CHAPTER 11 DOES ONE SIZE FIT ALL?

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One of the significant structural features of the Bankruptcy Reform Act of 1978 (the "Code") FN1 was its commitment to a single reorganization chapter for all types of businesses. This one chapter would encompass businesses whether large or small, publicly or closely held, corporations or partnerships, and also would cover individuals, whether in business or not. Although lauded in the legislative history to the Code as both an important departure from prior law and a reform expressly designed to make the reorganization alternative more efficient and less costly, the "one size fits all" choice is no longer above criticism. FN2 Now, with the National Bankruptcy Review Commission reviewing the effectiveness of the reforms to bankruptcy law, this structural issue should be evaluated to see whether the policy choice made in 1978 was brilliant, ill−considered, or perhaps just in need of some tinkering. The Commission should consider whether chapter 11 is sufficiently elastic to fit the broad variety of entities that currently qualify for relief, or whether the experience of the 1980's has confirmed that, in fact, there are a broad spectrum of cases that simply do not fit and cannot be made to fit without tearing the fabric of the statute. The Commission also should consider whether courts are unilaterally repealing the "one size fits all" character of chapter 11 with judicial decisions that operate to exclude some entities from relief, as well as whether Congress should ratify these decisions with modifications to the statute, or instead overrule them legislatively. The Commission also must ask itself whether the success of a "one size fits all" approach turns on the skill of the court officers entrusted with its administration.

Part I examines these issues by reviewing how Congress reached the decision to enact a unitary reorganization chapter. Part II then examines the changes made to the Code by the 1994 amendments, which seem to reflect the beginnings of a departure from the unitary approach. Part III focuses on whether such a departure is warranted. Finally, in Part IV, the role of the bankruptcy judge in making the implementation of a unitary reorganization scheme successful is examined, including the question of how the performance of that role might be enhanced. This Article concludes that although the unitary reorganization scheme is not perfect, it is preferable to the alternatives, especially if the judges whose job it is to "make it fit" are appropriately trained for the task.

This Article is limited in the scope of its consideration and therefore some definitional issues must be resolved at the outset. I have elected to define the "one size fits all" issue as one involving primarily what *entities* are entitled to employ the single remedy, and whether separate remedies should be designed for certain kinds of entities. For example, the Code permits corporations, partnerships, and individuals to file for chapter 11 relief, but excludes insurance companies and banks. FN3 Should the Code restrict the availability of the remedy? Should we split the remedy into multiple chapters, or rather expand the remedy to include insurance companies or banks? These are some of the relevant questions in the analysis of the issue as framed by the author.

What is *not* incorporated in this issue, though is touched on occasionally in this Article, is the slightly different question of which *claims* or *disputes* should be resolvable under the chapter 11 umbrella. Though related, the issue is analytically distinguishable. FN4 While it is important, I have intentionally avoided this question, FN5 primarily because it detracts from the equally important issue presented here for analysis as part of the American Bankruptcy Institute's Bankruptcy Reform Study Project.

I. THE ORIGIN OF THE UNIFIED REORGANIZATION CHAPTER

The Report of the 1973 Bankruptcy Commission FN6 (the "Report") noted that the three different reorganization chapters of the Act (chapters X, XI, and XII) "[had] detailed and overlapping rules regarding . . . availability which frequently produce[d] pointless and wasteful litigation as to which chapter should be utilized in a particular case . . . ." FN7 The Report added, almost as an afterthought, that "none of the chapters is precisely suited to the needs of many common business situations." FN8 It then recommended that "all of the business rehabilitation provisions . . . be combined into one chapter, thereby eliminating the problems referred to in the preceeding [sic] paragraph." FN9 This reference was aimed primarily at the concern over the litigation costs and delays that multiple choices available under the Act seemed to engender. FN10 The Report also emphasized that issues such as the appointment of a trustee, the

methodology for obtaining creditor voting, and the standards for confirmation should not vary across chapters. FN11

Later in the Report, the Commission reviewed the circumstances that led up to the enactment of the Chandler Act of 1938, including the work of the National Bankruptcy Conference FN12 and the then Commissioner of the Securities and Exchange Commission, William O. Douglas. FN13 Their efforts culminated in the creation of different chapters for individuals who own real property and pledge it as collateral (chapter XII), for nonpublicly held businesses (chapter XI), and for reorganizations of publicly held companies (chapter X), a chapter deemed by the Bankruptcy Commission of 1973 to be cumbersome and unnecessarily suspicion−laden. FN14 The Report then detailed how the Chandler Act and its policy choices seemed to have played out in practice, FN15 noting that chapter XI quickly became "the dominant reorganization vehicle" even for very substantial and publicly traded debtors. FN16 Lawyers quickly found ways to make chapter XI "fit" situations for which it was not originally designed, FN17 and courts aided the process. For example, judicial precedence for a "stay" of secured creditors evolved despite chapter XI's explicit nonapplicability to secured debt, as did precedence for the issuance of equity securities, notwithstanding the chapter's proscription on affecting the rights of equity interest holders. FN18

As a final comment before giving its recommendations, the Commission observed:

The reason underlying the preference of lawyers for [c]hapter XI is obvious, although not often stated . . . . Although proponents of [c]hapter XI generally talk about speed and economy, control and the "best interests" test obviously are the dominating reasons for the preference. The obvious advantages of [c]hapter XI to the debtor and his counsel have led to its use by large corporations. This has caused litigation as to the propriety of the use of [c]hapter XI, primarily generated by the Securities and Exchange Commission FN19

Despite acknowledging the "potential for abuse that was inherent in chapter XI, the Commission nonetheless recommended the adoption of a comprehensive new reorganization chapter built primarily upon the same foundation. Their recommendation was based on a belief that "[i]t is not feasible to attempt to carve out of [c]hapter XI certain cases which should be under [c]hapter X." **FN20** Instead, the Commission proposed certain "protective" provisions which would be available to a judge to prevent abuse. These provisions included the discretionary appointment of a trustee, a flexible version of the absolute priority rule, and a provision for conversion or dismissal "for cause," including the unlikelihood of the debtor's survival. FN21

From the Commission's point of view, the principal evil to be exorcised was the "Calvinist" demon of inflexibility that William O. Douglas had instilled into the reorganization statute for publicly traded companies (chapter X). FN22 The Commission believed that the interests of the small investor, the innocent creditor, and the public could be adequately protected by a watchful bankruptcy court armed with the necessary tools with which to punish abuse on a case by case basis. FN23 Flexibility was the touchstone of the Commission's analysis and recommendation. FN24

Equally apparent, however, was the Commission's emphasis on the need for a more viable reorganization law for large, publicly traded companies. FN25 The fundamental structural changes that the Commission proposed, most of which were ultimately enacted, favored the needs of this type of company for an acceptable and effective reorganization remedy. The deletion of the mandatory trustee, retention of existing management, relaxation of the absolute priority rule (permitting fully informed consensual workouts), and the replacement of the Securities and Exchange Commission with a "bankruptcy administrator" FN26 all promised to make the new reorganization chapter a more efficient tool for reorganizing the affairs of publicly traded companies. FN27 The "protective" provisions suggested to curb the potentials for abuse, including the discretionary appointment of trustees, optional dismissal or conversion on a showing of cause, and the "watchdog" function given to the bankruptcy administrator, functioned to make the new remedy more palatable for use in large reorganizations. FN28

Only passing reference was made to the plight of closely held companies, though such companies no doubt made up the majority of bankruptcy filings at the time. FN29 The Report itself does not explain why further attention was not given to whether the new "one size fits all" mechanism would, in fact, fit the smaller or closely held companies, though there are hints. FN30 For one, the Report assumes that chapter XI of the Act seemed to be working as well as could be expected for such companies. Arrangements were made with secured creditors to "cooperate" in the process while a restructuring with unsecured creditors was undertaken, usually with existing ownership retaining an interest.

FN31 The restructured enterprise might or might not work, but that seemed to have little to do with whether restructuring could be completed under chapter XI. FN32 It seems that the Report and the House Report FN33 that followed it assumed that reorganization had positive social value and that generally, chapter XI seemed to be functioning well, in that cases were being filed, problems were being resolved, and plans were being confirmed, all with a minimum of incident.

This is not to say that the Commission failed to recognize certain problems in the smaller cases. One of the biggest drawbacks to chapter XI for smaller companies, and especially for closely held enterprises, was that it did not apply to secured debt. FN34 Unlike large corporation cases, smaller cases tend to be dominated by secured debt, often held by a single creditor. FN35 Secured creditors, however, could not be forced to go along with a plan in chapter XI, but instead had to consent to an out−of−court proposal. FN36 This often was accomplished via a state court receivership, structured in tandem with a bankruptcy plan. FN37 Under the proposed unified reorganization chapter, secured creditors *could* be compelled to accept a payment arrangement over such creditors' objections, provided they were assured of the preservation of their lien rights. FN38 In addition, the Commission proposed incorporating the automatic stay, then in force via rule, into the statute itself to further insulate the reorganization process from unilateral action by secured creditors. FN39 Furthermore, voting procedures for closely held enterprises were to be relaxed to excuse the plan proponent from having to obtain court "pre−approval" for the plan and disclosure statement. FN40 These protections were deemed appropriate for widely dispersed shareholders lacking the knowledge and sophistication to evaluate a reorganization proposal, but were considered unnecessary for creditors of a closely held enterprise. Such creditors were presumably knowledgeable about the debtor's business affairs and financial condition, and were therefore in a better position to evaluate the proposal without additional protection from the court. FN41 The resulting structure thus appears to have been designed to make the new reorganization chapter a more workable mechanism for handling small cases as well as large ones.

The Commission's Report was forwarded to Congress along with the proposed new bill, which included a provision for a unified reorganization chapter. FN42 The House of Representatives accepted the concept of a "one size fits all" reorganization chapter, finding no reason to differ with the Commission's findings. FN43 Opposition to the Commission's bill did emerge, however, from the National Conference of Bankruptcy Judges, which in turn drafted and proposed an alternative bill. FN44 The only other serious contention that arose concerning the proposed chapter 11 was its incorporation of provisions from chapter XII which permitted a debtor to "write down" a nonrecourse secured creditor's loan to the value of the collateral, even over that creditor's objection. FN45 Secured creditor organizations mounted a campaign in the Senate to head off this prospect, focusing first on a tighter rein over the debtor's ability to use the automatic stay to forestall foreclosure in single asset real estate cases, and when that initiative failed, insisting on a change in the way nonrecourse secured creditor claims would be characterized. FN46 Otherwise, the proposition of a unified reorganization chapter went unchallenged, as did the widely held belief that reorganization was a good thing in and of itself.

II. THE 1994 AMENDMENTS

Now, some eighteen years later, we are having second thoughts. In the Bankruptcy Reform Act of 1994, FN47 Congress enacted special provisions for small businesses utilizing chapter 11, special protections for real estate lenders thought to have been victimized in the single asset real estate cases, and expanded eligibility for chapter 13, FN48 in part to siphon off into that chapter some of the "house cases" prominent in the Central District of California. FN49 All of these adjustments reflect a perceived need to "tailor" chapter 11 to fit certain kinds of situations, a tacit acknowledgement that, after all, perhaps one size does *not* fit all. Indeed, judges and practitioners alike had been doing on−the−spot tailoring long before 1994.

A. Small Business Cases

The small business case, for example, traces its lineage to the experimental efforts of Chief Judge A. Thomas Small, who implemented local rules to streamline the chapter 11 process for the numerous small businesses that frequented his docket. FN50 Judge Small found, for example, that disclosure statement hearings cost small debtors time and money and delayed the process of reorganization. FN51 Realizing that cost and delay were especially fatal in the small cases that tended to dominate his docket, but equally unable to ignore the statute's plain directive that a

disclosure statement had to be transmitted to creditors in order to solicit their vote, Judge Small eliminated the pre−solicitation hearing to approve the disclosure statement. FN52 This was possible because the Bar tended to use standardized disclosure statement formats. FN53 This made "pre−approval" relatively simple and did not require a pre−solicitation hearing. FN54 The court then could entertain the rare objections to the disclosure statement at a combined disclosure/confirmation hearing. FN55

Judge Small also introduced a scheduling order for small chapter 11 cases designed to move such cases through the system quickly, thereby reducing the cost of the process. FN56 He advocated even more dramatic changes to the statute by suggesting that a separate reorganization, modelled on chapter 13 be enacted for small businesses. FN57 While Congress ultimately failed to implement Judge Small's proposal *in toto*, it was sufficiently convinced that chapter 11 was too cumbersome for many smaller enterprises, and that it should be simplified in such cases. FN58

B. Single Asset Real Estate

The real estate lending industry, smarting from a decade of chapter 11 real estate cases, pushed hard for changes in the Code. FN59 The 1994 amendments to section 362, while not all that the industry wanted, at least gave lenders some of the protections that they had originally lobbied for with some success in the Senate in 1978. FN60 As part of the package, the amendments defined a single asset real estate case FN61 to fit the prototype of cases which had inundated the bankruptcy courts throughout the 1980's. FN62 Regardless of whether the effort was successful in achieving the ends sought by the lending community, the amendments underscore the widespread dissatisfaction expressed from numerous quarters regarding the use of chapter 11 by limited partnership ventures to rework their secured debt. FN63 Courts have been especially harsh in their criticism of chapter 11 in the single asset real estate context, with some insisting that such cases were never intended to be included under the otherwise broad umbrella of eligibility. FN64 Other courts have engrafted result−oriented interpretations of key chapter 11 provisions, expressly to make the chapter's application to single asset real estate cases more difficult, or even impossible. FN65

At the heart of the debate over single asset real estate cases is the "one size fits all" design of chapter 11. There is but one reorganization statute available for such cases, and these entities are not expressly prohibited from employing the chapter 11 remedy. FN66 Indeed, the Supreme Court concluded that chapter 11 *could not* be read to exclude an entity from eligibility solely on grounds that the entity was not the "type" of debtor intended to have the benefit. FN67

Skilled lawyers quickly discovered how effective chapter 11 could be for handling the financial difficulties of single asset real estate ventures. The protective shield of the automatic stay that comes into effect at the cost of only a filing fee certainly could stop most foreclosures. FN68 In addition, the cramdown features of chapter 11 FN69 gave debtors a powerful tool to coerce renegotiation of the secured creditor's note on the property. A limited partnership thus held a new and powerful weapon to bring to the bargaining table if the property ran into trouble.

In 1984, however, the real estate market began to collapse, dragging the savings and loan industry down with it. FN70 Suddenly there were *thousands* of new chapter 11 single asset real estate cases, not just dozens as there had been in years past. FN71 The great surge in chapter 11 filings which began in Texas and neighboring parts of the Southwest and continued in the Northeast, Florida and California, was comprised primarily of these troublesome cases. FN72 The combination of this bursting of the speculative bubble and the availability of a ready device with which to blunt the worst effects of the collapse led to this massive surge in filings and highlighted the worst aspects of the "one size fits all" feature of chapter 11. **FN73** Lacking a direct statutory exclusion to prevent the flood of single asset real estate filings, courts began to look for indirect ways to discourage the use of chapter 11 by these debtors. Many courts placed these types of cases on a "fast track," to eliminate the "delay benefit" that often motivated such filings. FN74 Other courts required debtors to come up with "hard cash" workouts as the price for confirmation of a plan. FN75 Still others developed a good faith prerequisite to filing chapter 11 (notwithstanding the absence of such a requirement in the Code itself), and devised a test for good faith in a way that would assure that most single asset real estate cases would flunk the test. FN76 Some began to interpret chapter 11's generic provisions relating to confirmation, including classification of claims, best interests, good faith, cramdown, voting by an impaired class, feasibility, and the fair and equitable standard, in a manner which assured that single asset real estate cases could not be confirmed, skewing the law in the process. FN77

These efforts reflect the judiciary's frustration with the "one size fits all" structure of chapter 11, at least in the context of single asset real estate cases. More than a few courts simply could not believe that such cases were ever intended to be "reorganized," or that chapter 11 was ever intended to be used so aggressively by a debtor entity that had but one significant creditor who was a secured creditor to boot. FN78 Yet the statute also gave no clear indications that such entities were excluded. By "nipping and tucking" to make sure that chapter 11 would *not* fit single asset real estate cases, however, courts inadvertently may have rendered the provision less of a fit for other, more obvious candidates for chapter 11 relief.

C. Remedies in Chapter 13

The third change made by the 1994 amendments expanded individual eligibility for chapter 13 and also reflects the dissatisfaction with the "one size fits all" scheme of chapter 11. FN79 As noted earlier, at least one motivation for this change was the increasing number of consumer debtors who were being forced to utilize chapter 11 to resolve their problems, often involving a home mortgage, simply because the size of their secured debt rendered them ineligible for chapter 13. FN80 Case law also revealed other problems associated with individuals filing for chapter 11 relief. In Toibb v. Radloff **FN81**, the United States Supreme Court found that the mere fact that a debtor was not engaged in a business did not render the debtor ineligible for chapter 11 relief. FN82 The Court acknowledged that an individual did face other difficulties that might render the chapter 11 remedy essentially valueless. **FN83** For example, a debtor might be unable to surmount the "fair and equitable" standard in section 1129(b). FN84 This section provides that an interest may retain no property on account of its interest unless all senior interests, including unsecured creditors, received property of a value equal to the allowed amount of their claims, unless such interests consented to different treatment. FN85 It is not at all clear what an individual debtor's "interest" might be, though the Supreme Court suggested in *Norwest Bank Worthington v. Ahlers* FN86 that a debtor retaining an ownership interest in any property might fall within the ambit of the "fair and equitable" rule. FN87 If this is the case, however, it may be functionally impossible for an individual to fully utilize chapter 11. At best, an individual can hope that the chapter 11 forum will afford sufficient time and leverage to permit the debtor to work out his or her problems on a consensual basis. Cramdown, however, would be completely out of the question. FN88

Individual debtors face another anomaly in chapter 11. Although section 541 excludes personal earnings income from the definition of property of the estate, FN89 the definition includes property earned by the estate during the pendency of the case as property of the estate. FN90 While this section creates no anomalies for the corporate debtor, all of whose income earned as a debtor−in−possession is deemed property of the estate, FN91 an individual debtor, such as a doctor, would encounter some difficulties. For instance, is the income earned from the doctor's practice property of the estate (*i.e.*, earned by the estate), or is it property of the debtor (*i.e.*, income earned from personal services)? FN92 What, after all, is being reorganized? Is it the medical practice, or is it the individual financial affairs of the debtor? FN93 If the debtor is an employee, is all of the debtor's postpetition income excluded from property of the estate? If so, then who or what is the estate? What is the debtor "in possession" of? Can an employee operate the "business of the debtor" in such a situation?

Chapter 13 offers an easy answer to these questions by simply adding the debtor's postpetition income to the estate's property, notwithstanding the exclusion of postpetition earnings found in section 541. FN94 Logically, chapter 11 should achieve the same result when it is employed by individuals, but it does not. Congress certainly intended that sole proprietorships have recourse to chapter 11 relief in order to reorganize their affairs, FN95 but only because sole proprietorships are simply businesses in another form. It made no sense to exclude certain businesses simply because of the form in which the business was conducted, and so the decision not to exclude sole proprietorships seems to have been sound. Without guidance as to whether nonbusiness individuals also are appropriate subjects for chapter 11 relief, courts and practitioners alike are left to guess. Most courts have resolved the problem by simply carving out a portion of the individual debtor's income attributable to the debtor's personal services, leaving any remainder to the estate. FN96 A few, however, have gone in the other direction by presuming that all earnings are generated by the estate, then allowing the estate to pay the debtor a salary, which is excluded from the estate. FN97 In any event, courts have been able to "adjust the fit," so to speak, to make chapter 11 work for individual debtors at least in some respects.

III. THE FLEXIBILITY OF CHAPTER 11

Such tailoring efforts do not necessarily mean that Congress's "one size fits all" decision was wrong after all. The Commission Report in 1973 noted with some admiration that judges and lawyers had made similar adjustments to the former chapter XI to make it more serviceable. FN98 If the adjustments required become so major that the parties and the court have to ignore the statute in order to make it work, however, then the statute itself may need mending. The 1994 amendments might seem to suggest that we may be near the breaking (or ripping) point, FN99 but a closer examination demonstrates precisely the opposite that chapter 11 has proven to be remarkably elastic.

Little adjustment has been required to meet the problems that have thus far emerged in making chapter 11 fit. We may have to sacrifice some of the simplicity of a universally applicable reorganization chapter, but that does not mean that we must return to the Act design either, with separate reorganization schemes for different kinds of debtors. FN100 Importantly, the extraordinary flexibility of chapter 11 has proven itself in handling a wide panoply of business enterprises and business problems. Mass tort problems, **FN101** tax difficulties, FN102 environmental issues, FN103 union disputes, FN104 industry contractions, FN105 and even multi−national insolvencies FN106 have all proved amenable to resolution under chapter 11. Carving up chapter 11, either to exclude certain kinds of debtors FN107 or certain kinds of problems, **FN108** carries with it the risk of generating strategic litigation or planning, increasing the cost of bankruptcy and decreasing the likelihood that the final remedy will be truly effective. FN109

What then can be done without sacrificing the flexibility that has made chapter 11 a relatively effective remedy? FN110 One promising suggestion has been offered by Professor David Skeel, a professor of law at Temple University, in a paper published in the University of Wisconsin Law Review. FN111 After analyzing the numerous critiques of chapter 11, he concludes that a court−supervised reorganization scheme is still more desirable than the alternatives that have thus far been proposed, but adds that the system would benefit from adjustments in order to "balance[] the desirability of more cost effective proceedings and less judicial intervention in asset deployment decisions, on the one hand, with the importance of judicial involvement for monitoring and discovery purposes, on the other." FN112 He calls for separate chapters for closely held and non−closely held corporations, following the definitions already familiar in the corporate law arena. FN113 He says that such a regime would address two significant problems. FN114 First, it would resolve the breakdown of committee structure now evident in cases involving closely held corporations. FN115 Skeel states that:

Rather than require a court to find seven willing committee members, the close corporation provision could authorize the court to appoint a single large unsecured creditor to act as the representative for the class. This creditor would have all the rights currently afforded to a committee, and would owe the same fiduciary duty to its constituency. Such a rule not only would ensure greater protection for unsecured creditors in cases where recovery is likely, but it also would significantly lower the committee's costs. FN116

Secondly, Skeel would propose that unsecured creditors in non−closely held corporations be given voting authority over the choice of the debtor's directors, as well as with respect to the decision of whether to approve a proposed preconfirmation sale of most or all of the firm's assets. FN117 This proposal is grounded on the proposition that unsecured creditors in bankruptcy are the new residual owners of the debtor. FN118 The two suggestions, in tandem, reflect Skeel's belief that ownership of the enterprise and control of the enterprise tend to be wedded in the case of a closely held enterprise, but separated in the case of non−closely held enterprises. FN119 Furthermore, because the provisions of chapter 11 themselves form "an elaborate corporate governance framework," Skeel recommends that two separate chapters be written to meet the unique needs of the two different kinds of business entities. **FN120**

A case certainly can be made in support of Skeel's suggestion, though one wonders whether the dividing line would, in fact, be honored, or would instead invite litigation over which is the better chapter. The proposal also presumes that all closely held companies are essentially like sub−S corporations, typified by an owner who also runs the enterprise. FN121 The leveraged buyouts of the 1980's, however, have left us with a substantial number of large enterprises that are managed much like publicly held corporations, whose ownership is centered in just a few people, and whose stock is not publicly traded. Still, there is much merit to the idea of creating slightly different regimes for publicly traded enterprises. Perhaps entirely separate chapters are not necessary, though adjustments in some of the requirements imposed on closely held corporations might be relaxed.

The Skeel proposal does not meet some of the other difficulties we have suggested. It leaves unanswered the question of whether single asset real estate cases should be excluded from chapter 11 relief on the grounds that no public bankruptcy purpose is served by affording those who speculate in real estate an "easy out" from their secured debt. FN122 It may well be that too few of the values one normally thinks of protecting with a bankruptcy reorganization chapter jobs, going concern value, encouraging entrepreneurial risk are implicated in the real estate investment industry to warrant creating a federal remedy for fending off secured creditors (though Congress appears to have believed otherwise for at least 60 years, dating back to the inclusion of chapter XII in the Chandler Act). FN123 In all events, it seems difficult to justify imposing an investor's entrepreneurial risk on the secured creditor, as does the current chapter 11 regime when used in this context.

Ultimately, Congress simply must make a policy choice with respect to single asset real estate cases. One could certainly argue that such cases have a place in a reorganization chapter on the theory that persons taking entrepreneurial risk in the real estate development industry are entitled to a "safety net" in the event of failure, just like other kinds of entrepreneurial activities. FN124 Just as persuasively, however, one could argue that the government should not interfere in this market, because lenders and developers alike place capital at risk based on evaluations of the real property's income potential, and when that potential fails, the value of the property itself declines. FN125 Because the market, and not the owner, controls the value of the property, a regime that attempts to retain the existing owner's interest in the property will not enhance the value of the property itself. The property will have essentially the same value in the hands of another owner, and all that foreclosure assures is that ownership will be transferred, allowing the lender to recoup its investment. FN126 The chapter 11 regime thus does not enhance the value of the property or significantly alter or preserve entrepreneurial activity. It merely preserves ownership rights at the expense of the lender. FN127

Whichever direction Congress chooses to take, the choice must be more clearly manifested in the statute itself. Congress can opt for giving real estate investors and developers a safety net in chapter 11 by simply leaving the statute alone the "one size fits all" structure of chapter 11 will assure its continued application to these types of enterprises. Or Congress can opt for excluding these types of enterprises from the chapter 11 remedy, defining them out of the universe of entities entitled to resort to reorganization. It is clear, however, that what Congress need not (and should not) do is simply write a separate chapter for single asset real estate reorganizations. Either such enterprises are an appropriate subject for reorganization, or they are not. A separate chapter unnecessarily undermines the flexible and efficient nature of chapter 11 and reflects a less than clear policy choice. FN128

The use of chapter 11 for individuals is similarly easy to resolve. Here too Congress can make a policy choice by restricting chapter 11 eligibility to corporations and partnerships. Or it could restrict individual filings to those persons who are "in business," though such a choice would create some inventive statutory drafting challenges. FN129 Leaving the statute as is leaves a number of unanswered questions most specifically the issue of the availability of cramdown over a dissenting class of unsecured creditors. FN130 Still, no separate chapter need be devised for individuals who desire to invoke the chapter 11 remedy, assuming Congress retains their eligibility to file. A combination of judicious statutory drafting, careful rulemaking on the part of the Judicial Conference, and careful tailoring by judges handling such cases should be sufficient to preserve the flexibility of the "one size fits all" design of chapter 11.

IV. THE ROLE OF BANKRUPTCY JUDGES

As previously discussed, one of the factors that may have influenced Congress' choice of the "one size fits all" design of chapter 11 might have been the creativity and practicality with which former chapter XI had been applied by referees in bankruptcy for many years. FN131 In many parts of the country, bankruptcy judges have exhibited similar abilities by adopting local rules and practices to make chapter 11 fit in a variety of situations. FN132 One of the most notable examples is the approach pioneered by Judge Tom Small in the Eastern District of North Carolina, as mentioned previously. FN133 His approach smoothed over some of the more cumbersome procedural aspects of chapter 11's disclosure and plan confirmation processes to make the statute fit the many small businesses that sought to reorganize their affairs. FN134 By simplifying the format of the disclosure statement and expediting the confirmation process, Judge Small was able to remove some of the cost and delay that can often prove fatal to the small case. FN135 Courts employed similar procedural mechanisms to reduce or eliminate perceived abuses in single

asset real estate cases. A popular practice of judges in Texas involved entering scheduling orders in the context of motions for relief from stay, which required the debtor to achieve confirmation by a certain date or face automatic foreclosure or dismissal of the case. FN136 Some courts added the requirement that debtors desiring to invoke the "new value" exception produce the cash as a prerequisite to going forward to confirmation. FN137 Other courts began granting motions to dismiss when it was shown that the property in question had no income potential. FN138 In this way, cases filed for the sole purpose of waiting for a positive change in the real estate market were quickly excised from the system. FN139 Only cases demonstrating an ability to refinance their obligations in a manner which treated the secured lender fairly could successfully run the procedural gauntlet laid down by these courts.

Courts also have proven adept at crafting procedures to make chapter 11 a better fit for individuals. Individual chapter 11 cases provide a number of unique issues to be considered by courts. Initially, there is the issue of conflicts in the representation of the estate. An attorney for a chapter 11 debtor receives compensation from the estate only to the extent that she represents the estate. FN140 When a corporation files bankruptcy, the attorney cannot represent the shareholders or the officers of the corporation. FN141 If an individual files, however, there is no "split" of the debtor in possession and owners of the estate. The debtor−in−possession *is* the owner. Courts have had little trouble with this problem, simply parsing out compensable services from noncompensable services in the fee application process. FN142 The professional is not disqualified from representing the individual simply because the professional also seeks to protect the debtor's exempt property from the reach of creditors, even though such services neither augment the estate nor benefit creditors. Her compensation is simply adjusted accordingly. FN143

Another issue is identifying what portion of the debtor's earnings is property of the estate under section 541(a)(6). FN144 That section excludes from property of the estate earnings from personal services. FN145 A straightforward reading of section 541(a)(6) would lead to the unlikely result that an individual debtor's postpetition income is hers to keep, apart from her creditors. This interpretation would invite many professionals in financial *extremis* to forego chapter 13 in favor of chapter 11 in order to insulate their income stream from creditors. FN146 Courts, however, have also finessed this problem. In some districts, for example, the United States Trustee evaluates the postpetition income generated by a debtor to determine whether the "salary" that the debtor is receiving is reasonable. FN147 If it is unreasonably high, the Trustee seeks a hearing to obtain a court determination of appropriate compensation, with the balance of earnings going into the estate as "proceeds, product, offspring, rents, or profits of or from property of the estate" within the meaning of section 541(a)(6). FN148 The rationale for the procedure is that an individual cannot earn income post−filing without utilizing the property of the estate, and such income must fall under court control when the debtor utilizes the property to make an income for herself, as opposed to operating the property for the benefit of the estate's creditors. **FN149** Case law also has developed in this area, with courts parsing out income between sums attributable solely to the debtor's personal efforts and income derived from the estate's assets. FN150 In short, the procedural devices employed by the courts have rendered the question of postpetition income largely a non−issue in terms of making chapter 11 work for individual debtors.

An issue also arises with respect to an individual debtor's conduct during the course of a chapter 11 case. A chapter 11 confirmed plan will discharge all preconfirmation obligations, not just prefiling liabilities. FN151 Thus, if a debtor incurs a tort liability or a consumer debt obligation during the course of the case, such liabilities would be discharged upon confirmation. FN152 Suppose that the debtor incurs a tort liability unrelated to her business affairs, involving negligence, or that the debtor decides to "charge up" her American Express card for a long−awaited trip to Hawaii. These liabilities would be discharged, FN153 but more importantly, they would then compete with other prepetition obligations for payment. FN154 Similarly, in the case of a corporation, torts committed by the debtor during the reorganization case prior to confirmation would be discharged, and also would compete with the claims of other creditors for payment out of the estate's limited assets. FN155 In addition, because debt incurred by the corporate debtor during the course of the case generates the same result, the issue thus dissolves upon inspection. Nonetheless, courts have invoked procedural protections to insure that a minimum of risk is inflicted on the estate's prepetition creditors. FN156 For example, it is not uncommon for courts to insist that debtors maintain insurance coverage against tort liability and extraordinary loss. FN157 Courts also may place limitations on a debtor's ability to incur debt "out of the ordinary course of business," FN158 though this requires a determination of what is "ordinary" for a consumer debtor.

A fourth issue concerns the difficulties that individuals face obtaining a plan. Two principal difficulties frequently arise. One relates to the determination of feasibility, while the other arises from the individual debtor's inability to effectuate a cramdown. This latter issue has already been discussed. FN159 Ultimately, the individual debtor's difficulties with cramdown may be entirely consistent with the outcomes now experienced in cases involving closely held corporations, save for the problem of exempt property, which is a matter easily remedied with a bit of clarifying language in section 1129(b)(2)(C). FN160 As to the former issue, the primary difficulty seems to be that it is either difficult or impossible to ascertain an individual's ability to perform on a plan, given that human beings are mobile and have free will. Yet on closer inspection, this issue has not created any great difficulty for the courts. FN161

If the debtor is doing business, the focus of the reorganization is likely to be on that business, for which projections can be made as easily as they can be for companies. If the debtor is a doctor, a restaurant, or even a real estate developer, projections can be made based on the debtor's historical performance. FN162 If the debtor is a consumer with regular employment, then projections can be based on the likelihood of continued employment at a similar salary, adjusted for anticipated inflation. FN163 Feasibility, after all, is little more than an evaluation of the debtor's promises against the likelihood of the debtor's being able to deliver. FN164 If the debtor fails to perform, the result is no different for individuals or companies: default occurs, triggering the consequences provided for in the plan. The fact that individuals may have a more difficult time establishing the feasibility of their plans is no fault of chapter 11, but rather reflects the increased uncertainty that necessarily accompanies any extension of credit to an individual. Courts have applied the same standard for feasibility to individuals as they have to companies, FN165 finding little need to adjust the test. FN166

In a broad spectrum of other situations, courts have proven similarly creative at tailoring chapter 11 to the peculiar circumstances of a given case. The most well−known examples are found in the mass tort cases, in which the bankruptcy courts have utilized trusts and legal representatives for future claimants, FN167 innovative claims estimation processes, FN168 and equally innovative claims adjudication procedures. FN169 In the process, they have turned chapter 11 into a useful tool for resolving a particularly thorny conundrum how to balance the legitimate rights of involuntary claimants against the equally legitimate rights of innocent workers who depend on a particular industry for their livelihood (and perhaps equally innocent creditors as well, who were in no position to prevent the harm visited on the tort victims). Once again, one might differ with the precise methods employed in a given case, but what is relevant for this discussion is that chapter 11 has proven to be sufficiently flexible to accommodate creative approaches to resolve the problem. Indeed, it can be safely said that, absent chapter 11, no equitable remedy afforded itself to the relevant parties. Had Johns−Manville FN170 not had the chapter 11 choice available, its only alternatives were to: (1) litigate asbestos claims at a huge transactional cost, with only some claimants recovering in full until the company liquidated, leaving remaining claimants with no recovery at all; FN171 or (2) liquidate immediately, FN172 forcing the company's unsecured creditors to pay for the damage caused by the company, **FN173** or (3) engage in strategic behavior designed to shield the company from liability for as long as possible, while assets are drained off into another entity. None of these three alternatives are as palatable, much less as equitable, as the remedy crafted by bankruptcy courts and practitioners.

Chapter 11 also has been employed to resolve labor disputes FN174 and pension fund liability, FN175 though with less spectacular results. One can, of course, criticize *how* these matters were handled in the bankruptcy process, but it becomes much more difficult to criticize *why* they were handled in that forum. FN176 If we begin with the proposition that an entity in financial *extremis* is unable to equitably respond to the competing claims on its assets, and that it should have a forum that balances the interests of those claimants, including the interests of employees and owners of the enterprise, then it remains only to design a reorganization statute sufficiently flexible to respond to the wide variety of claims that might be asserted against a given enterprise, regardless of the nature of that enterprise. As a result of the creativity of judges administering the statute, chapter 11 has proven to be just such a flexible instrument. If there is a criticism to be raised, it is one focused either at the priority scheme in place in the statute, or at the capacity of judges to apply the statute in a manner consistent with principles of equity, public policy, and appropriate economic outcomes.

This last point bears emphasis. Many of the complaints leveled against chapter 11 have focused less on the odd results that the statute itself mandates (though there have been such criticisms) FN177 and more on the odd results that the statute produces in the hands of the judges who administer it. **FN178** Courts have been criticized for forcing

negotiations that reward a party with an unfair negotiating position, FN179 for refusing to lift the stay when it is clearly indicated that the secured creditor should rightfully have relief, FN180 for confirming plans that have no real chance of success, FN181 for being unwilling to dismiss a case early, FN182 for extending exclusivity indefinitely, FN183 and for refusing to transfer venue, despite equitable considerations that seem to mandate transfer. FN184 The list could be lengthened, suggesting underlying problems that are rarely discussed.

Bankruptcy judges may not be adequately trained to do their jobs effectively. Most bankruptcy judges come to the bench with no prior judicial experience **FN185** That, of itself, is not all that critical, given that most *district* judges also come to the bench without prior judicial experience. FN186 Perhaps most disturbing is that most bankruptcy judges come to the bench with no prior business experience. FN187 Considering the role that judges play in the administration of chapter 11 cases, they should at least have sufficient advance training or experience in evaluating businesses to recognize those which have a likelihood of success and those which do not. It is fortunate that many bankruptcy judges develop a fairly good feeling for viability just from the experience of presiding over numerous cases, FN188 but this "on the job training" seems remarkably misguided in light of the billions of dollars in assets and claims that rely on these "experts" for appropriate resolution and disposition. A few examples will suffice to demonstrate the point.

The most obvious point at which business acumen is an essential prerequisite for accurate judicial decisionmaking is the confirmation of a debtor's plan. Wholly apart from the pure legal questions that arise under section 1129, FN189 the court must also evaluate the viability of the enterprise as a going concern in order to determine feasibility FN190 and, for that matter, good faith. FN191 Yet too often, the bankruptcy judge has only a passing familiarity with basic accounting, thus making it difficult to critically evaluate balance sheets, income statements, profit and loss statements, sources and uses of cash, and other accounting materials. Most judges do not have accounting backgrounds, much less the accounting skills to evaluate financial statements.

The problem extends beyond confirmation to evaluation of disclosure statements as well. FN192 What counts as "adequate disclosure" FN193 will be, at least in part, a function of the judge's familiarity with the underlying business. The problem also reaches to exclusivity, FN194 relief from stay, FN195 and dismissal motions as well, FN196 for at those stages the court is called upon to evaluate the debtor's likelihood of achieving an effective reorganization. Too often, a judge will simply decide that, if a debtor is trying hard, is being honest, or is facing a recalcitrant creditor group that refuses to negotiate, exclusivity should be extended, the stay should remain in effect, or the case should not yet be dismissed. FN197 Rarely does the judge employ her business acumen to decide these issues, or if she does, she has too little acumen upon which to justifiably rely. Now judges have the authority, under the amendments to section 105(d), to conduct status conferences early in the case. FN198 However, the status conference only will have real value if, at that time, the judge can also closely evaluate the business prospects of the enterprise.

Bankruptcy judges do receive "basic training" from the Federal Judicial Center ("FJC") FN199 shortly after their appointment to the bench. FN200 Lasting slightly under a week, the program focuses on substantive law issues and judicial case management. FN201 Judges also receive annual training from the FJC, most of which, again, focuses on updates to substantive law with additional programs on case management issues. FN202 As useful as this training is, it includes little that would make a bankruptcy judge a better evaluator of the business prospects of a given concern in chapter 11. Meanwhile, the United States Agency for International Development, with the assistance of a number of bankruptcy judges and a major accounting firm, has designed a judicial training program for insolvency judges in Central and Eastern Europe, a substantial component of which consists of business training. The design of that program, in which the author participated, intentionally incorporated the business aspect because in−country evaluations of these emerging nations' insolvency systems demonstrated a remarkable lack of business awareness on the part of the judges and, for that matter, on the part of trustees and others operating the insolvency systems. As the program design progressed and as United States judges were instructed as trainers, it quickly became obvious to the participants that it was not just the European judges who were in need of training in this area. Perhaps the judicial training model that was designed for use in Central and Eastern Europe could be modified for use in training United States bankruptcy judges as well.

CONCLUSION

No system is perfect. In selecting a "one size fits all" statute, Congress invariably gave up some of the precision and predictability that comes with tailoring a separate chapter for various kinds of enterprises. However, it also avoided the impracticality and high transaction costs that often accompany a more rigid and complex scheme. In reality, a "one size fits all" approach was effectively a statement of trust by Congress in the bankruptcy judges to whom it entrusted the administration of the statute. If there have been problems, it seems they may be traced to a lack of adequate training for these judicial officers. A more perceptive and savvy bankruptcy bench could more accurately tailor chapter 11 to fit the exigencies of particular businesses than persons who may have superb judicial and legal skills but little business acumen. When one buys a suit that does not quite fit, one expects that the tailor will know what she is doing. If the store's business manager does all the alterations, one can safely assume that she will have some familiarity with the suits in the store, and, after some experience, might even become fairly adept at simple alterations. But if one wants the suit to fit right, one will still hold out for the tailor. The analogy, while not perfect, adequately states the point.

Footnotes

FN* United States Bankruptcy Judge, Western District of Texas.

FN1 Pub. L. No. 95−598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101−1330 (1978)). The enactment is almost universally referred to as the "Bankruptcy Code," to distinguish it from its venerable predecessor, the "Bankruptcy Act," *i.e.*, the Bankruptcy Act of 1898. ch. 541, 30 Stat. 544 (repealed 1978). The Bankruptcy Act was amended on a number of occasions after its enactment, the most significant being the Chandler Act of 1938, which created chapters X and XI. *See* Chandler Act of 1938, ch. 575, 52 Stat. 840 (*repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95−598, tit. IV, § 401(a), 92 Stat. 2682 (1978)). The Code entirely displaced the Bankruptcy Act. The Code itself has been amended numerous times. The most recent amendment in 1994 created a new bankruptcy commission to review and examine the Code and to make recommendations regarding what, if any, changes should be made. *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103−394, §§ 601−610, 108 Stat. 4106, 4147−50. The National Bankruptcy Review Commission held its first meeting on November 1, 1995, and its final report is due two years thereafter. *See id*. § 608, 108 Stat. at 4149.

FN2 *See* Barry E. Adler, *Bankruptcy and Risk Allocation*, 77 CORNELL L. REV. 439, 442 (1992) (commenting that compulsory reorganization rules have inefficient effect of granting junior claimants coercive power over senior claimants); Douglas G. Baird, *The Uneasy Case for Corporate Reorganizations*, 15 J. LEG. STUD. 127 (1986) (arguing that entire law of corporate reorganizations is hard to justify under any set of facts and that corporate reorganizations are an impossibility when debtor corporation is publicly held); Lucian A. Bebchuk, *A New Approach to Corporate Reorganizations*, 101 HARV. L. REV. 775, 775 (1988) (stating that current corporate reorganization methods are inefficient and unfair); James W. Bowers, *Whither What Hits the Fan?: Murphy's Law, Bankruptcy Theory, and the Elementary Economics of Loss Distribution*, 26 GA. L. REV. 27, 34 (1991) (stating that norms of bankruptcy law are incongruent with norms of nonbankruptcy law which should be used to formulate more efficient bankruptcy system); Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE L.J. 1043, 1049 (1992) (challenging present corporate bankruptcy theory as causing greater loss to stockholders and bondholders than pre−1978 bankruptcy law); Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 TEX. L. REV. 51, 87−88 (1992) (arguing that corporation's access to chapter 11 reorganization should be controlled by firm's investors as matter of contract law rather than allowing government to make decision); Mark J. Roe, *Bankruptcy and Debt: A New Model for Corporate Reorganization*, 83 COLUM. L. REV. 527, 529 (1983) (suggesting that three desirable characteristics of new corporate reorganization scheme should be speed, low cost, and result in sound capital restructuring as opposed to present chapter 11 which is "cumbersome, costly and complex"); David A. Skeel, Jr., *Markets, Courts, and the Brave New World of Bankruptcy Theory*, 1993 WIS. L. REV. 465, 510 (suggesting that alternatives to chapter 11 be incorporated into Code as solution to problems in applying chapter 11). These commentators, citing the cost, delay and perceived lack of success that has attended chapter 11, have suggested that the entire notion of a bankruptcy reorganization should be scrapped in favor of state law regimes, contractual arrangements, auctions, or nothing at all, instead leaving it to the "market" to resolve insolvencies.

It is beyond the scope of this Article to summarize, evaluate or critique these various approaches, and Professor Skeel's work has made it unnecessary to reinvent the wheel. *See* Skeel, *supra.* He concludes that the various alternatives suffer from two significant shortcomings. First, they would all cost significantly more than their proponents seem ready to acknowledge, both in time and in transaction costs. *Id.* at 521. Second, they would create their own untoward opportunities for "strategic behavior" on the part of the players in the process, all without the oversight and disclosure that a court−supervised process affords. *Id.* at 495. He then suggests that perhaps a good deal of the current dissatisfaction with how chapter 11 operates in practice might be traceable to its "one size fits all" design, and proceeds to lay out an alternative for consideration. *Id*. at 510. That alternative is discussed *infra*, at notes 110−23 and accompanying text.

FN3 *See* 11 U.S.C. § 109(b)(2), (d) (1994) (stating that domestic insurance companies and banking institutions may not be debtors under chapter 7 or 11 of Code).

FN4 To the extent that a given type of claim or dispute is precluded from consideration or treatment within the reorganization process, there will be entities for whom resolution of that claim or dispute is so critical to their restructuring that exclusion of the claim effectively excludes the entity itself from chapter 11. In reality, however, deciding which claims or disputes should be excluded from the bankruptcy process is really a priorities question. Any excluded claimant or party to a given excluded dispute is accorded a priority over other claimants who are required to submit to the reorganization process. For example, under current law a nondebtor spouse is free to pursue temporary orders for maintenance and support, permitting that spouse to obtain immediate relief ahead of other creditors. *See* 11 U.S.C. § 362(b)(2) (1994); Altchek v. Altchek (*In re* Altchek), 124 B.R. 944, 959 (Bankr. S.D.N.Y. 1991) (holding that debtor's former spouse was not prohibited from requiring debtor to pay interest and late charges on mortgage because it was in nature of alimony, maintenance, and child support); Johnson v. Fisher (*In re* Fisher), 67 B.R. 666, 670 (Bankr. D. Colo. 1986) (holding that wife had right to seek award of maintenance and granting her relief from stay). Similarly, governmental entities are permitted to pursue certain enforcement actions against debtors, giving them the ability to compel an immediate expenditure of monies that otherwise might have to be incurred by the governmental entity itself. *See* 11 U.S.C. § 362(b)(4), (5) (1994) (exempting from stay government's police or regulatory powers and enforcement of judgments resulting therefrom); *see also* Commonwealth Oil Ref. Co. v. EPA (*In re* Commonwealth Oil Ref. Co.), 805 F.2d 1175, 1188 (5th Cir. 1986) (holding EPA's administrative action exempt from automatic stay under § 362(b)(4) of Code), *cert. denied*, 483 U.S. 1005 (1987); EEOC v. Rath Packing Co., 787 F.2d 318, 326 (8th Cir.) (stating that entry of money judgment as permitted by § 362(b)(5) was exempt from automatic stay), *cert. denied*, 479 U.S. 910 (1986); United States v. F.E. Gregory & Sons, Inc., 58 B.R. 590, 593 (W.D. Pa. 1986) (holding that United States was entitled to order requiring debtor to perform reclamation work which fell under § 362(b)(4), (5) exemptions from automatic stay); *In re* Kennise Diversified Corp., 34 B.R. 237, 243 (Bankr. S.D.N.Y. 1983) (stating that judgment requiring deposit and use of rent to remedy dangerous conditions is permitted under § 362(b)(5) of Code and is not considered money judgment). Recently, the Ninth Circuit issued an opinion suggesting that any claim against an estate arising under state law should at least be determined outside of the bankruptcy case if the claimant does not file a proof of claim. Benedor Corp. v. Conejo Enters. (*In re* Conejo Enters.), 71 F.3d 1460 (9th Cir. 1995). On March 27, 1996, the Ninth Circuit withdrew this opinion and stated that a new opinion will be forthcoming. At the time of this publication, the new opinion was unavailable.

FN5 Other articles do address the claims issue, including the work of Professor Heidt in a previous issue of the *American Bankruptcy Institute Law Review*. *See* Kathryn R. Heidt, *Products Liability, Mass Torts and Environmental Obligations in Bankruptcy: Suggestions for Reform*, 3 AM. BANKR. INST. L. REV. 117 (1995) (discussing problematic area of bankrupt debtors facing mass tort liability).

FN6 REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. Doc. No. 137, 93d Cong., 1st Sess. pt. I (1973) [hereinafter REPORT], *reprinted in* App. 2 COLLIER ON BANKRUPTCY, at PI−i (Lawrence P. King ed., 15th ed. 1995). The Commission was formed by Congressional act on July 24, 1970, and consisted of nine members. THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, Pub. L. No. 91−354, 84 Stat. 468 (1978). The Commission began hearings in June, 1971, deliberated for a total of 44 days, and submitted their report on July 30, 1973. REPORT, *supra*, at v.

FN7 REPORT, *supra*, note 6, at 23.

FN8 *Id.*

FN9 *Id.*

FN10 *See id.* ("[T]he patient will probably die while the doctors argue over which operating table he should be on.") (citing SEC v. Canandaigua Enters., 339 F.2d 14, 19 (2d Cir. 1964)).

FN11 *See id.* at 23−29.

FN12 REPORT, *supra* note 6, at 239−40. The National Bankruptcy Conference was composed of lawyers specializing in bankruptcy and reorganizations, who were disgruntled by legislation introduced into Congress in April, 1932. *Id.* at 239. The group was invited by the Senate Committee holding hearings on the legislation. *Id.* A group of lawyers then decided that they would draft legislation themselves, which then led to the establishment of the National Bankruptcy Conference. *Id.*

FN13 *See id.* at 242−44. At the request of Representative Chandler, the Department of Reorganization of the Securities and Exchange Commission, headed by William O. Douglas, met with members of the National Bankruptcy Conference in order to form chapter X. *Id.* at 243. In 1939, William O. Douglas was appointed by President Franklin D. Roosevelt to the United States Supreme Court, becoming the second youngest Supreme Court Justice ever.

FN14 *Id.* at 240.

FN15 *Id.* at 237−46.

FN16 *Id.* at 246. The Report had no real statistical data with which to work, and drew this particular conclusion from a comparison of the results from a student study conducted in 1941, shortly after the enactment of the Chandler Act. *Id.* at 246−47. The results of the student study were compared with results yielded by the work of the Commission's staff, which collected clippings from the *Wall Street Journal* over a two year period regarding Chapter XI cases of "substantial corporate debtors." *Id.* at 261 n.31. Thankfully, the work of Professors Elizabeth Warren and Jay L. Westbrook may give the current Commission better data than the anecdotal information that has been the grist of bankruptcy policy making for at least twenty−two years. *See* Elizabeth Warren & Jay L. Westbrook, *Searching for Reorganization Realities*, 72 WASH. U. L.Q. 1257 (1994) (discussing role of empirical work in policy debates and specific issues confronted in designing this new study). The study consists of a five−year longitudinal analysis of business bankruptcies filed in twenty−three federal districts beginning in 1994. *Id.* at 1258. The Administrative Office should develop more refined statistical collection methodologies in this area so that such massive (and expensive) studies will not have to be repeated every twenty years or so.

FN17 REPORT, *supra* note 6, at 247.

FN18 *Id.*

FN19 *Id.* The Report recommended abandoning the multiple chapter approach, but noted in passing that chapter XI, which served as the model for the Code's unified reorganization chapter, "has the same potential for abuse as the equity receivership." *Id.* at 247−48; *see also* Thomas G. Kelch, *Shareholder Control Rights in Bankruptcy: Disassembling the Withering Mirage of Corporate Democracy*, 52 MD. L. REV. 264, 268−69 (1993) (discussing "evils" of equity receiverships).

FN20 REPORT, *supra* note 6, at 248.

FN21 *Id.*

FN22 *See id.* at 249−53 (characterizing Douglas' study of protective committees as "Calvinistic"). The main result of Justice Douglas' efforts in his collaboration with the National Bankruptcy Conference was chapter X. *Id.* at 243. The new chapter X shifted control over reorganization away from management and the reorganizers to a judge−appointed,

disinterested trustee. *Id.*

FN23 *Id*. at 247−48.

FN24 *See id.*

FN25 The Commission acknowledged that "[t]he obvious advantages of [c]hapter XI to the debtor and his counsel have led to its use by large corporations." REPORT, *supra* note 6, at 247. They also acknowledged that this use had led to many lawsuits as to the propriety of the use of chapter XI. *Id.* (citing Melvin R. Katskee, *The Calculus of Corporate Reorganization Chapter X v. XI and the Role of the SEC Assessed*, 45 AM. BANKR. L.J. 171 (1971)).

FN26 *Id.* at 237−59.

FN27 *See id.* at 258−59.

FN28 *Id.* at 23, 258−59.

FN29 *Id.* at 23−29. While lamenting the lack of solid statistical information, the Commission Report does opine from the information available to it that "[i]t therefore seems likely that a great many business cases under the Bankruptcy Act, including a large portion not reported by Dun & Bradstreet, are very small businesses, probably sole proprietorships not readily distinguishable on the face of bankruptcy records from nonbusiness cases." *Id.* at 35. The Report cited to the Brookings Report, which sampled nearly 400 cases filed under the three reorganization chapters in 1964, and concluded that the typical business liquidations were unincorporated, while the typical chapter XI involved a corporation, usually a manufacturer of some sort. *Id.* at 36−39; *see also* DAVID T. STANLEY & MARJORIE GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM (1971). Little more could be gleaned, however, and the Report concluded its analysis of the data on business cases with this observation:

All in all, comparisons between failed businesses and succeeding businesses indicate little more than that in the growth of an individual business enterprise, as in the growth of a family or a household unit, most units succeed without serious debt problems, but a few do not. Except for factors of age and, with some reservations, size, comparison of the larger measurements of failed businesses and of ongoing businesses reveal very few differences.

REPORT, *supra* note 6, at 39.

FN30 One hint comes from the credits at the beginning of the Report. The National Bankruptcy Conference, many of whose members specialized in the reorganization of large, publicly held enterprises, played a strong and supportive role in the work of the Commission. *See* REPORT, *supra* note 6, at vii−xi. One of its most respected members, J. Ronald Trost, prepared several papers for the Commission on the absolute priority doctrine, the notion of consolidating reorganization chapters, the role of disinterested trustees, committees, and the SEC, and the rights of secured creditors. *Id.* at xiv, xvii. It is fair to assume that the National Bankruptcy Conference was focused on the problems of large companies, the details of which were very familiar to many of its members.

FN31 The Report is not explicit on this point, but implicit in its discussion is the practical reality that the owners of closely held enterprises also are the managers. Unless creditors could comfortably replace existing management with new management (a task not easily accomplished in most smaller businesses), creditors would usually have to succumb to demands for a retention of interest by the owners.

FN32 Indeed, the Report cited the *Brookings Report* and its finding that "only one third of the debtors were still operating their own businesses two years after their Chapter XI proceedings were closed," then commented that this outcome "underscores the need for research into the reasons for success and failure of business arrangements and reorganizations." REPORT, *supra* note 6, at 37. The Brookings' finding clearly referred to closely held enterprises (including sole proprietorships), but does not resurface in the Report's later discussion of reforms for the reorganization chapters of the Bankruptcy Act.

FN33 H.R. REP. NO. 595, 95th Cong., 1st Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963.

FN34 REPORT, *supra* note 6, at 23−24.

FN35 *Id.* at 245−47.

FN36 The Commission Report contains an excerpt from the National Bankruptcy Conference's analysis of the then "new" chapter XI. *Id.* at 240 (quoting from National Bankruptcy Conference, *Analysis of H.R. 12889*, 74th Cong., 2d Sess., at 38−39 (1936)).

FN37 *See generally* David M. Friedman et al., *Pre−Packaged Plans of Reorganization, in* CORPORATE DELEVERAGINGS AND RESTRUCTURINGS: NEW STRATEGIES AND OPPORTUNITIES 1991 (PLI Corp. L. & Practice Course Handbook Series), *available in* Westlaw 733 PLI/Corp. 441 (commenting on historical basis of out of court plans in chapter 11 springing from chapter XI).

FN38 *See* REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 137, 93d Cong., 1st Sess. pt. 2 at 267 (1970) [hereinafter REPORT II], *reprinted in* App. 2 COLLIER ON BANKRUPTCY, at PII−i (Lawrence P. King ed., 15th ed. 1995). Along with the Report, the Commission filed a second part containing a proposed new bankruptcy law entitled "the Bankruptcy Act of 1973." *Id.* at PI−vii. The new Act, chapter VII, §§ 7−301 to 7−313, dealt with plan confirmation. *Id.* at 266−70.

FN39 REPORT, *supra* note 6, at 24.

FN40 REPORT II, *supra* note 38, at 248−49.

FN41 Interestingly, one of the commentators to the House Report (Professor Kripke) suggested that this assumption was not well−founded. Increasingly, he noted, a publicly traded company's equity might be held by large institutional investors with a great deal of sophistication, and who were in a better position to obtain accurate information about the debtor's financial condition. *See* H.R. REP. NO. 595, *supra* note 33, *reprinted in* 1978 U.S.C.C.A.N. at 6219. Professor Kripke argues that the "public or private dichotomy" is no longer applicable because of the changes in ownership and control. *Id.* Congress' decision to require disclosure in all cases may have been motivated by this insight.

FN42 *See supra* note 38.

FN43 *See* H.R. REP. NO. 595, *supra* note 33, at 220−41, *reprinted in* 1978 U.S.C.C.A.N. at 6179−202.

FN44 *Id*. at 2, *reprinted in* 1978 U.S.C.C.A.N. at 5964. The bill was introduced at the Second session as H.R. 16643, 93d Cong., 2d Sess. (1974). *Id*. After hearings and debate on both bills, H.R. 8200 emerged, which would eventually become law. *Id*. at 3, *reprinted in* 1978 U.S.C.C.A.N. at 5964−65.

FN45 *See, e.g.*, Great Nat'l Life Ins. Co. v. Pine Gate Assoc., 2 B.C.D. 1478, 1487 (Bankr. N.D. Ga. 1976) (claiming debtor can reduce value of secured debt to value of collateral under chapter XII).

FN46 The change, familiar to most bankruptcy attorneys today because of the tremendous amount of litigation the provision eventually engendered, involved treating the nonrecourse lender as though it were a recourse lender, affording the creditor an unsecured claim for any deficiency between the amount of the debt and the value of the collateral. *See* 11 U.S.C. § 1111(b) (1994); *see also* H.R. REP. NO. 595, *supra* note 33, at 180−81, *reprinted in* 1978 U.S.C.C.A.N. at 6141−42; Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (*In re* Greystone III Joint Venture), 995 F.2d 1274 (5th Cir.), *cert. denied*, 506 U.S. 821 (1992).

FN47 Pub. L. No. 103−394, § 217, 108 Stat. 4106.

FN48 The provisions relating to single asset real estate were included in § 217 of the Bankruptcy Reform Act. Section 217, 108 Stat. at 4127. These amendments were codified in 11 U.S.C. §§ 101(51C), 1102(3), 1121(e), and 1125(f) (1994). Section 101(51C) defines "small business" under the Code. *Id*. § 101(51C). Section 1102(3) provides that in a case where the debtor is a "small business," the court can dispense with the appointment of a creditors' committee. *Id*. § 1102(3). Section 1121(e) establishes a period of exclusivity for the filing of a plan by a small business debtor. *Id*. § 1121(e). Section 1125(f) establishes guidelines in a chapter 11 case for disclosure and solicitation for a "small business" debtor. *Id*. § 1125(f).

Section 218 of the Bankruptcy Reform Act also included provisions relating to single asset real estate cases in chapter 11, codified in 11 U.S.C. §§ 101(51B), 362(d)(3) (1994). Section 218, 108 Stat. at 4128. Section 101(51B) defines "single asset real estate" under the Code. 11 U.S.C. § 101(51B) (1994). Section 362(d)(3) provides certain guidelines for lift−stay proceedings against single asset real estate. *Id*. § 362(d)(3).

The eligibility requirements for chapter 13 were amended in § 108(a) of the Bankruptcy Reform Act. Section 108(a), 108 Stat. at 4111−12. This provision was codified at section 109(e) of the Code. *Id.* § 109(e).

FN49 *See* Hon. Lisa Hill Fenning, *The Future of Chapter 11: One View from the Bench, in* ADVANCED BANKRUPTCY WORKSHOP 1993, (PLI Comm. L. & Practice Course Handbook Series), *available in* Westlaw 650 PLI/Comm 317. Judge Fenning noted that a remarkably sizeable percentage of her chapter 11 docket consists of individual debtors trying to save their homes, but who did not qualify for chapter 13 because the value of their homes in the hyper−inflated southern California real estate market exceeded the $350,000 limitation on secured debt then in place. *Id.*; *see* 11 U.S.C. § 109(e) (1988) (amended 1994). The 1994 amendments to the Code, however, increased the chapter 13 limitation to $750,000 of secured debt, thereby opening chapter 13 to those who would otherwise have had to fit into chapter 11. *See* Bankruptcy Reform Act of 1994 § 108(a), 11 U.S.C. § 109(e) (1994). The amendments also provide for future increases in the amounts based on changes in the Consumer Price Index. *Id.* § 108(e), 11 U.S.C. § 104(b) (1994).

FN50 *See generally* Hon. A. Thomas Small, *Small Business Bankruptcy Cases*, 1 AM. BANKR. INST. L. REV. 305 (1993) (discussing his streamlined approach to small business reorganization).

FN51 *Id.; see also* Steven W. Rhodes, *Eight Statutory Causes of Delay and Expense in Chapter 11 Bankruptcy Cases*, 67 AM BANKR. L.J. 287, 288−89 (1993) (citing numerous statutory and non−statutory causes for delay in chapter 11 cases).

FN52 *See* Small, *supra* note 50, at 312−14.

FN53 *See, e.g.*, *In re* B.C. Enters., 160 B.R. 827, 831 (Bankr. D. Ariz. 1993) (indicating use of standard disclosure statement).

FN54 *See* Small, *supra* note 50, at 312−14.

FN55 *Id*. at 310, 312−14; *see also* George W. Hay, *Lawyers Overwhelmingly Endorse Judge Small's "Fast Track" 11's*, TURNAROUNDS & WORKOUTS, July 15, 1989, at 1. Eighty−two percent of lawyers who filed bankruptcy cases in the Eastern District of North Carolina recommended that these procedures be adopted elsewhere. *Id*.

FN56 *See* Small, *supra* note 50, at 311−12.

FN57 *Id*. at 320−21.

FN58 Congress did not enact Judge Small's recommendations. *Id*. In enacting the Bankruptcy Reform Act of 1994, however, Congress did include a provision specifically addressing small businesses. Bankruptcy Reform Act of 1994, § 217, 108 Stat. at 4127. Its purpose was to make chapter 11 proceedings less expensive and more expeditious. 140 CONG. REC. 10,768 (1994).

FN59 *See Hearings on S. 540 Before the Subcomm. on Courts and Administrative Procedure of the Senate Comm. on the Judiciary*, 103d Cong., 1st Sess. (1993); *id.* at 91 (statement of Mary Jane Flaherty); *id*. at 184 (statement of James W. Nelson); *id*. at 426 (statement of Warren Laske).

FN60 *See Hearings on S. 2266 Before the Subcomm. on Improvement in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 716 (1977) (statement of Edward J. Kulik) (expressing support for provisions allowing for relief from stay upon finding that debtor had no equity in collateral as well as proposing that stay should be limited in single asset real estate cases).

In enacting the 1994 amendments, Congress attempted to expedite the relief process by requiring that the final hearing on the continuance of the stay be concluded within thirty days of the preliminary hearing. Bankruptcy Reform Act of 1994 § 101, 11 U.S.C. § 362(e) (1994).

See also H. Miles Cohn, *Single Asset Chapter 11 Cases*, 26 TULSA L.J. 523, 527 (1991) (discussing issues which drafters of Code confronted regarding single asset cases).

FN61 11 U.S.C. § 101(51B) (1994). Section 101(51B) defines single asset real estate as:

[R]eal property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto having aggregate noncontingent, liquidated secured debts in an amount no more than $4,000,000.

Id.

FN62 *See supra* note 45.

FN63 *See* Fenning, *supra* note 49, at 319; *see also* Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (*In re* Greystone III Joint Venture), 995 F.2d 1274, 1278−81 (5th Cir. 1991) (demonstrating dissatisfaction with manner single asset debtor construed Code to effectuate cramdown); *In re* Duval Manor Assocs., 191 B.R. 622, 630 (Bankr. E.D. Pa. 1996) (criticizing that adoption of coerced loan analysis effectively writes cramdown under chapter 11 out of Code in single asset case); *In re* River Village Assocs., 161 B.R. 127, 142 (Bankr. E.D. Pa. 1993) (discouraging debtors from proposing plans under chapter 11 that minimally meet guidelines by "rarely allow[ing] single asset debtors more than one opportunity to confirm a plan."), *aff'd*, 181 B.R. 795 (E.D. Pa. 1995).

FN64 *See, e.g.*, Little Creek Dev. Co. v. Commonwealth Mortgage Corp. (*In re* Little Creek Dev. Co.), 779 F.2d 1068, 1073 (5th Cir. 1986) (stating that single asset real estate cases are not proper in chapter 11 reorganization).

FN65 *See Greystone III*, 995 F.2d at 1274. Judge Jones' commandment−like directive that the deficiency claim of a secured creditor in a single asset case must never be separately classified is perhaps the best known effort in this regard. *Id.* at 1279. Section 1122 of the Code allows the debtor broad flexibility in classification of claims for voting purposes. 11 U.S.C. § 1122(a) (1994). The section places no restriction on classification other than mandating that different kinds of creditors may not be placed in the same class, and that those in the same class must be treated the same. *Id.* Therefore, debtors were able to classify claims and interests to "gerrymander" votes in an effort to gain acceptances for confirmation of their plan, a tactic that was disapproved of in *Greystone. Greystone III*, 995 F.2d at 1278−79; *see* Boston Post Rd. Ltd. Partnership v. FDIC (*In re* Boston Post Rd. Ltd. Partnership), 21 F.3d 477, 483 (2d Cir. 1994) (disallowing separation of secured creditor's deficiency claim from general unsecured claims), *cert. denied*, 115 S. Ct. 897 (1995).

Because § 1122 does not mandate inclusion of particular claims in the same class, it had become one of the battlegrounds on which real estate limited partnerships and secured lenders fought their fiercest battles. *See also* David Gray Carlson, *Artificial Impairment and the Single Asset Chapter 11 Case*, 23 CAP. U. L. REV. 339, 350 (1994) (discussing *Greystone III* and § 1122(a) classification veto).

FN66 It should be noted that in order to qualify as a single asset real estate debtor, it is necessary to have no more than four−million dollars ($4,000,000) in secured debt. 11 U.S.C. § 101(51B) (1994).

FN67 Toibb v. Radloff, 501 U.S. 157, 166 (1991) (holding individual not in business permitted to file chapter 11 petition).

FN68 11 U.S.C. § 362(a) (1994) (providing for automatic stay upon filing of petition); *see also* Scott Carlisle, *Single Asset Real Estate in Chapter 11: Secured Creditors' Perspective and the Need for Reform*, 1 AM. BANKR. INST. L. REV. 133, 134 (1993) (describing common scenario for single asset real estate chapter 11 filing); Cohn, *supra* note 60, at 527 (describing typical single asset case).

FN69 11 U.S.C. § 1129(b) (1994).

FN70 With the collapse of the real estate market in 1984 came a corresponding increase in the number of savings and loan institutions which faced financial difficulty or closure. *See* STATISTICAL ABSTRACTS OF THE UNITED STATES, Table No. 795 (113th ed. 1993). In the years following the collapse there were approximately 5000 savings and loans in financial difficulty and 500 more that closed. *Id.*

FN71 *See* Brian S. Katz, *Single−Asset Real Estate Cases and the Good Faith Requirement: Why Reluctance To Ask Whether A Case Belongs in Bankruptcy May Lead to the Incorrect Result*, 9 BANKR. DEV. J. 77, 77 n.1 (1992) (noting that bankruptcy filings have increased every year since 1985).

FN72 *See* STATISTICAL ABSTRACTS, *supra* note 70, at Table No. 864.

FN73 *See supra* notes 64−65 and accompanying text.

FN74 *See, e.g.*, Martwick v. AgriBank, FCB (*In re* Martwick), 60 F.3d 482, 483 (8th Cir. 1995) (holding that lower court did not abuse discretion in denying debtor's motion for continuance in order to expedite chapter 11 hearing where debtor's purpose in filing petition was to delay proceedings).

FN75 *See, e.g.*, *In re* Investors Fla. Aggressive Growth Fund, Ltd., 168 B.R. 760, 765−66 (Bankr. N.D. Fla. 1994) (denying chapter 11 debtor's proposed confirmation of cramdown plan in single asset case due to debtor's reliance on speculative sale of real property rather than hard cash); *In re* Longfellow Properties, Inc., 149 B.R. 12, 15−16 (Bankr. D.N.H. 1992) (sustaining objection to confirmation of proposed chapter 11 plan since debtor's proposal relied on shaky real estate market).

FN76 *See* Humble Place Joint Venture v. Fory (*In re* Humble Place Joint Venture), 936 F.2d 814, 815−18 (5th Cir. 1991) (dismissing chapter 11 petition because there was no business to reorganize, evidencing bad faith); Phoenix Picadilly, Ltd. v. Life Ins. Co. (*In re* Phoenix Picadilly, Ltd.), 849 F.2d 1393, 1394 (11th Cir. 1988) (dismissing chapter 11 case when only reason for filing petition was to delay foreclosure); *see also Good Faith: A Roundtable Discussion*, 1 AM. BANKR. INST. L. REV. 11 (1993) (discussing implied good faith requirement in chapter 11 cases); Katz, *supra* note 71, at 98 (recommending that courts should determine if debtor is attempting to reorganize existing business rather than beginning new one in chapter 11).

FN77 *See In re* Dollar Assocs., 172 B.R. 945, 946 (Bankr. N.D. Cal. 1994) (stating chapter 11 plan involving single asset did not further recognized goals of reorganization, and court determined that valuation was not fair and equitable).

FN78 *See supra* note 65.

FN79 *See supra* note 48 and accompanying text (describing expansion of chapter 13 eligibility).

FN80 *See* Fenning, *supra* note 49.

FN81 501 U.S. 157 (1991).

FN82 *Id.* at 163.

FN83 *Id.* at 163−65.

FN84 11 U.S.C. § 1129(b) (1994).

FN85 *Id.*

FN86 485 U.S. 197 (1988).

FN87 *Id.* The Court held that an individual farmer would not be able to retain his interest in his farm via the infusion of "sweat equity" under the "new value exception" suggested in *Case v. Los Angeles Lumber Prods. Co.*, 308 U.S. 106 (1939). *Id.* at 203−11. The implication is that mere ownership of the farm constituted the retention of an interest in property "on account of one's interest" within the meaning of § 1129(b)(2)(C) (1994).

FN88 A narrow possibility would be individuals with no unsecured debt, including no deficiency debt owed to a secured creditor who could conceivably force confirmation over the objections of a recalcitrant secured creditor but only if some other secured creditor in a separate class voted for the plan. *See* 11 U.S.C. § 1129(a)(10) (1994).

FN89 *Id.* § 541(a)(6) (excepting income earned by individual debtor from property of estate).

FN90 *Id.* (defining property of estate to include proceeds, rents, and profits from property).

FN91 *Id.*

FN92 *Id.*

FN93 Certainly, the doctor expects to discharge not only her liability on a malpractice claim but also her liability on her credit card accounts.

FN94 *See* 11 U.S.C. § 1306(a) (1994) (defining property of estate to include income earned by debtor after commencement of case).

FN95 Congress intended chapter 11 to be available for all business reorganizations by allowing a debtor to file a plan. *Id.* § 1121. Congress defines "debtor" as a "person or municipality concerning which a case under this title has been commenced." *Id.* § 101(13). "Person" is further defined as including an individual, partnership, and corporation. *Id.* § 101(41). Because a sole proprietorship is an individual as well as a business organization and is not specifically excluded under § 109, it follows that sole proprietorships may utilize chapter 11 reorganization.

FN96 *See* FitzSimmons v. Walsh (*In re* FitzSimmons), 725 F.2d 1208, 1211 (9th Cir. 1984) (holding that all income generated by debtor "personally" was not property of estate); *In re* Angobaldo, 160 B.R. 140, 150 (Bankr. N.D. Cal. 1993) (holding that postpetition income of sole proprietorship is allocated between what is generated for debtor's services and that which is profits from estate); *In re* Cooley, 87 B.R. 432, 441 (Bankr. S.D. Tex. 1988) (holding that all postpetition income belonged to debtor and burden was on creditor to establish it belonged to estate).

FN97 *See In re* Herberman, M.D., 122 B.R. 273, 282 (Bankr. W.D. Tex. 1990); *see also In re* Harp, 166 B.R. 740, 755 (Bankr. N.D. Ala. 1993) (concurring with *Herberman*). In *Herberman*, decided by the author of this Article, Judge Clark held that all postpetition earnings are property of the estate, and the debtor in possession received a salary from the estate. *Herberman*, 122 B.R. at 282. This approach only works if the debtor is "in business." Otherwise, there is no "business" for the estate to be operating, and therefore no new property to be added to the estate, a realization reached by the author some years later. *See* Lowe v. Yochem (*In re* Reed), 184 B.R. 733, 739−41 (Bankr. W.D. Tex. 1995); *see also* Jack F. Williams, *The Federal Tax Consequences of Individual Debtor Chapter 11 Cases*, 46 S.C. L.

REV. 1203, 1214 (1995) (discussing property of estate in chapter 11 individual debtor cases).

FN98 *See* REPORT, *supra* note 6, at 237 (discussing flexibility of chapter 11).

FN99 *See supra* note 44 and accompanying text.

FN100 *See supra* notes 6−11 and accompanying text. In fact, the 1973 Commission Report justifiably criticized the extra cost and delay that went into litigation brought to determine in which chapter an entity belongs. *See* REPORT, *supra* note 6, at 23.

FN101 *See In re* UNR Indus., Inc., 20 F.3d 766 (7th Cir.) (involving claims against asbestos manufacturer), *cert. denied*, 115 S. Ct. 509 (1994); Murray v. Pan Am. World Airways, Inc. (*In re* Pan Am. Corp.) 16 F.3d 513 (2d Cir. 1994) (wrongful death and personal injury actions resulting from airplane crash); *In re* Dow Corning Corp., 187 B.R. 919 (E.D. Mich. 1995) (involving personal injury claims against breast implant manufacturer).

FN102 *See* Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 115 S. Ct. 1331 (1995) (regarding claim for payment of sales tax by chapter 11 debtor); Holywell Corp. v. Smith, 503 U.S. 47 (1992) (determining chapter 11 trustee's obligation to file tax returns and pay taxes on gain from real estate sale).

FN103 *See* Pennsylvania, Dept. of Envtl. Resources v. Conroy, 24 F.3d 568 (3d Cir. 1994) (involving chapter 11 debtor attempting to abandon property containing hazardous waste); Torwico Elecs., Inc. v. New Jersey, Dept. of Envtl. Protection (*In re* Torwico Elecs., Inc.), 8 F.3d 146 (3d Cir. 1993) (involving chapter 11 debtor challenging state's enforcement of environmental cleanup), *cert. denied*, 114 S. Ct. 1576 (1994).

FN104 *See* Air Line Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65 (1991) (debtor airline repudiated collective bargaining agreement with pilot's union after filing petition); Sheet Metal Workers' Int'l Ass'n, Local 9 v. Mile Hi Metal Sys., Inc. (*In re* Mile Hi Metal Sys., Inc.), 899 F.2d 887 (10th Cir. 1990) (requiring union to deal in good faith with chapter 11 debtor's proposed rejection of collective bargaining agreement); New York Typographical Union No. 6 v. Royal Composing Room, Inc. (*In re* Royal Composing Room, Inc.), 848 F.2d 345 (2d Cir. 1988) (allowing elimination of seniority rules of debtor's collective bargaining agreement), *cert. denied*, 489 U.S. 1078 (1989).

FN105 *See In re* Continental Airlines, Inc., 60 B.R. 459 (Bankr. S.D. Tex. 1985) (stating that labor protective provisions were not implicated when debtor's work force was reduced); *In re* Baldwin United Corp., 43 B.R. 888 (Bankr. S.D. Ohio 1984) (allowing chapter 11 debtor to dispose of assets to aid reorganization).

FN106 *See* Maxwell Communication Corp. v. Barclays Bank (*In re* Maxwell Communication Corp.), 170 B.R. 800 (Bankr. S.D.N.Y. 1994) (regarding insolvency case jointly administered in United Kingdom and United States), *aff'd*, 186 B.R. 807 (1995); Committee of Asbestos−Related Litigants and/or Creditors v. Johns−Manville Corp. (*In re* Johns−Manville Corp.), 60 B.R. 612 (Bankr. S.D.N.Y. 1986) (involving multinational corporation in chapter 11).

FN107 *See supra* notes 64−90 and accompanying text.

FN108 *See supra* note 4 and accompanying text.

FN109 Bankruptcy is essentially a collective remedy and, like all collective remedies, becomes increasingly less effective when parties are exempted from having to participate. For example, one of the principal shortcomings of former chapter XI was that neither secured creditors nor public equity owners could be bound, thereby weakening the remedy itself. The exempted players held all the "hold cards," and could either assure the remedy's success (at whatever price they might choose to exact), or guarantee its failure. The "Prisoners' Dilemma" is a dilemma only for the prisoners. *See* ANATOL RAPOPORT & ALBERT M. CLAMMAH, PRISONER'S DILEMMA 24−25 (1965) (describing game in which two prisoners are charged with same crime and can only be convicted if one confesses however it is in their best interests to hold out). Those who are not "in jail" face no particular pressure to reach a cooperative or collective solution. Of course, in the larger economic sense, some "exempted players" may still face the Prisoners' Dilemma because insolvency itself places them "in jail," whether or not the bankruptcy remedy does. A

secured creditor with a lien on operating assets, for example, may have little choice but to reach an accommodation, if only to preserve the value of its collateral. And equity interest owners may have no choice but to cooperate with a restructuring, given that the alternative is liquidation. But if the remedy is less global, then the transactional costs of resolving the dilemma rise dramatically.

FN110 According to the legislative history to the Code, an important goal of chapter 11 was to save jobs and preserve going concern values deemed important not just to creditors but to the community within which the enterprise operated. *See* H.R. REP. NO. 595, *supra* note 33, at 220, *reprinted in* 1978 U.S.C.C.A.N. at 6179. Whether chapter 11 in fact achieves these ends (or even the more modest goal of assuring to creditors more than they would have received in a liquidation) remains to be answered, hopefully by the empirical work now being done by Professors Warren and Westbrook. *See* WARREN & WESTBROOK, *supra* note 16. The critiques of chapter 11 have thus far been woefully short on empirical evidence. The shortcomings of the Bradley & Rosenzweig effort have already been heavily documented. *See* Bradley & Rosenzweig, *supra* note 2. Professor Bowers attempted to argue from a study of market reactions to bankruptcy announcements performed by Professor Slovin that chapter 11 failed to achieve its stated purpose of preserving going concern values, but his argument suffers from straying far beyond what the underlying study proved. *See* James W. Bowers, *Rehabilitation, Redistribution or Dissipation: The Evidence for Choosing Among Bankruptcy Hypotheses*, 72 WASH. U. L.Q. 955, 967 (1994); *see also* Myron B. Slovin, *Bankruptcy Resolution, Creditors Holding Private Debt and the Market for Corporate Control: Market Based Evidence from Chapter 11 Filing Announcements* (Sept. 11, 1994) (on file with *Washington University Law Quarterly*). The study itself simply noted that the stock value of secured creditors whose debtors announced a chapter 11 filing reacted negatively to the filing, though the secured creditors in fact suffered little or no loss as a result of the bankruptcy. Bowers, *supra* at 967−68. Unsecured creditors did suffer loss, but the study does not compare losses in chapter 11 to losses in chapter 7. Instead, the study simply compares outcomes in chapter 11 plans which reach confirmation and chapter 11 cases which ultimately end in liquidation. *Id.* Thus, the evidence is still too thin to draw the conclusions reached by many of chapter 11's critics. *Id.*

FN111 Skeel, *supra* note 2, at 465.

FN112 *Id.* at 521.

FN113 *Id.* at 510−520.

FN114 *Id.*

FN115 *Id.* at 511.

FN116 Skeel, *supra* note 2, at 511−12 (citation omitted).

FN117 *Id.* at 512.

FN118 *Id.*

FN119 *Id.*

FN120 *Id.* at 513. Skeel also recommends two other modifications, designed to reduce the cost and delay of bankruptcy. The first would impose a firmer deadline on exclusivity, one which courts would not be at liberty to alter, with publicly held corporations being afforded a longer time than closely held enterprises. *Id.* at 513−14. Second, he would substantially reduce the hold up power of equity in publicly held enterprises by providing for a variation of the "preemptive cramdown" proposal if all the other creditor classes vote for the plan, then the plan is preemptively crammed down on the nonconsenting shareholder classes. *Id.* at 515−16. This latter proposal is drawn from the work of LoPucki and Whitford. *Id.* at 514−16; *see also* Lynn M. LoPucki & William C. Whitford, *Bargaining Over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 139 U. PA. L. REV. 125, 186 (1990).

FN121 Skeel, *supra* note 2, at 512. Interestingly, the available data (and there is very little) suggests that the transactional costs of chapter 11 for large corporations, as a percentage of asset value (estimated to be 3%), are in general far lower than they are for much smaller enterprises (estimated to exceed 10%), suggesting that chapter 11 itself imposes certain tasks that are sufficiently fixed that they will impose a relatively significant cost regardless of the size of the enterprise. *See* Robert M. Lawless et al., *A Glimpse at Professional Fees and Other Direct Costs in Small Firm Bankruptcies*, 1994 U. ILL. L. REV. 847, 881 (1994); *see generally* 69TH ANNUAL MEETING OF THE NATIONAL CONFERENCE OF BANKRUPTCY JUDGES 8−26 (1995) (discussing chapter 11 costs). The sheer cost of litigating with creditors, preparing and obtaining approval of a disclosure statement, and preparing schedules and statements of affairs will have to be borne by any entity that enters chapter 11, regardless of size. As the size of the case increases, the size of the fees associated with handling the case do not increase proportionately. If some of the duties and administrative costs that are now imposed on the smaller cases were relaxed, such as the preparation of extensive disclosure statements (*see* 11 U.S.C. § 1125 (1994)), or the appointment of committees of unsecured creditors at estate expense (*see id.* § 1102(a)(1)), then perhaps the transactional costs of reorganization for smaller debtors might be reduced to a percentage approaching that in larger cases.

FN122 *See, e.g.*, *In re* Woodbrook Assocs., 19 F.3d 312, 315−16 (7th Cir. 1994) (addressing single asset real estate issue).

FN123 *See In re* Dollar Assocs., 172 B.R. 945, 950 (Bankr. N.D. Cal. 1994) (explaining that reorganizational goals of chapter 11 are not found in single asset real estate filings); George W. Kuney, *New Value Questions Remain, Whatever the Decision in Bonner Mall*, 112 BANKING L.J. 383, 386−87 (1995) (noting court's distinction in *Dollar Assocs.* between economic significance of normal chapter 11 filings and those of single asset real estate debtors).

FN124 Former chapter XII applied to "persons" other than corporations, affording explicit reorganization relief to real estate partnerships having to deal with secured debt. 9 COLLIER ON BANKRUPTCY, [[paragraph]] 2.07, at 763 (James Wm. Moore ed., 14th ed. 1976).

FN125 *See* MICHAEL T. MADISON & ROBERT M. ZINMAN, MODERN REAL ESTATE FINANCING: A TRANSACTIONAL APPROACH 384 (1991).

FN126 *See* Steven Wechsler, *Through the Looking Glass: Foreclosure By Sale as De Facto Strict Foreclosure − An Empirical Study of Mortgage Foreclosure and Subsequent Resale*, 70 CORNELL L. REV. 850, 851 (1985) (reporting that profitable resale of mortgage foreclosure properties is relatively common).

FN127 *See* 11 U.S.C. § 362(a) (1994) (staying actions and attempts by creditor to interfere with debtor's ownership rights).

FN128 It is worth adding here that if courts have a clearer directive from Congress that single asset real estate cases are indeed an appropriate subject for chapter 11 relief, they will then be less inclined to engage in judicial legislation to affirmatively exclude such entities from reorganization. The courts are not the appropriate venue for making this policy call, and can justifiably be criticized for overstepping their bounds in their efforts to judicially exclude these cases from chapter 11 protection. It is one thing to "tailor" the statute; it is quite another to alter it completely.

FN129 This raises the question of how to define "in business." Even if Congress successfully cleared that hurdle, there is still the issue of whether chapter 11 would discharge only business debts, or whether it would be extended to all of the debtor's obligations, including consumer liabilities. This also creates an inquiry of whether "debtor−in−possession" status attaches only to those aspects of the debtor's affairs that relate to the debtor's business, or whether it includes for example, postfiling tort liabilities incurred by the debtor in her individual capacity.

FN130 An argument can be advanced that the current regime leads to the appropriate result that an individual can no more expect to confirm a plan over the dissent of her unsecured creditors than can a corporation's shareholders. When one considers that there is little practical difference between an individual doing business as a sole proprietorship and an individual doing business via a closely held corporation, one can see that the outcomes for reorganization in the two scenarios should be similar. The only additional difficulty posed by the individual's situation is that the individual

might well be as willing to surrender her ownership of the business as would her closely held corporation, but the individual faces the additional problem that she could only invoke the cram down if she were willing to surrender *all* of her property, including her home, her car and her clothes. That obstacle may be overcome by a clarification that property of an individual held to be exempt is not deemed to be property retained on account of the debtor's interests for purposes of § 1129(b)(2)(C), statutorily overruling the dicta in *Ahlers*. Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 207−08 (1988). Of course her non−exempt and non−business property would have to be surrendered in order to invoke the cram down, but that result merely mirrors what would happen outside of bankruptcy to a person who does business as a sole proprietorship and who is subjected to creditor collection activity.

FN131 *See supra* text part I and accompanying footnotes.

FN132 If chapter 11 had been a less flexible statute, these creative judges might have found themselves unable to make the reorganization chapter work effectively. *See* Sam Gerdano, *New NCBJ President Martin Speaks on Bankruptcy Trends and the '94 Amendments*, AM. BANKR. INST. J., Nov. 1995, at 1, 1 (discussing flexible nature of chapter 11); *see also* Teamsters Nat'l Freight Indus. Negotiating Comm. v. United States Truck Co. (*In re* United States Truck Co.), 800 F.2d 581, 586 (6th Cir. 1986) (stating that idea of chapter 11 was to combine flexibility of chapter XI with protection and remedial tools of chapter X) (citing H.R. REP. NO. 595, 95th Cong., 1st Sess. 221−23, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6181−83).

FN133 *See supra* text part II.A. and accompanying footnotes (discussing Judge Small's efforts to streamline chapter 11 for small businesses).

FN134 *Id*. (detailing Judge Small's simplified process).

FN135 *Id.* Delay and cost often go hand in hand. *See* Hon. A. Thomas Small, *Paying the Piper: Rethinking Professional Compensation in Bankruptcy*, 1 AM. BANKR. INST. L. REV. 305, 305−06 (1993) (stating that time is money for creditor and delay means considerable expense for debtor). Another month in bankruptcy means another month of representation by the estate's lawyers, and perhaps accountants as well. *See* Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11, 58 (explaining that delay can hurt burdened debtor by increasing professional fees).

To de−link delay and cost, a flat fee arrangement could be adopted, motivating professionals to achieve the intended results in less time, thereby assuring profitability for the firm. *See* A.W. SoRelle, III, *Alternative Billing Methods*, 15 No. 6 LEGAL ECON. 24, 24−25, Sept. 1, 1989 (discussing hourly rate as ineffective and flat fee as beneficial and efficient). Such innovations in compensation schemes might silence one of the major criticisms of chapter 11 the cost.

FN136 *See, e.g.*, *In re* DRW Property Co. 82, 54 B.R. 489, 491 (Bankr. N.D. Tex. 1985) (setting mandatory deadline for debtor to file plan).

FN137 *See* Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 203 n.3 (1988) (disallowing promise of labor, experience, and expertise to satisfy new value exception to absolute priority rule.

FN138 *See* Coones v. Mutual Life Ins. Co., 168 B.R. 247, 255 (D. Wyo. 1994) (dismissing case where debtor offered insufficient income projections), *aff'd*, 56 F.3d 77 (10th Cir. 1995); *In re* M&S Assocs., Ltd., 138 B.R. 845, 849−50, 852 (Bankr. W.D. Tex. 1992) (failing to confirm plan in part because income projections offered were not based on concrete evidence of financial potential).

FN139 *M&S Assocs.*, 138 B.R. at 849 (determining that income projections offered in support of plan of reorganization must not be speculative, conjectural or unrealistic).

FN140 This assertion, long assumed by courts, now has additional support in the 1994 amendments to 11 U.S.C. § 330, which expressly permit compensation to attorneys representing *debtors* (as opposed to the estate) in chapters 12 and 13, and by implication prohibit such compensation in the chapter 11 context. *See* 11 U.S.C. § 330(a)(4)(B) (1994).

FN141 *See In re* Grabill Corp., 113 B.R. 966, 970 (Bankr. N.D. Ill. 1990), *aff'd sub nom.* Grabill Corp. v. Pelliccioni, 135 B.R. 835 (1991), *aff'd*, *In re* Grabill, 983 F.2d 773 (1993); *In re* Kendavis Indus. Int'l, Inc., 91 B.R. 742, 752 (Bankr. N.D. Tex. 1988); *see also* 11 U.S.C. § 327(a) (1994) (allowing trustee to employ attorney who does not represent interest adverse to estate); FED. R. BANKR. P. 2014 (providing means for court to determine interest of attorney by requiring disclosure). Section 327(a) and Rule 2014 must be read together to analyze the requirements. *In re* Roberts, 46 B.R. 815, 821 (Bankr. D. Utah 1985), *modified rev'd in part on other grounds*, 75 B.R. 402 (D. Utah 1987) (reversed in part on other grounds). The debtor−in−possession must follow the same requirements as a trustee. *Id.* at 821−22.

These requirements have been interpreted to mean that an attorney retained must not be a creditor, an equity holder, insider or person with an interest adverse to the estate. *In re* Michigan Gen. Corp., 77 B.R. 97, 103 (Bankr. N.D. Tex. 1987). However, the prohibition on such representation is often relaxed in the case of closely held companies, largely in the interests of economy and practicality. *See, e.g.*, *Roberts*, 75 B.R. at 413 (reinstating fee that bankruptcy court denied because equity dictated it should be awarded).

FN142 *See, e.g.*, *In re* Reed, 95 B.R. 626, 628 (Bankr. E.D. Ark. 1988) (denying attorney's compensation request for defending dischargeability issue which benefited debtor not estate), *aff'd*, 890 F.2d 104 (8th Cir. 1989).

FN143 *See In re* Spanjer Bros., Inc., 191 B.R. 738, 747−48 (Bankr. N.D. Ill. 1996) (stating that attorney's fees are properly payable out of estate if services benefit estate, but not if only personally benefit debtor); *In re* Lifschultz Fast Freight, Inc., 140 B.R. 482, 488 (Bankr. N.D. Ill. 1992) (stating that fees are properly paid from estate when proportional benefit to estate is rendered).

FN144 11 U.S.C. § 541(a)(6) (1994).

FN145 *Id.* Section 541(a)(6) provides that property of the estate includes, "[p]roceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after commencement of the case." *Id.*

FN146 *See id.* § 1306(a) (including postpetition earnings in property of estate); *see also In re* Powell, 187 B.R. 642, 646 (Bankr. D. Minn. 1995) (stating that § 1306(a)(2) removes § 541(a)(6) exception from chapter 13).

FN147 *See In re* Herberman, M.D., 122 B.R. 273, 282−83 (Bankr. W.D. Tex. 1990)

FN148 *Id.* at 287−88 (finding that debtor is to receive seventy−five percent of postpetition income generated and balance goes to estate).

FN149 Lowe v. Yochem (*In re* Reed), 184 B.R. 733, 740 (Bankr. W.D. Tex. 1995) (stating that individual had fiduciary obligation to creditors and that postpetition earnings become part of estate).

FN150 *See In re* Cooley, M.D., 87 B.R. 432, 442 (Bankr. S.D. Tex. 1988) (calculating postpetition income attributable to estate as compared to debtor personally). Judge Margaret Mahoney's decision in *Cooley* is probably most representative of this approach. Judge Mahoney attempted to allocate what portion of Dr. Cooley's large income was attributable to his personal services, as opposed to the services of staff or the contributory value of his office and equipment. This is yet another example of a court finding a way to make chapter 11 "fit" in an unusual situation without offending either the statute or common sense.

See also FitzSimmons v. Walsh (*In re* FitzSimmons), 725 F.2d 1208, 1211 (9th Cir. 1984) (finding that debtor should be compensated only to extent services were "personal" and not attributable to invested capital, goodwill, firm staff, etc.); *In re* Molina Y Vedia, 150 B.R. 393, 402 (Bankr. S.D. Tex. 1992) (following *Cooley* reasoning but finding that no other estate property contributed to debtor's earnings).

FN151 *See* 11 U.S.C. § 1141(d)(1)(A) (1994) (stating that confirmation of plan discharges debtor "from any debt that arose before the date of confirmation"); *see also infra* note 152 and accompanying text.

FN152 11 U.S.C. § 1141(d) (1994). To be more precise, confirmation will operate as a discharge unless three conditions are met: (1) the plan provides for the liquidation of substantially all of the property of the estate; (2) the debtor does not engage in business after consummation of the plan; and (3) the debtor would be denied a discharge under § 727 were the case pending under chapter 7. *Id.* § 1141(d)(3). A confirmed plan in which the individual debtor liquidates all of her estate property and does not engage in business will still operate as a discharge of the debtor, provided the debtor has not been so unwise as to engage in conduct that would deprive her of a chapter 7 discharge. *See* Norwest Bank, N.A. v. Tveten, 848 F.2d 871, 874, 874−76 (8th Cir. 1988) (denying debtor's discharge pursuant to § 1141(d)(3) because debtor transferred property with intent to defraud); Shapiro, M.D., v. Gherman (*In re* Gherman), 103 B.R. 326, 330−31 (Bankr. S.D. Fla. 1989) (denying discharge because of debtor's concealment of funds according to § 727(a)(5) and applying it to chapter 11 debtor under § 1141(d)(3)(C)).

FN153 *See* 11 U.S.C. §§ 1141(d)(1)(A), 524(a) (1994) (stating that effect of discharge is to void judgment or enjoin collection of debt).

FN154 *Id.* § 1123(a)(4) (requiring equal treatment for claims within same class); *see In re* Granada Wines, Inc., 26 B.R. 131, 134 (Bankr. D. Mass. 1983) (finding that pension fund as unsecured creditor could not be unfairly discriminated against due to § 1123(a)(4)), *aff'd sub nom*. Granada Wines, Inc. v. New England Teamsters & Trucking Indus. Pension Fund, 748 F.2d 42 (1st Cir. 1984).

FN155 *See* Brutoco Eng'g & Constr. Co. v. Dennis Ponte, Inc. (*In re* Dennis Ponte, Inc.), 61 B.R. 296, 298 (9th Cir. 1986) (stating that damages for postpetition torts become administrative expenses under § 503(b)(1)(A)).

FN156 *See In re* A.H. Robins Co., 89 B.R. 555, 561 (Bankr. E.D. Va. 1988) (disallowing punitive damages claim where allowance would frustrate successful reorganization); *In re* Johns−Manville Corp., 68 B.R. 618, 627 (Bankr. S.D.N.Y. 1986) (finding "inequitable on its face" recovery of punitive damages which would deplete trust assets to benefit some creditors at expense of others), *aff'd in part, rev'd in part*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom.* Kane v. Johns−Manville Corp., 843 F.2d 636 (2d Cir. 1988).

FN157 *See*, *e.g.*, CGR, Ltd. v. Fleet Nat'l Bank (*In re* CGR, Ltd.), 56 B.R. 305, 306−07 (Bankr. S.D. Tex. 1985) (lifting automatic stay due in part to debtor's failure to obtain insurance pursuant to court order).

FN158 A two−pronged test is necessary to determine what transactions are within a debtor's ordinary course of business under 11 U.S.C. § 364 (1994). *See* Committee of Asbestos−Related Litigants and/or Creditors v. Johns−Manville Corp. (*In re* Johns−Manville Corp.), 60 B.R. 612 (Bankr. S.D.N.Y. 1986). The first prong, the vertical component, examines the debtor's action from the standpoint of his creditors. *Id.* at 616−18. This is determined by the reasonable expectations of interested parties in what transactions the debtor−in−possession is likely to enter into in the ordinary course of business. *Id.* The second prong of the test is the horizontal component which views the debtor's actions from the perspective of similar businesses in the same industry as the debtor. *Id.* at 618.

FN159 *See supra* notes 81−88 and accompanying text.

FN160 *See*, *e.g.*, *In re* Rocha, 179 B.R. 305, 307 (Bankr. M.D. Fla. 1995) (commenting on difficulty of cramdown for individual chapter 11 debtor because of need to obtain "infusion of new capital" from "outside source" to be excepted from fair and equitable rule); *In re* Harman, 141 B.R. 878, 887 (Bankr. E.D. Pa. 1992) (discussing difficulties of individual debtor to effectuate cramdown while retaining anything of value in estate); *In re* Yasparro, 100 B.R. 91, 98 (Bankr. M.D. Fla. 1989) (commenting on difficulty of cram down for individual debtor because they must determine how much property to liquidate for new capital in order to save other property).

FN161 *See*, *e.g.*, Coones v. Mutual Life Ins. Co., 168 B.R. 247, 255 (D. Wyo. 1994) (affirming bankruptcy court's holding that plan infeasible because proposed capital contributions were not substantial and plan did not satisfy § 1129 requirements), *aff'd sub nom. In re* Coones, 56 F.3d 77 (10th Cir. 1995); *In re* Calvanese, 169 B.R. 104, 110−13 (Bankr. E.D. Pa. 1994) (holding plan infeasible because it failed to provide that home would be turned over to mortgagee at end of marketing period); *In re* Harman, 141 B.R. 878, 889 (Bankr. E.D. Pa. 1992) (holding that individual chapter 11 debtor could amend plan after court determined plan infeasible because it failed to treat

unsecured creditors fairly and equitably); *In re* Neff, 60 B.R. 448, 452−56 (Bankr. N.D. Tex. 1985) (holding individual debtor plan feasible because plan represented best method for realization of maximum return to both secured and unsecured creditors), *aff'd sub nom.* SBA v. Neff, 785 F.2d 1033 (5th Cir. 1986).

FN162 *See In re* Smithfield Estates, Inc., 52 B.R. 220, 223 (Bankr. D.R.I. 1985) (indicating that court can refer to prior years' financial losses in determining lack of feasibility); *see also* 11 U.S.C. § 1129(a)(11) (1994) (requiring feasibility test to determine whether plan is likely to be followed by liquidation or further reorganization); 5 COLLIER ON BANKRUPTCY [[paragraph]] 1129.02, at 1129−61 (Lawrence P. King ed., 15th ed. 1995) (stating that purpose of § 1129(a)(11) to prevent confirmation of plans promising more than debtor could possibly attain after confirmation).

FN163 *See* 5 COLLIER, *supra* note 162, [[paragraph]] 1129.02, at 1129−62.

FN164 Feasibility is described as:

[I]nvolv[ing] the question of the emergence of the reorganized debtor in a solvent condition and with reasonable prospects of financial stability and success. It is not necessary that success be guaranteed, but only that the plan present a workable scheme of organization and operation from which there may be a reasonable expectation of success.

Id. [[paragraph]] 1129.02, at 1129−61 (referring to standard under chapter X); *see In re* One Times Square Assocs. Ltd. Partnership, 159 B.R. 695, 709 (Bankr. S.D.N.Y. 1993) ("The feasibility test requires the court to determine whether a plan is workable and has a reasonable likelihood of success."), *aff'd*, 165 B.R. 773 (S.D.N.Y.), *aff'd*, 41 F.3d 1502 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1107 (1995).

FN165 *See In re* Kemp, 134 B.R. 413, 415−17 (Bankr. E.D. Cal. 1991) (applying feasibility test to case of individual debtor); *In re* Belco Vending, Inc., 67 B.R. 234, 237−38 (Bankr. D. Mass. 1986) (applying feasibility test to case of corporate debtors).

FN166 The feasibility test of § 1129(a)(11) considers the following factors when making a feasibility determination:

(1) the adequacy of the capital structure; (2) the earning power of the business; (3) economic conditions; (4) the ability of management; (5) the probability of the continuation of the same management; and (6) any other related matters which determine the prospects of a sufficiently successful operation to enable performance of the provisions of the plan.

5 COLLIER, *supra* note 162, [[paragraph]] 1129.02, at 1129−64; *see also* Paul J. Sandelin, Comment, *Acceleration of Plan Confirmation Analysis to the Pre−Confirmation Stage Under the Federal Bankruptcy Code [In re Martin, 761 F.2d 472 (8th. Cir. 1985)]*, 12 WM. MITCHELL L. REV. 831, 856 n.163 (1986) (discussing factors of feasibility).

FN167 *See* Findley v. Falise (*In re* Joint Eastern and Southern Dists. Asbestos Litigation), 878 F. Supp. 473, 479 (E.D.N.Y. S.D.N.Y. 1995) (discussing establishment of trust fund to insure payment to tort claimants), *aff'd*, 1996 WL 75879 (2d Cir. 1996), *aff'd in part, vacated in part*, 1996 WL 76145 (2d Cir. 1996, *aff'd*, 1996 WL 77954 (2d Cir. 1996).

FN168 *See* A.H. Robins Co. v. Piccinin, 788 F.2d 994, 1011 (4th Cir.) (noting different estimation used for unliquidated contingent claims), *cert. denied*, 479 U.S. 876 (1986); *In re* Continental Airlines, Inc., 57 B.R. 842, 845 (1985) (explaining that estimation process works on case by case basis).

FN169 *See, e.g., In re* A.H. Robins Co., 182 B.R. 128, 134 (Bankr. E.D. Va. 1995) (adjudicating reasonable attorney's fees under mass tort litigation in chapter 11 case).

FN170 *In re* Johns Manville Corp., No. 82B11656−11676 (Bankr. S.D.N.Y. 1982).

FN171 *See* Lee Ann Flyer, Comment, *Will Financially Sound Corporate Debtors Succeed in Using Chapter 11 of the Bankruptcy Act as a Shield Against Massive Tort Liability?*, 56 TEMP. L.Q. 539, 542−43 (1983) (stating that Johns−Manville corporate officials claimed that petition for chapter 11 reorganization was filed to avoid debilitating effect of massive litigation on corporation's financial status); Steven J. Parent, Comment, *Judicial Creativity in Dealing With Mass Torts in Bankruptcy*, 13 GEO. MASON U. L. REV. 381, 398 (1990) (stating anticipation of massive liability was key issue in Manville's voluntary bankruptcy petition).

FN172 Flyer, *supra* note 171, at 567 n.13.

FN173 The inequity of this result has been discussed by Professor LoPucki, who points out that it is the secured creditor who is in a better position to monitor the company's affairs and therefore to influence the company's behavior, yet the secured creditor is insulated by having "first call" on the debtor's assets in the event of liquidation, ahead of tort claimants. Lynn M. LoPucki, *The Unsecured Creditor's Bargain*, 80 VA. L. REV. 1887, 1913 (1994). Meanwhile, unsecured creditors (including debentureholders) with little ability to monitor the debtor's conduct and little leverage to influence the debtor's conduct, find their claim on the debtor's assets "watered" by the tort claimants. *See generally* Michael P. Coffey, *In Defense of Limited Liability A Reply to Hansmann and Kraakman*, 1 GEO. MASON U. L. REV. 59 (1994); *see also* Christopher M.E. Painter, Note, *Tort Creditor Priority in the Secured Credit System: Asbestos Time, the Worst of Times*, 36 STAN. L. REV. 1045, 1045−53 (1984) (noting inequity of repayment scheme which pays secured creditors first, leaving little or no money to pay unsecured creditors).

FN174 *See, e.g.*, Airline Pilots Ass'n Int'l v. O'Neill, 499 U.S. 65 (1991) (regarding debtor airline that repudiated collective bargaining agreement with union after chapter 11 filing); NLRB v. Bildisco & Bildisco, 465 U.S. 513, 527 (1984) (stating that collective bargaining agreement is not always valid once petition is filed).

FN175 *See, e.g.*, Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633 (1990) (involving restoration of pension plan that was terminated upon filing of chapter 11 petition).

FN176 This is not to say that there are no valid critiques regarding the resolutions of these issues by this particular *court*, however. A number of commentators have questioned the propriety, for example, of permitting labor disputes to be resolved in a non−Article III tribunal. *See generally* Peter A. Jackson, *Bankruptcy Courts and the NLRB: A Clash of Jurisdiction Over Unfair Labor Practices*, 1 BANKR. DEV. J. 27 (1984) (discussing conflict over whether NLRB or bankruptcy court has jurisdiction over labor disputes). Without addressing whether that criticism has merit, it is safe to say that the criticism draws its strength from the *court* which administers the statute rather than the statute itself. If chapter 11 was administered by an Article III tribunal, the strength of these criticisms would be largely (though not entirely) sapped. Two points are worth making here. First, if Congress continues to assign chapter 11 cases to non−Article III courts, it will invariably dilute the value, flexibility, and even the efficacy of the "one size fits all" structure of the statute. Second, the question of whether labor disputes, environmental issues, or pension plan issues are being resolved within the context of a reorganization statute has less to do with the overall structure of the reorganization statute than with the *priorities* recognized (either directly or *sub rosa*) within the reorganization scheme. Any time a particular type of claim is "carved out" of the reorganization scheme, it is automatically accorded a priority. The claimant is then free to pursue its remedies without having to "share the pain" with other creditors.

FN177 *See supra* note 173.

FN178 *See, e.g.*, *In re* Fields, 127 B.R. 150, 152−53 (Bankr. W.D. Tex. 1991) (noting that courts should look to additional evidence when literal reading of statute produces odd results).

FN179 This is an especially sensitive point for those who maintain that chapter 11 inappropriately elevates the interests of equity holders, especially in publicly held companies, permitting them to exact a form of economic rent by holding up creditors via the bankruptcy process itself. It assures a retention of interest (or even a return on investment) where no such retention seems warranted in the face of creditors' claims. The complaint is in part, however, a plea for a return to the absolute priority rule under chapter X. As any student of the Bankruptcy Act will quickly point out, we have been down that road before.

FN180 *See In re* Pro Football Weekly, Inc., 60 B.R. 824, 827 (N.D. Ill. 1986) (holding it was abuse of discretion for lower court to deny motion for modification of stay).

FN181 Laura Davis Jones et al., *The Indenture Trustee in Chapter 11 Proceedings: Overview of Trustee's Right to Fees and Expenses, and Case Tactics and Strategies*, *in* THE PROBLEMS OF INDENTURE TRUSTEES AND BONDHOLDERS 1994: DEFAULTED BONDS, HIGH YIELD ISSUES AND BANKRUPTCY 1994, at 469, *67 (PLI Real Estate Law & Practice Course Handbook Series), *available in* Westlaw 650 PLI/Real 469 (stating that some courts have relied on debtor's good intentions rather than plan feasibility); Lawrence J. Dash, Note, *The Equity Cushion Analysis in Bankruptcy*, 10 HOFSTRA L. REV. 1149, 1176−77 (1982) (discussing cases which have focused on necessity of collateral for debtor's business regardless of effect on plan or creditors).

FN182 *Cf.* Bruce G. Vanyo & Jared L. Kopel, *Defending Companies Accused of Securities Fraud*, *in* SECURITIES LITIGATION 1992: STRATEGIES AND CURRENT DEVELOPMENTS 1992, at 77, *6 (PLI Litig. & Admin. Practice Course Handbook Series), *available in* Westlaw 443 PLI/Lit 77 (noting that courts in most areas are unwilling to dismiss case at pleading stage).

FN183 *See* Angela K. Layden, *Extensions of Exclusivity under § 1121: Appeal as a Matter of Right*, AM. BANKR. INST. J., Sept. 1995, at 26, 26 (commenting on ease in which debtor obtains extension of exclusivity); *see also In re* Washington−St. Tammany Elec. Co−op., Inc., 97 B.R. 852, 854 (Bankr. E.D. La. 1989) (holding lower court's extension of exclusivity period abusive and beyond congressional intent); Teacher's Ins. & Annuity Assoc. v. Lake in the Woods (*In re* Lake in the Woods), 10 B.R. 338, 342−45 (E.D. Mich. 1981) (holding lower court erred in extending exclusivity to one and one−half years).

FN184 *See* LoPucki & Whitford, *supra* note 135, at 25−26 (commenting that change of venue is difficult in reorganization cases because judges consider them career opportunities and refuse to transfer them).

FN185 *See* Hon. Barry Russell, BANKRUPTCY EVIDENCE MANUAL, Rule 605 (1994−95 ed.) (stating bankruptcy judge is expected to resolve problems without prior experience); Arnold M. Quittner, *Employment and Compensation of Appointed Professionals*, *in* CURRENT DEVELOPMENTS IN BANKRUPTCY AND REORGANIZATION 1992, at 297, *279 (PLI Com. Law & Practice Course Handbook Series), *available in* Westlaw 688 PLI/Comm 445 (noting that few bankruptcy judges have expertise of experienced practitioners).

FN186 *See* ROBERT A. CARP & RONALD STIDHAM, JUDICIAL PROCESS IN AMERICA 202−03 (1990) (stating that one−third of district judges had prior judicial experience).

FN187 *See* Raymond N. Hulser, Comment, *The Rejection of Collective Bargaining Agreements in Chapter 11 Reorganizations: The Need for Informed Judicial Decisions*, 134 U. PA. L. REV. 1235, 1258 n.78 (1986) (stating that bankruptcy judges do not have experience outside of bankruptcy field); *see also supra* note 185.

FN188 Certainly that was the case with respect to single asset real estate cases, whose structure was relatively simple, and the variety of potential outcomes was fairly predictable.

FN189 11 U.S.C. § 1129 (1994). Section 1129 contains the conditions for confirmation of a plan of reorganization under chapter 11 of the Code. *Id.* Subsection (a) states the thirteen requirements that must be fulfilled for the plan to be confirmed. *Id.*

FN190 *See id.* § 1129(a)(11) (requiring that plan must be feasible for confirmation); *see also supra* notes 159−166 and accompanying text.

FN191 *See* 11 U.S.C. § 1129(a)(3) (1994) (requiring that the plan must be proposed in good faith); *see also In re* Madison Hotel Assocs., 749 F.2d 410, 424−26 (7th Cir. 1984) (discussing interrelationship between chapter 11 and "good faith" requirement under § 1129(a)(3)).

FN192 *See* 11 U.S.C. § 1125 (1994). Section 1125 governs the adequacy of disclosure in a chapter 11 case. *Id.*

FN193 *See* Richard J. Morgan, *Application of the Securities Laws in Chapter 11 Reorganizations Under the Bankruptcy Reform Act of 1978*, 1983 U. ILL. L. REV. 861, 909 (noting court's approval of disclosure statement is discretionary based upon court's determination of adequate disclosure); Nicholas S. Gatto, Note, *Disclosure in Chapter 11 Reorganizations: The Pursuit of Consistency and Clarity*, 70 CORNELL L. REV. 733 (1985) (discussing standards for adequacy of disclosure).

FN194 *See* 11 U.S.C. § 1121(b) (1994) (providing that only debtor may file plan during 120 days following commencement of case).

FN195 *See id.* § 362(d) (permitting lifting of stay after notice and hearing provided requirements of either subsections (1), (2) or (3) are met).

FN196 *Id.* § 305 (allowing court to dismiss case if interests of parties would be better served).

FN197 *See supra* note 183.

FN198 11 U.S.C. § 105(d) (1994). Subsection (d) was added to the powers of the court in the 1994 amendments to the Code.

FN199 The FJC was established by Congress on the recommendation of the Judicial Conference of the United States. The FJC was created originally under the Act of Dec. 20, 1967, Pub. L. No. 90−219, 81 Stat. 664 (codified at 28 U.S.C. §§ 620−629 (1988 & Supp. V. 1993)).

FN200 *See* Kathryn H. Vratil, *Notes from the Bench*, 42 U. KAN. L. REV. 1, 5−6 (1993) (relating judge's personal experience at FJC).

FN201 *See* William W. Schwarzer, *The Federal Judicial Center and the Administration of Justice in the Federal Courts*, 28 U.C. DAVIS L. REV. 1129, 1151−54 (1995) (detailing orientation and continuing education programs offered by the FJC); *see also* Jack B. Weinstein, *Limits on Judges Learning, Speaking and Acting − Part I − Tentative First Thoughts: How Many Judges Learn?*, 36 ARIZ. L. REV. 539, 543−44 (1994) (discussing purpose and activity of FJC).

FN202 *See* Schwarzer, *supra* note 201, at 1152; Weinstein, *supra* note 201, at 544.