commencement of voluntary case).

respect to involuntary petitions,[107] but most debtors get to chapter 11 by voluntary petition. It takes a lawyer's retainer, an $800.00 filing fee, and two sheets of paper. Judge Fitzgerald, do you have any ability to monitor the financial performance of debtors in chapter 11 to see whether they are making it or should be shut down, are they making money or losing money, do they have a positive cash flow or not, etc?

Judge Fitzgerald: Along with the two page petition, the debtor also has a requirement to file schedules that list all assets and liabilities,[108] identify all executory contracts and leases,[109] identify all the officers and particular types of shareholders so the same requirement of good faith filing and complete disclosure is there. In addition, monthly operating reports are required of the debtors[110] and they are filed with the court and sent to the United States Trustee. The United States has a sort of supervisory body that is a part of the Department of Justice, which is administered by the United States Trustee's Office, and they are responsible, that office is responsible, for the types of administrative duties that we've been hearing about from some of the other judges. So the United States Trustee is supposed to supervise the case to make sure that the debtor is filing reports and that, in fact, there is this reasonable prospect of reorganization ongoing. Those financial reports are available to all creditors and to me as the judge as well, because they are filed in the court – and yes, I do look at them to see what the circumstances are. I don't, however, have the capability of challenging the information in them as a theoretical model. I could compel someone to come into court and justify the information on the operating reports, but as a practical matter, judges in the United States very seldom get that involved in the administration. We rely on the adversarial process and expect the parties to bring motions before us on which we rule, rather than to initiate the process on our own, even though we do have some limited capability of initiating that process. We do not look at the voluntary petition in the sense that we're compelled to sign an order that approves it. Although we do sign an order, our clerks actually stamp these orders. They don't even come before us when a case is filed because the filing creates an automatic stay of all actions against the debtor and the debtor's property[111] and as a result there has to be some sort of a court document that notifies the creditors that a filing has taking place. Because, many

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[107] *See* 11 U.S.C. § 303(b) (providing financial "tests" for bringing involuntary case).

[108] *See* 11 U.S.C. § 521 (requiring debtor to file schedule of assets and liabilities); *see also* FED. R. BANKR. P. 1007(b)(1) (noting debtor's obligation to file schedules of assets and liabilities).

[109] *See* FED. R. BANKR. P. 1007(b)(1) (requiring debtor to file schedule of executory contracts and unexpired leases); *see also* 7 COLLIER, *supra* note 105, ¶ 1111.02[5][b] (discussing debtor requirement to file schedule of executory contracts and unexpired leases with petition in voluntary case).

[110] *See* All Denominational New Church v. Pelofsky (*In re* All Denominational New Church), 268 B.R. 536, 538 (B.A.P. 8th Cir. 2001) (explaining chapter 11 process is undermined when monthly operating reports are not filed); *In re* Berryhill, 127 B.R. 427, 433 (Bankr. N.D. Ind. 1991) (stating "failure to file operating reports 'in itself constitutes cause for dismissal'") (quoting *In re* McClure, 69 B.R. 282, 289 (Bankr. N.D. Ind. 1987)); *In re* Davison, 73 B.R. 726, 727 (Bankr. W.D. Mo. 1987) (noting debtors are required to file monthly operating reports).

[111] *See* 11 U.S.C. § 362.

times, it's some collection effort that has prompted the filing. Maybe the taxing bodies are closing an account, or a mortgagee might be foreclosing on a lien, and some action like that typically precipitates the filing. So this order that sets the date of filing is an important document but it's not something where the court is putting its imprimatur on the petition. The petition simply is the initiating document. Then the litigation commences after the petition takes place. Right now neither attorneys nor accountants have to sign the petition in bankruptcy, only the debtor. If it's a corporation, someone who is authorized by the corporation or the partnership has to file it.

The new legislation that's pending has some aspects that are very troubling for many of the participants in the process. The one really troubling aspect for most practitioners is they are now going to be required in consumer cases to sign this petition in bankruptcy which is a certification under our law that you have taken reasonable and investigative steps to determine the accuracy of the information on the petition. I suppose this is true in other countries that have a voluntary filing system. Our experience is that most consumer-debtors particularly, have no clue what their assets and liabilities are. Most of them can't even tell you what their take home income is per month. They certainly don't know where they are spending it. They don't operate on budgets and now an attorney is going to be required to sign a document that says that that information that his client has given him is accurate. I think were going to be creating a million cases where we'll have pro se debtors unrepresented because no one is going to be able to get professional liability insurance against this type of a process. So the new legislation, in that sense I think, is very problematic.

Broude: Before I get to Germany I have one question to ask you. Do U.S. lawyers representing debtors in chapter 11 incur any personal responsibility if the debtor doesn't follow the rules, if the debtor in chapter 11 pays a pre-petition bill without getting a court order or pays lawyers without court authorization, etc.? Is the lawyer a monitor, or watchdog, or just stands above the whole situation?

Judge Fitzgerald: Well, the attorney for the debtor in possession is deemed to be a fiduciary just as the debtor in possession is. Having said that I think the answer is "no," they don't incur anything like that. They can be subject to malpractice actions, and occasionally, if the court is convinced that an attorney's actions have actually precipitated the bad faith conduct on part of the debtor, then the court may institute some action against the attorney, and that happens very rarely, but it does happen when you see an egregious case, but for the most part, no, the debtors' attorneys are not the insurers of the system. They are not the watchdogs. That is what the U.S. Trustee's Office is supposed to do.

Broude: It was indicated earlier that the judge, not the clerk in Germany, approves the petition. Could you give us a little insight as to the standards governing your role with respect to that particular aspect of the case?

Justice Vallender: When I was listening to Judi I was thinking about the German statute's situation and that I think they would do forum shopping to the United States because this is something like paradise. I mean, you got the automatic stay and you're under the protection of the insolvency Code. We don't have this. When you face the court with a petition then the investigation ex officio starts. That means you are extended to the court, but we of course have this kind of measure, for example, if there is an execution we can order that this has to stop. It depends on the special case. We don't have this automatic stay. Well, the situation is, when the debtor or the creditor files for a petition we have to decide if this petition is admissible or not. If it is not admissible we give him a chance to correct it. There is a hearing; normally we don't do an oral hearing. We give him the chance to write within a certain time. If he can manage it, and it is admissible, then the investigation starts and normally it starts, for example, when a debtor files for a petition. Then we elect an expert who is at least our right-hand and who does all the work for us. His expertise is the basis of our decision whether to open the case or not. And this nomination, or designation, of the expert is at least a signal for the whole proceeding because the preliminary administrator and the administrator normally is the same. The expert and all the following steps are concentrated on one person. That means the one who is elected we call "the emperor of the proceeding" because he has a lot of power and we had a big discussion in Germany about our way of designating administrators. People are accusing the judge in Germany, saying, "What they are doing is unconstitutional." There is no control on your way of designating judges. Judge Piot, in France you have the same discussion and Austria recently passed a law where it says in Article 14A there is a list the administrators can be put on. This is going on in Germany too. This is the critical point of the proceeding, to designate the expert which means at least he is the administrator, and of course, in mega cases the creditors try to put influence on the designation sometimes before the case is filed, by coming to the court. A high-ranking bank manager calls us and asks, "Do you know that there is a big company which will file for proceedings tomorrow?" Normally I don't know. Sometimes I know. When you are reading newspapers you can realize. And then the next question is, "Well, did you already make up your mind who you want to designate?" Most of my colleagues stop talking about it. If anything they refuse to go on. I'm a little bit more open to it, I say, "What do you want?" I mean, of course, they have a chance to say what they want but my decision could be totally different. This is just a question of fairness, or whatever, but of course they are interested in placing their administrators in the case for several reasons. I don't want to say why, but of course personal reasons. Very often we have to think about how we manage these

problems and it is coming to us often because we have more big cases. Within these cases is this interesting subject for the creditors especially.

Broude: The best place to be in is the United States when there is an involuntary petition filed by creditors. The automatic stay comes into effect and debtor continues to operate normally as if there were no bankruptcy until there is an adjudication. That's pretty much true. That really is terrific because you get the stay but none of the burdens.

Judge Fitzgerald: But in that instance, when in an involuntary petition, the judge does have to adjudicate the petition and the debtor to be bankrupt and there typically is, well not typically, there is always an opportunity for the creditors to prove that the debtor is insolvent and otherwise subject to bankruptcy relief.

Broude: Does somebody have a question? Yes.

Unidentified Speaker: Just picking up on the comment that Judge Fitzgerald made, and Michael Steiner made from the U.K. There was a time in the U.K. when legislative reform was enacted as a result of proper consultation with the professionals because we tended to have a fairly practical first-hand view of what would work and what wouldn't. The reforms in the United Kingdom, specifically in the Enterprise Bill which Michael Steiner referred to, have been introduced ostensibly as a result of consultation but really not as a result of consultation at all. Most of the recommendations from the U.K. professionals have actually been ignored and the comment that Judge Fitzgerald made about the attorney being required to sign off something which patently he could not do, seems to be another example of somebody inventing legislation without thinking it through. Certainly my experience in the U.K. has been that in this process we are not consulted effectively. Is it the case elsewhere that the legislative program tends to carry on regardless of recommendation from the profession, and if that is the case, is there anything we can do about it?

Broude: What's the case in France?

Buchman: It's a very difficult question because there was a big row raised recently during the previous legislature by some representatives who really wanted to reform the Commercial Courts and they did that by way of a report made to Parliament. This report was highly controversial and was very badly received by the judges themselves who really threw up their arms and said they will have nothing to do with this kind of reform imposed upon them. So there was a big, big problem in France. We hope that the new legislature, that the new majority that will come out of the coming general election, will take a more calm view of things because of course there is need for reform. There is always need for reform, but not

a reform that would cast in doubt the integrity of the judges as the previous report implied. And to take it one step further, by-and-large, the legal profession sided with the commercial judges. We hold our commercial judges in very high esteem and we thought that it was unfair, just because of certain instances that did occur (of course, there are black sheep everywhere), to put the blame on a whole array of judges. So that's the position in France at the moment.

Broude: You have to understand by the way that the legislation in United States is very well thought out by the credit card lobby. This is a bill that is designed to make sure that people who run up credit card bills, and go into bankruptcy, never escape. That they will spend the rest of their lives paying off the credit card companies and the harder it is made for people to get into the bankruptcy system the more the credit card companies will like it. That's just the truth of the matter. This was not legislation that appeared full blown from Zeus' brow. Certain lobbyists carefully thought this out. The banks have spent seventy million dollars over the past four years in lobbying expenses to get this bill. This was thought out.

On the general front of whether Congress ever thinks about legislation: of course not. It has a barely passing relationship with the English language for one thing. I don't know whether the English statutes are drafted any better. But this bill, which has more lives than a cat, is a very, very carefully drafted statute to make bankruptcy very, very difficult for consumer debtors and I don't think that's an overstatement. I think that is generally true. There are some business things in there which are not controversial but for the most part this is a get-the-consumer-forever bill and I don't know if I mentioned this yet, it's hung up today over the issue of abortion,[112] believe it or not, as opposed to anything that going to happen to debtors. It shows the total fecklessness of professionals and professors who write letters or that have op-ed articles in The New York Times[113] about what a dreadful bill this is. That's not where to stop the bill. The bill has been stopped with the homestead laws and over abortion. If we are really lucky we'll escape it this year but who knows.

How is legislation drafted in Germany? Does the legislature listen to professionals or other people involved in the process in passing mandatory legislation? What was the impetus, for example, to the bill that became effective in 1999?

Jauch: I was still in the University when they started to discuss it. It was a process of more than ten years of discussion with people from universities and practitioners at the end. However, the final bill, to some extent, had nothing to do with all these nice ideas developed in advance. There are some political

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[112] Philip Shenon, *Bankruptcy Talks Collapse on Abortion Issue*, N.Y. TIMES, May 10, 2002, at A24 (discussing bankruptcy and dispute over provision on abortion issue).

[113] *See*, *e.g.*, Elizabeth Warren, *A Quiet Attack on Women*, N.Y. TIMES, May 20, 2002, at A19 (asserting that bankruptcy bill is unconscionable because of effects it would have on women).

implications later put into specific things, like discharge, which is a very complicated discharge proceeding. It was a gift for the election by Helmut Kohl and we learned it is not successful but we have to deal with this thing now for the next two or three decades. We never really get rid of this.

Broude: Michael, I thought that this new bill resulted because Peter Mandelson visited the United States and thought about chapter 11 a couple of years ago.

Prior: The stories when he came back were very well received and he said we are going to have to enact some legislation and actually know what they are going to put in it. The Department of Trade said, "well we've had this thing on the shelf now for several years about moratoriums and simplifying insolvency" and the government grasped it and said "thank God somebody thought of something that sounds like enterprise" and they have now sort of built up a philosophical justification. For example, we're told America is where we should be looking. There are all these English entrepreneurs, who because of the stigma of bankruptcy, are not able to start another venture but we are now going to have incredibly easy discharge within twelve months, maybe less, in bankruptcy so all these unsuccessful entrepreneurs will be able to repeat their mistakes several times over. It's as simple as that. It's unfortunately nothing to do with the law. It is all to do with politics.

Broude: Will this be the end of western civilization, as we know it? (laughing). We have to move along because I want to get to button pushing time. The judges in most of the jurisdictions up here have some role in approving the plan, or the scheme of reorganization, whatever you want to call it. Do the judges believe that they have the financial and personnel resources to do a proper job? The French seem to set the standard. As mentioned in Judge Piot's paper, you read the list of organizations and bodies of the state that the presiding judge can call in to help him in determining whether or not to send this letter to the CEO. Do the civil law countries have better resources than the common law countries? Does the adversarial system, as opposed to the civil law system, lead to deficiencies in the way that the common law system judges whether a reorganization is appropriate or not? So why don't we start with Germany? Justice Vallender, in your role you have to approve a plan I take it? Is it different than approving the petition, do you have any more information now than you had then?

Justice Vallender: Maybe if you have two minutes time, I'll just show you what I have to approve. It's really not so much. The insolvency court shall refuse the insolvency plan ex officio, that's what it says, if the provisions governing the right to submit a plan and its contents are not complied with and the submitting party is unable to correct such defect or does not correct it within a reasonable

period of time fixed by the court.[114] That's the first reason. The second is, if a plan submitted by the debtor obviously has no chance of being accepted by the creditors or confirmed by the court.[115] The third reason is if the claims provided for the parties, under the constructive part of plan submitted by the debtor, clearly cannot be satisfied.[116] That's it. If you look into the commentary they say, of course, we haven't to ask experts for verifying out if it's like that. Otherwise, it takes too long to go on with the planned proceedings. As far as I know only three or four decisions have been made on this section 231 which gives us this right, but nothing else.

Broude: Judge Piot and Louis, what are the criteria by which a French judge determines whether or not the deal should be approved?

Buchman: Well, first of all, maybe it would be important to discuss here which deal we're talking about because we move, I understand, from pre-petition to actually a plan, which is, under French usage, something different because the plan comes further down the road. Just to put things in perspective, when you have a voluntary petition you file a "Declaration of Cessation of Payments,"[117] and immediately thereafter, or very soon thereafter, you have a hearing and an opening judgment, we call a "Judgment Declaratif." This opening judgment, made by the court acting collegially, appoints what I said before and sets an observation period, or no observation period at all. If there is a hope of reorganization, there is an observation period, and then things start to build up to the presentation of a plan. So it takes time. Whereas, if you have an involuntary petition, say either by a creditor or under the powers of the presiding judge, you get almost immediately to the opening judgment stage you have no Declaration of Cessation of Payments, and then most of the time you get into liquidation; very seldom, a reorganization. So the plan is really when there is a slight hope of recovery and then, of course, it is the court that decides to approve the plan. There is a hearing on this by the court. It's a collegial decision and this decision is reached because the court is, in France, the finder of facts. It has full power to appraise the facts presented in the plan and its only legal obligation, or duty, is to make sure that the creditors are reimbursed within ten years. So you see, there is a lot of leeway for the court to approve or disapprove the plan.

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[114] *See* Insolvenzordnung (InsO) [Insolvency Code] § 231(1)(1) (F.R.G.) (providing insolvency court shall reject plan if plan does not comply with provisions for filing and contents, and defects cannot be cured, or are not cured within reasonable time as determined by court).

[115] *See id*. § 231(1)(2) (providing insolvency court shall reject insolvency plan if plan submitted by debtor clearly has no chance of acceptance by creditors or of confirmation by court).

[116] *See id*. § 231(1)(3) (providing insolvency court shall reject plan if claims provided for under constructive part of plan by debtor clearly cannot be satisfied).

[117] *See* INTERNATIONAL CORPORATE INSOLVENCY LAW 181 (Dennis Campbell ed. 1992) (discussing *cessation de paiements*).

Broude: Does the court have the ability to call upon the resources in approving plans that it does and determining whether or not to send the letter that we've talked about earlier today?

Buchman: No, the letter that we talked about is really at the much earlier stage.

Broude: I know. I understand that, but Judge Piot's paper indicates the state resources that are available to the presiding judge in determining whether or not to send the letter. Further on, when you're doing different kind of proceedings and the judge and the court is approving a plan, does it have the ability, in determining whether or not the plan is appropriate, to call upon the organs of the state such as the public prosecutor, the statutory auditor, etc. to determine whether the plan is proper or not?

Judge Piot: Prior to pronouncing in this court, we hear advice from the prosecutor and the special overseeing judge who is the manager of the proceeding. And it's only after the plan is prepared by the company with the help of the administrator. The creditors have a new discussion of the plan. And we hear, at the hearing, the advice of the delegate of the creditors. So it's only after hearing all this advice that the court decides.

Broude: John, what about the scheme in administration?

White: Well, as you would expect in a superior, non-interventionist system, the plan or the proposal is recorded. The administrator's proposal goes nowhere near the court. It only goes to the creditors, but it's interesting because you speak of the benefit of testing the plan by the adversarial process in the cockpit of a U.S. bankruptcy court. Our administrators' proposals get tested pretty fiercely in the creditors' meetings, and eventually, you get a majority decision of the creditors. That seems to me to be as good a way of proving the validity of a plan, if not slightly better, because you actually have business people, by and large, arguing the pros and cons of the administrator's proposal. Of course you get lawyers and accountants as well. But the creditors are entitled to be there in person. I think you probably get a better feel. But I do believe we get the same result at the end of the day in that there is a testing of the plan before it goes forward.

Audience Member: With regard to that system, a couple of questions. First of all, what are the rules with regard to binding dissenters in that process, in the proposal that you just described? And second of all, how vigorous are the negotiations in the context in which the bank has a floating charge?

White: Well, as to finding dissenters, you don't have to look very far.

Audience Member: No, no, no. Binding. B as in…

White: Binding, yes, in that process it's that much easier to find than bind. In that process there is no binding because, in an administration, the administrators aren't dealing with claims. They're just dealing with getting the assets together and then passing them over to a liquidator essentially.[118]

Audience Member: Does this mean then that there must be 100% approval by unsecured creditors?

White: No, no it's a majority approval.[119]

Audience Member: So it's the law itself, which binds the minority that disagrees?

White: The minority has a right to go to court and say, "This administration is being carried on materially prejudicial." But it's rare that that happens. They normally go along with the majority and the administrators are then entitled to put their proposals into effect.

Audience Member: And then, with regard to the floating charge?

White: In the floating charge, you got rid of that, really by the time you're into administration, because the floating charge holder could have prevented the administration by being quick enough. The floating charge is still there and they remain secured, so they don't really have an interest in the approval of the plan.

Audience Member: Does it continue to float at that point or is it crystallized by that time?

White: It's crystallized by that time.

Broude: Never to be re-floated?

White: Never to be re-floated.

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[118] *See* Insolvency Act, 1986, c. 45, § 15 (Eng.) (providing that Administrator has broad powers to dispose of, or exercise authority over, property of company); *id*. § 17 (providing that Administrator shall control all property to which company is, or appears to be, entitled); *id*. Schedule 1 (enumerating broad range of powers reserved to Administrator, including power to sell or dispose of property of company and power to appoint professional person to assist in performance of Administrator's functions).

[119] The Insolvency Rules 1986, 3 BANKR. INSOLV. 396, Rule 1.19(4) (providing that at unsecured creditors' meeting, those voting to approve resolution must include more than half in value of creditors).

Broude: Mr. Justice Kelly, I understand the High Court judge must approve the plans as well. Do you feel comfortable with your ability to determine whether the criteria have been satisfied?

Justice Kelly: Well, first of all, you have to look over the criteria. And the Act says that when it comes up it can be confirmed, it can be confirmed subject to modifications, or it can be refused.[120] That's all very helpful, but it doesn't tell you the basis upon which you should exercise that discretion. The Act does tell you three circumstances in which you may not approve. The first is if no class of creditors vote in favor.[121] If a single class of creditors votes and there are 77 other classes who don't, nonetheless, I'm still in a position to approve. Secondly, if on the evidence I'm satisfied that the sole or primary purpose of the proposal is the avoidance of a payment of tax, I can refuse it.[122] Or thirdly, if I'm satisfied that the proposals are fair and equitable in relation to any class of members or creditors that have not accepted the proposal, and whose interest or claims would be impaired by implementation, and the proposals are not similarly prejudicial to the interest of any interested party, then I'm to refuse.[123] So I'm told the three circumstances under which I should refuse, but I'm not told circumstances under which I should approve other than that I have to be satisfied that there's a reasonable prospect that the company will survive.[124] And in that regard, I have to use my own commercial judgment based upon the evidence that's put before me. I have no ability to call an independent accountant, expert, company doctor, whatever it might be, to give me any assistance in that regard. So, first of all, I think the statutory criteria might well be re-addressed, and secondly, I think the ability of the court if you have to make a decision like that ought to be apprised of more information than is necessarily available from the adversarial system that operates and the evidence that's thrown up in that regard.

Broude: Are there any statistics, meaningful statistics, about the number of plans that are presented that are disapproved?

Unidentified Speaker: Yes. Before the 1999 act, in excess of 60% of the companies that were the subject of an approval, within two years, had either gone into liquidation or gone into receivership. I expect that will improve, given the higher statutory criterion that has to be met, but it was a pretty disastrous record. I should say in that regard, that is probably a function of the way in which the legislation came about and this is just to revert for a moment to the history of the legislation in other jurisdictions. This legislation was passed after the recall of Parliament during the summer of 1990 and was put through both houses of

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[120] *See* Companies Act § 24(3) (1990) (Ir.).
[121] *Id.* § 24(4)(a).
[122] *Id.* § 24(4)(b).
[123] *Id.* § 24(4)(c)(i)(ii).
[124] *Id.* § 24(3).

Parliament in one day. It had been part of an amendment to the Companies Legislation that had been in Parliament for years. I think it was Part Five of the Act. The single biggest meat exporting company in the country was about to go under and there was no ability to rescue it unless legislation was passed. So Parliament was recalled and within twenty-four hours the legislation was rammed through having been picked out of an amending bill, which was to amend all of the Companies Legislation, and the application was in court the following day. And notwithstanding the many shortcomings of that legislation that became manifest over the years, it took another nine years before there was any amending legislation. So the legislative history of these measures is rather similar. I think that it's politics rather than anything else.

Broude: In my opening remarks, I referred to the increased recidivism rate that has become more manifest in the United States. According to the author of the article, this is partially because of pre-packaged plans that don't get judicial supervision in the appropriate way because of the lack of resources of judges in approving plans that are consensual, which leads to my question to Judge Fitzgerald. Not to whether you feel comfortable doing what you do, but if you lived in Utopia, would you prefer the English system where you have almost no role? Do you like our system, but you want more resources? Do you like things the way they are? What would you like to see done to either to take away that responsibility of approving plans and the economic standards, or do you think you should have an independent role, and if so, how can that be financed?

Judge Fitzgerald: Is there a system where I can just collect my paycheck and then go live in Paris for a while, or is that not on the table?

Broude: That's the English system. That's the English system.

Judge Fitzgerald: I think that the United States' system, although it's not perfect, works for our culture. It needs some modification and it's not going to solve all of the problems of every company that attempts to use it, but I don't think any system ever will. When this statute was passed, we hadn't had a TWA or a Continental Airlines, or an Enron, or a PG&E file. Major companies had simply not taken advantage of the opportunities that are available in bankruptcy. As a result, I don't think the statute necessarily deals with all of the things that those major corporations, really, really big corporations, need to have done, but the test of this statute is the fact that it's been working. It's very flexible and it has been working. It isn't perfect, but it's working. In terms of the debate, Richard, that I'd like to have, I'm not sure I agree that the court in the United States has the "proper job" of deciding in advance that a company's plan should not be confirmed if the creditors of an insolvent company want to give that company the opportunity to keep going forward.

Under our law, at the point in time at which a company is insolvent, its assets essentially, are the assets of the creditors to deal with. The means by which those creditors decide that they want to deal with them in a chapter 11 is through a reorganization proceeding. There are statutory standards. Like in Ireland, I have exactly the same three disabilities to confirming plans. I cannot approve them for those purposes. There is a statute that says what a plan must do before it can be confirmed,[125] but there are very few limits on my discretion to either confirm, or deny confirmation of a plan beyond those. The fact is that it's the creditors who are subject to getting to the assets of that company in one form or another. If the debtor commits through its reorganization at least as much as it would have had to commit if its assets had been liquidated to the creditors, that's the basic threshold. As long as the debtor comes up with at least what it would have had to pay out had it been liquidated, then its creditors have the opportunity to vote.[126] And if at least one class does vote to approve the plan, then I can confirm it under some circumstances.[127] And my view tends to be, if they want to give the debtor the opportunity to stay in business and keep people employed, and keep paying into the tax base, then is it really my role to say "no, I don't think you should have that opportunity?" Although I'd like to be omniscient, I'm not, and although I think I've confirmed some plans that are what I call the "wing and a prayer" theory, and a couple of them have tanked after the case, nonetheless, it has kept the economy going for a brief period. It hasn't probably paid its pre-petition debts but it had been paying its post-petition debts. In the United States plans are sent out on notice to all creditors and they vote.[128] So if they don't like a plan, they vote against it. And if they vote against it, then I think I have an issue before me. But if they don't vote against it, is it my proper job to say to the creditors "No, you've got to take your money now," as opposed to four years from now? So this recidivism rate that you're talking about with respect to public companies, I think it is telling that part of the problem is that the plans are coming up too soon, and they're getting confirmed too soon. I do have the opportunity in the statute to appoint an expert or an examiner,[129] but it's at the expense of the estate. I don't have a budget for it. As you can imagine, every time you try to suggest that, the parties are less than happy about the idea that more of their funds are going to be used for more professionals in the case. It is adversarial. There are committees that are active, the debtor is active, the U.S. Trustee is there. If they can't present me with the evidence that I need in order to judge the credibility of the witnesses, which is what my function is, and determine whether

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[125] 11 U.S.C. § 1129(a) (2000).

[126] *See id.* § 1129(a)(7)(A).

[127] *See id*. § 1126 (identifying situations under which plan deemed accepted). *See*, *e.g.*, Nantucket Investors II v. Cal. Fed. Bank (*In re* Indian Palms Assocs., Ltd.), 61 F.3d 197, 209 n.18 (3d Cir. 1995) (allowing debtor unable to secure plan acceptance by all impaired claims to confirm plan over objections through cramdown procedure).

[128] *See* 11 U.S.C. 1128 (requiring notice before hearing on confirmation of plan); FED R. BANKR. P. 3017(d) (stating debtor mails notice to creditors as well as ballot to vote on plan).

[129] *See* 11 U.S.C. § 1104 (allowing appointment of examiner or trustee under enumerated circumstances); *see also* 11 U.S.C. § 1106 (specifying duties of examiner or trustee).

the financial statements that I'm being given and the projections are reasonable, I'm not sure that adding one more expert to that mix is going to change much. That was a long way of saying I'm not sure I agree with the standard that you've set out for what judges are supposed to do in the United States. Do I feel that I have the resources available? In theory, yes. In practice, no. Do I think that in all instances I can call it right as to whether a case will reorganize or not? No, I don't think I have that ability anymore than as a prosecutor I knew for a fact that the people I was prosecuting really were guilty of the crime that I alleged.

Broude: What if any, responsibility do you have to future creditors? It's one thing for the current creditors to get their twenty cents on the dollar and get the hell out, but what about the creditors who see this company emerging from chapter 11 and decide to extend credit only to be caught up in the whirlwind of the second bankruptcy? Is there any effect that you worry about, with respect of those people that weren't there at the creation?

Judge Fitzgerald: If there are new creditors . . . are you talking in a mass tort context or . . .

Broude: No, I'm talking about a regular business. Not a huge business but a business. You confirm the plan the second time though there are new creditors. People that weren't there in the beginning, the ones that didn't get a chance to vote, but say, "this company came out of bankruptcy must be O.K. So I'll extend credit." What about those? Is there a responsibility to worry about those creditors?

Judge Fitzgerald: I don't think the way our statute is written that's my responsibility. Actually, I'm not sure I'm supposed to worry about the fact that it's keeping the economy oiled and that employees are working either, but I do in fact worry about that because I'm a member of that society and it's important to all of us to keep the wheels greased and to have people employed. So I do. I am concerned about that. In terms of the other creditors, no, I think their obligation is to assess whether or not the debtor is creditworthy before they extend credit going forward in the future. Certainly, if I were a creditor looking at a company that had just discharged, let's say, 50% of its debt and expected to pay the next 50% out over 10 years, I'd have some concerns about whether that company was creditworthy and I may choose not to lend. But if my own business decision said to me I'm better off taking that risk, then it's the risk that I've been willing to take and hopefully I'll charge enough interest, or get an upfront payment or something, so that I'll protect myself appropriately.

Broude: Last . . .

Audience Member: Can I just ask one question of Judge Fitzgerald?

Broude: Absolutely.

Audience Member: If you confirm a plan, if the creditors vote in favor, what function are you actually performing?

Judge Fitzgerald: I'm essentially rubber-stamping the fact that the creditors have decided that this is the means by which they want to deal with the debtor.

Audience Member: See, don't you take out a layer of intervention, therefore, by just having your system decide by the creditors, with no judicial intervention at all?

Judge Fitzgerald: Essentially the systems that we're talking about are the same. It's a timing issue that's different. In your system, creditors vote and only come to the court if they have an objection. In my system, the court supervises the notice to make sure that all creditors are included and then if there is an objection, rules on that objection at the outset. But my statute says that there are some things that a plan must do before it can be confirmed and so I have to make sure that those standards are met. That's not up to the creditors. That's up to me.

Broude: And also John, the court enters the orders, and under our system it's a court order that binds the dissenters or that crams the plan down. So the judges must enter orders.

Our last issue, Leif Clark said pushes my button, but nevertheless. What fees do the judges set in each of our cultures? And do the judges believe that they are policemen, exercising independent judgment, or do they wait for objections, or what are the standards by which they determine whether the fee requested it appropriate? Mr. Justice Kelly?

Justice Kelly: A very limited role indeed. And in our jurisdiction, first of all, insofar as attorney's fees are concerned, they will normally in the course of a liquidation or in the case of a reconstruction, if required, be subject to an examination by an independent court officer called a taxing master and he will pare down as he sees appropriate. Insofar as the fees of other professionals are concerned, in the reconstruction, they would have been included in plan that comes up, would have been voted on by the creditors, and will ultimately have to be subject to the approval of the judge but rarely have I heard anybody object to the fees that are being . . . in fact I've never heard people object.

Judge Fitzgerald: That's the fallacy of the adversarial system in the fee application, because if you object to mine, in the next case maybe I'll object to yours.

Justice Kelly: Yeah, there is that element to it.

Broude: In Germany?

Jauch: It's very easy. We have a percentage fee depending on the net assets of the company and . . .

Broude: At the beginning or the end of the proceeding?

Jauch: We take it at the end. We have so many proceedings, no problem.

Broude: In France?

Buchman: Well, first of all, I'd like to remind you that, in France, the receivers are a separately regulated profession, so they are appointed as receivers, but by the Minister of Justice.[130] They are not ordinary lawyers, if you will. As to their fees, I think the Paris colleagues of Michael Steiner have indicated a few precious data in the paper that I referred to earlier. The only other observation I'd like to make is that the overseeing judge, the Juge-Commissaire, is really the one who keeps the receivers on a tight leash. They basically don't like the receivers to come to them with the request to appoint professionals to help them do their job because it means more expenses for the proceeding. So they generally refuse, unless there is a special circumstance that would warrant professionals, lawyers, accountants, financial specialists, and so on to be appointed at the request of the receiver. That is the rule in France.

Broude: Judge Fitzgerald?

Judge Fitzgerald: I think Utopia has just come back to the United States again. I'd hate to debate this when I'm on beautiful Irish soil, but with respect to fees, yes, I think the judges are, to a certain degree, traffic cops. Our appellate courts have a wide variety of decisions about what the obligation of a sitting bankruptcy judge is to look at fees if there are no objections.[131] I'm in the Third Circuit, and in the Third

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[130] *See* 2 COLLIER INTERNATIONAL, *supra* note 23, ¶ 22.05[1][c] (noting court appoints and determines scope of receiver's role); *see also* Koral & Sordino, *supra* note 78, at 449–50 (discussing procedure and function of "administrateur judiciaire" [receiver] under French legal system).

[131] *See* 11 U.S.C. 330 (2000) (allowing attorney "reasonable compensation for actual, necessary services rendered" for bankruptcy work); Atkins v. Wain, Samuel & Co. (*In re* Atkins), 69 F.3d 970, 973–74 (9th Cir. 1995) ("The bankruptcy courts in this circuit possess the equitable power to approve retroactively a professional's valuable but unauthorized services.") (citing Halperin v. Occidental Fin. Group, Inc. (*In re* Occidental Fin. Group, Inc.), 40 F.3d 1059, 1062 (9th Cir. 1994)); *In re* Daikin Miami Overseas, Inc., 868 F.2d 1201, 1206 (11th Cir. 1989) (finding failure to object to attorney's fees precluded circuit court consideration); *In re* T.H.C. Fin. Corp., 837 F.2d 392 (9th Cir. 1988); *In re* Chicago M. S. P. & P. R. Co., 840 F.2d 1308, 1312, 1318 (7th Cir. 1988) (affirming decision of special master disallowing attorney's fees

Circuit I have an independent duty to review all fee petitions.[132] Our fee petitions are works of art. They are longer by far than any combination of bankruptcy petitions that you could ever expect. They are broken down in tenths of hours with respect to how you have to allocate your time. The hourly rates that I'm now awarding in some of my Delaware cases are up to $700 an hour. Hence Utopia, in my view, for many of the cases, for New York counsel, and some accountants in the case. They are higher for investment bankers. They are typically on a monthly basis for turn-around managers, for investment bankers, who by the way, have essentially no accountability once their ability and entry into the case has been approved. They sometimes have obligations to make sure that they are working minimum numbers of hours, but it's their say-so as to whether they are working those minimum number of hours. And if they're not, typically their fees are then subject to some renegotiation. In addition, most plan confirmations provide for releases for all of the professionals and typically the members of the creditors' committee in the case for any work that's not grossly negligent, or wanton and willfully subject to misconduct allegations, and so, on top of getting these hourly fees, although it's a lot of work to do it, it is very time consuming to get your fee applications approved. Once you do it and collect those fees, you're pretty much home free. In addition, you have an administrative priority for fees[133] and so you get paid regardless of whether most other creditors will or won't get paid, other than secured creditors. Fees do not precede secured creditors. They come after that level. You will be paid assuming there's any cash at all available in the enterprise.

Broude: John?

White: Certainly not a policeman so far as fees are concerned. In most of our processes fees are agreed between the office holder and the creditors, but if they can't be agreed then the creditors do have the right to go to court to get them fixed.

Sowman: Standing outside courts where decisions have been made on fees over the years, I've heard various descriptions of the presiding judge by people emerging from the court, but a policeman hasn't usually been one of them. (laughing).

Broude: One of my worries before today's program was whether the judges would feel capable of being frank with us about what goes on. I needn't have worried. I really appreciate their openness and their responsiveness and want to

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where lawyer traded claims without court approval and records submitted with fee application were not sufficiently detailed or accurate).

[132] *See In re* Busy Beaver Bldg. Ctrs., 19 F.3d 833, 848 (3d Cir. 1994) (finding court obligated to act as "surrogate for the estate" in review of application for attorney's fees).

[133] *See* 11 U.S.C. § 503(b) (allowing for payment after hearing of administrative expenses including attorney's fees); *id.* § 507 (determining priority of payment and allowing fees under § 503(b) of Code be paid before or concurrently with creditor claims).

thank them, as well as our lawyers who have been in the program. Thank you very much for a terrific presentation.