CHAPTER 11 AT THE CROSSROADS: DOES REORGANIZATION NEED REFORM?

A Symposium on the Past, Present and Future of U.S. Corporate Restructuring

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Session: ABI Presidential Roundtable Discussion of Legislative Symposium

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Bob Keach: I'm Bob Keach, ABI President. This is the roundtable discussion following the 2009 ABI Legislative Symposium—"Chapter 11 – At the Crossroads: Does Reorganization Need Reform?" As part of that program, we had a board of observers consisting of past ABI Presidents—in this case, Bob Fishman, John Penn and Reggie Jackson. I asked them to observe the entire program with the idea that we would get together to discuss it afterwards, along with Melissa Kibler Knoll, who is ABI's President-Elect and also was a moderator of the program. The idea was to get an immediate reaction to the symposium and to talk about potential takeaways from the symposium.

Without a lot of further ado, let me start with Reggie Jackson. We'll just go around the table on these discussions. Let's start with a wide-open question regarding your general reactions to the program, and then we'll break it down. What was your general reaction, Reggie?

Reginald Jackson: First of all, I want to congratulate you and the rest of the ABI for putting together such a wonderful program. Each individual panel was very instructive and well done. Also, collectively, over the last day-and-a-half, we were privileged to have some of the finest minds from academic, judicial and practitioner standpoints talking about the bankruptcy system.

What I thought was particularly interesting was the beginning program, talking about 1978, where we were with respect to the Code, and where we are today. I couldn't help but be impressed by the way in which the Bankruptcy Code has been able to deal with and address the whole panoply of financial issues we've seen in this country over that 30-year period. From that standpoint, I think this program helped bring that together for me, and I like that to a significant degree.

Bob Keach: John Penn, your thoughts?

John Penn: I thought it was an excellent program. It showed how flexible and robust the Bankruptcy Code has been. It also highlighted the economic and political challenges ahead for the next time Congress decides to do a major revision of the Code, just because you have so many people that will be paying so close attention to the process, each with their own interests and turf to protect. It's going to turn into an absolute Donnybrook when it comes back up for reconsideration and perhaps significant revision.

Bob Keach: Bob Fishman?

Robert Fishman: I echo Reggie's and John's comments. It was really quite an amazing program with a great deal of diverse opinions and information provided.

I had two 100,000-foot kinds of observations. One is that many of us tend to present from our point of reference, and I think that point of reference shows a bias that people have toward the position in the process that they have. In listening to the presentations, you have to cull out the parts of the presentations that sort of support that which you are already doing and your comfort with it.

The second thing that I was reminded of, and I ran into this to a great extent when the Bankruptcy Commission was operating in the mid-1990s and we were beginning the first of the several runs at the legislation that ended up being BAPCPA, is those of us who make our lives in the bankruptcy world forget that it isn't the world. It's just our little world. When you get into these broader discussions about what to do with bankruptcy issues as they relate to the economy, and as they relate to the country in general, we have to be careful not to get caught up in our bankruptcy world perceptions. This topic is a real world topic, not just a bankruptcy world topic. I know I am often guilty of myopic views on topics based on my limited and narrow experience. One of the things that I think that the panelists did a good job of doing was bringing to the discussion broader perspectives than just bankruptcy professionals' views of things. I think in order to successfully change anything, we're going to have to conceive that it isn't a bankruptcy world's view about what to do about bankruptcy, but it's a world global economic view of what to do with bankruptcy.

Bob Keach: Melissa?

Melissa Kibler Knoll: I think that what we came away with from most of the panels is that there are definitely changes that we can identify that would substantially improve the practice of bankruptcy and the success of reorganization. I think there are differences as to the extent of those changes, some being relatively targeted and focused and others being broad. Some even suggested a rewrite from the ground up of the Code.

What really struck me, however, is that the type of input that we received in this conference from judges, practitioners and academics, is the kind of input, frankly, that I think Congress should be considering and looking to as they are trying to resolve some of the difficult questions that we all debated. I would like to see and know that this is the type of information that Congress is looking at and giving thoughtful consideration to in our next bankruptcy bill, as opposed to a situation where we have unattended consequences.

Bob Keach: I was, fortunately, able to participate in the planning calls and hear a lot of the discussion. I was also struck in the preparations for this, in reading the papers and then in moderating the program, with how incredibly important this has become to the economy and to the country and to the way we deal with not only commercial law issues, but economic issues, even though we do tend to live in this bankruptcy-parallel universe from time to time. In the '78 Code panel, Rich Levin made a comment about the reason they were able to get the '78 Code through was because no one was paying attention and how that would never happen again.

I think it's actually evidence of the centrality of what we do to a lot of important issues. It's easy for us now to talk about these cases as if they were just everyday cases in the casebooks now, but we've been dealing, as a system, in the last year or year and a half with the restructuring of General Motors and Chrysler. Step back from talking about that in trade-talk terms—that's just a phenomenal event. Lehman Brothers is being liquidated in chapter 11. Those are world-shattering, myth-shattering, large-scale events.

I think, as a consequence of that, there will be some invasion of our parallel universe the next time around. People are going to examine whether we should be trusted to do what we've been trusted to do in the future. The debate about resolution authority strikes me as being at that level. Do we really want the bankruptcy system to handle this really important business or not?

My first big takeaway was to step back and go, wow! We've come from starting out in '78 as, "Let's just try to build a workable bankruptcy process," to becoming, as somebody referred to it, the nation's "commercial court." This is a pretty phenomenal travel.

We'll go around again and start with you, Melissa. We'll try to go panel by panel. The opening panel was on the '78 Code. Anything jump out at you from that panel that's a takeaway for you?

Melissa Kibler Knoll: There were a few things that jumped out at me, Bob. One of them was the comment that you mentioned earlier, which was that the Code was intended to be not a formula that one followed letter-by-letter to go through a process of restructuring, but it was supposed to be a flexible guide—one which prescribed certain remedies should a consensus not be able to be reached, but that really was trying to push the parties towards a consensus using the Code as the framework within which that consensus would be developed. As we talked in later panels about the ways that one does have to adjudicate issues, at times, I think the letter of the law is, of course, incredibly important in terms of understanding what the ultimate results are going to be. Sometimes, however, I think our process has become much more about using the litigation tools as opposed to the consensus-building that was envisioned by the Code's drafters. Again, I think this is why many people would agree, although disagree on the extent, that there needs to be somewhat of a readjustment.

Also, there were comments about the fact that you can start out with a blueprint, but that over time, very special interests come into play and will try to represent their interests in making modifications. You get the sense that, similar to your example about coats of paint on a nice wood floor, after a while, one does need to strip and actually try to level that playing field. I think it was generally, by many of the people on that panel, a consensus. I was surprised in some ways that, although there was a consensus, they were more in favor of a new Code than of an additional coat of paint.

Bob Keach: In preparing for this and then doing the program, one of the things I expected, actually from Rich Levin or Bob Feidler, for example, or even Professor Epstein, was some pure nostalgia for the '78 Code. This original working hypothesis was if we could just get the '78 Code back, things would be okay. To the founders I talked to, including the people who were on the panel, and people like Ken Klee who couldn't attend, their attitude was that you can't go back there. It was a code that worked for that time, and there's no back-to-the-future strategy, and we really do need to look at ways to move this forward. I found, frankly, a remarkable lack of nostalgia, and much more of a recognition that it was a great statute for the time, but the times have changed.

Bob Fishman, I don't know what you took away from that.

Robert Fishman: Having been practicing since the beginning, and having seen the evolution that has occurred, I guess the reason I agree that you can't go back to the environment of 1978 is that that environment doesn't exist anymore.

The two things that I really got from that panel were, number one, the underlying initiative was to create an environment in which all of the constituencies would have a seat at the table and they would apply their varying degrees of leverage to reach a consensus. That consensus would form the basis for the outcome. When I began practicing in 1979, that's actually kind of how cases went. As time has progressed, however, that model is less and less prevalent. Now, people use the Bankruptcy Code more as a sword to try to push the process to deliver to them what they want without a lot of regard for the enterprise outcome. I think that the 1978 Code was written with consensus in mind as a driver that may or may not currently be a viable approach. Theoretically, I wish it was a viable approach because I think it's a good place to end up, but it may be that the changes in who holds what leverage today, compared to who held what leverage at the time they were designing the 1978 Code, may have changed a lot.

The second thing that I got from that panel that I inherently knew, but was glad to be reminded of, was a point that Bill Brandt made that basically was accepted by everybody. That is, if you for a second think that anything that's going to happen or isn't going to happen isn't being driven by politics, then you're being pretty naïve. When you apply politics to the process, you really get a whole different spin on what you're trying to accomplish, and a politically motivated outcome may not be systemic driven. It may be outcome driven. It may be loaner driven. It may be pubic-image driven. When you apply all those things to the bankruptcy marketplace, you may get to some very different places than you got in 1978, when Rich Levin said nobody was paying attention.

A bunch of us bankruptcy hotshots got together and tried to design the perfect mousetrap, and nobody messed with it. We had a pretty good opportunity to do that. You may disagree about whether this piece or that piece of their mousetrap was the best one, but that process will never be able to be replicated because all kinds of people with a vested interest in outcomes are now going to be paying very close attention. They're not going to be Garden-of-Eden oriented to get the perfect system. They're going to be what-serves-my-constituent-interest driven, and I think that's going to make for a completely different kind of approach to the debate this time around.

Bob Keach: Excellent. John?

John Penn: The thing that I took away was primarily what Bob was talking about, and that is how political the process was, and Bill Brandt saying it was a deal. It may not have been the best system. There could have been lots of other changes, but what we had was the result of political negotiations that created this system. Does that make it perfect? No. If you try to tweak any part of it, you're going to have to deal with politics, absolutely.

The takeaway was how they faced the challenges, but also how those challenges are going to be so much larger for any other revision, just because so many more people are going to want a seat at the table. It's going to be spending years negotiating the shape of the table first, before they even get down to talking about what to do about the system.

Bob Keach: Reggie?

Reginald Jackson: The context of all the comments thus far reminded me of what I think about when I think about that first panel. When I think about the '78 Code, and we reflect back on all that happened in 2009, the words "flexibility" and that "we're in a different world now" resonate, and amazingly, the Code has enabled us to address those issues. When I think about now moving forward, I think what's important to me, and what comes out of this panel to me, is that we need not to try to fix every problem that you believe is coming on the horizon because the bottom line is, we will not be able to know today what the horizon holds, just like the framers of the Code in 1978 could not imagine at that time some of the issues that the Code is dealing with today. Likewise, if an effort is made to try to legislate every possible circumstance or situation, even with politics involved in the process, I think what will result will be potentially something that might fail because it will be gerrymandered in such a way that it may not work cohesively together and may lose sight of the focus of being a statute that allows for consensus to be built.

What this panel emphasized to me was as we move forward, let's keep the approach of being flexible. Let's keep the approach of providing discretion. Let's keep the approach, as Bob mentioned, of giving a seat at the table to the various constituencies. Let's keep the opportunity for consensus to be built. Let's try to avoid, if at all possible, the reaction of legislating every problem that we have today, and the problems that we can see immediately. The bottom line is we'll not be able to anticipate all the issues that will come down the road.

Bob Keach: Yes, I think that's well-taken. In addition to the general statement that there was no back-to-the-future solution, the other things I took away from that were a couple of things. One, and it was another thing that Bill Brandt said about the whole concept of the '78 Code, was about establishing an initial equilibrium. The idea that it was going to be the Constitution or the Bible never really entered anybody's mind, but they reached an equilibrium, a balance.

Everything that happened since '78 was that equilibrium being upset by the kinds of forces, Bob, that you talked about, which is people figured out that there was money to be made and lost in the bankruptcy business, that there were consequences to what was going on in the bankruptcy court, and they acquired a vested interest in outcomes. When they were disappointed in the bankruptcy court, they went to their legislators and found another way to achieve their goals. These are the layers of paint, or whatever you want to call them, that push against the equilibrium. Slowly they moved away from the equilibrium, and much of what we may be talking about now is restoring discretion, restoring the equilibrium. Much of the developments in '78 have been going away from this flexibility and largely trusting the judge and the system to get it right, a very discretionary approach, to one that's much more rules based.

The simple test is the Code has a lot more pages in it now than it had in '78. Go back and look at section 365 from 1978 and look at it now, or section 363 or 362. It's like the Internal Revenue Code. It has become expanded because players in the marketplace like fixed rules. They particularly like fixed rules that favor their outcomes. Given fixed rules versus discretion, the market will always choose predictability. I thought Bill's comment on that respect was extremely insightful.

The other lean-on and microbasis thing that caught me totally by surprise was Rich Levin's discussion of the absolute priority rule and that they never really intended it to be this straitjacket. It was really intended to facilitate a consensus, discussions, negotiations and trading among classes of the value in order to get the reorganization done. They're as surprised as anyone that the absolute priority rule has become this straitjacket that may be inhibiting restructurings, as opposed to furthering. I thought that was an interesting point.

Moving to the BAPCPA discussion, which I thought was equally compelling, let me start with you, Reggie. I thought that this was maybe the most grounded of the panels in the sense of specifics. We had a lot of the panels who were talking about really big, 100,000-foot sorts of things. This was as close as we came to identifying specific provisions that are problematic. What do we do about it? What did you pull out of that one?

Reginald Jackson: I thought this panel was an example of the processes that we were talking about in the first panel—the fact that you go back to '78 and now you come forward, and what's happened since '78 until now is a series of modifications to the Code. Many times, the impetus for them was a particular group or a particular part of the financial community that wanted the change to meet their specific goals. When that happens, you get the political process of fiscal overlay, and then Congress doesn't always get it right because they're responding to, perhaps, a small element of the financial community. What this panel highlighted for me was looking at BAPCPA and the changes and asking ourselves, do they work? Do they have the intended consequences? Did they get it right? As to many of the examples that were examined here by this panel, the answers were no, or at least they did not work to the extent that was anticipated. The unanticipated consequences have been greater than what was thought about at the time when the new legislation was passed. I thought this panel was an example of what we have to be conscious of as you look at the Code. When you make changes, particularly to the political footprint, you begin to get, sometimes, these piecemeal kind of changes that don't always work.

For example, one of the changes that was talked about, of course, here was the change to the timeframe within which debtors have to assume or reject unexpired leases and executory contracts. When you see the real world impact on the retail industry, I think Larry Gottlieb had a very compelling argument or comments to make relative to what that has done to the ability of retailers to reorganize and how this changed the leverage point. We know that landlords need tenants, so maybe it hasn't had the impact there, but from the standpoint of the lenders, the DIP facilities and the folks who brought in the financing, their view of these retailers that are now debtors has changed based upon the timeframe that they have to make critical decisions in terms of the locations. This example indicates how if you don't get it right, it can have a real impact in the marketplace. I thought this panel did a good job of identifying or highlighting some of those situations.

Bob Keach: Yes, I actually thought that the discussion between Larry and Bruce on that point was excellent in the sense that it focused on a micro issue, which was the lease extension period. It became a nice example of how the credit community, in that case, particularly the lenders who lend to retailers, absorbed the change and reacted to it and how it affected their own conduct, even though they were probably outside of the purview of the people who drafted that provision. They thought it was a landlord-tenant question, and it really became a retail-credit question. I thought, as you said, be careful about the unintended consequences of seemingly simple changes.

John, anything from there?

John Penn: The thing that struck me, having been through one of the more significant retail cases, the *Bombay* case that came after BAPCPA, is I have to agree with Larry. That is, it turns into a liquidation just because the lenders have such little flexibility on how soon you can get things accomplished. I don't know if that was the intended consequence because I think the landlords were thinking it was a good thing. They were going to be able to control their properties, get them back and be able to deal with it. Now it's, "Oh my God, you mean you closed?" Now the stores are dark because of one of the unintended consequences.

The other thing was the discussion between Bruce and Larry about the administrative priority for the delivery of goods, and how you now have the fight among the creditor-side body between the goods providers and the service providers about why one gets better treatment than the other. It's starting up a little intramural war within the creditor body about that. You'll have a lot of tension on that side.

Bob Keach: Because it's a creditor- v-creditor issue now?

John Penn: Right. Yes. Essentially, the other changes made the debtor, to some extent, a spectator—almost a spectator at its own funeral, but still, a spectator.

Robert Fishman: This panel confirmed for me that which I already believed, which is every time Congress accedes to a special interest's demand for protection in the Bankruptcy Code, they literally harm the process. The process, as the first panel pointed out, was a balance. Every time you tack another requirement on, you build the wall higher for somebody to get out of chapter 11 and reorganize. There's a fundamental disconnect. As a country and as a philosophy we believe reorganization is a laudable goal. We want to create an environment in which operating businesses can reshuffle their deck and come out the other side reorganized. Then right after we say that's our policy intention, we start building the wall keeping them from doing that higher and higher and higher and higher.

Every time you tack on an administrative claim, every time you create a new class of priority claims, every time you implement a statutory provision which requires a debtor in possession to use cash for something that is not an end-game result, you make it less and less likely that a reorganization can be achieved. On a stand-alone basis, the policies behind all the BAPCPA changes, and all the changes in the 30 years before that, all have merit. It's not like these are incorrect things to try to address, but when you address them by making them obstacles to reorganization, I'm not sure that you are actually facilitating the outcome that you're shooting for. You enact a provision because you want to make it so that when you reorganize, this class of creditors gets treated more fairly than you perceive it to have been treated before. The reality, in my world, is you don't reorganize because you can't get over all the hurdles. Now, instead of getting treated as a part of a class of unsecured creditors who got 14 cents on the dollar at confirmation, you are part of a class of administrative creditors who've got nothing because there was no plan confirmed. The case got liquidated, and the secured creditor got all the proceeds.

The unintended consequence has repeated itself, in my opinion, over and over and over again. This panel merely further illustrated that. You could argue that Bruce's view of the word was right, or Larry's view of the world was right. It doesn't matter. It's not like either one of them were wrong when they articulated the justification for the special treatment that their particular constituency was going to get. I don't remember who it was that said it. Was it Rich Levin who said if we simply made it a requirement in chapter 11 that all creditors get paid 100 cents on the dollar, we could confirm plans all the time? Well, if you keep doing that, that's the only case that can get confirmed. I think that that gets us away from the underlying policy that I thought was inherent in the system, which is we want to encourage rehabilitation. I think these things actually discourage rehabilitation.

Bob Keach: Melissa?

Melissa Kibler Knoll: I think that from a big-picture perspective, the changes that we were talking about, as the panelists pointed out, had impacts in two areas. Primarily, one was to increase the rights, as Bob has been talking about, of certain creditor constituents, and this has resulted in a drain in the liquidity of the debtor, particularly at the inception of a case. I think that the unintended consequences on what has happened with lenders were absolutely happening before today's economic environment, although it has certainly been exacerbated by the recessionary conditions that we've seen in recent periods.

I think that there was agreement among the panelists, generally, particularly relative to the lease issue, that the pendulum has swung too far and the results are too dramatic, and that there's clearly a need for a fix in that area. I think there was somewhat less consensus on the 503(b)(9) administrative claims.

I was interested to see that there was actually, even with some prodding, no real discussion on exclusivity. I think that we've all found, maybe possibly due to the economic environment, less testing of that as a true fulcrum issue that might be the deciding factor in negotiations.

Bob Keach: Eighteen months has become an eternity now.

Melissa Kibler Knoll: That's it, exactly.

Robert Fishman: Who has a case that could last that long?

Melissa Kibler Knoll: The other thing that I stepped away with goes back to some of my prior comments. In terms of what changes one might make to improve the system, noting Judge Houser's comments in particular, there might be a "big fix" somewhere down the road —the rewriting that we've been talking about, but there are also some small changes that can be made to clarify things that would have a dramatic impact on reducing the amount of litigation and costs and otherwise. The people who drafted these provision either didn't take the time, or weren't knowledgeable enough about the potential ramifications, to actually provide more clarity.

Bob Keach: I was struck by, and I think this was true of virtually every judge on every panel, number one, they wanted their discretion preserved. Secondly, if they can't have discretion, at least get them clarity. I think that was one of the constant themes.

In addition to all the things that have been said by other people here, I was actually struck by Judge Houser's insight in this area. This goes a little bit to the unintended consequences point, but it's also, I think, a lesson for the future in terms of looking at legislation. That is when you look at each of these provisions in isolation, 503(b)(9), or the leases, or exclusivity, or the utilities provisions requiring cash deposits, each of them on a stand-alone basis seemed relatively benign. Not one of them is going to be the reason that reorganization doesn't happen. As a consequence, when you discuss them in isolation, it's hard to get terribly agitated about them. The problem is that when you took them as a whole, they had real, genuine impacts on liquidity in cases. They had real impacts on the ability of cases to reorganize because of the reaction to them as a whole by the lending community, by the bar and everything else. I thought one of the insights there, and one of the lessons, was redesigning the Code, even when you're trying to do it in a relatively minor way, like the BAPCPA business provisions, is kind of a large game of Whack-A-Mole. Every time you do something, something else pops up. These things do have a cumulative impact. I thought that was pretty insightful on their part.

Let's talk a little bit about safe harbors and derivatives. I can tell you, from a moderating standpoint, this was the really difficult panel in the sense that you're talking about an incredibly complex amount of background material we need to know to understand the problem. I think that's part of the problem, which is that these provisions got put into the Code with relatively little challenge and were expanded with relatively little challenge because people in the financial industry wanted them. The people who were being asked to put them in the bill were probably without the same level of understanding as the people who wanted them. I was struck by how often during the last two days the issue of derivatives and safe harbors, and the damages that were done by the safe harbor provisions, came up.

Robert Fishman: Interestingly, this panel was the one panel that came the closest to having a consensus. Even though there were some divergent opinions expressed during the presentation, I think everybody on this panel conceded that these Bankruptcy Code sections are definitions and applications run amok.

Bob Keach: Yes, overbreadth. I think they agreed that they were over-broad.

Robert Fishman: Yes, there is an appropriate set of contracts to try to capture. How to deal with those wasn't even really what they talked about. This panel, I thought, uniformly said, these provisions aren't what they should be, and they should be fixed. Of all the panels I listened to, this was the one where I got done and thought this one's fairly obvious. Everybody on all sides of the equation agrees these definitions need fixing.

Bob Keach: Yes, I think even the panelist, Shmuel Vasser, who generally represents the industry and was a stand-in for the ISDA position (and obviously, at some point, we should let ISDA speak for themselves on this point), even believed it's not serving the interest of the swaps and derivatives industry to have over-breadth here—that there really isn't a lot of justification for sweeping into the protection simple bilateral supply contracts or buyouts of private LBO transactions. This is a place where we need a relatively obvious legislative fix to restore some reason to this and to narrow it down.

Melissa Kibler Knoll: Narrow down not only the definition of the financial products themselves, but also the application, more broadly, outside of the financial services arena, which really was more of the intention, I think, when these provisions were initially enacted. That is one of the issues that came out to me, as well as the idea that in practice these, at times, have actually, one might argue, increased systemic risk by creating that rush at the beginning of the bankruptcy to grab assets that, in fact, most of our system is designed explicitly to prevent.

Bob Keach: Yes, it was interesting, and I didn't really sense a lot of pushback from those people who are more sympathetic to the swaps and derivatives industry perspective. I thought it was interesting that Professor Levin said that, really, again, if we want to discuss unintended consequences, you can make as strong an argument that the safe harbors have created runs on the bank than that they have prevented them. I thought that was a pretty interesting insight.

John?

John Penn: I would agree with everything said so far that by trying to isolate and protect something, you have really created another set of problems entirely. You have people that rush to cash out their positions and get new positions and taking steps that they would not otherwise do but for the bankruptcy, which creates a problem.

As far as the definitions, they're just so broad that they catch so many things, including things that touch or get anywhere near financial institutions. When it goes through a financial institution, it gets protected.

Melissa Kibler Knoll: When Julia was talking a little bit about the history, she was talking about repos and about the idea that initially, repos were primarily with Treasuries. It was a very transparent market, and then she went through the progression of how that marketplace has changed through today. I think it's just an example as to how you have incredible speed in the increasing complexity of financial products and markets, and how, while this has been, in theory, an attempt to have the Code keep up with that increasing complexity, it has been an inadequate attempt and hasn't been able to do that in some ways. It possibly has taken us in the other direction.

Bob Keach: I was struck by Judge Sontchi's description of the *American Home Mortgage* cases when they arrived at his doorstep. He said that essentially, largely as a consequence of counterparty activity, those cases were dead on arrival. They arrived in chapter 11 as literal shells because the assets had essentially been moved away.

Reggie?

Reginald Jackson: My reaction is similar to all of your comments. This is not an area that I see a lot, but it reminds me of what happens when the industry that's looking for a particular protection of changes pretty much writes the legislation, if you will. Those that are actually passing the legislation don't fully appreciate and understand the impact or the way in which the markets work in these areas and, therefore, can't anticipate fully the implications or what will result from legislation. I think in this case, as most of us are saying, the definitions are broad enough to drive a truck through. As a result, the breadth of the protections, I think, far exceeds probably what they were intending when they put this in place.

Again, this is an example of how when you go through this process, you need to try as much as you can to be able to understand the complexities of that particular issue and having the right experts before you. I'm not suggesting that Congress didn't try to get it right or didn't think they were getting it right, but again, this, to me, is an indication of how the exemption provided was much more than what was needed to address the problem they were concerned with.

Bob Keach: I thought the interesting thing here was, again, underlining the importance of the Bankruptcy Code to governing behavior outside. Literally because of these safe harbor provisions, you now have people making relatively distorted decisions about what they're going to do before they arrive. I think a couple of people mentioned the *Capmark* case as a case where a company literally liquidated its derivatives portfolio before arriving, in what may or may not have been a fire sale. It certainly was, "Let's sell these where we need value rather than just lose them because we're going to have them all terminated when we file for bankruptcy, and our counterparties get to enforce their backup clauses."

The other part was we now have transactional lawyers designing everyday commercial transactions to fit into these definitions so that they'll be exempted from the Bankruptcy Code. That's clearly the kind of conduct, I think, that you don't want legislation to encourage, where you're not protecting the transactions you set out to protect. You're protecting this whole universe of other stuff.

I agree with you, Bob. I thought this was a place where if we had a clear path panel, this was probably it. This provides a nice segue into a discussion about the labor panel because if there was a panel that was the other way around, it was probably labor.

Melissa, thoughts on the labor panel?

Melissa Kibler Knoll: Just to start with, on a less substantive standpoint to carry out your thought, I was certainly struck by the emotion of this panel and the strength of conviction of the individuals. While not unexpected, I think what this demonstrates is that this is a very complex issue because you are combining the human issues and the people issues with dollars. Many times the human side of things, as much as we try, is harder to quantify and put, as Judge Wedoff would say, on an oranges and oranges basis with the questions of dollars. I think that's what creates some of the difficulty with coming up with the right solution for what that balance that we've been talking about today is, in terms of achieving the strength of the various parties and the rights that they're afforded under the Code.

Bob Keach: Bob?

<u>Robert Fishman:</u> This panel made me think of a speech that I once heard former President Clinton give with respect to his observations about trying to negotiate a settlement of the Middle East crisis. He said that when you are dealing with constituencies who believe their truth is the truth, it's impossible to get a compromise because if your truth is the truth, you can't compromise from the truth. Labor issues have always had that bipolar element to it where management had one view, labor has another view, and there's little or no ground in the middle between them. When you throw it into bankruptcy, I find that they leave little room for each other's perspective and little room for compromise. If there is an area where bankruptcy law intersects with other law that requires the greatest touch in terms of balancing competing, legitimate interests, I think labor and employee issues may be the place. As long as the constituents are representing the truth, there's not a lot of room for compromise. This is a great example of what I referred to in my opening general comments about how if the parties in the debate are merely going to present the positions of their constituencies, we're not going to work toward a consensus. We're going to work toward polarization of the issues where in order for me to get what I'm entitled to, you can't get what you want.

This is a great example of a place where we, and when I say we, I mean they, must find some middle ground to compromise where labor gets some of what it thinks it has to have, but concedes it can't get all, in terms of statutory protection. And management must understands that, on the one hand, the claim of an employer or retiree may not seem any more important than the claim of a vendor, to some degree, but they have to be treated as though they're more important in order to get the consensus that makes these cases tick. Until parties are ready to do that, then I think that we're going to have people at the table who are merely trying to achieve their own outcomes and not trying to get the case through the process to the finish line.

<u>Bob Keach:</u> John?

<u>John Penn:</u> This panel was the classic example of where you stand depends on where you sit at the table. Everyone was advocating their position because it really turned from process and procedure to the much bigger question of who gets more pie and who gets less because of it. That becomes a little more of a societal, translated, political debate and not an economic debate because in a true zero-sum game, to the extent one gets more, someone else gets less. The biggest risk that this panel showed is how a number of parties can sit around the table and actually employ a mutually assured destruction as their entire theory of operation just because each one had the ability to blow up the enterprise if no consensus is reached.

Reginald Jackson: Melissa touched on this. The emotions that came out of this discussion were really what struck me. It's a good example of the intersection of where bankruptcy affects the everyday person on a much more real and down-to-earth level. We can all appreciate that there's friction that you have between labor and management at times, but I think this panel really highlighted this. Also, what was interesting to me were the strong emotions with which the lawyers or those on the various sides of this particular point expressed their positions.

I thought it was interesting when Babette was talking about, as was Marcus Migliore from the Air Line Pilots Association, they believed they had a legislative fix before with 1113 and 1114. Their concern was now the way in which the courts have applied that statute over the years. Their expression was, "We didn't get what we thought we had, and now we're trying to go back to where we were." The comments were interesting to me because, again, we're talking about this idea of discretion with the courts and setting the principles there in the Code and then allowing the courts to apply the facts to their individual cases and apply the law in that context and come up with the right decisions. Well, that's what courts have been doing ever since 1113 was passed, but at least one introspection, at least those on the labor side, feel like the courts are going to far having to apply the statute the appropriate way. Here's where we get that friction again between discretion and trying to have a series of rules and regulations to mandate what the outcome's going to be. What this panel suggested to me was that the more you try to mandate the outcome, whichever side of the court you're on, the more difficult it will become because you'll have to put in more rules and regulations.

I believe this is an example of where you need to have guidelines but leave room for discretion for applications to go fast. The idea of trying to go back to what, in this case, labor thought they'd received when the statute was passed is an indication to me of how careful you have to be when you're trying to make modifications to a statute to address the particular circumstances. Again, here we have a situation where Congress believed it was addressing the concern to labor and management in a bankruptcy context and collective bargaining agreements. Yet, the application of that fix, if you will, was seen as being deficient by one side of the table, so now the move is to move it back in the other direction.

Again, I thought that this was a very spirited discussion—one where, as the other comments have mentioned, if emotion continues to prevail to the extent that it does, when this gets back up before Congress again, the battle will be one to observe. the concern I've got is that the outcome will become so politicized that the remedy that's fashioned will not actually address a viable solution.

Bob Keach: I thought that the discussion of labor issues illustrated for me what I can only describe as almost a cultural dissonance. It is almost as if the two sides are not actually speaking the same language. I opened this discussion by talking about the evolution from the *Bildisco* decision—you can reject collective bargaining agreements on the business judgment standard through 1113. I would guess that virtually every bankruptcy practitioner who does not represent labor would have thought of, I certainly thought of, section 1113 as a labor-oriented piece of legislation—that this was restoring bargaining and information sharing, giving labor something that no other contract party in the Bankruptcy Code has, which is this special set of negotiation rules, and that it was unique in recognizing the perceived special place of labor agreements in our system. I'm struck by the fact that labor is so unhappy with 1113. I think in Babette Ceccotti's words in her paper, 1113 is seen as a blank check for debtors to reject collective bargaining agreements, as opposed to a check on the ability of debtors to reject CBAs. I'm struck by how different the perception is of those of us who have toiled in bankruptcy every day from the labor lawyers' perspective.

I think coming out of the discussion too, which Babette and others have written about, is this clash of policies. Again, it sort of comes across as, the way that Bob Fishman described it, a "you win, I lose, I win, you lose" sort of approach to things. I think the comment was, "When 1113 was a labor statute, we liked it. When it became a bankruptcy statute, we didn't. We always thought it was going to be construed like a labor statute, and we woke up to find it was being construed like a bankruptcy statute." I thought that was an interesting discussion.

John Penn: I think part of that goes to labor lawyers seem to deal in a two-party arena. It's labor and the company, and yet bankruptcy is anything but two-party. It is three-dimensional chess.

Robert Fishman: Ten dimensional.

Bob Keach: That came out of the discussion, again, this sort of disconnect. I think Michael Bernstein pointed this out, which is the Conyers Amendment, of course, has a provision that essentially says that there are only going to be two parties to the rejection dispute. If the unions or labor were allowed to amend 1113 as they want to in the Conyers Amendment, other parties and interests in the case would not get to weigh in on the CBA rejection dispute, which is probably indicative of the desire to restore that to a two-party framework again.

The other thing that struck me was, and this goes to the emotions comment and it's throughout the Conyers Amendment, what I call this relativity concept, which I think comes right out of the emotion that gets attached to these disputes. That is that if management gets something, then we/labor have to get an equal amount on a percentage basis, and if the rank and file takes a hit, then management has to take a commensurate hit—this idea that these things have to move in lockstep, and the presumption, for example, is there are retention bonuses that there cannot be concessions in the labor agreement. I make no value judgment on that. I was just struck by how important that was, which says a lot to me about the optics of dealing with executive compensation in chapter 11 cases and its impact on the overall labor dispute. I was just struck by how much that was an issue.

John Penn: Bob, optics is the word came to my mind, as well. There maybe aren't as many cases where you have the labor dispute in the 1113 issue, but there are a lot of cases where you have the management incentive programs. Everybody is watching those cases. If you're affected by a bankruptcy and a laborer and the management layer seems to be taken care of from where you sit.

Bob Keach: Maybe even rewarded, right? We're putting it into a situation where your job's now at risk.

John Penn: Right, and you see it over and over again. Now you come back to your case, and the incentive program's in place, or whatever it might be, and you're being asked to take it on the chin in order to give the company a go at it. From an optics standpoint, I think you have this built-up frustration, this built-up anger, if you will, and then I think things begin to spill over.

Look at the Conyers Bill that was proposed a couple years ago now. The provisions in that bill, when you read them, make you think that there's not really an effort here to try to be balanced in many respects. It's so far to one end. There's a lot of distance to travel before any compromise can soon be in hand.

Robert Fishman: I think John really hit the nail on the head when he said that labor and management are used to existing in a two-party dispute world. What labor doesn't appear to appreciate is when they make a demand for management, they're actually making a demand from all these other people at the table because all these cases, or most of them, are zero-sum games. When labor says, "I've got to get something," it's not management that's actually giving labor whatever it is they've got to get. It's the secured creditor. It's the second lien holder. It's the unsecured creditor.

John Penn: Bob, isn't that the same, though, when management is saying we need to have these incentive programs in place for whatever the reason might be? Not because somebody's really going to leave and get another job, but because we just didn't have these earmarks in place at the time for you to achieve a certain return. Well, the money is still coming out of somebody's pocket.

Robert Fishman: It is exactly the same thing. The only difference that I can articulate, and it's a case by case equation, is apparently some or all of the stakeholders in the management incentive scenario are in agreement that however many dollars you're asking to spend directly or indirectly comes out of my pocket, is an exchange for some benefit that I perceive I'm going to get. I don't know why labor doesn't evoke that same response. It doesn't appear to. Whether it should or it shouldn't is irrelevant. Whether I think it should or it shouldn't is irrelevant. It doesn't appear to generate in the other parties whose economic interests we're talking about, whose economic ox we're goring. They don't seem to feel the incentive to address that issue. I don't know if it's perception. I don't know if it's reality. I don't know if it's policy driven. I don't know what exactly it is that causes those disparate outcomes, but they appear to exist, and in my world they exist.

Bob Keach: Our panel was nicely balanced because we had the judge from *United Airlines*, a former executive from the airline industry, counsel to the pilots' union, and then a labor lawyer and a management lawyer. I was struck by the fact that, as Judge Wedoff pointed out, virtually every labor dispute in *United Airlines* was negotiated to a resolution and brought to him as a compromise. Clearly the statute is generating compromise, which is, of course, what we generally want the Code to do, but I was struck by the fact that labor's view of that is that they're being driven to compromises they would not otherwise make if they had a different regime.

Robert Fishman: Welcome to bankruptcy. Who in the bankruptcy process isn't driven to accept compromises they otherwise wouldn't have any interest in?

Melissa Kibler Knoll: I was just going to say in drawing some of this back up at a higher level, we've been talking a lot about the flexibility of the Code and the way that we need to maintain that flexibility in order to enable it to adapt. I think this is another example of, in this case, labor looking to draw some very bright lines. I think that what we saw in that panel is the tension. Michael brought it out, as well, between them wanting to protect some rights and the issues that these are facts-driven situations. The circumstances may be very different of two debtors in terms of how they address, for example, executive compensation pre-petition, or what impact that may have on the business, or how wages either at the executive or the labor level relate to the market, and what the needs of the business might be. The flexibility concept again came forward to me in this panel with the tension between wanting to preserve rights and, at the same time, needing to be able to adapt to the facts and circumstances.

Bob Keach: The Conyers Amendment in many respects, not all, is about getting fixed rules in advance of things I'm going to get out of this case and you can't take away from me. Again, it's sort of like the BAPCPA provisions in some respects in that I don't want to trust in the process to deliver a good result for me. I want to preordain the result, which I thought was kind of interesting.

John Penn: It's almost like labor wanting to return the favor in that we had to take these deals because otherwise, we would be crushed. Now that bill goes through, you'll have to take these deals because otherwise you'll be crushed.

Reginald Jackson: We'll talk regarding later panels about indeed calling the bluff of the DIP lender who's saying, "Look, I've got to have these provisions or I'm walking away." Likewise, when labor's faced with it, just like the debtor or the court has that decision to make whether to chicken-game it or doing the DIP financing facility, again, labor has to assume the position of saying, "Look, we basically dig our heels in and don't take this deal. We think we're being driven to take it because we don't want to risk that basically our workers will be thrown out or the company will close down. We don't want to pull that trigger. We don't want to throw the hand grenade in the middle of the room." Again, I view it the same way. That's why labor feels like, "Hey, we're being forced into these compromises. Yes, they're consensus, but only consensus because the end game for us is viewed as being more draconian if we don't get the deal done than if it would be viewed by, maybe, management."

Melissa Kibler Knoll: Yes. One thing we haven't mentioned at all, but that did strike me, was the adamant views of labor about the no-strike decision relative to *Northwest* and their fervent view that it needs to be modified as quickly as possible. This is nothing that wouldn't be expected, but certainly they view that as a right that has been removed from their arsenal of protections of their constituents.

Reginald Jackson: I'm going to legislate out bad decisions or judgments. This isn't about judges.

Bob Keach: I think, again, this goes to this issue of when labor policy prevails, they feel like they're in an environment where they will succeed more often than not. The ability to limit a strike in a post-rejection environment, which only applies in a really narrow category of cases, let's face it, is an example of bankruptcy policy prevailing over labor policy. I thought, despite the fact that there were a lot of specifics in this panel and it was very emotional at given levels on specific points, to the extent that there was a direct collision of policy viewpoints, this panel illustrated that.

You provided a nice segue, Reggie, into the whole DIP-financing panel. I thought, frankly, this panel was tackling the toughest issue because so much of what we would like to do in terms of rationalizing the process as we go forward, having more time, having fewer sales, you can't really do them if there's no money in the system. The real sub-theme here was lenders getting too much control and forcing transactions, sales primarily, and what can we do about this lender control? I think the panel here struggled for a solution about what you could do here.

Melissa Kibler Knoll: Bob, I would say that part of that is absolutely because of the economic environment in which we are looking at these issues. I think this was one of the panels where one has to really question whether there truly are legislative fixes to the problems that we're seeing or as, frankly, both Harvey on the debtors' side as well as Jonathan on the lenders' side, I think viewed it as the market changes, and as competition changes, which is not an animal in bankruptcy law in general. It's an animal of the economic environment, that the oppressive conditions, which I again think most agree to right now in the DIP-financing market, are going to change. I think that's why this panel struggled a little bit in terms of really coming up with things that are solely legislative fixes.

Robert Fishman: If I had to pick one panel whose topic is most pertinent to the greater discussion, I would pick this one. I think that DIP financing and cash collateral is, in almost all circumstances, where the rubber meets the road in a bankruptcy case. Most flows from what happens in the context of DIP financing and cash collateral, in most cases, and I'm excluding GM and Chrysler because that's not most cases. That's not what the Bankruptcy Code's supposed to be about. That's not what most of us do in a normal day. In most cases, that which is allowed to be put into a financing order or not allowed to be put into a financing order has everything to do with how a case is going to proceed.

I know there are proponents out there, and many of them represent unsecured creditors, who view the world in terms of chapter 11 is not supposed to be a federal bankruptcy court of foreclosure for secured creditors—if you don't carve out a piece of your collateral for unsecured creditors, you don't belong in chapter 11. I personally don't buy that as a correct interpretation of the legal issue, which is does the Bankruptcy Code permit it? I don't even think, from a policy standpoint, it's the right outcome. On the other hand, there are secured creditors who view this issue as, "I should exercise the maximum amount of leverage I possibly can and demand everything I can possibly get because if I can successfully persuade a particular judge in a particular jurisdiction, and whether that's one of the favored jurisdictions or whether it's some other jurisdiction where a judge wants to curry favor with the professionals who are making these decisions, by demanding self-executing remedies, elimination of 506(c) rights, and sale milestones that make it impossible for the case to do anything except liquidate for my benefit, then I'm going to ask for that."

I was involved in a case in Delaware recently. It was a medium-sized case. It was no big deal. It was a run-of-the-mill case—a manufacturing company. It was a case in which the perception generally was that the case was for the benefit of the secured creditors. There was a second-lien holder who hoped they would get something. The information provided to the court in a short telephonic hearing (I wouldn't call it evidence, but I accepted it as somebody's legitimate opinion) was that if the world went perfectly, unsecured creditors might get a modest return. I was representing the largest unsecured creditor in the case. It was the third day of the case. In Delaware, you can't get a committee formed fast enough for a hearing on the third day of the case, so no creditors' committee was in existence on the day of this hearing. The DIP-financing package had a $650,000 fee to the secured creditor for providing financing to liquidate its collateral for its benefit. I objected to that on the grounds that it was simply removing the margin that the unsecured creditors had for the possibility of an outcome and just handing it to the secured creditors to pay them for conducting a liquidation for their benefit. The particular judge in Delaware overruled my objection and said this was ordinary course of business in Delaware. This is a typical fee in a typical case. What I wanted to do was reach through the phone and shake him and say, "That's the problem! It's the ordinary course of business for you to pay a secured creditor to use your court to liquidate its own collateral for no one else's benefit."

Until we come up with a methodology for addressing what I'll call the uneven playing field that occurs from judge to judge and from court to court and from jurisdiction to jurisdiction, you're always going to have cases driven by secured creditors toward places where they perceive they can get the greatest degree of protection for their sole benefit. Rightfully so, they are only concerned about themselves. I don't fault them for only being concerned about themselves. That's their job, but the system should care about it more than that.

Reginald Jackson: Bob, there was a time when you had a lot of leverage representing the lender. I'm talking about middle market cases where there wasn't that much competition for getting DIP loans because usually you had a lender who was the lender pre-petition. You drafted an order that basically had everything but the kitchen sink you wanted in it because the debtor had no leverage, and you submitted it to the court. In those days, you had courts that would say, "Look, I'm not signing that. I'm taking that out. I'm taking this out. I'm taking the other out." In today's world, where you have virtually no competition out there and very few people to get cash from, it seems to me the judges are no longer willing to do that. I heard a number of the judges on the panels suggest, "Okay, you didn't hear the record before me. My choice is basically do I kill the case? Or do basically I let this go forward, particularly if I don't have a lot of people objecting to it?" I would submit that part of what we need to put into this process, in addition to maybe some sort of change although a legislative change may not work, as Bruce mentioned, is I think we need judges to be willing to basically draw a line in the sand where appropriate and say, "Look, I'm not approving this order in this case with that particular provision in it."

In your case, you mentioned the idea that somehow the lender ought to get $650,000. Maybe they're underwater. Maybe they're not. They probably don't even have any testimony on that issue on the first day of the case, but they get it all on the order anyway. They're using the chapter 11 process to liquidate their collateral that they thought was so great that they want to pay for it. Let them do it in a state court.

I like a judge who wants to stand up and say, "Not in my court." Even representing the committee, you don't have much leverage on the first day, particularly the second day. You can push back, but some of this you can't accomplish without the court's backup.

Robert Fishman: I think there are some courts or judges that still do that. I don't want to suggest that the judges in Delaware will sign an order with anything in it because I certainly don't mean to say that. There are local rules. There are U.S. Trustee guidelines. There are all kinds of things in place today about what can't get into an order that, 20 years ago, when you and I were doing this and secured creditors were asking for the kitchen sink, it really was up to the particular judge to push back.

On the other hand, I'm thinking to myself about this particular case in Delaware. Most of the judges in Chicago would not have signed that order. They would not have paid the secured creditor a fee for financing the liquidation of its own collateral. They wouldn't have said this was ordinary course in Chicago because in Chicago it would not be ordinary course. We don't do it all the time. The fact that it may be done all the time in Delaware and isn't done all the time in Chicago doesn't really make either one of those things right, but the fact that you could get such a disparate result in those two places, simply based on the judges that are sitting in on the cases, strikes me as a problem in terms of what every professional I have ever met says is the most important thing when talking about a bankruptcy case—predictability. What's going to happen? I need to tell my client what's going to happen, and if it varies so greatly from place to place, you now have factors other than the written rule of law dictating what's going on in cases. I'm not sure that's good for the system.

John Penn: Taking the devil's advocate position for a moment, and with the disclaimer that this may or may not represent my views, what it sounds like is, and particularly on this panel and with the discussion, is a complaint about the Golden Rule—that is, whoever has the gold makes the rules. To some extent, it is the game of chicken between the judge, who has the real power because the debtor doesn't have any power to negotiate, against the lender, as to whether they will really insist upon the provisions or walk. Up until the time somebody says no, an advocate's job is to advocate for the most that they can get. In the sense of Golden Rule, the person that's putting in new money is going to ask for everything imaginable.

Robert Fishman: I do not disagree with you at all, and I think the Golden Rule, as you articulate it, has a very real place in the process. If you're at the head of the line, and it's your economic risk, and it's your new money, you rightfully do have a lot to say, but the fact is that there are things that you can extract because there's no one in the process who really is able to push back. The debtor doesn't even care in these cases; they have no economic interest in the outcome. Maybe there's a principle of the debtor with the guarantee who wants to see the secured creditor do as well as he can for his own personal reasons. The company itself is getting sold. It is going out of business. The employees may go with the assets to a new place where their jobs are preserved. The decision makers in the company don't have an economic interest in the outcome of this debate. The creditors' committee is often perceived as being out of the money. I think Judge Gonzalez in one of the later panels said, "I'll listen to an objection from somebody in the money a lot more seriously than I'll listen to an objection from somebody not in the money." And you know what? I even respect that because you don't want somebody to be able to become an obstacle to a legitimate outcome because nobody's throwing them a bone that they don't have a legal entitlement to. What concerns me, however, in the particular case that I articulated, is here is a case where they were trying to say that maybe unsecured creditors could get something if things went well. They were using that as a justification for why we ought to proceed with this sale here under these circumstances, because it was the best chance to get that outcome. Then the very same guy says, "Oh, by the way, I want to take $650,000 off the table and give it to the secured creditor for the right to gamble on whether I can pay something to these creditors at the end of the line."

Bob Keach: I thought one of the things that was interesting here was that, and this goes back to Melissa's point that there wasn't, certainly, a ready legislative solution to this problem, there was certainly a lot of discussion about when competition is restored to the marketplace, we'll see some lessening of the inclusion of these provisions. From the moderator's standpoint, I expressed some level of skepticism about whether or not all of these provisions would go away just because competition for DIP facilities was restored. I think that will certainly happen on some of the newer, more draconian provisions like sale milestones. Obviously, if you're a healthy debtor with a competition for a DIP, you don't need to accept somebody else's timetable for when you're going to have to sell your assets. To the extent we're worried about things like sale milestones, I do think those will probably go away as healthier debtors get competition in the market for DIPs. I'm a little less optimistic, however, that we'll see, without some help, other things go away because they're not necessarily debtor-driven issues. The debtor, for example, doesn't care a whole lot about 506(c) waivers. It doesn't care a whole lot about whether it gives its avoidance actions away, or gives releases, or the deal is structured as a rollup. I do think that even when competition restores some debtor leverage to the marketplace, some of these issues will remain.

I also thought it was interesting that, with the exception of the person on the panel who was a clear lender's representative, there did seem to be some consensus for doing away with what I'll call the more ordinary course, onerous provisions. Rollups seemed to come in for a particular criticism, I think in large part because the current version of rollups lend so much money to pay off old debts and lend so little money going forward. Even that may be a temporal kind of issue. I did find it interesting that there seemed to be a consensus that rollups may have gone way too far.

I thought the assignment of avoidance actions seemed to draw the universal condemnation. There seemed to be maybe less condemnation, but some concern, around 506(c) waivers and the inability of the debtor in possession's successors, chapter 7 Trustees or others, to be able to finance even the wind-down, because all of the equity had been sucked out of the assets in the DIP.

Despite the general frustration that there wasn't a big-picture legislative solution, there did at least appear to be a few suggestions for fixes. I thought that was indicative of the fact that the process isn't going to generate throwing these kinds of provisions away. Maybe if these provisions were just "illegal," that might not be a bad thing.

Melissa Kibler Knoll: Yes, Bob, I would agree with you, particularly on the rollup point. From the judicial standpoint, as well, while this particular panel didn't have a judge on it, the feeling was that when trying to look at how much responsibility lies on the shoulders of the judges to intercede in these situations and stand up and play that game of chicken, or what kinds of tools we want to give them, or things to fall back on, that was one in particular that might be helpful in terms of assisting the judges and limiting harmful practices.

To diverge a little bit from this, we had talked about the interplay in this particular topic between the marketplace issues and the availability of DIP facilities in the marketplace, as well as the issues with the law. I thought that Harvey's suggestion at the end in terms of a solution to the marketplace issue of starting a government DIP program was particularly interesting, as well.

Bob Keach: I thought it was an interesting suggestion. I wasn't quite sure whether it was serious or not, although I think it was largely serious. I think it's an interesting concept. I think it reflects, whether fully serious or not, a recognition that for many cases, DIP facilities are just not available otherwise.

I want to shift a little bit to the discussion that was in the following panel, which was who should run the chapter 11s? The one thing that struck me about this is actually, despite invitations to people on the panel who I think were generally in favor of having independent third parties, i.e. trustees, in more cases, despite my inviting people to say that the DIP model was broken, I think, again, an element of consensus here was that the basics of the DIP model are not broken. There was some discussion about whether the presumption should be in favor of the DIP or not, but nobody was saying we should never have a debtor in possession. What we really want to talk about here is tweaking around the edges. Are elements of the DIP system functional, not functional or could be improved upon? I don't know. Melissa?

Melissa Kibler Knoll: I think that's right. I think that there was, in general, from all parties, support for the current system under most circumstances. From the U.S. Trustee's standpoint, what I sensed most was the frustration in the way that courts, over time, have applied the current law, which in essence, speaks to trustees only in certain more limited circumstances—certainly not to the extent that Professor Tabb, for example, might have argued that a mandatory trustee would be invoked in a number of circumstances.

What I found particularly interesting, though, were comments that were generating from discussion with Steven Golick from the Canadian perspective. One of which was the way in which much of the world has been moving towards a system that is more like our debtor-in-possession rehabilitation model, as opposed to what has been typically more creditor-driven models. The world has looked to our chapter 11 model as something that's desirable. At the same time, we're talking about whether we should move away from it. In particular, I found of interest the other panel members' intellectual curiosity about the concept of a monitor and the concept that one might have a party who plays a more independent role without having to move fully to a trustee-type of situation, but that might achieve some of the same objectives that those advocating trustees might be trying to achieve.

Bob Keach: Interestingly enough, I had a discussion offline with some of these panelists, and we explored that idea. I proffered the proposition that maybe it's not that the debtor-in-possession part of the model is broken, but that the committee side of the model is broken. Perhaps creditors' committees are no longer the most effective counterbalance to the debtor in possession, simply because of the dynamics of the way committees are formed, the way claims are traded, the different agendae, if you will, of committee members now, from maybe what their traditional mission was. I suggested that maybe we develop a quasi-monitor, something like the Canadian monitor—maybe somebody who doesn't wear quite the same number of hats as the Canadian monitor. Interestingly enough, the idea was, well maybe we could have a monitor-like entity replace the committee. Even analysts who were staunch defenders of the traditional DIP model said that might not be a bad idea. I do think that the monitor idea actually, as you said Melissa, acquired a little traction as a consequence of this discussion.

Robert Fishman: I think it has some possibilities, but here's the place where the concept of the objective third party, without an economic interest in the outcome, worries me. Courts make decisions based on the presentation of evidence. One of the biggest criticisms for that monitor, special master, objective third-party helper of the court is do you want to elevate a particular person's opinions about what are the facts, and give them more credence than you do other people's interests? If Melissa represents the creditors' committee, and she gets up and testifies about a valuation issue, or an adequate protection issue, or a cash flow issue, then she represents a constituency with an interest in the outcome. I listen to her, and I weigh the sufficiency of her testimony. If she's now a monitor, and she gets up and makes the exact same statements, do I give greater credibility to her opinions because she's been anointed with this special title? Should a judge give greater credibility to those opinions because she's appointed as a friend of the court?

Bob Keach: I think that's a legitimate question, but I think in the early days of the '78 Code, courts did that with committees. Committees were seen as independent third parties. Even though they individually had economic stakes in the case, the committee was somehow seen above that. Committee counsel, in particular, was a place the court could go to find out what was going on in the case. I think as committees have evolved, that role's no longer accurate. I think as a consequence, they no longer have that special eyes and ears of the court status that they had.

What I'm thinking about, Bob, is more like if you look in small-market and middle-market cases when committees are not formed, essentially the U.S. Trustee steps up and is a stand-in for the committee. That role's a little confused because now you've got the statutory watchdog in the role of the representative of the unsecured creditors. I think that their roles conflict. Those cases don't proceed, however, with any less regard for the interests of unsecured creditors than the ones where there is an active committee.

I think it would take some real thinking about the role, but the other benefit is the monitor may not have to have its own financial advisor, and his or her own investment banker to go along with the whole process. Maybe there's a benefit there. I'm not telling you I'm ready to scrap committees, but I do think the monitor idea got some traction, moreso than I would have thought.

The other thing that I thought was a remarkable point of consensus on this panel was . . . I think Cliff White, the Director of the Executive Office for U.S. Trustees, talked about the U.S. Trustees' disappointment with the development of the law that has essentially made appointment of a trustee an extraordinary remedy, and which has imposed the requirement of establishing the need for a trustee by clear and convincing evidence. There did not appear to be a lot of pushback to that complaint. I think even Jack Butler, who was a pretty clear defender of the DIP model, said that he would not be troubled if it were easier to get trustees. I thought that may have been a kernel of consensus there in terms of maybe it is too hard right now to change management. Maybe we need to make it a bit easier.

Robert Fishman: I certainly agree that every decision you ever read about the appointment of a trustee starts off by citing a case that says it's an extraordinary remedy that shouldn't be entered into lightly. There probably is some room for a little bit of changing of that standard. On the other hand, and some of the people in this panel kind of pooh-poohed this, and I think it's a pretty legitimate issue, there is a very real cost to appointing a chapter 11 trustee in an operating company case. There's that dichotomy between appointing a trustee for purposes of dealing with certain issues in a case and appointing a trustee who runs the business. While I think there's legitimacy to the debate, I think the economics of appointing a trustee in a real company case can be very significant.

Bob Keach: John?

John Penn: The thing that struck me was something that Bob was just mentioning. While people talked about how it might be good to have an independent person come in alone, I don't run across that many cases with enough extra juice, if you will, to fund it.

Bob Keach: Is part of that problem because our system now adds that person on top of the existing layer of costs, right? We start off with debtor's counsel, debtor's financial advisor, debtor's investment banker, committee's counsel and committee's financial advisor. Maybe the committee's got its own investment banker. Now, when somebody's thinking about getting an examiner or a trustee appointed, you're talking about adding a layer of cost on top of that. If you had a monitor system that replaced one of those components, presumably you wouldn't be adding a layer of costs. You might even be potentially displacing costs.

John Penn: I'm going back down into the mid-market cases where you have trouble even forming a committee. One of the reasons you have trouble forming a committee is either a lack of interest or a lack of ability to fund anybody to stand up for the committee. What you're doing at that point is saying, if you want an independent party, someone's going to have to fund it. Who are we going to take stuff from to fund that?

Bob Keach: Right.

Robert Fishman: The secured creditor. They'll always lend to pay for everything.

Bob Keach: On the independent third party point again, one of the things that popped out about this to me too was how lukewarm the reception is to the whole concept of examiners, even by the people you would think would be most in favor of having them around. Obviously, the U.S. Trustee is charged with seeking examiners in some cases and appointing them, and I thought they defended the system quite adequately. There doesn't appear to be a lot of love, however, over the mandatory examiner provision for cases with $5 million or more in public debt. There seemed to be a consensus for restoring discretion in those cases. I think if there was a consensus, it would be for just eliminating that portion of the examiner statute and giving the judges discretion. Maybe it was just me, but my impression was that I didn't hear a lot of people saying cases that have examiners are much better cases or we really ought to have more examiners. I didn't get that impression.

Melissa Kibler Knoll: I agree that there was consensus around the idea that the one-size-fits-all solution doesn't fit a system that needs to be able to adapt to the facts and circumstances of a case. I think there was acknowledgment of the value that examiners have brought in certain cases. There was acknowledgement of costs invested, but recognition, I believe, that one should be able to weigh those factors when considering whether it's really necessary in a case.

Robert Fishman: I have to say that in 1978, $5 million was a very big number. In 2009, $5 million is a very small number when it comes to bankruptcy. The notion that you would trigger the automatic appointment of somebody at $5 million doesn't make anywhere near whatever amount of sense it might have made in 1978 when you thought you were putting somebody in for the extraordinary big case.

Bob Keach: In reflecting back on the '78 Code panel, in fact, this may just be a historical anomaly because this provision came out of the compromise between the House and the Senate about whether or not there were going to be mandatory trustees in public cases. The House got what they wanted, which was not mandatory trustees. This mandatory examiner provision was a bone, essentially to the Senate, that there'd be mandatory examiners if anybody asked for one. This may just be the leftovers of that deal and really probably doesn't need to be in the Code anymore.

You talked a little bit about this being a one-size-fits-all kind of solution. That's what propels us into this discussion about "too big to fail" and whether or not we need a special chapter for these companies due to either size or interconnectedness. Largely, we're talking about financial holding companies, but not exclusively, as the discussion proved out. Do we need a whole different approach to these?

This is something that's obviously right in the news as we speak, but to summarize and kick this off . . . We've got four different approaches being thrown out here. We've got chapter 11 as it exists. I think there's a consensus that it should be chapter 11 as it exists but with a substantially narrowed set of derivative safe harbors.

The chapter 14 concept is the Republican alternative, which is a special chapter for the too big to fail and the systemically sensitive entities. It looks a lot like chapter 11 with some derivatives fixed. It has an interesting entry provision that requires the Secretary and the Treasurer of the FDIC and the Federal Reserve to allow the filing to happen, and then maybe to allow or discuss whether or not these stay derivatives transactions. It is a little bit more like an involuntary voluntary, actually.

We have two versions of resolution authority, which is the Administration's version, which is essentially, again, the Federal Reserve, the Treasury and the FDIC deciding whether a firm has sufficient systemic risk, in which case it's put into a proceeding that looks a lot like an FDIC receivership going forward.

Finally, we have Senator Dodd's slight spin on that, which isn't a lot different from the Administration's, other than the identity of who's doing the receivership and who gets to make the choice.

So that's the list. I thought this was a fascinating discussion that certainly left me, at the end of the day, still thinking that chapter 11 is the best option if we can deal with the derivatives situation.

Reginald Jackson: Bob, that was my exact reaction. The more I listened to the panelists on this discussion, the more I was convinced that with some appropriate slight modifications, chapter 11 was the place to handle these institutions. I don't buy the argument that bankruptcy courts and bankruptcy judges aren't to be trusted and can't figure out how to make decisions on a timely basis and wouldn't be able to address the issues that these large non-financial institutions raise.

I listened to the regulatory scheme for the so-called chapter 14 and the concept of these various members of the government coming together for a meeting that was supposed to go really quickly. They would call all parties into the room and decide whether to stay things or not stay things, and if they can't figure it out, they give them the okay to file bankruptcy and make a statement. It was a huge mushy area, and again, the bill's probably in its early stages, but it didn't seem like a practical fix to the issues that were trying to be addressed, not that it didn't have some benefits to it. I thought that some aspects of the legislation were positive.

Likewise, as to the other proposals, and I've not read them but just as they were explained, the more I listened, the more I thought, basically, we have a system that's tested in many respects with all types of institutions that we've been able to restructure, liquidate or deal with in the bankruptcy concept. We have some difficulties, and we have to modify, but we can do that within the existing context of the Code and leave in place the overall structure of the system and not create something from the moral code that I think, quite frankly, is not likely to be as successful as what we do in the chapter 11 context. None of the other alternatives, to me, made a compelling argument for moving in a different direction.

John Penn: The biggest problem with the systemic risk candidate or the too big to fail candidate was they turn to the same definition you have for pornography, and that is, we know it when we see it. No one could define what it was going to be and how you would know, on the front end, whether you qualified for it or not, which really gets into a lot of due process and equal protection issues.

Bob Keach: As a moderator, a big issue for me was the eligibility or the definitional issue. I certainly pressed, I thought, hard for them to tell me who's in the special chapter. I'm not sure I ever got an answer to that question.

Robert Fishman: No, you didn't.

John Penn: The fact that you did not get an answer was an answer. It's also a Rorschach test.

Bob Keach: Again, so much of the Administration's resolution authority, and even in the Dodd bill in a strange, backdoor way, and also with the chapter 14 proposal, leaves largely the heads of the major financial regulatory entities determining eligibility based on their perceptions of systemic risk. I thought Professor Kuney made a good point here. He's been an advocate of the special chapter, but he didn't have the same entry rules. In his special chapter, you defined who wasn't in it essentially by excluding people, and everybody else was in. He used the example of Boeing, but a big manufacturing firm, a GM-type firm, would not be distinguished from an AIG or from some other entity. Even in that case, I think the eligibility question wasn't all that clear. To me, the biggest impediment towards the whole let's-deal-with-these-in-a-special-way approach was the definitional problem. The approaches essentially boiled down to certain members of the financial regulatory community and the U.S. government saying, "We know what we're doing. Trust us to pick the right people, and trust us how to work this out."

Robert Fishman: This panel really brought me back to what the first panel told us what this debate was all about. This panel isn't about bankruptcy professionals talking about what we've learned in the 31 years since the Bankruptcy Code was enacted. This issue is about politics. This issue highlights what I perceived as one of the important lessons of the first panel, which is our myopic bankruptcy world view is very narrow. The world is looking at this topic, not through bankruptcy glasses, but through much broader perspective glasses. Therefore, they aren't starting from the presumption that we all make, which is look at how well the bankruptcy system generally works. They don't necessarily agree with that. I don't remember exactly which of the professors said this, but a professor was reacting to something someone else said about who's going to decide an issue. The professor said, "We don't want so-and-so doing it, and we're certainly not going to let a mere bankruptcy judge do it." The notion was a bankruptcy judge is a dangerous, ineffective person for having power over such an important issue as a too-big-to-fail company. I don't think that the professor said that intending to be disrespectful, but I do think he was giving us an insight into the broader view of the topic, which is, to us, generally speaking, bankruptcy judges are capable, knowledgeable, sophisticated people who really get a lot of stuff, but to the outside world these are mere bankruptcy judges.

Bob Keach: Again, I'm not sure this is just an issue of difference in perspectives. I think, in many respects, it is a misapprehension about the system from people who are not regularly in it. Again, if the system hasn't proven that it can handle really complex restructurings by now with Lehman, GM, Chrysler and CIT and, frankly, countless cases before that going back to Manville or Drexel Burnham, I'm not sure how we're going to prove that. I think the debate over resolution authority versus bankruptcy, for example, forgetting about what bankruptcy variation we're talking about, really comes down to a view of the world that says, the problem with bankruptcy is it cares too much about mere distribution questions. It's about who gets what share of what. Whereas, when we're talking about rescuing the too-big-to-fail firm, we're talking about "systemic risk," which again, nobody could define for me. The idea is that there's something bigger going on here than merely saving the firm or merely distributing the residual assets. We're talking about saving the economic system, saving the world, saving some really big voting block—saving something that the bankruptcy system doesn't normally take into consideration.

Robert Fishman: And shouldn't be trusted to safeguard.

Bob Keach: Right. I think that's actually myopia from the other side of the fence. In my experience, while bankruptcy judges were not charged with expressly taking into account social policy concerns, the idea that they have some narrow view of the impact of their decisions, that they don't appreciate the greater environment in which their decisions take place, I think is just wrong.

Robert Fishman: The issue is not to say what you just said is incorrect because I believe they do that. I think the point is the one that the professor made when he said, "but we can't have a mere bankruptcy judge doing that." It isn't that they don't try to do that. It isn't that they don't mean to do it. It isn't even that they don't succeed in doing it. It's that they haven't been entrusted by the system with the right to do it.

Reginald Jackson: There's a quote in the news release that was just released after this panel this afternoon that makes that point. I think they attribute it to the Republican counsel to the committee, where basically he says that the bankruptcy judge and the bankruptcy courts are not trusted with this assignment. That's paraphrasing, but that's effectively what the quote said.

Bob Keach: He said the Administration's not trusted. Actually, in fairness to Daniel Flores, because that may not reflect it, he was saying we should trust the bankruptcy judges.

Melissa Kibler Knoll: Yes. Forgive me for making a comment that may sound politically naïve, but I will continue to strive for the ideal. Understanding that both those of us who practice in the bankruptcy field and those in Congress may be somewhat myopic in their viewpoints, I think we all have to understand, and what I'd like those in Congress to understand is, that bringing those two viewpoints together is going to be the best way for us to try to achieve our mutual goals. We do have, as Bob suggests, decades of experience that is available to Congress in terms of working through some of the very complicated issues of balancing different priorities, economic, political and otherwise, and accomplishing a restructuring. I think that what was clear from the panel was that the idea of creating an essentially new restructuring regime that would be run by the FDIC or other government agency, and secondly allowing little to no judicial recourse to any of the parties, as well as very limited transparency as to what was happening in that process, was essentially universally considered to be an undesirable solution to get to the objectives that the government is trying to achieve. If the government wants to address the issues of the fact that our distribution scheme does not afford appropriate opportunity to protect against systemic risk issues or otherwise, I think that the most constructive way to look at that is how we can modify our current bankruptcy system to allow more opportunity for participation or consideration of some of those issues, rather than moving to the resolution authority side of the spectrum.

I think another thing that does tend to obscure the resolution authority debate is the bailout question. I think the panel struggled a bit with how to mix and match bailouts, chapter 11 and resolution authority. There are clear positions on whether bailouts, as a general matter, are acceptable or not.

Bob Keach: I thought clearly the chapter 14 proposal, while bankruptcy based, was an anti-bailout system. No bailouts. These things are going into bankruptcy. Again, to the extent that Dan Flores represented the Republican viewpoint here, I think he would admit to that. They did allow for the committee approach to (a) whether the filing would happen, and (b) whether or not a stay of derivatives termination would be sought, but clearly, no bailouts. Clearly, we're going to let the bankruptcy judge handle this after we make the decision to file or not. Whereas, from their standpoint, the Administration's resolution authority is just structured bailouts, right?

Melissa Kibler Knoll: Right. It's almost akin, I think, to someone in Congress attaching an abortion rider to a budget bill or something. It infuses an issue that has some relationship, but doesn't necessarily have to be married to the question of bankruptcy versus resolution trust authority.

Bob Keach: I think Adam Levitin made this point in his paper and in his presentation, which is when you're talking about too-big-to-fail companies, you may be talking about companies where, in his view, the only financial recourse is the government. I think that Daniel Flores probably would say, "Precisely, but that doesn't mean we should give them the money." I do think you're right. I think the bailout issue did get merged a little bit with the structure issue.

Again, this may reflect my own bias as somebody who's lived inside the bankruptcy system for almost 30 years, but I did not hear a compelling case for handling these matters outside the system, assuming that we can fix the derivatives issue. I thought it was interesting, even in that respect, even in the Republican bill, that the presumption was there would be no stay unless the major players, the "trust-me" people in the financial system, allowed for a stay of derivatives, terminations and liquidations, whereas clearly, the bankruptcy judges would be called upon to implement any relief from the presumption. Again, I think that's also part of this. Even though the Republican bill is based on more trust of the system than resolution authority, it wasn't quite total trust in terms of allowing that decision to get made.

John Penn: Although didn't this panel also raise the issue of how you might, in a backdoor way, increase moral hazard by creating a threshold where companies might try to get big enough to cross that threshold to then get the special benefits?

Bob Keach: Of resolution authority. Yes. I think Flores made the point that if you're going to create a situation of structured bailouts for companies of a certain size or nature, you're encouraging people to acquire that size or that nature. How practical that is, I don't know, but I understand the point.

Let's talk a little bit about the final panel, which was, again, plucked from the headlines. This was the sale model of reorganization, which I thought was an interesting panel. It started out, clearly, as a dissection of GM and Chrysler, but I thought nicely moved to a bigger examination of, what do we do about the prevalence of sales, assuming we want to do anything about them? Then it moved to a mature discussion about the fact that there are going to be sales, but we might be able to make the system better while acknowledging that the sale model of reorganization is here to stay.

Thoughts on that one?

Robert Fishman: I think the positions on this one are largely dominated by your view of the panel about DIP financing. This sale model is really driven by the controls that come from DIP financing and cash collateral that a secured creditor exerts. Again, GM and Chrysler are not the right vehicles for this discussion because. . .

Bob Keach: Those guys are the government money.

Robert Fishman: That's right. It's a different vehicle. I have been in the debate about plan versus 363 sale a million times. We've all been in that debate. I've never been a big proponent of you need a plan to sell the assets. Michael Richman made a point, however, that I thought was a really valid point, even if I don't agree with him necessarily, and that was that you should be compelled to use a plan to sell the assets of a company. His point was that if we made that the system, everybody would adapt to it, and the process would make adjustments to allow for that additional time by getting to the process earlier. When everybody's going through their first and second and third forbearance agreements, they would know that if ultimately selling the assets in bankruptcy is what you think might need to happen, you need to get to the church in time to let everybody get set up to do that. If we now know that, instead of 30 days, it takes 90 days. You're just going to adjust your pre-petition behavior to account for that. While I wasn't necessarily buying into his need for that outcome, I was completely accepting of the notion that he suggested that if you change that to the rules, the system would adapt to those rules. It would become the way we do things, and not this, "Oh my God, everything's going to fall apart because we don't know how to do it this way."

Bob Keach: Isn't that another way of saying, Bob, that our 363-sales system doesn't have to be perfect? It just has to be sufficiently better than the state-law alternative to be attractive enough to choose. You can't go to state court anywhere in the country, that I know of, and get a sale free and clear of all liens, claims, interests, encumbrances and successor liability in 30 days at no cost. We've got a great system for moving assets quickly. In fact, it's probably way better than it needs to be to attract the traffic that we might want to run through it.

Robert Fishman: When was the last time that a state court listened to the view of an unsecured creditor during any kind of a foreclosure action by secured creditors? By definition, you don't even have standing to be heard in that case.

Bob Keach: Again, if we're comparing not to some isolated ideal, but to the viable, straightforward alternatives, it might suggest that Michael's not that far off base when he says we could legislate some more time into this.

Melissa Kibler Knoll: Yes. I think that Michael's suggestion is not actually as radical as it might, on its face, seem. I think there was general consensus, although a disagreement on the degree, that given the increasing frequency with which 363 is now being used to sell substantially all assets, the statute is not robust enough to provide adequate guidance to enable the consistent application and practice of those types of sales on a national basis. I think that there was certainly support on that panel for improving and formalizing some of the bidding procedures and other types of procedural things that might go along with the use of 363, and also to increase the amount of information, the transparency, as Corinne was talking about, and the standards that provide for the burdens of proof that the debtor must bear. I think that Michael is just taking it to that next step, which is an expedited plan process, which would be flexible to adapt to exigent circumstances. It would provide all of those things that you're saying need to be improved about just using the current 363 process as it is.

Reginald Jackson: From a practical standpoint I wonder to what extent we would see dramatic change. For example, I think the comment made that instead of the third or forth or fifth or seventh forbearance, they would know they had this process in bankruptcy. I'm not sure that people always think that far ahead, quite frankly, in terms of that process. On the lender's side, particularly, they're looking to keep a loan that's somehow performing on the books of the forbearance arrangement, and it does not many times facilitate that process not to bridge a gap to a buyer, because they don't even have buyer out there yet. They don't have the extra strategy, in most of the market cases I see, until some point in time. Maybe they told their borrower to go out and find a buyer or they're cutting things off, but when they finally get that person, whoever it might be, they're ready to move very quickly into the process. I would suggest that, of course, we'll move as quickly in the resale process today as they would in the combination plan 363 sale process, but I do like what Michael was suggesting.

The other aspect about this whole thing that I guess I wonder about is whether there is too much of this or what's the evolution or demise of chapter 11 in this regard? I'm not convinced in this particular context of 363 sales that legislation is the answer. For example, uniformity in bid procedures and things of that sort—I don't think that that's the answer. In terms of trying to have uniformity in that regard, I truly believe that the uniformity would have to be so broad to encompass the differences between different types of cases and circumstances. Perhaps in a disclosure statement type of context it will work, but if try to get too specific I'm not sure, quite frankly, that a different process will work.

My view is that until the economy improves and there's really an opportunity to provide DIP financing for a longer period of time to allow that there be a reorganization or restructuring that really can make sense, we're going to see the 363 sale model continue to proliferate for quite some time. I think we ought to try to tweak it to make it better. I'm just not convinced that there's a legislative answer in this area that I think is going to work across the board.

Bob Keach: I thought Professor Baird made a good point here in the sense of saying there's a little too much hand wringing over the prevalence of sales. I think we're melding liquidations and sales of going concerns. I've always felt, even though these don't show up in the statistics, that sales of businesses as going concerns are forms of reorganization. The condemnation of Chrysler and GM that these were "reorganizations" and not sales strikes me as a false dichotomy.

Going to Michael's point, I do think you could legislate more time into the system. Going to something that Bob said earlier, I think lenders will react. I think the DIP-financing problem will resolve itself because I think if there's sufficient value in the assets, somebody will step up to finance the bridge to the disposition, so long as that disposition is sufficiently efficient, speedy and by comparison to the state law alternative, better. As to the cases where there's not value or where they're really on the margin, maybe the change in the system will tip that in a different direction. Again, maybe that's not so bad. Maybe those are cases that ought to get kicked.

Reginald Jackson: From a timing standpoint, what Michael was suggesting was that the practice maybe in most jurisdictions, setting aside Chrysler and GM, is that a very fast 363-sale process is still taking 90 days, thereabouts—maybe a little longer, maybe a little shorter sometimes. I haven't seen a 60 day sale process, at least in my jurisdiction.

Robert Fishman: I've seen it.

Bob Keach: It's happened in the retail industry.

Reginald Jackson: What's the prevalence? Was it 60, 90 or 120? I've seen much more in the 90 to 120 range than I've seen in the 60-day range.

Bob Keach: I would say 60 to 90 is average. In a lot of cases, particularly in retail, 60 and under is pretty prevalent.

Robert Fishman: My concern with Michael's proposal is not that it'll make the system procedurally more complicated and cumbersome and be problematic. I agree with his point that the players will all adapt to the new system. I recognize that there are those that say you're not supposed to be able to sell so easily merely under 363, but my problem with melding 363 and the plan is the plan requires the resolution of all the other issues in the case. In today's environment, to get the resolution of all the other issues in the case in the first 90 days in the case, unless the resolution is nothing for you, nothing for you, nothing for you and everything for me, is close to impossible. When you put voting and that issue resolution burden on top of the sale burden, I think that's where you're going to run into danger that your new process is going to damage sales on the economic viability measure that we're suggesting, the best economic outcome. That's where I may not agree with Michael's view of the world, but the notion that building in some more procedural safeguards and building in a little more time will be devastating to the outcome of the sales, I don't really accept that counter to his argument.

Bob Keach: Going to your point, one of the things I reflected back on listening to this discussion was Rich Levin's comment about they never intended the absolute priority rule to be a straitjacket. Actually, what's happened with the settlement process and the sales process in particular is that we now are expecting the absolute priority rule in all of its glory to be grafted onto the sale process so that nothing can happen in the sale process or the settlement process that directly or indirectly implicates the absolute priority rule. That doesn't necessarily make logical sense when you look at what the original purpose of the absolute priority rule was. It's usually the product of what you just described, which is the class-by-class negotiation down the waterfall over the ultimate distribution of the assets. I do think that we want to bring some plan aspects to the sale process. Disclosure, right? Creditor involvement, a little bit more time? But we don't want to graft the entire plan process onto the sale process. It won't work.

Melissa Kibler Knoll: I think what's created some of this sensitivity is the GMs and the Chryslers. In those cases you almost did have the melding of the sale process and much of the distribution process. I guess what concerns people is the idea that there was discussion about creditor classes that are naturally left behind by the people who are trying to take the go-forward business. They're trying to shed the liabilities and the creditors. If they are given a free hand to prefer one group over the other, while obviously naturally occurring already within our bankruptcy law, I think that's where it concerns people in cases like those, which obviously aren't typical, but where those concepts of plan and sale are already melded.

Bob Keach: I found so many of the complaints about Chrysler and GM to not be complaints about Chrysler and GM. They were complaints about things that are already in the Code that were properly applied by judges looking at what was, to them, a bankruptcy case. Assumption and assignment of executory contracts is a distribution mechanism. It is a preference. There's no other way to look at it.

Robert Fishman: And it is not about the absolute priority rule.

Bob Keach: No.

Robert Fishman: The statute expressly removes it from that process.

Bob Keach: Sure. It is no question, however, that you have somebody making a selection to pay somebody in full who, but for that decision, would not be paid in full.

Robert Fishman: In the back of the line.

Bob Keach: And there are a number of other decisions that get made along the process that have that effect. I think we have to just be really careful. I think these judges were careful about saying that because something has the potential to affect a future decision about distribution, it is therefore distributed, and therefore we have to apply plan wheels to it. I don't think you can ever go that far. I think the sub rosa plan prohibition was designed to get at true sub rosa plans, i.e., working out the entire distribution in advance.

Robert Fishman: I don't even know what a true sub rosa plan is, as opposed to a non-true sub rosa.

Bob Keach: There may never have been such a thing. I'm not sure that there's ever been a decision that found one, actually.

Reginald Jackson: I've certainly seen attempts at what I think are sub rosa plans.

Let me ask you a question. I don't disagree with what you said, but if you incorporate some aspects of the plan process into the sale process, at the end of the day, what do you have? In terms of what's different then, as opposed to what you have now? You're still going to have the buyer or DIP lender to bridge the gap dictating the terms of what it is when you get there. The only thing you can build in, potentially, is maybe a bit more time. Let's say 30 days, and let's say a bit more transparency. In terms of dictating the outcome, and in terms of taking out what Michael said was the reorganization value that maybe was there for the benefit of unsecured creditors, you haven't affected that at all by this process. What you've done is add 30 days to the process, maybe 45 days to the process.

Bob Keach: Also disclosure.

Reginald Jackson: Okay, add some disclosure.

Robert Fishman: And an ability to participate in whatever way you want to try to participate.

Bob Keach: And some added costs. Presumably, you're banking on the fact that the end costs will either generate additional interest in the assets or leave the participants with the outcome that the process is more fair, even if it doesn't generate net economic benefit at the end of the day.

Melissa Kibler Knoll: Right, and it's hard to separate. There was just an inherent feeling of unfairness about some of the things that happened within GM and Chrysler. Judge Gonzalez appropriately pointed out that in some ways, one has to step back and try to remove the government from that equation and say, "What if it had been Hedge Fund A that had lent that money? And what would your expectations have been then?" I think point taken that the optics of the fairness of the process and the ability for all to know and participate are very important to satisfaction with the outcomes.

Reginald Jackson: That goes back to Adler's point. There was a question about robust marketing and appropriate marketing, and additional time allows that question to be answered. I don't disagree that the optics are going to leave. I think the ability to participate is functionally about the same, whether it's 30 days or 60 days or 90 days. That's in my experience. I'm not sure you're going to get that many more people to the table. I think the optics standpoint is a good thing, and if you get a greater marketing process, I think that's good, as well.

Bob Keach: If you look at Adler's paper, his concern is actually about what I would consider a pretty common bankruptcy problem. His real concern was with the apples-to-apples provision in both of the Chrysler and GM sales. The fact that you had to, as a condition to receiving the government financing, assume the modified labor agreements. I'm not sure that's a problem unique, necessarily, to GM because what you had, of course, was the stalking horse bidder saying, this is my deal.

Quick, around the table, final thoughts. Melissa?

Melissa Kibler Knoll: I'll end with where Reggie started, which is complimenting you, Bob, on doing an incredible job of pulling together some of the best people within our profession who could speak to these issues. I think that it was an incredible two days where we touched on a breadth of topics, and I agree with you that we are just at the beginning of the discussion. This is not the end, but hopefully it's the beginning of a fruitful process where we can provide the kind of thoughtful consideration to the powers-that-be as potential legislation moves through Congress as quickly or, as Beau Grant might say, slowly as it's going to.

Bob Keach: Bob?

Robert Fishman: To quote our short-winded colleague, Robin Phelan, "great program, great job."

Bob Keach: John?

John Penn: It was a great program that I think helped to define the problems while providing some potential solutions but not really providing the full road map of how everything can work out to improve the system. It did define the issues laid out in various perspectives and, quite frankly, set the table for the battle that will begin at some point.

Bob Keach: Reggie?

Reginald Jackson: I would echo what everyone else said. I would just add that this program helped to really focus on the other side of the fact of how significant a role the bankruptcy process and procedure and bankruptcy law plays in our financial system, not only of our country, but of the world. If any of us think that what we do doesn't matter in the overall scheme of the financial underpinnings of this country, and maybe of the world, then this program helped us to appreciate the fact that such is not the case. In fact, what we do is very significant.

Bob Keach: I would close by saying the biggest takeaway I got out of this conference was how proud I was of the insolvency community for participating in it. I put out an invitation to the best and the brightest that we have on the bench and academia and in the professions, financial and legal, and everybody who could come and participate did so. That's a credit to our industry that number one, they care enough about the system to want to come talk about making it better. Secondly, they were willing to give of their time for this process, even though they, I'm sure, all know that this is the start of what would be a multi-year process to get this right. I was incredibly proud, frankly, of the business we're in for responding in this way. I would close the way I closed before, which is with a message to Congress: Listen to these people because they know what they're talking about.

Thank you guys for doing this. I appreciate it.