THE BANKRUPTCY CODE, SECTION 1121: EXCLUSIVITY RELOADED

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INTRODUCTION

Section 1121 of the Bankruptcy Code,[1] is a very powerful tool for debtors.[2] It gives the debtors the exclusive right to propose a plan for reorganization for a period of 120 days, subject to extension by a court, after notice and hearing.[3] This is commonly known as the "exclusivity period."[4] It is also commonly known that bankruptcy courts, almost routinely, extend the exclusivity period two or more times after the first 120 days. During this time, creditors are not permitted to propose a plan of reorganization, even though they may believe that the debtor will not be able to propose a feasible plan and that the assets of the debtor may be depleted during the extended exclusivity.[5] Since the enactment of the Bankruptcy Code in 1978,[6] section 1121 has been criticized by creditors and defended by debtors.[7]

This thesis realizes the importance of the debtor's exclusivity right. Although useful, the practice of multiple extensions is based on ambiguous language. The plain language of section 1121 does not allow for extension of the exclusivity right

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[1] 11 U.S.C. § 1121 (2002). *See* discussion *infra* Part II.B.

[2] *See* 11 U.S.C. § 1121. *See generally* 11 U.S.C. § 101(13) (defining "debtor" as person or municipality for which case under title 11 has been commenced); 11 U.S.C. § 1101(1) (defining "debtor-in-possession" as debtor except when person that has qualified under section 322 of Bankruptcy Code is serving as trustee in case). There is a difference in the definition of debtor and debtor-in-possession. *See* 11 U.S.C. § 1107 (giving more rights, power and duties to debtor in possession than to ordinary debtor); 11 U.S.C. § 1121(b), (c)(1) (notwithstanding right created by section 1121(b) refers to debtor, subsection (c)(1) excludes possibility that right created by section 1121(b) might belong to debtor, but more precisely only to debtor-in-possession); ELIZABETH WARREN, BUSINESS BANKRUPTCY 126 (1993) [hereinafter BUSINESS BANKRUPTCY] (discussing strategic value of section 1121 and its effects on creditors).

[3] *See* 11 U.S.C. § 1121(b), (d).

[4] The term "exclusivity period" is a colloquial term that cannot be found in the Bankruptcy Code. The statute uses descriptive language rather than using the word "exclusive." *See* 11 U.S.C. § 1121(b) (stating only debtor may file plan until after 120 days after date of order for relief indicating exclusivity of debtor to file during this period). The phrase is commonly known as the exclusivity right and has been used since 1977. *See generally* H.R. REP. NO. 95-595, at 406 (1977) *reprinted in* 1978 U.S.C.C.A.N. 5963, 6362 (noting subsection (b) "gives the debtor the *exclusive right* to file a plan.") (emphasis added); Barbara E. Nelan, Comment, *Multiple Plans "On The Table" During Chapter 11 Exclusivity Period*, 6 BANKR. DEV. J. 451, 454 (1989) (stating debtor's right to file is exclusive for first 120 days after date of order for relief).

[5] *See, e.g., In re* Situation Mgmt. Sys., 252 B.R. 859, 862 (Bankr. D. Mass. 2000) (creditor arguing debtor's exclusivity should be terminated because it is unconfirmable). *See generally* 11 U.S.C § 1121.

[6] Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified at 11 U.S.C. §§ 101–1330), *amended by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in various sections of 11 U.S.C. and 28 U.S.C.), Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3114 (codified as amended in various sections of 11 U.S.C. and 28 U.S.C.), Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, 102 Stat. 610 (codified as amended in various sections of 11 U.S.C.), Pub. L. No. 103-394, 108 Stat. 4106 (originally signed by President Carter on November 6, 1978).

[7] The exclusivity right gives debtors the power to set the pace of the bankruptcy procedure. To use a chess analogy, it can be said that this right gives the debtor the advantage of the white figures in the chess game, the advantage of making the first move. This is frustrating for the creditors, like the black chess pieces who must wait until the white piece has made a move, because the exclusivity right renders them passive, while their right to collect their debt is suspended. For a discussion on debtors' and creditors' view on exclusivity, see *infra* Part II.

if the request for the extension is not submitted during the first 120 days. This thesis demonstrates the vagueness of the language used in section 1121 and maintains that the language may be inconsistent with the courts' practice regarding extensions of exclusivity and may be thus misused by the courts regarding so-called co-exclusivity. This thesis further demonstrates that section 1121 should be rewritten in order to give clear authority for a flexible application of the exclusivity right. Finally this thesis recommends changes to section 1121 to clarify the extent of the bankruptcy courts' authority under section 1121 in a way that would permit effective plans of reorganization to go forward, while conserving assets for the benefit of creditors.

Part I describes the development of the exclusivity period from its genesis to the present, with a review of the legislative history and evolution of the debtor's right to propose a plan of reorganization.

In Part II, there is a full discussion of the interpretation and the language of section 1121 of the Bankruptcy Code. This part also briefly covers the issue of the debtor's exclusivity right with regard to small business bankruptcy.

Part III addresses the treatment of the exclusivity period by the courts in determining which factors courts look at to determine cause to establish whether to extend or reduce the exclusivity period. Part three also briefly discusses the nature of the courts' order for extension or termination of the exclusivity right.

Part IV discusses some alternative approaches regarding exclusivity from the aspect of: i) the status conferences and the exclusivity right, ii) termination of the exclusivity right with the appointment of the trustee, and iii) co-exclusivity.

In conclusion, this thesis suggests changes to the section 1121 to alleviate the problems that have evolved with its implementation.

I. LEGISLATIVE HISTORY

A. The right to propose a plan

Historically, bankruptcy laws have been characterized by two separate approaches: (1) a retaliatory action rooted in Roman or earlier codes; and (2) a cooperative action that comes from English common law.[8] The existence of a right to propose a plan of reorganization places a debtor in an active role and has inherent similarities with the common law, which provides for contracts of composition and assignments for the benefit of creditors.[9]

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[8] *See* H.R. DOC. NO. 93-137, at 63 (1973) (discussing early roots of American bankruptcy laws). *See generally* David A. Skeel Jr., *The Genius of the 1898 Bankruptcy Act*, 15 BANKR. DEV. J. 321, 326 (1999) (indicating English bankruptcy law was source of reference in establishing American bankruptcy law); Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 7 (1995) (detailing origins of bankruptcy law from early American law as predicated upon English bankruptcy law to current Code established in 1978).

[9] *See* H.R. DOC. NO. 93-137, at 63 ("These processes have been continually premised on the need for a way for an 'unfortunate debtor' unable to meet his obligations to apportion his assets equitably among his

The Bankruptcy Law of 1867[10] provided that a debtor had a right to make an arrangement before the bankruptcy proceeding was commenced against him. Although the Bankruptcy Law of 1867 provided the basis for today's concept of debtor's exclusivity,[11] debtor's exclusivity under the 1867 law was not the same concept as a debtor's exclusivity right to propose a plan as it is known today.

The Bankruptcy Act of 1898[12] contained some provisions that might imply the existence of a right to allow a debtor to propose a plan of reorganization in the bankruptcy proceeding,[13] specifically with the adoption of a section dealing with

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creditors. He might enter an agreement with them or, . . . he might assign his property in trust for the benefit of all of them."); *see also In re* Reiman, 20 F. Cas. 490, 492 (S.D.N.Y. 1874) (No. 11,763) (allowing debtor to enter into composition agreements if majority of creditors approved). For an excerpt on the development of composition settlements see *infra* App. A.

[10] *See infra* Apps. B & C. *See generally Commission to Study Bankruptcy Laws, 1968: Hearings Before the Subcomm. on Bankr. of the Comm. on the Judiciary*, 90th Cong. 12 (1968) (statement of Daniel R. Cowans, Referee in Bankruptcy, San Jose, Calif., First Vice President of National Conference of Referees in Bankruptcy) (illustrating historical and sociological setting, Mr. Cowans noted, it is interesting that nine years after enactment of Bankruptcy Law of 1867, in 1876 battle of Little Big Horn River with General Custer took place. Ten years thereafter last of Indian wars were fought, and there were no automobiles and no roads); Thomas E. Plank, *Bankruptcy and Federalism*, 71 FORDHAM L. REV. 1063, 1069 (2002) (noting bankruptcy law did allow for arrangement in lieu of liquidation).

[11] *See generally* Karen Gross and Patricia Redmond, *In Defense of Debtor Exclusivity: Assessing Four of the 1994 Amendments to the Bankruptcy Code*, 69 AM. BANK. L.J. 287, 290 n. 13 (1995) ("Debtor exclusivity has been a part of bankruptcy law for over one hundred years."). The Gross & Redmond article notes the continued appearance of the debtor's exclusivity right throughout the evolution of the bankruptcy laws in the United States. *Id*.

[12] Bankruptcy Act of 1898, Pub. L. No. 696, 30 Stat. 544 (1898) [hereinafter The Bankruptcy Act]. The Bankruptcy Act of 1898 was enacted on July 2, 1898, and dealt mainly with bankruptcy liquidation issues, although it contained some provisions regarding composition. Various amendments were made in 1903, 1910 1917, 1922, 1926, but the Bankruptcy Act was thoroughly amended by the Chandler Act in 1938. Since the enactment of the Chandler Act there has been only one important revision of the act with an amendment in 1946. *See* S. REP. NO. 1529, at 2 (1968).

[13] *See* The Bankruptcy Act; *Bankruptcy Act Revision: Hearings before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, H.R., 94th Cong., 1st and 2d sess., on H.R. 31 and H.R. 32, Supplemental App. Part 1, 64–97, 72–73 (laying out section 12 of the Bankruptcy Act of 1898) *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 8, doc. 32 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979):

> Sec. 12. Compositions, When Confirmed. –
> (a) *A bankrupt may offer terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors and filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts*.
> (b) An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.
> (c) A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation
> (d) The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein

"compositions," latter amended in 1910[14] and 1926,[15] which introduced the

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provided, or by any means, promises, or acts herein forbidden.
(e) Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.

Id. (emphasis added).

[14] Act of June 25, 1910, Pub. L. No. 294, § 6 (1910); *see Bankruptcy Act Revision: Hearings before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, H.R., 94th Cong., 1st and 2d sess., on H.R. 31 and H.R. 32, Supplemental App. Part 1, 197–201, 198 (amending section 12 of Bankruptcy Act of 1898 in regards to time when terms might be offered) *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 8, doc. 32 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979):

Sec. 5. That section twelve, subdivision a, of said Act as so amended be, and the same hereby is, amended so as to read as follows:
A bankrupt may offer, either before or after adjudication, terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors and has filed in court the schedule of his property' and the list of his creditors required to be filed by bankrupts. In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of estates, at which meeting the judge or referee shall preside; and action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed.

Id.; *see* H.R. REP. NO. 511, at 5 (February 22, 1910), *Bankruptcy Act Revision: Hearings before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, H.R., 94th Cong., 1st and 2d sess., on H.R. 31 and H.R. 32, Supplemental App. Part 1, 206 (discussing composition as follows) *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 8, doc. 32 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979):

Section 5: Compositions can now be obtained only after an adjudication that the debtor is a bankrupt, with the resultant stigma on his name. (In re Back Bay Automobile Co., 158 Fed. 679, 685.) The change in section 12 of the law which would be accomplished by this section of the bill simply makes it possible for debtors to compose with their creditors before adjudication and without such stigma; in other words, encourages settlements between debtor and creditors under the supervision of the court, and is compulsory upon all creditors when a given proportion in number and amount shall have assented. Such settlements are now accomplished outside of court and frequently do not result in all creditors getting the same percentage, some one or more exercising the leverage of "holding out" to get for himself a more advantageous settlement in secret. These settlements before adjudication under court supervision are exceedingly popular in England, and are specifically provided for by section 3 of the English bankrupt act of 1890. (53 and 54 Vict., c. 71.).

Id.

[15] Act of May 27, 1926, Pub. L. No. 301, § 5 (1926) [hereinafter *1926 Amendment*]; *Bankruptcy Act Revision: Hearings before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, H.R., 94th Cong., 1st and 2d sess., on H.R. 31 and H.R. 32, Supplemental App. Part 1, 233–40, 234, *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 8, doc. 32 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (further amending Bankruptcy Act of 1867 and including language allowing court to delay the process for "good cause shown" for the benefit of the bankrupt party). Specifically the language read:

Sec. 5 The section 12.(a) of said Act, as so amended, be, and the same hereby is, amended to read as follow:
(a) A bankrupt may offer, either before or after adjudication, terms of composition to his creditors, after, but not before, he has been examined in open court, or at a meeting of his creditors, and has filed in court the schedule of his property and the list of his creditors required to be filed by bankrupts. In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation

requirement for "good cause."[16] However, a technique of the equity receivership gave the debtor some control over the reorganization process.[17] Dissatisfaction with equity receiverships and with bankruptcy in general[18] led to the passage of the Chandler Act,[19] which gave a debtor the exclusive right to propose a plan of

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> or conduct of the estate, at which meeting the judge or referee shall preside; but action upon the petition for adjudication shall not be delayed, except that *the court, for good cause shown, may in its discretion delay such action upon such terms and conditions for the protection of and indemnity against loss by the bankrupt estate as may be proper*.

Id. (emphasis added); *see also* H.R. REP. NO. 877, at 7 (April 14, 1926); *Bankruptcy Act Revision: Hearings before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, H.R., 94th Cong., 1st and 2d sess., on H.R. 31 and H.R. 32, Supplemental App. Part 1, 259–270, 265, *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 8, doc. 32 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (discussing the 1926 amendment):

> This amendment strikes out the words "and action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed," appearing at the end of section 12(a), and inserts in lieu thereof the following: "but action upon the petition for adjudication shall not be delayed, except that the court, for good cause shown, may in its discretion delay such action upon much terms and conditions for the protection of and indemnity against loss by the bankrupt estate as may be proper.
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> Experience has shown that many composition offers are submitted which are never intended to be carried through, and it is customary and proper for the preservation of the good will .of the bankrupt's business to continue its operation pending the consideration of his composition terms, and as these businesses are frequently conducted at a loss, therefore alter the composition terms are withdrawn it is found that the bankrupt estate has suffered accordingly.
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> This amendment will prevent a debtor in bankruptcy making an offer of composition which ipso facto stays further proceedings and very often to the detriment of the creditors.

Id.

[16] *See 1926 Amendment*, *supra* note 15 ("[T]he court, *for good cause shown*, may in its discretion delay such action upon such terms and conditions for the protection of and indemnity against loss by the bankrupt estate as may be proper.") (emphasis added).

[17] *See Report on the study and investigation of the work, activities, personnel and function of protective and reorganization committees: pursuant to section 211 of the Secs. & Ech. Act of 1934*, Secs. & Exch. Comm'n, Part I, "Strategy and Techniques of Protective and Reorganization Committees," 24-26, 29 (May 10, 1937) (explaining technique created from and for those in control of corporation to propel company into receivership, ensuring complete control of the proceedings would thereafter reside in management of debtor corporation); Nicholas L. Georgakopoulos, *Bankruptcy Law For Productivity*, 37 WAKE FOREST L. REV. 51, 94–95 (2002) (discussing reorganization through process of equity receiverships under Bankruptcy Act of 1898); *see also* Paul B. Lewis, *Trouble Down Under: Some Thoughts On The Australian-American Corporate Bankruptcy Divide*, 2001 UTAH L. REV. 189, 205–06 (2001) (reviewing same).

[18] For an excerpt discussing abuses resulting from the application of the bankruptcy laws *see infra* App. D; *see also* H.R. DOC. NO. 93-137, at 201 (1973) (illustrating dissatisfaction of bankruptcy in general and the acts); David S. Kennedy & Spencer Clift, *An Historical Analysis of Insolvency Laws and Their Impact on the Role Power and Jurisdiction of Today's United States Bankruptcy Court and Its Judicial Officers*, 9 J. BANKR. L. & PRAC. 165, 176 (2000) ("The Chandler Act was the Congressional response to the depression and was modeled after the emergency legislation of the early 1930's."); David A. Moss & Gibbs A. Johnson, *The Rise of Consumer Bankruptcy; Evolution Revolution or Both?*, 73 AM. BANKR. L. J. 311, 320 (1999) (providing same).

[19] The Chandler Act amendments were drafted by the National Bankruptcy Conference and were introduced by Walter Chandler, Congressman from Tennessee. It was enacted in 1938. Reflecting the impact of the Great Depression, and the spirit of the New Deal aspirations for reconstruction of the railroads, financial institutions, and business corporations, the Chandler Act fundamentally revised the Bankruptcy Act

reorganization [20] in a new Chapter XI[21] of the Bankruptcy Act.[22] A characteristic of Chapter XI, which affected only unsecured creditors, was that the insolvent[23] debtor[24] was the only person[25] who had a right to propose an arrangement.[26] This

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of 1898 regarding composition and corporate reorganization bankruptcy and included special provisions for arrangements. In the foreword to the bankruptcy law of 1938, published by the National Association of Credit Men, Mr. Chandler stated that the act was to revise the bankruptcy law to meet modern business and economic problems and to promote the welfare of all the people of the country. In the Report from the Committee on the Judiciary, for creation of a commission to study the bankruptcy laws of the United States, it was stated that:

> The present Bankruptcy Act was enacted in 1898. It is interesting to note that the first major revision of this act was not made until 40 years later with the passage of the Chandler Act in 1938. The primary purpose of the Chandler Act was to revise the bankruptcy law to meet modern business and economic problems and to take into account far-reaching social and economic changes which had occurred in the span of 40 years, and to correct defects and inadequacies in the Bankruptcy Act.

S. REP. NO. 1529 (1968) (to accompany Senate Joint Resolution 100). *See generally* Kennedy & Clift, *supra* note 18, at 176 (discussing changes effected by The Chandler Act).

[20] *See infra* App. A.

[21] *See* Bankruptcy Act of 1898, Pub. L. No. 696, 30 Stat. 544, §§ 12, 74 (1898) (repealed 1978), *reprinted in* THE BANKRUPTCY ACT, ENACTED JULY 2, 1898 AS AMENDED THROUGH MAY 1, 1957, at 231 (annotated by John Hanna & James Angell McLaughlin, eds., 6th ed. 1957). Added by the Chandler Act, chapter XI incorporated numerous changes and additions to former Sections 12 and 74. *See id*.; *see also infra* App. A; David R. Perlmutter, *Navigating A Proposed "New Value" Plan Through The Cross-Currents Of The Confirmation Process: An Arduous Journey For The Debtor Of A Single-Asset Real Estate Case*, 17 WHITTIER L. REV. 427, 434 (1996) (explaining effects of amendments, stating "Chapter XI of the Chandler Act suited small individual and corporate businesses with few stockholders and was designed to protect only trade and commercial creditors (unsecured creditors).").

[22] The Bankruptcy Act, Pub. L. No. 879, 64 Stat. 1113 (1950) (providing The Bankruptcy Act of 1898 referred to as "The Bankruptcy Act of 1898, as Amended," but the Act of December 20, 1950, adopted official short title "The Bankruptcy Act"); *see* Harvey R. Miller & Alan N. Resnick, *Commentary on Professor Warren's Paper: Absolute Priority*, 1991 ANN. SUR. AM. L. 49, 49 (1992) (noting underlying philosophy of Chandler Act was reorganization); Joseph F. Rice & Nancy Worth Davis, *The Future Of Mass Tort Claims: Comparison Of Settlement Class Action To Bankruptcy Treatment Of Mass Tort Claims*, 50 S.C. L. REV. 405, 427 n.144 (1999) ("The Chandler Act of 1936 codified the equity receivership procedure as the Chapter XI [of the Bankruptcy Act] reorganization.").

[23] Section 1(19) of the Bankruptcy Act of 1898 as amended by the Chandler Act of 1938 defines "insolvent" as:

> [a] person shall be deemed insolvent within the provisions of this title whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts . . .

11 U.S.C. § 1(19) (1976) (repealed 1978); *see* 11 U.S.C. § 101 (32) (2002) (providing an expanded definition of insolvent under current Code).

[24] *See* 11 U.S.C. § 706(3) (1976) (repealed 1978) (defining "debtor" as "a person who could become a bankrupt under section 22 of this title [Bankruptcy Act] and who files a petition under this chapter [Chapter XI]").

[25] Section 1(23) of the Bankruptcy Act of 1898 as amended by the Chandler Act of 1938 defines "persons" as:

> Persons shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are forbidden under this Act shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees or of other similar controlling bodies of corporations.

11 U.S.C. § 1(23) (1976) (repealed 1978); *see* 11 U.S.C. § 101(41) (2002) (providing definition of person under current Code).

was the first step in the development of the debtor's exclusive right to propose a plan. Aside from Chapter XI, as added by the Chandler Act, the Bankruptcy Act contained, *inter alia*, Chapter X,[27] which dealt with reorganization of publicly held companies, and Chapter XII,[28] which provided for real property arrangements for

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[26] *See* 11 U.S.C. § 706(1) (1976) (repealed 1978) (defining "arrangement" as "any plan of a debtor for the settlement, satisfaction, or extension of the time of payment of his unsecured debts, upon any terms").

[27] 11 U.S.C. § 501-676 (1976) (providing chapter X, "Corporate Reorganizations"); *see Perlmutter*, *supra* note 21, at 434 (stating "Chapter X was specially adapted to the reorganization of large corporations. . ."); *see also* Thomas E. Plank, *Bankruptcy Professionals, Debtor Dominance, and The Future Of Bankruptcy: A Review And A Rhapsody On A Theme*, 18 BANKR. DEV. J. 337, 343–44 (2002) (reviewing DAVID A. SKEEL JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA (2001)) (discussing same). For criticism on chapter X with regards to exclusivity right see S. REP. NO. 1916, Part 2, at 8-9 (1938) stating as follows:

> The second innovation in chapter X is the requirement that there must be a "disinterested" trustee. Whether or not there is any criticism of the managements the court must appoint someone who has had absolutely no connection with the company, to act as one of the trustees. The problem of finding a disinterested trustee capable of performing the duties required of him is a major difficulty and the cost to estates of such officers are always burdensome. The requirement of disinterested counsel is an added financial burden and in many cases is entirely unnecessary.
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> The duty of drafting the plan of reorganization is imposed in the first instance upon the disinterested trustee. This transfers the duty of preparing a plan from the interested parties—the management or the creditors—to the court appointee who is wholly ignorant of the corporation and its activities. A Government official is thus called upon to outline the future structure of the debtor thus preventing negotiation between the interested parties, as at present is the practice, for the purpose of preparing a suitable plan of reorganization.
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> It is essential, in order to save the good will of a corporation in financial difficulties, that it be given the right to retain possession of the business. If such possession is taken from the management (unless, of course, fraud were proven on the part of the management), the good will which the corporation has built up will vanish with the possession. It would seem that the proper course would be to minimize the shock of financial adversity, rather than to aggravate it in a movement which would indicate that there has been mismanagement and fraud, even though there were no evidence to support such presumptions. To wrest the possession from the management would certainly aggravate the situation. It would appear that, to allow the management to retain possession would be a much wiser course than to put in a new management (the trustee) entirely "disinterested" and unfamiliar with the business. A well-directed criticism of this feature of chapter X has been made by Mr. Cloyd Laporte, in 51 Harvard Law Review, in his article, Changes in Corporate Reorganization Procedure Proposed by the Chandler and Lea Bills:
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> These provisions (requiring the "disinterested" trustee) appear to be unduly rigid. A company may have an indebtedness of more than $250,000 and still be a small company, measured by assets and volume of business. Also, there are situations in which even large companies cannot bear the expense of an outside trustee and counsel, and situations in which no trustee is necessary because there is no reason for suspecting that there has been mismanagement or misconduct and the situation is otherwise so simple that the appointment of a trustee would merely entail unnecessary expense and injure the company's goodwill and trade relations.

Id.

[28] *See* Chandler Act, 11 U.S.C. §§ 801-926 (1976) (repealed 1978) (listing sections of chapter XII entitled "Real Property Arrangements By Persons Other Than Corporations"); *see also* Glenn W. Merrick, *The Chapter 11 Disclosure Statement in a Strategic Environment*, 44 BUS. LAW. 103, 104 (1988) (highlighting chapter XII allowed non-corporate debtors with obligations secured by real estate to negotiate plan of arrangement with both secured and unsecured creditors); Don Willenburg & Baxter Dunaway, *Single Asset*

non-corporate debtors (an individual or partnership). Neither Chapter X, nor Chapter XII recognized or provided an exclusive right for a debtor to file a plan.[29] Chapter X provided the same rights to the debtor as to any party in interest, whether a trustee had been appointed in the case[30] or a debtor remained in possession.[31] In contrast,[32] in Chapter X or XII proceedings, any party in interest had a right to submit proposals for a plan.[33] Nonetheless, the exclusivity right of a debtor to

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Real Estate Cases After the Bankruptcy Reform Act of 1994, 5 J. BANKR. L. & PRAC., 107, 108 n.5 (1996) (explaining chapter XII necessitated by common practice of individuals or partnerships holding real estate obligated by bond issues, secured by trust indentures, and owned by individual holders).

[29] *See* H.R. DOC. NO. 93-137, at 244 (1923) ("an independent trustee . . . has the first opportunity to file a plan. All persons other than the debtor may submit proposals for a plan to the trustee. The debtor may not file a plan until the trustee's time to file has expired."); *see also* Merrick, *supra* note 28, at 105 (stating under chapter X, trustee or district court appointed to submit reorganization plan while under chapter XI debtor had exclusive right to file plan and chapter XII represented composite of provisions of chapter X and XI).

[30] *See* 11 U.S.C. § 569 (1976) (repealed 1978) ("Where a trustee has been appointed the judge shall fix a time within which the trustee shall prepare and file a plan, or a report of his reasons why a plan cannot be effected, and shall fix a subsequent time for a hearing on such plan or report and for the consideration of any objections which may be made or of such amendments or plans as may be proposed by the debtor or by any creditor or stockholder."); *see also* Kay v. Hogan (*In re* Gulfco Inv. Corp.), 593 F.2d 933, 934 (10th Cir. 1979) (determining section 596 authorizes district court to fix time by which creditors must file proof of claim); Bennett v. Gemmill (*In re* Combined Metals Reduction Co.), 557 F.2d 179, 202 (9th Cir. 1977) (determining proper for court to order proofs of claims to be filed with trustee as trustee makes initial determination of validity of said claims).

[31] *See* 11 U.S.C. § 570 (1976) (repealed 1978):

> Where a debtor is continued in possession, a plan or plans may be filed, within a time fixed by the judge–
> (1) by the debtor;
> (2) by any creditor or indenture trustee;
> (3) by any stockholder, if the debtor is not found to be insolvent;
> (4) by the examiner, if so directed by the judge.
> The judge shall fix a subsequent time for a hearing on such plans and for the consideration of any objections or amendments thereto.

Id.; Kenneth Alan Rosen & Angel Ruiz Rodriguez, *Section 1121 and Non-Debtor Plans of Reorganization*, 56 AM. BANKR. L.J. 349, 352 (1982) (stating debtor, creditors and stockholders also afforded opportunity to submit plans or proposals); Eugene V. Rostow & Lloyd N. Cutler, *Competing Systems of Corporate Reorganization: Chapters X and XI of the Bankruptcy Act*, 48 YALE L. J. 1334, 1338–39 (1939) ("Plans or proposals for plans may be submitted to the trustee by creditors and stockholders; the trustee then prepares a plan which is considered at a hearing, together with objections, amendments or separate plans proposed by the debtor or by any creditor or stockholder.").

[32] There were three basic differences recognized between chapters X, XI and XII. *See, e.g.*, H.R. DOC. NO. 93-137, at 213, 244–45 (discussing distinct goals and differences); s*ee also* Martin I. Klein, *The Bankruptcy Reform Act of 1978*, 53 AM. BANKR. L.J. 1, 8 (1979) (illustrating chapter X embraces reorganization through rigid statutory scheme, while chapter XI contains more informal procedures for arranging non-public debt); Merrick, *supra* note 28, at 105 (stating under chapter X trustee or district court appointed to submit reorganization plan while under chapter XI debtor had exclusive right to file plan and chapter XII represented composite of provisions of chapter X and XI); Nelan, *supra* note 4, at 459 ("Former Chapters X and XI differed from each other in terms of: 1) control of the proceeding; 2) regulation of creditor and equity security holder representation; and, 3) the standard for plan acceptance."); Benjamin Weintraub & Alan N. Resnick, *Involuntary Petitions Under the New Bankruptcy Code*, 97 BANKING L.J. 292, 294 (1980) (explaining involuntary petitions for rehabilitation permitted under The Bankruptcy Act of 1898 in chapter X reorganization cases, but not in chapter XI arrangement cases or chapter XII real property arrangements).

[33] *See* H.R. DOC. NO. 93-137, at 244 ("[A]n independent trustee . . . has the first opportunity to file a plan. All persons other than the debtor may submit proposals for a plan to the trustee. The debtor may not file a plan until the trustee's time to file has expired."); Rosen & Rodriguez, s*upra* note 31, at 352 (stating debtor, creditors and stockholders also afforded opportunity to submit plans or proposals); Rostow & Cutler, *supra*

propose a plan under Chapter XI[34] contributed to making this Chapter the dominant reorganization vehicle under the Bankruptcy Act.[35]

B. Factography[36] of the Legislative History and Genesis of the Debtor's Exclusivity Right

With the enactment of the Bankruptcy Code in 1978, Congress combined Chapters X, XI and XII of the Bankruptcy Act of 1898 into a "one size fits all" Chapter 11.[37] However, combining these sections, which regulated filing of the plan

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note 31, at 1338 ("Plans or proposals for plans may be submitted to the trustee by creditors and stockholders; the trustee then prepares a plan which is considered at a hearing, together with objections, amendments or separate plans proposed by the debtor or by any creditor or stockholder.").

[34] *See* Howard Karasik, *Extending the Debtor's Exclusive Right to File a Plan of Reorganization*, 90 COMM. L.J. 359 (1985) ("Chapter XI, under which a debtor generally was entitled to remain in possession of its property and had the exclusive right to propose a Plan."); Nelan, *supra* note 4, at 463 ("A major distinction between Chapter XI and Chapter X was that the right to file a plan under Chapter XI was exclusively the debtor's."); *see also* Merrick, *supra* note 28, at 105 (noting distinctions).

[35] *See* H.R. DOC. NO. 93-137, at 246–47 (comparing chapter XI bankruptcy cases from 1940 to random sampling of cases from 1971 and 1972 and noting drastic increase in indebtedness by debtors filing chapter XI bankruptcy); *see also* Klein, *supra* note 32, at 8 ("Yet, large public companies have often resorted to Chapter XI because of informality and because trustees appointed in Chapter X to operate business and investigate management."); Arthur L. Moller, *Chapter 11 of the 1978 Bankruptcy Code or Whatever Happened to Good Old Chapter XI?*, 11 ST. MARY'S L.J. 437, 439 (1979) (postulating Commission on Bankruptcy Laws of United States had become frustrated with large corporations accruing large debts then utilizing the direct and forthright procedure of chapter XI).

[36] "Factography" (fac-to-gra-phy). A description, outline, picture, portrait, recapitulation, retrospective, review or sketch of an event or a case solely based on the facts. A dissection of history, a historiography. *See generally* Erika Wolf (reviewing Margarita Tupitsyn, *The Soviet Photograph*, 1924-1937. Yale Univ. Press, 1996) *available at* http://www.artmargins.com/content/review/wolf1.html, (last visited Nov. 21, 2003) (providing, "[t]his term suggests the existence of a cohesive, fully articulate theory . . . based upon factual documentary materials."). However, to the author's knowledge, this term has not been published in any known English or American dictionary.

[37] The suggestion to combine chapter X, XI and XII of the Bankruptcy Act of 1898, according to Congressional records, was recorded as early as July 16, 1968. At the hearing on Senate Joint Resolution 100 before the Subcommittee on Bankruptcy of the Committee on the Judiciary, where the necessity of the creation of a Bankruptcy Commission to study the bankruptcy law was discussed, Mr. Jacob Dim questioned:

> Should there be a chapter X1/2 for businesses somewhere in between? Presently an arrangement deals technically with only unsecured creditors. Should it also deal with secured creditors, stockholders, and all others connected with the debtor's business affairs? Should a secured creditor be allowed to tighten the noose around a business roll, property on the tax rolls, buildings occupied and suppliers supplying — with the benefits extending to every phase and facet of the community; provided the secured creditor is amply protected, and his only loss the loss of time?

Commission to Study Bankruptcy Laws 1968: Hearings Before the Subcomm. on Bankr. of the Comm. on the Judiciary, 90th Cong. 29, 38 (1968) (statement of Jacob Dim, Referee in Bankruptcy, St. Paul, Minnesota). In their report, the *Commission to Study the Bankruptcy Laws of the United States*, recommended "that all of the business rehabilitation provisions . . . be combined into one chapter," for the purpose of eliminating pointless and wasteful litigation and because "none of the chapters are precisely suited to the needs of many common business situations." H.R. DOC. NO. 93-137, at 23 (1973); *see also* Klein, *supra* note 32, at 1 ("Bankruptcy courts have faced ever expanding caseloads and increasingly complex litigation in the past two decades. The Act updates and revises present law taking into consideration the vast changes brought about by the adoption of the Uniform Commercial Code, the boom in credit and changes in public policy since 1938."); Merrick, *supra* note 28, at 106 ("Thus, adequate disclosure prior to

under the chapters of the Bankruptcy Act of 1898, was not an easy process and it took years to crystallize.

From the beginning of the process for developing a modern bankruptcy reorganization law, the priority of the drafters was the dual need for expedience and efficiency in formulating and consummating a plan of reorganization without any unreasonable delay.[38] According to proposals made by the *Commission to Study Bankruptcy Laws*,[39] in the very first stages of drafting the right to propose a plan of reorganization, a debtor did not have equal rights as those provided to the trustee. The trustee, instead, actually had the exclusive right to propose a plan.[40] The Commission's proposal cut the debtor's exclusive right to propose a plan formerly available under Chapter XI.[41]

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solicitation of plan votes was the linchpin for the collapse of the three former business reorganization chapters into a single chapter 11."). *See generally* Hon. Leif M. Clark, *Chapter 11-Does One Size Fit All?*, 4 AM. BANKR. INST. L. REV. 167, 167–68 (1996) (describing 1978 Code as commitment to single unitary system of reorganization, but noting recent criticism to this approach).

[38] *See* H.R. DOC. NO. 93–137, at 27:

> Section 7-112 of the proposed statute seeks to encourage expedition and efficiency in formulating and consummating a plan of reorganization, which unfortunately are lacking today in many such proceedings, by providing that upon the complaint of any party in interest the court may order the case to be converted to one for liquidation if it is unreasonable to expect that a plan can be effected or if there has been unreasonable delay by the debtor that is prejudicial to creditors or if no plan is proposed and confirmed within a time fixed by the Bankruptcy Administration.

Id.; *see also* Klein, *supra* note 32, at 2 ("The single chapter for all business reorganizations will simplify the law by eliminating unnecessary differences in detail inevitable under separately administered chapters."); Moller, *supra* note 35, at 440–41 (listing among reasons for consolidation of chapters X, XI, and XII, desire to alleviate delays brought on by motions to convert chapter XI case into chapter X case).

[39] *See* H.R. DOC. NO. 93-137, at 246. The proposed draft of the *Section 7-304 read*:

> *Sec. 7-304 Filing of Plan or Report*, reads:
> *(a) Filing by Trustee, Debtor, or Disinterested Person.* On or before the date set by the administrator, the trustee, or if there is no trustee the debtor or disinterested person designated by the administrator pursuant to section 7-103(b), shall file with the administrator a plan or a report why a plan cannot be formulated.
> *(b) By Others.* The debtor, a creditor, and equity security holder, a creditors' or equity security holders' committee, or an indenture trustee may file a plan with the administrator at any time prior to the date set by the administrator pursuant to subdivision (a) for the filing of a plan or report.

[40] *See id*. The note accompanying proposition, section 7-304, stated that under this provision anyone may file a plan. This is a sharp departure from chapter XI of the Bankruptcy Act of 1898, where only the debtor could file. Similarly, this is also a deviation from the chapter X procedure where the trustee had the opportunity to file first. *Id. See generally* Lynn M. Lopucki, *The Debtor In Full Control – Systems Failure Under Chapter 11 of the Bankruptcy Code?*, 57 AM. BANKR. L.J. 247 (1983) (examining potential success and failure of chapter 11).

[41] *See Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st and 2d sess., on H.R. 31 and H.R. 32, Supplemental App. & Part I, 412 (July 1975), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 3, doc. 27 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (citing to Peter F. Coogan et al., *Commenting on Some Reorganization Provisions of the Pending Bankruptcy Bills*, 30 BUS. LAW. 1149, 1162 (1975)):

> Chapter VII may give the debtor fewer rights than does present Chapter 11 in that:
> (b) It loses the exclusive right to present a plan which the creditors must accept or reject, quite possibly with a less productive liquidation or what looks like a long Chapter 10 as the only practical alternative, or persuade the debtor to alter as the price of his acceptance[.]

In contrast to the Commission's proposal, the majority of the American Bar Association committee members felt that the debtor's exclusive right to propose a plan for some reasonable period of time should be reinstated.[42] After presentation of the "judges bill",[43] the role of creditors on formulation and proposal of the plan[44]

Id.; *see also* Timothy B. Matthews, *The Scope of Claims under the Bankruptcy Code*, 57 AM. BANKR. L.J. 221, 233–34 (1983) (discussing absence of estimation provision for liquidation in H.R. 31 and H.R. 32).

[42] *See Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part I, 415 (July 1975), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 3, doc. 27 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (citing Coogan, et al., *supra* note 41, at 1165):

> The majority of the Committee members feels that if Chapter VII is to be used as the starting point, it should, and can easily be modified to, allow the debtor a reasonable period of time during which he alone can present a plan, and allow the use of prepetition consents where the proposed out-of-court and in-court plans are substantially identical. It is generally felt that, contrary to present Chapter 11, creditors should at some reasonable point in time be able to file under Chapter VII a Chapter 11 type plan should they prefer it to a liquidation or a Chapter 10 type reorganization.

Id.; *see also* Coogan, *supra* note 41, at 1165 (discussing consensus of Committee members to make changes to chapter VII to "enable the parties to accomplish under Chapter VII a Chapter 11 type plan. . . ."). *See generally* William J. Woodward, Jr. & Richard S. Woodward, *Exemptions As An Incentive To Voluntary Bankruptcy: An Empirical Study*, 57 AM. BANKR. L.J. 53, 54 (1983) ("The relationship between the bankruptcy filings and provisions of the Reform Act is commonly expressed in terms of 'incentive': attractive provisions of the Act are said to provide the debtor with 'incentives' to choose bankruptcy.").

[43] *See infra* note 54 and accompanying text discussing the Judges' proposals and its benefits.

[44] *See Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part I, 317–18 (July 1975), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 3, doc. 27 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (testimony of Daniel R. Cowans, Esq., Former Bankruptcy Judge from Cal.):

> If creditors were genuinely interested in rehabilitating the business, then I have not a great deal of problem with their ability to formulate a plan. The debtor is going to have to live with the plan, so certainly he should be preeminent in some fashion in the formulation.
>
> The abuses that have been talked about to me in regard to the formulation of a plan by creditors are those in which a competitor offers a little more than the debtor is able to raise himself and does it for the purpose, in essence, of doing away with the business. There ought to be some limitation on that.
>
> I have seen cases where creditors were genuinely interested in that business staying in business. And their suggestions are usually listened to with great interest by the debtor. He needs the cooperation of his creditors.
>
> I find that where creditors are quite interested right now, they do not encounter too much difficulty in having their idea very seriously listened to. In some cases, you will find that the bulk of the creditors are geographically remote, are not cognizant of the special geographic problems, and the suggestions that develop are not really from the creditors themselves but from collection representatives. So there ought to be some kind of limitation there.
>
> My feeling is that the need for a specifically stated right of creditors to file a plan is not so great as it might be, because of this tendency of debtors right now to listen carefully. But I have no great theoretical objection, if we can keep that competition sense up.

Id.; *see also Bankruptcy Act Revision: Hearings Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong. 1st sess., on H.R. 31 and H.R. 32, Part III, 1660–65 (Mar. 12, 1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 5, doc. 29 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (testimony of L.E. Creel III, Bankruptcy and Commercial Law section, Dallas Bar Association) (discussing rehabilitation in relation to proposed bills).

and consequences[45] were being considered in the hearings on the bankruptcy bills.[46]

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[45] *See Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part I, 434–35 (July 1975), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 3, doc. 27 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (testimony of Peter F. Coogan):

> Now, let me take one other illustration, and to allow the present practice under chapter XI, under which a debtor can propose a plan of reorganization, get the consent of most of his creditors, or at least the majority in amount number of unsecured creditors, before filing a petition in court and have a chapter XI arrangement go through in rather expeditious fashion.
>
> The present chapter VII is deficient on this point. Nobody would go ahead on the assumption that he could under the present language get the consent of creditors before he filed a petition.
>
> Under chapter X we know that the consents may not be solicited until one is way down the road, until there has been a plan of reorganization that has been approved by the judge. It might be 2, 3, or 5 years before the plan gets to the stage where you, the plan proponent, ask for creditors' consents.
>
> Now, how does that have a bearing on keeping out of bankruptcy? It has a bearing in the sense that there are many, many situations where a debtor will present to his creditors a double-edged plan. The plan says that, if we get the approval, outside of the chapter, of X percent of all our unsecured creditors, this will take effect as a common law composition. Now, that may mean that there may be a few stragglers who refuse to consent, but the rest of the creditors will say, 'Well, we'd rather avoid the time and expense of a chapter proceeding, and allow those few creditors to continue to hope to get 100 percent of their claim, while we agree to take less.'
>
> Let's suppose that the figure is placed at 87 percent. Now, it turns out that you don't get 87, you get only 75 percent. In that case the consent which has already been signed, we'll say that approval by the creditors of this particular piece of paper will act as approval for the plan of arrangement if it is put into chapter XI. Now, by the use of this mechanism-the threat that the debtor will resort to a chapter XI if he doesn't get the necessary consents-without a chapter XI followup if one does not get the necessary high percent of consents, you have a minority of the nonconsenting creditors control the action of the consenting majority of the creditors, and the result is that a liquidation, or some other form of disaster is very likely to occur.
>
> In this connection, let me state a couple of assumptions which are almost always acted upon by creditors and debtors, but seldom stated. I have previously stated one such: In almost any situation the going concern value of the assets is worth often many times the liquidation value. And any method that can be used to preserve the going concern value is likely to be a very substantial help to all of the creditors, as well as to the debtor. The interests are absolutely mutual in that respect.
>
> The second assumption is that the Bankruptcy Act should be used somewhat as a concept of a fleet-in-being: It is a power which deters action on the part of either side because of the mutual threat that it imposes, which is often unacceptable to either of the parties; but nevertheless the ability of the debtor to resort to bankruptcy may be a very potent factor in bringing the creditors to the bargaining table where it is hoped they can work out their problem in the way that most ordinary problems are worked out-by bargaining.

Id.; *see also* John C. Anderson, *Classification of Claims and Interests in Reorganization Cases Under the New Bankruptcy Code,* 58 AM. BANKR. L.J. 99, 111–12 (1984) (discussing debtor reorganization and creditor's role). *See generally* David A. Skeel, Jr., *Markets, Courts, And The Brave New World Of Bankruptcy Theory,* 1993 WIS. L. REV. 465 (1993) (discussing possible abolition of chapter 11 and reviewing various alternative approaches to bankruptcy process).

[46] See *supra* notes 44 and 45. *See Bankruptcy Act Revision: Hearing Before Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary*, S., 94th Cong., 1st sess., on S. 235 and S. 236, Part II,

The idea of exclusivity for a particular period of time subject to extension by the court for the debtor was supported because it was expected that this would help balance creditor and debtor interests[47] and provide flexibility in determining the length of the period. Indeed the principal of flexibility was one of the important

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540 (Oct. 1, 1975), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 10, doc. 36 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (report of the Bankruptcy Comm. of the Commercial Law League of America on Proposed Revisions of the Bankruptcy Act):

> 9. Creditors in Chapter VIII cases should be authorized to propose plans if and only if the debtor fails or refuses to file a plan within a specified time period prescribed by the Act, or by general bankruptcy rules, or within such extended period as may be allowed by the court for good cause shown; or if the court finds and determines that there is no possibility of any plan proposed by the debtor being confirmed. If creditors refuse to accept a proposed plan or if confirmation of a proposed plan is denied, the court should fix a time within which creditors may propose a plan.

Id.; *Bankruptcy Act Revision: Hearing Before Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary*, S., 94th Cong., 1st sess., on S. 235 and S. 236, Part II, 1004 (Nov. 18, 1975), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 10, doc. 36 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (statement of Gerald K. Smith):

> Who May File the Plan. – Other than the concept of an independent agency participating in the rehabilitation process, the most important change recommended by the Commission as to rehabilitation proceedings is the authorization of creditor plans (§ 7-304(b)). Under present Chapter XI, only the debtor may file a plan. Thus, the creditors are often faced with the undesirable choice of what the debtor offers or liquidation. Thus, allowing creditor plans is not a mere matter of scuttling presently expeditious relief under Chapter XI; it means that the debtor no longer can force an unfair plan on its creditors simply because the liquidation alternative is less desirable. If Congress prefers the present Chapter XI approach then, quite frankly, there should be two chapters as suggested by the Bankruptcy Judges, with all the attendant problems.
>
> Some have suggested that the debtor should be given an exclusive period of time within which to file a plan and have it confirmed, as long as the plan does not affect publicly held securities. This is quite a different matter than precluding creditors from proposing a plan, and probably would do not real harm since the creditors have a real alternative to the debtor's plan, that is, the creditors can reject the debtor's plan and propose their own plan.

Id.

[47] *Bankruptcy Act Revision: Hearing Before Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary*, S., 94th Cong., 1st sess., on S. 235 and S. 236, Part II, 462 (Sept. 24, 1975), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 10, doc. 36 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (testimony of Robert J. Grimmig on Behalf of the American Bankers Association Before the Subcommittee on Improvements in Judiciary Machinery of the Senate Committee of the Judiciary on the Commercial Bankruptcy Aspects of S. 235 and S. 236):

> We accordingly, recommend that § 7-304 of the Commission's Bill and § 7-301 of the Judges' Bill should provide that under the circumstances set forth above, the debtor should have the exclusive right to file a plan within 120 days after the first meeting of creditors provided under the Judges' Bill, which plan must be confirmed within 90 days after it is filed, with discretion in the judge, for good cause shown, to extend either of the said periods. After the expiration of the said period, any party in interest set forth in § 7-304 (§ 7-301) could file a plan. Such modification to the sections as drawn would:
>
> (a) Protect against the debtor exacting an unfair advantage by virtue of having the exclusive right to file a plan as opposed to the alternative of liquidation; and
>
> (b) Protect against the possibility of a debtor being outbid by a creditor-competitor at the initial filing of a plan, if the right to file were open to all parties in interest at the inception of the proceedings.

Id.

considerations in the minds of the drafters.[48]

It is interesting to note that the concept of the debtor's exclusive right to file a plan was also discussed during the hearings on the "Municipal Financial

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[48] H. R. REP. NO. 95-595, at 231–32 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6191 (report of the Committee on the Judiciary together with a separate supplemental and separate additional views):

> Proposed chapter 11 recognizes the need for the debtor to remain in control to some degree, or else debtors will avoid the reorganization provisions in the bill until it would be too late for them to be an effective remedy. At the same time, the bill recognizes the legitimate interests of creditors, whose money is in the enterprise as much as the debtor's, to have a say in the future of the company. The bill gives the debtor an exclusive right to propose a plan for 120 days. In most cases, 120 days will give the debtor adequate time to negotiate a settlement, without unduly delaying creditors. The court is given the power, though, to increase or reduce the 120-day period depending on the circumstances of the case. For example, if an unusually large company were to seek reorganization under chapter 11, the court would probably need to extend the time in order to allow the debtor to reach an agreement. If, on the other hand, a debtor delayed in arriving at an agreement, the court could shorten the period and permit creditors to formulate and propose a reorganization plan. Again, the bill allows the flexibility for individual cases that is unavailable today.

Id. (internal citations omitted); *see also id*. at 233 ("The policy that has been followed generally in the consolidation of the two reorganization chapters has been flexibility, in place of the absolute rules now contained in chapter X, and determination of the needs of each case on the facts of the case."); *Bankruptcy Act Revision: Hearing Before Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary*, S., 95th Cong., 1st sess., on S. 2266 and H.R. 8200, Part II, 817 (Dec. 1, 1977), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 15, doc. 47B (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (prepared statement of L. E. Creel III, Study Committee Chairman, Dallas Bar Association's Section of Bankruptcy And Commercial Law):

> EXHIBIT 9. NEED FOR FLEXIBILITY
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> As is the case in fashioning most legislation, significant policy decisions result from the balancing of frequently opposing, but, at the same time, essential needs. Any thoughtful legislator is constantly aware of the care and thoroughness required in seeking that best of all possible compromises that leads to accomplishing the particular legislative goal.
>
> In tailoring the new bankruptcy act, the legislators must, at the same time, balance:
>
> 1. the need for a rigid, clear, sometimes arbitrary, legal set of rules, incorporating firm and understandable standards, time periods and requirements, so that those who are to be governed by the new law may find it both reliable and predictable. No law is a good law if its language cannot be relied upon and its use not predictable with certainty; against
>
> 2. desirability of the unfettered and unrestricted use of the good judgment and discretion of each and every experienced and knowledgeable bankruptcy judge to fashion the unique and creative remedies frequently required to solve the highly complex problems which arise in the "pressure cooker" of bankruptcy proceedings.

Id.; *Bankruptcy Act Revision: Hearing Before Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary*, S., 95th Cong., 1st sess., on S. 2266 and H.R. 8200, Part II, 821 (Dec. 1, 1977), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 15, doc. 47B (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (statement of L. E. Creel III, Dallas Bar Association):

> I note that in the last series of bills that there has been a time allowance for debtors exclusively to file a plan. That is acceptable to my view because flexibility, again, is the keynote. If a debtor wants a longer time and can convince the court that he is entitled to it. Then he can go into court and get more time.

Id.

Adjustments" chapter.[49] There were, however, some proposals to enable the creditors to have an active role in negotiations on the plan itself[50] or in proposing a plan.[51] Some other proposals were also made: filing a plan with a petition,[52] extension of the time to file a plan[53] or setting a time to file a plan.[54]

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[49] *See* 11 U.S.C. §§ 901–946 (2002). *See generally Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part II, 660, (Jan., Feb., 1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 4, doc. 28 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (statement of John R. Butler, President, Municipal Issues Service Corp.) ("Chapter XI of the Bankruptcy Act does not permit the creditors of a municipality to overtly propose a plan of composition. Only the municipality may propose such a plan.").

[50] *See Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part II, 660 (Jan., Feb., 1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 4, doc. 28 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (statement of John R. Butler, President, Municipal Issues Service Corp.):

> THE RIGHT TO PROPOSE A PLAN
>
> Chapter XI of the Bankruptcy Act does not permit the creditors of a municipality to overtly propose a plan of composition. Only the municipality may propose such a plan. In order to have an affect on the terms of the plan, the creditors must indicate to the municipality that they will vote to disapprove the plan which the municipality is proposing. Such an indication on the part of the creditors would lead the municipality to either amend its plan to reflect the desires of the creditors or to abandon the use of bankruptcy and permit writs of mandamus to be issued for payment of its obligations.
>
> A provision in the Bankruptcy Act which would permit the creditors and the municipality to actively negotiate with regard to the provisions of the plan of composition under the supervision of the judge or the administrator, would avoid this awkward negotiation posture. Though, as a substantive matter, this would probably not change the outcome of a default, it would facilitate the procedure for negotiating the terms of the plan of composition. Simplifying the presently existing procedure would, of course, speed up the process.

Id.; *see also* Kenneth N. Klee, *Adjusting Chapter 11: Fine Tuning the Plan Process,* 69 AM. BANKR. L.J. 551, 552 (1995) (attributing origins of chapter 11 plan process balancing to the "extensive testimony before Congress during the middle 1970's").

[51] *See Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part II, 714 (Jan., Feb., 1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 4, doc. 28 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (testimony of George Hempel, Professor of Finance, Graduate School of Business Administration, Washington University) ("In jotting down some quick notes, the idea I got was that any interested party may file. This indicated to me that not only could the city file, but a group of creditors could also file, and could actually do it separately[.]")

[52] *See Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part II, 740 (Jan., Feb., 1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 4, doc. 28 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (testimony of Benjamin Weintraub, Esq. of the New York Bar):

> My recollection is that an earlier provision of chapter XI contained a provision that a petition filed under chapter XI had to have a plan, at the same time that you filed a petition. And very often, what happened was that debtors would file plans that they knew would be unacceptable to creditors knowing full well that later on, the plan would be subject to negotiation with their creditors.

Id.; *see also* Rosen & Rodriguez, *supra* note 31, at 350 (stating purpose of chapter 11 of the Bankruptcy Act was to allow honest debtor to protect business).

[53] *See Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the*

The Commercial Law League of America,[55] while struggling with the problem of drafting a single chapter[56] in its official report,[57] preferred the ideas presented in

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Comm. on the Judiciary, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part II, 738 (Jan., Feb., 1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 4, doc. 28 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (statement of Benjamin Weintraub, Esq. of the New York Bar, analyzing legislation adopted by the New York State Legislature) The following was the proposal for the section regarding filing of a plan:

> Sec. 406, Filing of a Plan*:*
>
> The petitioner shall file a plan with its petition or thereafter, but not later than a time fixed by the court. If the petitioner has not filed a plan prior to the first date set for the meeting of creditors, the court, at the meeting or thereafter, shall fix a time for filing a plan and may extend such filing date or dates in its discretion.

Id. Although Weintraub references a different subject, in regards to the sovereignty of municipalities and their inability to be adjudged as bankrupt, it seems that this proposal alludes to the possibility of multiple extensions of the petitioner's right to propose a plan, because the intent is to allow only the petitioner the right to file a plan. This highly compelling notion may find support in business bankruptcies where the petitioner, whether a debtor in a voluntary bankruptcy or an interested party in an involuntary bankruptcy filing, should have an exclusive right to propose a plan. *See generally* Stephen J. Luben, *The Direct Costs of Corporate Reorganization: An Empirical Examination of Professional Fees in Large Chapter 11 Cases,* 74 AM. BANKR. L.J. 509 (2000) (discussing corporate chapter 11 procedure and its expenses).

[54] *See Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part II, 744 (Jan., Feb., 1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 4, doc. 28 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (statement of Benjamin Weintraub, Esq. of the New York Bar):

> Similar to rule 9-3 and form 9-F1, a plan may be filed at the first meeting or at such time or times as the court may require. I certainly would not hamstring the court as to the timing of 90 days to file a plan or any limited time. There is no such provision in chapters X and XI today, and the court has wide discretion to determine when a plan should be filed.

Id.; *see also In re* Fernandez, 97 B.R. 262, 263 (Bankr. E.D.N.C. 1989) ("There is no good reason why most consumer chapter 11 cases should not be put on a fast track. After all, chapter 13 debtors must file their plans with the petition or within 15 days thereafter."). *See generally* Lawrence P. King, *The History and Development of the Bankruptcy Rules,* 70 AM. BANKR. L.J. 217 (1996) (recounting history and development of bankruptcy rules and procedure).

[55] Information about the Commercial Law League of America is available at http://www.clla.org/about.html. "Founded in 1895, the CLLA has nearly 5,000 members in the United States as well as in dozens of countries abroad. Its membership consists of attorneys who concentrate their practice in commercial law, collections, the Uniform Commercial Code and bankruptcy and reorganization." *Id*.; *see* Steven L. Harris, *Rules for Interpreting Contracts: A Cautionary Note*, 62 LA. L. REV. 1279, 1280 n.2 (2002) (describing Commercial Law League of America as a trade organization that promotes interests of unsecured creditors); *see also* Pearl Goldman, *A Guide to Researching Bankruptcy Law on the Internet*, 8 J. BANKR. L. & PRAC. 449, 477 (1999) (listing resources and information available through the CLLA).

[56] *See Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part III, 1548 (Mar. 5, 1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 5, doc. 29 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (statement of Louis W. Levit, Chairman, Special Committee of the Judiciary, Commercial Law League of America):

> We just find that the differences between the large, publicly held entities and the small - the corner grocery store, or even the chain of grocery stores, or the entity which may have debts in the hundreds of thousands, or millions of dollars, but which has basically a simple capital structure involving primarily a need for adjustment of the unsecured debts, the differences in the applicable procedures, and the appropriate procedures are so great that if you try to write one chapter, you are going to end up with what is called one chapter, but is two separate subchapters. There have to be at least two different types of proceedings available.
>
> We feel that the Judges' proposal of a separate chapter VII and chapter VIII comes

the Judges' Bill.[58] In its report, the League proposed and drafted an outline of the debtor's exclusive right to propose a plan of reorganization within the period of time prescribed by the Code.[59] It also proposed an option to extend the filing period for good cause shown[60] and an opportunity for creditors to propose their own plan.[61]

> close to preserving all the advantages with the fewest disadvantages. It isn't perfect, there will be problems. Courts will have problems and Congress will have problems as they arise, but we think at this point that the best system is that suggested by the Judges of two separate chapters; one that is something like the present chapter X, but far less rigid; and the other, which is something like the present chapter XI, but gives the court somewhat more power over secured creditors than does the present chapter XI.

Id.; *see* Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of* 1978, 96 MICH. L. REV. 47, 108 (1997) (discussing debate over whether to treat large, publicly traded corporations same as small businesses); *see also* Lynn M. LoPucki et al., *ABI Roundtable – Judicial Perspectives on the Reform Act of 1994*, AM. BANKR. INST. L.J. Feb. 1995, 1995 ABI JNL. LEXIS 203, *27–28 (discussing debate over whether to provide differing treatment to large corporations versus small businesses in bankruptcy proceedings).

[57] *See generally* Louis W. Levit, *Report of the Bankruptcy Committee of the Commercial Law League of America on Proposed Revisions of the Bankruptcy* Act, 80 COM. L.J. 188 (1975) (providing an official report of Commercial Law League of America).

[58] *See Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part III, 1541 (Mar. 5, 1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 5, doc. 29 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (statement of Louis W. Levit, Chairman, Special Committee of the Judiciary, Commercial Law League of America):

> Subsequently after struggling with the problem of drafting a single Chapter containing the desired safeguard, and after examining the alternative proposed by the judges, the Committee concluded that the difference between the needs to be met by, and the type of procedures applicable to, the different types of debtors were such that adequate safeguards could not feasibly be written into a combined chapter. Accordingly, the Executive Committee unanimously voted to reconsider its original position and to recommend two separate chapters.

Id.

[59] *See supra* note 56.

[60] *See Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part III, 1545 (Feb., Mar., 1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 5, doc. 29 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (statement of Louis W. Levit, Chairman, Special Committee of the Judiciary, Commercial Law League of America):

> 9. Creditors in Chapter VIII cases should be authorized to propose plans if and only if the debtor fails or refuses to file a plan within a specified time period prescribed by the Act, or by general bankruptcy rules, or within such extended period as may be allowed by the court for good cause shown; or if the court finds and determines that there is no possibility of any plan proposed by the debtor being confirmed. If creditors refuse to accept a proposed plan or if confirmation of a proposed plan is denied, the court should fix a time within which creditors may propose a plan.

Id.; *see also* Julia Patterson Forrester, *Bankruptcy Takings*, 51 FLA. L. REV. 851, 893 n.303 (1999) (noting Congress addressed consequences of bankruptcy limitations on secured creditors' rights).

[61] *See Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part III, 1548 (Mar. 5, 1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 5, doc. 29 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (statement of Louis W. Levit, Chairman, Special Committee of the Judiciary, Commercial Law League of America):

> We feel particularly strongly that in what I call the chapter XI type case, although we feel creditors should have the right to propose a plan - and the Judges bill does not give them that right - it should be severely limited to those situations where the debtor has

The American Life Insurance Association[62] supported the basic goals of both bills.[63] It supported a single chapter "fast track" rehabilitation proceeding,[64] composed of chapters X and XI,[65] providing debtors with the right to propose a

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> attempted but just cannot come up with a plan, or has abandoned any idea of coming up with a plan; and where the creditors, under present law, have no alternative than to let the company be liquidated just because the debtor doesn't want to reorganize.
>
> I think in that situation the creditors should have a chance to try to reorganize where the debtor himself has the stock, or equity interest which must be dealt with by the court. We think it should be limited to those situations.
>
> We recognize that in large public corporations all parties in interest should have the right, ultimately, to propose plans and have them considered.

Id.

[62] The American Life Insurance Association (ALIA) was a predecessor of the American Council of Life Insurance (ACLI). *See* Robert M. Zinman, *Under the Spreading Bankruptcy: Subordination and the Codes*, 2 AM. BANKR. INST. L. REV. 293, 302 n.54 (1994).

[63] *See Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part III, 1582 (Mar. 8, 1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 5, doc. 29 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (statement of John J. Creedon Chairman, Subcommittee on Federal Bankruptcy Legislation, American Life Insurance Association):

> ALIA supports generally the basic goals of both bills because they are designed to achieve needed reforms in bankruptcy, up-date the present law and effect savings of time and expense in proceedings, whether for liquidating, arrangements or reorganizations.
>
> ALIA is opposed, however, to some provisions in either bill as hereinafter indicated ; in some areas it prefers the treatment given by the Commission's bill and in others the approach indicated in the Judges' bill, while in some respects ALIA would prefer an approach different from that in either bill.

Id.

[64] *See id*. at 1603:

> The "fast track " rehabilitation proceeding wherein the debtor can get in and out of court relatively quickly under a comparatively simple and inexpensive arrangement which adjusts or extends the debtor's indebtedness, subject to approval by each class of affected creditors, should be preserved not only because of its speed, simplicity and economy but also because it offers a means of extending and consummating attempts to reach negotiated out-of-court settlements which should be encouraged. Where recalcitrant hold-outs unreasonably hold up an out-of-court settlement, Chapter XI provides a means of bringing dissenters into line. It has been successful in this respect, partly because acceptances of the plan obtained in the out-of-court negotiations can be taken into account in determining whether the plan has received the necessary acceptances under Chapter XI (§ 336(4) of the present Act). The Judges' bill contains this feature in § 8-303 but the Commission's bill may possibly need clarification on this point and in other areas.

Id.; *see also* Posner, *supra* note 56, at 109 (discussing creditors refrained from filing under chapter X and instead opted for chapter XI based on belief "the formal requirements of Chapter X produced delay, during which costs mounted and assets dwindled, without creating any offsetting of benefits.").

[65] *See Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part III, 1631, (Mar. 8, 1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 5, doc. 29 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (statement of John J. Creedon Chairman, Subcommittee on Federal Bankruptcy Legislation, American Life Insurance Association):

> Our next point relates to combining chapters X and XI into one chapter, VII. We have really no strong position about having chapters X and XI in one chapter or two chapters; we do feel it is important, however, to keep the fast track procedure now available under chapter XI.
>
> A chapter XI case is a much more expeditious procedure. It is less expensive from a

plan, but also giving creditors the right to propose their own plan[66] or the trustee to

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> lender's standpoint. It is very desirable to keep that fast track procedure. As we read the Commission's bill, chapter VII would have more elements of the present chapter X in it.
>
> The present chapter X is a time consuming, costly and a wasteful undertaking. Generally speaking, a life insurance company lender would rather have his debtor involved in chapter XI than chapter X.

Id.; *see also* Posner, *supra* note 56, at 114 (discussing debate over whether chapter X and chapter XI should be consolidated).

[66] *See Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part III, 1603–04, (Mar. 8, 1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 5, doc. 29 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (statement of John J. Creedon, Chairman, Subcomm. on Fed. Bankr. Legis., Am. Life Ins. Ass'n):

> The various benefits of the "fast track" proceeding, however, should not be achieved by simply allowing the debtor virtually to hold a gun against the heads of creditors. Testimony submitted to the Senate Subcommittee on Improvement in Judicial Machinery has indicated that debtors' plan which appeared unreasonable and unfair have sometimes been approved simply because the debtor enjoyed an overwhelming advantage in bargaining power over the creditors. (Record of Proceedings, April 29, pp.522-5, Proceedings of the Subcommittee on Improvement in Judicial Machinery of the Senate Judiciary Committee).
>
> Only the debtor can initiate a Chapter XI case, file a plan and have ready access to records needed to properly assess the plan. The creditors' committee can not get expenses reimbursed if the debtor's plan is not confirmed. The creditors can effectively attack the plan as unfair merely because it gives them 10 cents on the dollar from moneys received from a third part buying the assets while the controlling stockholder walks off with most of the money received, so long as the creditors receive more than available in a liquidation. The creditors generally have no alternative course to pursue (other than a possible liquidation which debtors often use as a threat) because Chapter X is not available unless it can be shown the debtor cannot be rehabilitated under Chapter XI.
>
> ALIA agrees therefore with the objectives of the Commission's bill which would eliminate some of the overwhelming advantages given debtors by allowing creditors also to file the petition and to file the plan for adjustment or extension of the debtor's debts. However, ALIA recommends adoption of the National Bankruptcy Conference's proposal of giving the debtor an exclusive right to file a plan for a limited period of time after which the creditors would also be permitted to file a plan. One way of assuring speed is to limit the number of plans to one if possible. Admittedly, a plan filed by the debtor may not give the creditors as much as they would require in a plan they might file. But if the time available to the debtor to come up with an acceptable arrangement is limited, the debtor may very well go much further in the direction of fairness and reasonableness than he might if he alone could propose the plan.

Id.; *see also Bankruptcy Act Revision: Hearing Before Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary*, S., 94th Cong., 1st sess., on S. 235 and S. 236, Part II, 648 (Oct. 30, 1975), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 10, doc. 36 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (recommendations of the American Life Insurance Association) Note the similarities to the statement of John J. Creedon above:

> ALIA agrees therefore with the objectives of the Commission's bill which would eliminate some of the overwhelming advantages given debtors by allowing creditors also to file the petition and to file the plan for adjustment or extension of the debtor's debts. However, ALIA recommends adoption of the National Bankruptcy Conference's proposal of giving the debtor an exclusive right to file a plan for a limited period of time after which the creditors would also be permitted to file a plan. One way of assuring speed is to limit the number of plans to one if possible. Admittedly, a plan filed by the debtor may not give the creditors as much as they would require m a plan they might file. But if the time available to the debtor to come up with an acceptable

propose a plan, or the creditors and other interested parties together to file a plan of reorganization, "which could provide for a merger of the debtor with one or more other railroads."[67]

The *Subcommittee on Improvements in Judiciary Machinery of the Committee on the Judiciary* considered some views on the issue of debtor's exclusivity, including: (a) the extent of the court's discretion;[68] (b) exclusivity as a debtor's

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> arrangement is limited, the debtor may very well go much further in the direction of fairness and reasonableness than he might if he alone could propose the plan.

Id.

[67] *Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part III, 1616, (Mar. 8, 1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 5, doc. 29 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (statement of John J. Creedon, Chairman, Subcomm. on Fed. Bankr. Legis., Am. Life Ins. Ass'n, relaying recommendation of ALIA):

> The ALIA recommends that: The new Act include a provision which would specifically authorize the trustee, the creditors and other interested parties to file a plan of reorganization which contemplates a merger of the debtor with one or more other railroads.
>
> *Discussion*
>
> § 9-101 of the Commission's bill incorporates by reference into new Chapter IX, § 7-304 which deals with the question of who may file a reorganization plan. § 7-304 permits the trustee, the debtor, any creditor, an indenture trustee, an equity security holder and others to file a plan.
>
> The Judges' bill follows the same pattern. (§ 10-101 and § 7-302).
>
> Unfortunately, neither bill specifically authorizes the trustee, creditors, indenture trustees and other interested parties to initiate a reorganization plan providing for a merger of the debtor with any other railroad. In the case of *St. Joe Paper Co. v. Atlantic Coast Line R.R.*, the Supreme Court held that in order for a § 77 plan to provide for a merger the plan must be initiated by those who "wield the corporate merger power" that is, the directors and stockholders. 347 U.S. 298, 1954.
>
> As far back as 1958, a committee of the American Bar Association recommended that § 77 be amended so as to authorize the trustee to file a plan providing for a merger of a debtor railroad with another railroad in order to solve the problem posed by the *St. Joe Paper* case, but no such amendment has been enacted.
>
> ALIA believes that the problem of the *St. Joe Paper* case should be clearly settled in the new Act by including a provision that would specifically authorize interested parties, including the trustee and creditors, to file a reorganization plan *which could provide for the merger of the debtor with one or more other railroads*.

Id. (emphasis added).

[68] *Bankruptcy Act Revision: Hearing Before Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary*, S., 94th Cong., 1st sess., on S. 235 and S. 236, Part II, 556 (Oct. 1, 1975), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 10, doc. 36 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (Memorandum Expressing the Views of the Dallas Bar Association's Section of Bankruptcy and Commercial Law on the Proposed Bankruptcy Acts):

> *B. Debtor's exclusive right to file plan of arrangement*
>
> In order to encourage effective bargaining between debtors and creditors, and realizing that the affirmative vote of creditors is required before any proposed plan of arrangement may be confirmed, the debtor should have the exclusive right to file a plan of arrangement for such period of time as the Bankruptcy Court, in its discretion, may permit, but in any event not less than 180 days alter the first date set for the first meeting of creditors. Thereafter, the Court may (i) permit others to file plans of arrangement, (ii) adjudicate the Debtor a bankrupt, or (iii) take such other appropriate action as the Bankruptcy Act may permit.
>
> *Commission's bill*. - Section 7-304(b) is disapproved.
>
> *Judges' bill* - Section 8-302 is approved, subject to inclusion of additional language

protection in a voluntary reorganization;[69] (c) arbitrariness of the estimation of the exclusivity period;[70] and (d) balancing power of exclusivity.[71] The Subcommittee

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> permitting others than the debtor to file a plan upon order of the Bankruptcy Court but no sooner than 180 days after the first meeting of creditors.

Id.

[69] *Bankruptcy Act Revision: Hearing Before Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary*, S., 94th Cong., 1st sess., on S. 235 and S. 236, Part II, 624 (Oct. 8, 1975), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 10, doc. 36 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (California State Bar: Committee on Relations of Debtor and Creditor):

> G. WHO MAY FILE A PLAN
>
> H.R. 31, § 7-304 and H.R. 32, § 7-302. both provide for a plan to be filed by any party in interest. Under Chapter VIII, § 8-302, of H. R. 32, only the debtor may file a plan.
>
> The Committee believes that it is generally a good idea to enable any party in interest to propose a plan of arrangement or reorganization. Restricting the filing of a plan to a debtor only might not produce the best results for creditors when their only alternative is that of liquidation. However, giving any party in interest an opportunity to file a plan in any case might minimize the incentive to a debtor to file a chapter proceeding timely; it might also create opportunities for competitors to take advantage of the debtor. Thus the Committee believes that some protection in voluntary reorganization proceedings should be afforded to the debtor, perhaps by recognizing the exclusivity of its right to file a plan for a brief period of time, such as 120 days. The ability to file a plan might also be expanded to any party in interest at any time in a publicly held debtor proceeding.
>
> Of course, in involuntary reorganization proceedings, any party in interest should have the right to file a plan.

Id.

[70] *Bankruptcy Act Revision: Hearing Before Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary*, S., 94th Cong., 1st sess., on S. 235 and S. 236, Part II, 992–93 (Nov. 18, 1975), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 10, doc. 36 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (statement of Lawrence P. King, Associate dean and Professor of Law, New York University Law School, New York City, and statement of Gerry Smith, Practicing Attorney, Phoenix, Ariz.):

> Mr. Smith: The American Bar Association committee has suggested there be a 90-day period within which a plan can be filed, and 60 days thereafter within which to obtain confirmation. I have no objection with that period of time.
>
> Mr. King: The period fixed by the National Bankruptcy Conference—obviously, any period that would be fixed is purely arbitrary, anyway—is very similar to that. It is a period of 30 days after the first date set for the first meeting of creditors, which can be a period, therefore, of something like 60 or 70 days after the filing of a petition. So, that is very similar. But I think that is just the mechanics, really, that anybody is talking about. Any period that would be fixed, I suggest, would be purely arbitrary anyway.
>
> Senator Burdick: I know it is mechanics, but we have to put a figure down in the bill.
>
> Mr. King: Well, there is a suggestion specifically made by the National Bankruptcy Conference in the report that you have.

Id.

[71] *Bankruptcy Act Revision: Hearing Before Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary*, S., 95th Cong., 1st sess., on S. 2266 and H.R. 8200, Part II, 846–47 (Dec. 1, 1977), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 15, doc. 47B (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (statement of Leon Forman, Attorney, Philadelphia):

> Mr. Fiedler: . . . The previous witness, Mr. Creel, spoke in opposition to let some one other than the debtor propose a plan in Chapter XI. I believe the National Bankruptcy Conference has a different position. Could somebody argue that point?
>
> Mr. Foreman: You have to take a step backward. We have combined chapters X, Xl, and XII. Chapter X today the trustee proposes the plan. After he proposes a plan then others can submit other plans.

summarized its view in its report to Congress.[72]

The *Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary* reviewed more proposals and ideas including: (a) duration of the debtor's exclusive right to propose a plan;[73] (b) the necessity of equal footing between the

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> In chapter XI and XII only the debtor, that is in XII there is a possibility for creditors to submit a plan. But primarily it is the debtor that submits a plan.
>
> In H.R. 8200 - and I think your bill is substantially similar - where there is no trustee the debtor is in possession and the debtor has an exclusive period which is initially 4 months and then 2 more and that is for submitting the plan. If he doesn't do that within a period or an extension of that period, then all the parties can submit a plan.
>
> Where a trustee is appointed, then he does not have the exclusive rights. He can submit a plan and others can submit a plan.
>
> I think the problem that we were trying to correct was that in chapter XI where the bulk of cases are today—overwhelmingly— permitting only the debtor to submit a plan hampers reorganization where a debtor is unable to submit a plan. He just does not have the wherewithal to finance a plan or the creditors are unable to negotiate a plan with him. Chapter XI is basically a negotiating type of proceeding.
>
> If the negotiations are not successful, then the only alternative is adjudication because no one else can submit a plan.
>
> This change permits keeping a case in reorganization as long as reorganization is feasible by having others submit a plan. A majority of us just felt that it is not fair to let the debtor have all of the leverage. He can say, "Here is my reorganization. If you do not like it and your alternative is liquidation.
>
> If it is a viable reorganizable business, then creditors ought to be able to save it too if they have a stake in it. The balancing goes on by giving the debtor a certain exclusive period in the typical chapter case.

Id.

[72] H.R. Rep. No. 95-595, at 406 (Sept. 8, 1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6362 (Report of the Committee on the Judiciary together with a separate supplemental and separate additional views):

> *1121. Who may propose a plan*
>
> Subsection (a) permits the debtor to file a reorganization plan with a petition commencing a voluntary case or at anytime during a voluntarv or involuntary case.
>
> Subsection (b) gives the debtor the exclusive right to file a plan during the first 120 days of the case. There are exceptions, however, enumerated in subsections (c) and (d). If a trustee has been appointed, if the debtor does not meet the 120-day deadline, or if the debtor does meet that deadline but fails to obtain the required consent within 180 days after the filing of the petition, then any party in interest may propose a plan. This includes the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, and an indenture trustee. The list is not exhaustive. Finally, subsection (d) permits the court, for cause, to increase or reduce the 120-day and 180-day periods specified. Cause might include an unusually large or unusually small case, delay by the debtor, or recalcitrance among creditors.

Id.

[73] *Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part III, 1655 (Mar. 12, 1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 5, doc. 29 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (statement of L. E. Creel, III, Representing the Views of the Dallas Bar Ass'n, discussing arrangements and reorganizations):

> *B. Debtor's exclusive right to file plan of arrangement –*
>
> In order to encourage effective bargaining `between debtors and creditors, and realizing that the affirmative vote of creditors is required before any proposed plan of arrangement may be confirmed, the debtor should have the exclusive right to file a plan of arrangement for such period of time as the Bankruptcy Court, in its discretion, may permit, but in any event not less than 180days after the first date set for the first meeting of creditors. Thereafter, the Court may (i) permit others to file plans of

debtor and creditors;[74] (c) a proposal for statutory exclusivity of 120 days;[75] (d)

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arrangement, (ii) adjudicate the Debtor a bankrupt, or (iii) take such other appropriate action as the Bankruptcy Act may permit.

Commission's bill. - Section 7-304 (b) is disapproved.

Judges' bill. - Section 8-302 is approved, subject to inclusion of additional language permitting others than the debtor to file a plan upon order of the Bankruptcy Court, but no sooner than 180 days after the first meeting of creditors.

Id.

[74] *Id*. at 1661–62 (Mar. 12, 1976) (testimony of L. E. Creel, III, Bankr. and Commercial Law Section, Dallas Bar Ass'n):

> You gentlemen well know, chapter XI is motivated by the business itself; it is only because management is able to end up with something that they are interested in going through the pain and turmoil of rehabilitating, trying to rehabilitate a problem business chapter X is trustee motivated, creditor motivated; the motivation are different, therefore the chapters should be different because the goals are different.
>
> If you eliminate management motivation, you essentially eliminate the chapter XI approach, and that is not practical.
>
> The second point in the arrangement/reorganization area which I feel is a most important one, not only because of its particularity, but because of the general mood of the bill. It is difficult in any business reorganization to make all of the problems go away. It is very difficult to get people with different views to sit down at the bargaining table and spend these long hours, long, late nights, hammering out solutions to complicated problems. That can only be done if two things are available. One is absolute flexibility (there should be no rules, no limits); the other is that both sides in the bargaining process have to have equal strength. If one side has more strength than the other, you know the result; you are wasting your time because it is not going to work. Therefore, the debtor should have the exclusive right to file a plan; the creditor the exclusive right to vote on that plan. Only when both sides have the same power, only when both sides have the ability to put the company effectively into liquidation can you have a fair, bargained, negotiated result.

Id.

[75] *Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part III, 1754–1755 (Mar. 12, 1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 5, doc. 29 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (statement of Robert J. Grimming on Behalf of the American Bankers Association):

> Essential to the preservation of the Chapter XI type proceeding for the small debtor, where the rights of publicly held securities are not to be materially and adversely affected, is the debtor's exclusive right, initially and for a limited period of time, to file a plan. After the expiration of such period, creditors, equity security holders, committees of either or an indenture trustee should be permitted to file a plan.
>
> We, accordingly, recommend that § 7-304 of the Commission's bill and § 7-301 of the Judges' bill should provide that under the circumstances set forth above, the debtor should have the exclusive right to file a plan within 120 days after the first meeting of creditors provided under the Judges' bill, which plan must be confirmed within 90 days after it is filed, with discretion in the judge, for good cause shown, to extend either of the said periods. After the expiration of the said period, any party in interest set forth in § 7-304 (§ 7-301) could file a plan. Such modification to the sections as drawn would:
>
> (a) protect against the debtor's exacting an unfair advantage by virtue of having the exclusive right to file a plan as opposed to the alternative of liquidation; and
>
> (b) protect against the possibility of a debtor being outbid by a creditor-competitor at the initial filing of a plan, if the right to file were open to all parties in interest at the inception of the proceeding.

Id.; *see also* Nelan, *supra* note 4, at 466 ("The National Bankruptcy Conference recommended the adoption of a limited period of debtor exclusivity as a way to help assure speed, and yet, motivate debtors to be more fair and reasonable then they might be if given unlimited exclusivity.").

starting the exclusivity time period from the moment of filing the petition and giving additional 60 days for approval of the plan;[76] (e) outlining the reason why creditors should be permitted to file a plan[77] and the effect on spreading of a control;[78] (f) possibility of misuse of the advantages by the debtor;[79] (g) the

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[76] *See Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part III, 1874–76 (Mar. 29, 1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 5, doc. 29 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (statement of Harvey R. Miller, William J Rochelle, Jr., & J. Ronald Trost on Behalf of the National Bankruptcy Conference on Business Reorganizations). *See infra* App. E for an excerpt of this statement.

[77] *Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part III, 1898–99, (Mar. 29, 1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 5, doc. 29 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (testimony of Harvey R. Miller, Esq., New York, N.Y., on Behalf of the National Bankruptcy Conference):

> The plan proposal is another very integral part of reorganization. In chapter XI, where we do have the large, publicly owned, publicly financed corporations, only the debtor may propose a plan. In contrast, under chapters X and XII, there is the ability on the part of creditors and parties in interest to propose a plan of reorganization.
>
> In the actual operation of a chapter XI case, the so-called leverage is with the debtor in the proposal of a plan. As the chapter XI case progresses and becomes a proceeding of the length of a year or so, there is much more leverage on the part of the debtor to propose a plan, and the only alternatives available to the creditors, essentially, are to confront an adjudication and possible liquidation in an ordinary bankruptcy with the loss of all going concern values, and possibly very minimum dividends, or to accept the plan as proposed. This happens very often, certainly in the New York area, where the creditors committee essentially says, "Well, since this is better than liquidation, we might as well take the proverbial 10 cents on the dollar."
>
> If creditors had the opportunity to propose a plan, you might have plans which would provide a substantially greater return to creditors, more creditor control, and more public investor control.
>
> What a consolidated chapter essentially does is to provide a democratization of the proceedings. There is more creditor participation and there is more creditor ability to get the best possible reorganization plan for the distressed business entity, and thereby create a viable business concern.

Id.

[78] *Id*. at 1900 (testimony of Harvey R. Miller, Esq., New York, N.Y., on Behalf of the National Bankruptcy Conference):

> Essentially, I think, the bottom line of a consolidated chapter is that there is a spreading of control; all of the leverage is not in the debtor's camp under a consolidated chapter. The creditor is going to have a greater voice in what occurs. The ability of both the debtor and creditors to propose a plan, as I said, is a major element which we believe should be in the reorganization process in one consolidated chapter.

Id.

[79] *Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part III, 1910–1915 (Mar. 29, 1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 5, doc. 29 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (testimonies of Judge Arthur Moller, of Houston, Tex., and Judge Herbert Katz, of San Diego, Calif. on Behalf of the National Conference of Bankruptcy Judges, and Testimonies of William Rochelle, Esq., Dallas, Tex., Harvey R. Miller, Esq., New York, N.Y., and J. Ronald Trost, Esq., Los Angeles, Calif., on Behalf of the National Bankruptcy Conference). *See infra* App. F for an excerpt of this testimony.

desirability of having creditors file their own plan;[80] (h) principals that should be embodied into the new chapter;[81] (i) effect of the appointment of the trustee on the exclusivity right;[82] (j) proposal for a limited time of exclusivity for a debtor;[83] (k)

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[80] *Id*. at 1923–25 (Mar. 29, 1976). *See* App. G for an excerpt of this testimony.

[81] *See Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part IV, 2175 (Apr. 5, 1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 6, doc. 30 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (report of Sec. & Exch. Comm'n on Proposed Bankr. Legislation, H.R. 31–32):

> 3. Suggested Addition to Bankruptcy Commission Bill and Judges Bell
>
> At the present time, Section 146(3) of Chapter X contains a threshold requirement to a reorganization proceeding. The section requires that a Chapter X petition be filed in "good faith" which has been interpreted to mean, *inter alia*, that it is not unreasonable to expect that a reorganization is possible. The Supreme Court has pointed out 'that Chapters X and XI were not designed to prolong—without good reason and at the expense of the investing public—the corporate life of every debtor suffering from terminal financial ills.'
>
> Neither of the proposed bills retains this requirement. We believe that a similar provision, that it not be unreasonable to expect that a successful reorganization can occur, should be included in whichever bill is enacted.

Id. (internal citation and footnotes omitted).

[82] *See Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part IV, 2471 (Apr. 12, 1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 6, doc. 30 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (statement of Homer Kripke, Professor of Corporate Law, New York University School of Law):

> As to § 7-304, I agree with the determinations of the National Bankruptcy Conference at its last meeting that the debtor should not have the exclusive right to present a plan for any period if the court has determined to appoint a trustee. I also believe, contrary to the NBC's determination, that if the debtor has public *senior* security holders, the debtor should not have the exclusive right to present a plan for any period, in order to avoid the pressures on public senior security holders that this monopoly of the debtor would give the debtor. I see no reason why the debtor should not he able to present a plan if it has public residual security holders, because this, of course, is what debtors have been doing in a number of Chapter XI proceedings with public equity and non-public debt, and — as I have argued in this letter — there is little likelihood that a plan presented by the debtor will unfairly cut down public equity holders.

Id.

[83] *Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part IV, 2475–77 (Apr. 12, 1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 6, doc. 30 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (statement of Leonard M. Rosen, Attorney, New York City):

> The needed revisions and reforms would move each of Chapters X and XI to a middle ground where they would become indistinguishable. Therefore, the concept of a single Chapter which is more flexible than present Chapter X, but more protective of public interests than present Chapter XI, clearly becomes the path to follow. The Commission has followed this path in its combined Chapter VII and I would for the most part concur in the choices made by the Commission of the differing Chapter X and XI provisions, (as modified by proposals of the National Bankruptcy Conference). The more desirable choices (following the enumeration of distinctions set forth on page 4 above) appear to be obvious in most cases:
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> . . . .

needs for modification of debtor's exclusivity right;[84] (l) right to propose a plan in railroad bankruptcies;[85] (m) procedure for filing the plan;[86] (n) an option for pre-

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> 7. The debtor should have the exclusive right to propose a plan only for a limited time, after which creditors and other parties in interest should also have the right.
> . . . .
> In general, my philosophy would be to keep the combined Chapter as simple and as flexible as possible, so that in most cases the debtor and its creditors will have no greater difficulty in negotiating, accepting and confirming a plan than they would have had in Chapter XI. However, in those instances in which a substantial public interest is involved, additional protection would be afforded to that interest. This is consistent with the Commission's approach in Chapter VII which (as noted above) triggers special safeguards if a class of securities held by 300 or more persons is present. (This criteria is apparently derived from Section 15(d) of the Securities Exchange Act of 1934 in which it is utilized to determine whether a company which had a public offering need no longer comply with the filing requirements of Section 13 of said Act.) In the absence of any demonstration of greater cogency for any different number, the Commission's selection of a class held by 300 or more persons appears reasonable.

Id.

[84] *See Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part IV, 2479–82 (Apr. 12, 1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 6, doc. 30 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (testimony of Leonard M. Rosen, Attorney, New York City):

> Mr. ROSEN: For instance, a needed reform in XI, is the ability of the creditors eventually to propose a plan. In XI now they are locked into the debtor being the only person to propose the plan. This has led to problems and abuse in some XI's. The creditors are left with the problem that they either take the deal that the debtor proposes or else face the alternative of a liquidation or a X, neither of which the creditors have generally found desirable. I think the concept of having the creditors be able to propose a plan is certainly a desirable one to bring into XI's.
> . . . .
> Mr. PARKER: The NBC proposed a period for the debtor of 120 days to propose a plan and an additional 60 days to solicit acceptances. Does that period of time meet with your approval?
> Professor KRIPKE: Yes; it does. However, in my prepared statement, I took the position that if you have public senior securityholders, they should not be at the mercy of the debtors suggesting a plan.
> Mr. ROSEN: My position is in accord with the National Bankruptcy Conference. I think it is a reasonable compromise with respect to the problem. My experience has been that the problem of the debtor only being able to propose a plan is one which can be overcome, providing the creditors can eventually propose one. I think the argument that the advocates of XI have made, which is that you would immediately throw the proceeding up to an auction if you did not give the debtor the exclusive right for some period of time, is persuasive. I feel this is a reasonable compromise.

Id.

[85] *See Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part IV, 2578–88 (Apr. 30, 1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 6, doc. 30 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (statement of Hon. George M. Stafford, Chairman, Interstate Commerce Commission):

> Concerning the question of delay in reorganization cases, the fact is that undue time is consumed in court litigation years before the ICC gets the case. While section 77(d) of the Bankruptcy Act requires that the debtor submit a plan of reorganization within six months of the entry of the judge's order approving the bankruptcy petition as properly filed, the court may in its discretion, and usually does, grant extensions of time. The real delay in bankruptcy proceedings is in the length of time taken to get a plan of reorganization before the ICC, not in the length of time taken by the ICC to act

on the plan or to satisfy its other obligations under the Act.

The most obvious and recent examples of this delay will be found in the reorganization proceedings of the railroads in the Northeast and Midwest region of the country which were ultimately reorganized under the provisions of the Regional Rail Reorganization Act of 1973. Reorganization petitions for these carriers were filed as early as 1967, for the Central Railroad Company of New Jersey; in 1970 for the Penn Central Transportation Co.; in 1970 for the Lehigh Valley; in 1971 for the Reading; in 1972 for the Erie Lackawanna; and in 1973 for the Ann Arbor. Of these, only in the Penn Central proceeding was a reorganization plan ever filed, and in that case it took over three years to produce what was really a plan of liquidation which was rejected by the Commission. The Chicago, Rock Island and Pacific Railroad has been in reorganization for over a year, and no reorganization plan has as yet been filed. In an earlier Rock Island bankruptcy, incidentally, during the early 1930's, it was over three years following the filing of the petition before a plan was submitted.

. . . .

Specifically, we propose that the process for the submission and approval of the reorganization plan be substantially revised. First, something must be done to eliminate the long periods of time during which all the parties sit back and wait for someone else to come up with a plan while neither court nor Commission can compel action. We suggest requiring the trustee, rather than the debtor, to file a plan of reorganization within six months of approval of the petition. This would solve the problem of having the debtor, which is invariably oriented to the equity interests, having the least rank, delay development of a plan or come up with a totally unrealistic plan from the standpoint of the public and the creditors. FN

FN: We note that section 7-304 of H.R. 31 does place the primary requirement for development of a plan on the trustee and we support this change from section 77(d), which places this requirement of the debtor.

There should still he an opportunity for extensions, but the statute should make it clear that such extensions will be granted only for good cause specifically shown. Moreover, the Commission should have the responsibility for granting the extension since the Commission, with its greater familiarity with the subject matter, is best able to determine whether the complexity of the issues involved warrant extensions.

Id.

[86] *See Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part IV, 2621–39 (May 3, 1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 6, doc. 30 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (statement of R. Lawrence McCaffrey, Jr., Chief Counsel Designate, Federal Railroad Administration):

A. Filing

Section 77(d) of the Bankruptcy Act presently requires that the plan of reorganization be filed by the debtor with the court and the Commission within 6months after approval of the petition. In practice, it is rarely, if ever, filed that early. The court has power to grant extensions of time and does so liberally. With the consent of the Commission, plans may also be filed by the trustee, creditors representing at least 10% of any class, stockholders representing at least 10% of any class, or any party in interest.

H.R. 31, section 7-304(a) and H.R. 32, section 7-30 (a), state that on or before a date set by the court, the trustee, or if there is no trustee, the debtor or a disinterested person designed by the court, must file a plan of reorganization or a report explaining why one cannot be formulated. Under H.R. 31, section 7-304(b) and H.R. 32. section 7-302(b) a creditor, an equity security holder, a creditors' or equity security holders' committee or an indenture trustee may also file a plan. FN.

FN: It should be noted here that although H.R. 31, Chapter 9 (Railroad Reorganization,) incorporates by reference section 7-304 of Chapter 7 (Reorganization) which sets out requirement for filing of a reorganization plan, it does not incorporate section 7-303 which details the provisions a reorganization plan must include. The latter section should likewise be incorporated in Chapter 9 of H.R. 31.

A source of delay under section 77 has been the provision that only the debtor was

packaged plans, erasing the difference between "public" and "private" debtors, and a proposal for different approaches based on whether or not a trustee is appointed;[87] (o) proposals of exclusivity language by the National Bankruptcy Conference.[88]

> required to file a plan of reorganization. Although certain other parties are permitted to file a plan with the consent of the court, they have generally hesitated to file one unless the debtor has already done so.
>
> In practice, the term "debtor" has been construed to mean the trustee and not the insolvent railroad's board of directors. H.R. 31 and H.R. 32 appropriately codify the existing practice by using the word "trustee" instead of "debtor." DOT supports this provision.
>
> As to who else, besides the trustee, should be permitted to file, DOT recommends that the present section 77 requirement that a stockholder or creditor group be substantial (10 percent) be retained. As to such a group, however, leave of court should not be required for filing of a plan.

Id.

[87] *See Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part III, 1938–41 (June 12, 1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 5, doc. 29 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (correspondence dated June 12, 1976, from John Copenhaver, President, National Conference of Bankruptcy Judges and Charles A. Horsky, Chairman, National Bankruptcy Conference to Hon. Don Edwards, Chairman, Subcommittee on Civil and Constitutional Rights, enclosing a memorandum on Business Reorganizations that was proposed and approved by representatives of the National Conference of Bankruptcy Judges and the National Bankruptcy Conference). Part V of that memorandum was in regards to "Filing of Plan" and stated:

> In any case a plan may be filed with the Chapter VII petition or thereafter. (This is presently the law under Chapter XI, but not under Chapter X.)
>
> The issue of who may file a plan does not depend on whether the case involves a "public" or "private" debtor. Rather, the distinction is based on whether a trustee is appointed or a debtor is retained in possession.
>
> A. *When no trustee is appointed,* the debtor shall have the exclusive right for a period of 120 days after the filing of the petition to file a plan. If a plan is filed the debtor shall have an additional 60 days to obtain the requisite acceptances and confirmation. Both the period for filing the plan and the period for obtaining acceptances may be reduced or extended by the court.
>
> B. *Even if a trustee is appointed,* the debtor shall have the exclusive right to file a plan for 120 days and a 60-day period for obtaining acceptances and confirmation. This 120-day period *cannot,* under any circumstances, be extended, but it may be reduced. The 60-day period may be reduced, or it may be extended on good cause shown as to a plan having a reasonable prospect of acceptance and [sic] (emphasis in original).

Id.

[88] *See Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st and 2d sess., on H.R. 31 and H.R. 32, Appendix, 377 (1975), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 7, doc. 31 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (National Bankruptcy Conference, Bankruptcy Act of 1975):

> *Section 7-304. Filing of Plan or Report*
>
> *(a) Filing by Trustee, Debtor, or Disinterested Person.*
>
> On or before the date set by the administrator, the trustee, or if there is no trustee, the debtor or disinterested person designated by the administrator pursuant to section 7—103(b) shall file with the administrator a plan affecting publicly held securities or a report why such a plan cannot be formulated.
>
> *(b) By Others.* The debtor, a creditor, an equity security holder, a creditors' or equity security holders' committee, or an indenture trustee may file a plan with the administrator at any time prior to the date set by the administrator pursuant to subdivision (a) for the filing of a plan or report. *Notwithstanding the foregoing, if no trustee or disinterested person is appointed or designated, no person other than the debtor may file a plan until the expiration of 120 day after the filing of the petition,*

The *Subcommittee on Civil and Constitutional Rights* also reviewed some objections to proposals for one chapter for all bankruptcies: (a) different procedures for arrangements and reorganizations;[89] (b) doubts (objections) about combination

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> *and, if a plan is filed within such period by the debtor, no other person may file a plan until the expiration of 60 days after the filing of the plan. After the expiration of such periods, which may be extended or reduced by the administrator, a person other than the debtor may file a plan unless the debtor's plan has been accepted by the majority required by the Act for confirmation within such period.*
>
> Note—The purpose of the change is to give the debtor, when no trustee is appointed pursuant to § 7-102 or no disinterested person is designated pursuant to § 7-108(b), a period of time during which he has the exclusive right to file a plan and, if one is filed, to obtain acceptances. If the debtor is not retained in possession, a plan can be filed by any party at any time before the deadline fixed by the administrator.

Id. (emphasis in original); *Bankruptcy Act Revision: Hearing Before Subcomm. on Improvements in Judical Machinery of the Comm. on the Judiciary*, S., 94th Cong., 1st sess., on S.235 and S.236, Part II, 365–66 (Apr. 30, 1975), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 10, doc. 36 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (Statement of Lawrence P. King, Associate Dean, New York University Law School, and Consultant to the Bankruptcy Commission):

> Under the Commission's bill there are provisions which permit creditors to file a plan. The National Bankruptcy Conference has approved that principal but with a reservation. The reservation is that there should be some change in drafting so that the debtor should have for a time, and I think the time is something that can be fixed easily enough, should have for a period of time the exclusive ability to file a plan. It is only after that time has expired, and if the court has not granted and extension of that time, that creditors may file a plan. But since this is the debtor's business, and since this is the debtor's property, it should have the exclusive right for a period of time to file a plan."

Id.; *Bankruptcy Act Revision: Hearing Before Subcomm. on Improvements in Judical Machinery of the Comm. on the Judiciary*, S., 94th Cong., 1st sess., on S.235 and S.236, Part II, 1029 (Nov. 18, 1975), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 10, doc. 36 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (prepared statement of the National Bankruptcy Conference):

> *Section 7-804. Filing of Plan or Report*. [Filing by Trustee, Debtor, or Disinterested Person.]
>
> (a) *Filing of Plan Not Affecting Publicly Held Securities. The debtor may file a plan not affecting publicly held securities with his petition or thereafter but not later than a time fixed by the administrator. The administrator may fix a time, which shell be not less than 30 days after the first date set for the meeting of creditors under § 7-108, for the filing of a plan or plans by the trustee, a creditor, or a creditors' committee.*
>
> *(b) Filing of Report or Plan Affecting Publicly Held Securities*.
>
> On or before the date set by the administrator, the trustee, or if there is no trustee the debtor or disinterested person designated by the administrator pursuant to section 7-103(b), shall file with the administrator a plan affecting publicly held securities or a report why such a plan cannot be formulated.
>
> [(b) By Others.] The debtor, a creditor, an equity security holder, a creditors' or equity security holders' committee, or an indenture trustee may file a plan affecting publicly held securities with the administrator at any time prior to the date set by the administrator pursuant to this section for the filing of a plan or report.
>
> This section was redrafted to (1) clarify that present Chapter XI practice of permitting the filing of plans at an early date is continued (including filing preparation acceptances and (2) permit the debtor, in Chapter XI type cases the first opportunity to file a plan.

Id. (emphasis in original).

[89] *See Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part IV, 2101 (Apr. 5, 1976), reprinted in BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 6, doc. 30 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (Department of Justice overview comments on H.R. 32, a bill to establish a uniform law on the subject of bankruptcies) ("Arrangements are better suited for smaller more closely held business entitles and avoid the cumbersomeness and delays so often associated with

of two chapters into one.[90] There was an attempt to summarize these views and the power of section 1121 and the exclusivity right in Senate Report 95-989.[91]

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reorganizations. We strongly favor retention of separate proceedings for the two types of situations indicated.").

[90] *See Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part IV, 2153 (Apr. 5, 1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 6, doc. 30 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (statement of Philip A. Loomis, Jr., Comm'r, Sec. & Exch. Comm'n):

> We can understand why the Bankruptcy Commission recommended a combination. Under existing law, there is, on occasion, some uncertainty as to whether Chapter X or Chapter XI provides the right procedure for a particular company, and over the years there has been considerable litigation with respect to the question of whether Chapter X or Chapter XI should be used in a particular case. The Bankruptcy Commission understandably thought that such litigation was unproductive and undesirable and should be eliminated by the use of a single chapter. As the Supreme Court has had occasion to point out, however, Chapter X and Chapter XI are not really alternative procedures for the reorganization of any given corporation; rather, they are mutually exclusive. The procedures to be followed are entirely different, the control of the reorganization is entirely different, the rights given to creditors and to equity security holders are entirely different, and the degree of supervision over the course of the reorganization is entirely different.
>
> In order to combine Chapter X and Chapter XI, the Bankruptcy Commission had to work out a number of difficult compromises in order to provide a chapter which would be workable for both types of cases. We are concerned that in doing so they may have created a situation in which the protections for public investors provided in existing Chapter X might be seriously compromised or eroded. We do not on that account entirely reject the idea of combining the chapters, since, we think that the Bankruptcy Commission is right in attempting to avoid unfruitful controversies as to which chapter a corporation should elect to file under. This problem is aggravated by the natural disposition of corporate management to seek Chapter XI if in any way possible, since under Chapter XI they can remain in control, while under Chapter X they are largely ousted. We do feel, however, that the compromises proposed by the Bankruptcy Commission must be modified in order to preserve investor protections.

Id.

[91] S. REP NO. 95-989, at 118 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5904:

> *Section 1121. Who may propose a plan*
>
> Subsection (a) permits the debtor to file a reorganization plan with a petition commencing a voluntary case or at any time during a voluntary or involuntary case.
>
> Subsection (b) gives the debtor the exclusive right to file a plan during the first 120 days of the case. There are exceptions, however, enumerated in subsection (c). If a trustee has been appointed, if the debtor does not meet the 120-day deadline, or if the debtor fails to obtain the required consent within 180 days after the filing of the petition, any party in interest may propose a plan. This includes the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, and an indenture trustee. The list is not exhaustive. In the case of a public company, a trustee is appointed within 10 days of the petition. In such a case, for all practical purposes, any party in interest may file a plan.
>
> Subsection (d) permits the court, for cause, to increase or reduce the 120-day and 180-day periods specified. Since, the debtor has an exclusive privilege for 6 months during which others may not file a plan the granted extension should be based on a showing of some promise of probable success. An extension should not be employed as a tactical device to put pressure on parties in interest to yield to a plan they consider unsatisfactory."

Id.

C. Statutory changes

Since section 1121 was originally enacted in 1978,[92] it has been changed three times: in 1984,[93] 1986[94] and 1994.[95] The first amendment of section 1121 in 1984 modified subsection (c)(3) and (d).[96] The changes to subsection (c)(3) were mostly stylistic and technical.[97] On the other hand, the changes to subsection (d) were less stylistic and more substantive according to some authorities.[98] The amendments of 1986 substantively amended subsection (d)[99] to add a reference to subsection "(b)".[100] The amendment of 1994 targeted small businesses and provided for an expedited process of reorganization under Chapter 11.[101] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2003,[102] now before the Congress, has

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[92] Act of Nov. 6, 1978, Pub. L. No. 95-598, § 1121, 92 Stat. 2549, 2631 (1978) (enacting 11 U.S.C. § 1121). *See id*. § 402 at 92 Stat. 2682 (stating Act effective October 1, 1979).

[93] Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 506, 98 Stat. 333, 385 (1984) (codified as amended at 11 U.S.C. § 1121 (2002)). *See id*. § 553(a) at 98 Stat. 392 (applying amendment "to cases filed 90 days after" July 10, 1984).

[94] Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99–554, § 283(u), 100 Stat. 3088, 3118 (1986) (codified as amended at 11 U.S.C. § 1121 (2002)). S*ee id*. § 302(a) at 100 Stat. 3119 (stating Act effective Nov. 26, 1986).

[95] Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 217(d) at 108 Stat. 4106, 4127 (1994) (codified as amended at 11 U.S.C. § 1121 (2002)). S*ee id*. § 702(a) at 108 Stat. 4150 (stating Act effective Oct. 22, 1994).

[96] *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98–353, § 506, 98 Stat. 333, 385 (1984) (striking out "the claims or interests of which are" and substituting "of claims or interests that is" in 11 U.S.C. § 1121(c)(3))

[97] *See* 8 WILLIAM L. NORTON, JR., NORTON BANKR. L. & PRAC. § 1121 (2d ed. 2002) (referring to 1984 amendment as "stylistic change").

[98] *See* Eric W. Lam, *Of Exclusivity and For Cause: 11 U.S.C. Section 1121(d) Re-examined*, 36 DRAKE L. REV. 533, 535–36 n.18–19 (1987) (suggesting changes in section 1121(d) were more substantive than recognized by others). *See generally* Nelan, *supra* note 4, at 455–58 (discussing importance of exclusivity period in section 1121(d)).

[99] Pub. L. No. 99–554, § 283(u), 100 Stat. 3088, 3118 (1986) ("Section 1121(d) of title 11, United States Code, is amended by striking out 'subsection' and inserting in lieu thereof 'subsections (b) and'."); *see id*. section 302 at 100 Stat. 3119 (stating Act effective November 26, 1986).

[100] *See* 8 WILLIAM L. NORTON, JR., NORTON BANKR. L. & PRAC. § 1121 (2d ed. 2002) (referring to amendment of Act of 1986 which added reference to subsection (b) in subsection (d)).

[101] Pub. L. No. 103–394 § 217(d) at 108 Stat. 4106, 4127 (1994) (providing small businesses with expedited process of reorganization). *See generally* Gross & Redmond, *supra* note 11, at 298–301 (discussing small business election in 1994 amendments).

[102] Bankruptcy Abuse Prevention and Consumer Protection Act of 2003, H.R.975, 108th Cong., (1st Sess. 2003):

> Sec. 411. Period For Filing Plan Under Chapter 11.
> Section 1121(d) of title 11, United States Code, is amended-
> (1) by striking 'On' and inserting ' (1) Subject to paragraph (2), on'; and
> (2) by adding at the end the following:
> '(2)(A) The 120-day period specified in paragraph (1) may not be extended beyond a date that is 18 months after the date of the order for relief under this chapter.
> (B) The 180-day period specified in paragraph (1) may not be extended beyond a date that is 20 months after the date of the order for relief under this chapter. '.

proposals amending section 1121, focusing on limiting the possible duration of the exclusivity period.[103]

There is no doubt that the objective of Congress in 1978 was to combine the successful parts of the prior law[104] to create a flexible exclusive right to serve the interest of a debtor as well the interests of creditors in a balanced way.[105] Toward that end, Congress created an option for an incremental increase or reduction of the exclusivity period if that was necessary.[106] The bankruptcy court would have the power, after notice and a hearing, for cause, to increase or reduce the exclusive period.[107] However, the word "cause" is not defined in the Bankruptcy Code.[108] The legislative history provides some measure of insight into the meaning of "cause" in this context,[109] but case law has developed a range of factors that can be understood

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[103] *See id*.

[104] *See In re* Sharon Steel Corp., 78 B.R. 762, 764 (Bankr. W.D. Pa. 1987) (stating exclusive period of section 1121 combines creditors' ability to propose plan under chapter X with debtor's exclusive right to file plan under chapter XI, predecessor to chapter 11 of Code); H.R. REP. NO. 95-595, at 231–32 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6191 (asserting exclusive provision of section 1121 reflects debtor's exclusive right to propose plan under chapter XI, predecessor to chapter 11 of Code, and recognizes creditors' ability to propose plan under chapter X); Angela K. Layden, *Extensions of Exclusivity Under § 1121: Appeal as a Matter of Right*, AM. BANKR. INST. J., Sept. 1995, at 26 [hereinafter *Extensions of Exclusivity*] stating exclusive period of section 1121 represents compromise between chapter X allowed party in interest to file plan at any time during pendency of case and chapter XI, predecessor to chapter 11 of Code, that allowed only debtor to file plan during case).

[105] *See In re Sharon Steel*, 78 B.R. at 764 (noting section 1121 serves to balance interests of debtor with interests of creditors); H.R. REP. NO. 95-595, at 232 (1977) *reprinted in* 1978 U.S.C.C.A.N. 5963, 6191 (stating section 1121 provides flexibility for individual cases since exclusivity period can be adjusted to balance interests of debtor and creditors); Lam, *supra* note 98, at 547 (narrating legislative intent of section 1121 to balance "the bargaining power between the debtor and its creditors.").

[106] *See* H.R. REP. NO. 95-595, at 232, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6191 (asserting section 1121 provides flexibility for individual cases since exclusivity period can be adjusted to accommodate interests of debtor and creditors in balanced way); Lam, *supra* note 98, at 540 (noting court's ability to extend or reduce exclusivity period serves legislative intent to allow flexibility in individual cases); Raymond T. Nimmer & Richard B. Feinberg, *Chapter 11 Business Governance: Fiduciary Duties, Business Judgment, Trustees and Exclusivity*, 6 BANKR. DEV. J. 1, 67 (1989) (stating section 1121 allows court to adjust exclusivity period in order to meet specific needs of individual debtors and creditors).

[107] *See* 11 U.S.C. § 1121(d) (2002) (providing explicitly after notice and hearing court may reduce or extend 120 day period "for cause."); *In re* Central Jersey Airport Serv., LLC, 282 B.R. 176, 184 (Bankr. D. N.J. 2002) (stating section 1121(d) allows court to increase exclusive period for cause after notice and hearing); *In re* James Philip Sletteland, 260 B.R. 657, 669 (Bankr. S.D.N.Y. 2001) (stating bankruptcy court may adjust exclusive period for cause under section 1121(d)).

[108] *See, e.g.*, 11 U.S.C. § 1121(d) (stating court may "for cause" decrease or increase exclusive period, however, providing no definition of phrase "for cause"); *In re* Homestead P'ship, Ltd., 197 B.R. 706, 714 (Bankr. N.D. Ga. 1996) (stating courts use their own discretion to determine whether cause exists when deciding to change 120 day period); Nimmer & Feinberg, *supra* note 106, at 67 (stating absence of statutory definition of phrase "for cause" allows courts to interpret phrase to meet specific circumstances of each case).

[109] *See, e.g.*, S. REP. NO. 95-989, at 118 (1978) *reprinted in* 1978 U.S.C.C.A.N. 5787, 5904 (stating debtor's desire to put pressure on creditors to agree to plan they consider unsatisfactory not valid cause for extension); H.R. REP. NO. 95-595, at 406 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6362 (stating cause for extension and reduction might exist where extremely large corporation is involved and where debtor delayed in reaching agreement); *id*. at 6362 (stating cause for extension may be established in case of extremely large or small corporation, delay by debtor, or disagreement among creditors); *see also In re*

as "cause".[110]

Although there have been attempts by scholars[111] and courts[112] to itemize factors that should be considered in determining "cause", we can say that those factors are very complex and specific[113] and depend on the facts of each case.

II. INTERPRETATION OF SECTION 1121

A. Different Views of a Debtor's Exclusivity Right

Exclusivity for the debtor is necessary to further the goal of reorganization.[114] The automatic stay is another benefit that applies to debtors in bankruptcy.[115] However, while the automatic stay applies generally to all debtors, exclusivity applies only to a debtor-in-possession under chapter 11.[116] The attractiveness of chapter 11 to debtors is mostly due to the attractiveness of exclusivity. Without exclusivity, the automatic stay has less value to debtors. It is exclusivity that seduces debtors to file for Chapter 11 protection, affording them with the opportunity to stay in the saddle and fairly ride through the reorganization process without being kicked off the horse by creditors. The question, however, becomes how long should exclusivity last in order to satisfy its purposes.[117]

In comparison with foreign bankruptcy systems, exclusivity is one of the most

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Newark Airport/Hotel Ltd. P'ship, 156 B.R. 444, 451 (Bankr. D.N.J. 1993) (quoting S. REP. NO. 95-989, at 118 "A debtor should not misuse an extension as a tactical device to put pressure on parties in interest to yield to a plan they consider unsatisfactory.").

[110] *See infra* Part III.

[111] *See* Lam, *supra* note 98, at 540–41 (stating five major categories for determining whether cause exists: passage of time, size and complexity of case, evident progress of case, nature of debtor's business and status of related litigation); Nelan, *supra* note 4, at 457 (stating courts look at size of corporation and complexity of case to find whether cause for extension exists); Nimmer & Feinberg, *supra* note 106, at 68–69 (noting size and complexity important factors in determining whether cause for extension exists).

[112] *See In re* Henry Mayo Newhall Mem'l Hosp., 282 B.R. 444, 452 (B.A.P. 9th Cir. 2002) (listing factors in court's consider cause); *In re* Express One Int'l, Inc., 194 B.R. 98, 100 (Bankr. E.D. Tex. 1996) (considering nine factors relevant in determining cause); *In re* Geriatrics Nursing Home Inc., 187 B.R. 128, 132 (D. N.J. 1995) (discussing two major factors of cause).

[113] *See In re Geriatrics Nursing Home*, 187 B.R. 128, 132 (D. N.J. 1995) (noting consideration of cause case specific); *In re Henry Mayo Newhall Mem'l Hosp.*, 282 B.R. at 452 (stating because question of cause fact specific, reasonable judges could differ); 7 COLLIER ON BANKRUPTCY ¶ 1121.06[1] (Lawrence P. King et al. eds., 15th ed. Rev. 1997) (asserting determinations of cause for extension fact specific).

[114] *See* H. R. REP. NO. 95-595, at 231–32 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6191 ("Proposed Chapter 11 recognizes the need for the debtor to remain in control to some degree, or else debtors will avoid the reorganization provisions in the bill until it would be too late for them to be an effective remedy."); Richard Greene, *Recent Developments in Small Business Bankruptcy Law*, 7 J. SMALL & EMERGING BUS. L. 215, 216 (2003) (stating chapter 11 goal of rehabilitation furthered by exclusivity); Claude Montgomery et al., *Solicitation Under Section 1125 of the Bankruptcy Code:* Century Glove *and the First Amendment*, 23 SETON HALL L. REV. 1570, 1593 (1993) (stating exclusive period furthers rehabilitation of debtor).

[115] *See generally* 11 U.S.C. § 362 (2002) (automatic stay provision, providing various protections from suit and enforcement of judgments).

[116] *See generally* 11 U.S.C. § 1121 (providing periods up to 120 days for a debtor to exclusively file a plan).

[117] *See generally* 11 U.S.C. § 1121(d) (failing to provide any limits on how long exclusivity should last to accomplish its goals).

important features of the Bankruptcy Code. For instance, in the Republic of Macedonia, the new bankruptcy law provides an automatic stay and a reorganization option, but does not provide any exclusivity right.[118] Debtors are reluctant to file for bankruptcy because they do not see bankruptcy as their last chance to rescue their business. Rather, bankruptcy is often more like a death sentence for their business. Thus, this is one of the main reasons why debtors are reluctant to file for bankruptcy. Bankruptcies in the Republic of Macedonia are predominantly filed on an involuntary basis, often when it's too late for a successful reorganization.[119]

In the United States, a debtor may file for bankruptcy because of insolvency.[120] Under the Bankruptcy Code, this means that the amount of the debt is greater than the value of a debtor's assets.[121] However, a debtor may file for bankruptcy based on liquidity or cash flow problems even if he is not insolvent.[122] Whether the filing is as a result of insolvency or liquidity problems, each reason for filing bankruptcy leads to a different perception of the exclusivity right. Based on the debtor's anticipation, expectations, and exploitation of the exclusivity right, we may generally delineate two types of debtors in a chapter 11 proceeding.[123] The first type of debtor will be an insolvent debtor, filing its bankruptcy because its debts exceed its assets.[124] This first type of debtor desperately needs court protection from pursuing creditors.[125] As such, this type of debtor looks at the exclusivity right as a means to provide the debtor with a safe harbor. This kind of debtor applies the

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[118] *See* MACED. BANKR. LAW, Article 229, "Submitting a Bankruptcy Plan." ("The Bankrutpcy Trustee or the debtor has the right to submit a bankruptcy plan to the Bankrutpcty Council.") *available at* http://www.finance.gov.mk/gb/laws/bankrupt.pdf (last visited Nov. 21, 2003).

[119] The Macedonian Bankruptcy Law is generally considered to be a pro-creditor oriented law. *See* MACED. BANKR. LAW, Article 2, *available at* http://www.finance.gov.mk/gb/laws/bankrupt.pdf (last visited Nov. 21, 2003) (providing an unofficial translation of Macedonian Bankruptcy Law, which according to Article 2, "Objectives of the Bankruptcy Proceeding," states that "(1) A Bankruptcy Proceeding aims to achieve a collective settlement of the creditors of the bankruptcy debtor…").

[120] *See* 11 U.S.C. § 101(32) (defining insolvency as financial condition where sum of entity's debt greater than all of such entity's property, at a fair valuation); Merkel v. Comm'r, 192 F.3d 844, 850–51 (9th Cir. 1999) (defining insolvency); United States v. Whitehead, 176 F.3d 1030, 1040 (8th Cir. 1999) (same).

[121] *See* 11 U.S.C. § 101(32).

[122] When a debtor is not able to meet debt payments when they became due, but it does not necessarily mean that debt exceed asset. *See* Cross v. Globe Boss World Furniture, 63 F.2d 421, 422 (9th Cir. 1933) (noting insolvency not required to declare bankruptcy); *In re* Amsterdam Ave. Dev. Assoc., 103 B.R. 454, 459 (Bankr. S.D.N.Y. 1989) (stating bankruptcy statute does not differentiate between solvency and insolvency); Charles M. Elson & Robert K. Rasmussen, Note, *Switching Priorities: Elevating the Status of Tort Claims in Bankruptcy in Pursuit of Optimal Deterrence*, 116 HARV. L. REV. 2541, 2542 (2003) (stating bankruptcy available to solvent companies).

[123] *See* Pugh v. Comm'r, 213 F.3d 1324, 1327 (11th Cir. 2000) (explaining plight of insovlent debtors).

[124] *See id*. at 1327, n.6 (defining insolvent as "the excess of liabilities over the fair market value of assets.")

[125] *See generally* United States v. Messner, 107 F.3d 1448, 1457 (10th Cir. 1997) (discussing purpose of bankruptcy law to allow debtor to receive protection from creditors, pay debts, and obtain fresh start). United States v. Michalek, 54 F.3d 325, 332 (7th Cir. 1995) ("[Bankruptcy] is a special proceeding by which the debtor seeks the protection of federal law from his creditors."); Joseph A. Guzinski, *Affairs of State: Government's Emerging Role as a Source of Empirical Information in Bankruptcy Cases*, 1998 ABI JNL. LEXIS 230, *1, *3 (1998) (discussing how bankruptcy serves to protect debtors from creditors).

exclusivity to get some breathing room. After the initial application, this debtor utilizes the right to get as much time as possible to keep its pivotal position while diminishing and possibly collapsing the value of the estate.[126]

The second type of debtor is one who is not able to meet its debt payments, and its view of the exclusivity right is different.[127] For this debtor, the exclusivity right will serve more as an opportunity, giving the debtor time to restructure its business.[128] This debtor will use exclusivity to concentrate on the problems and recognize the reasons for its failure. Utilizing exclusivity, this debtor will attempt to come out of bankruptcy with a viable plan meeting most of the expectations of the interested parties.[129]

1. Debtor's View

The debtor needs exclusivity because, in the early days of the proceeding, the debtor desperately needs time to consider the best course to follow without competition, harassment or pressure from creditors.[130] A debtor should have the right to propose a plan of reorganization because the debtor normally knows the business better than all others involved in the bankruptcy proceeding.[131] Ideally, the debtor should propose a plan that will optimally meet the needs and interests of all of its creditors. There is no doubt that the optimal fulfillment of the creditors'

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[126] *See generally* Robin E. Phelan, et al., *If Their Business Judgment Was So Good How Come They're in Bankruptcy and Other Perplexing Mysteries of the Business Judgment Rule: Corporate Governance Issues for the Troubled Company*, 10 J. BANKR. L. & PRAC. 471, 504 (2001) (noting debtor's exclusibity right provides significant ability to influence form of proposed plan and gives debtor tremendous opportunity and leverage to negotiate on his terms without interference from interested parties).

[127] *See generally* J. Douglas Bacon & Jennifer A. Love, *When Good Things Happen to Bad People: Practical Aspects of Holding Directors and Managers of Insolvent Corporations Accountable*, 10 J. BANKR. L. & PRAC. 185, 197 (2001) (stating how exclusivity period allows debtor to restructure company without interference from creditors); Kenneth N. Klee, *A Brief Rejoinder to Professor LoPucki*, 69 AM. BANKR. L.J. 583, 586 (1995) (discussing how exclusivity is debtor's incentive to file chapter 11 "before the business dies").

[128] *See, e.g., In re* Hechinger Inv. Co. of Del., 274 B.R. 71, 80 (D. Del. 2002) (demonstrating one company's attempt to utilize bankruptcy proceedings to restructure and reorganize its business).

[129] *See generally id*. (attempting to reorganize through viable plan but failing to do so and instead opting for liquidation).

[130] *See* First Am. Bank of N.Y. v. Southwest Gloves and Safety Equip., Inc., 64 B.R. 963, 965 (D. Del. 1986) (asserting section 1121 allows debtor to reorganize without pressure from creditors). *See generally* BUSINESS BANKRUPTCY**,** *supra* note 2, 125 (illustrating debtors need opportunity to explore implication of either legal devices, such as assumption and assignment of executory contracts and avoiding preferential payments, or business devices, such as dropping certain product lines and cutting back particular operations); Tim Peoples, Comment, *Creditors Take One Step Forward and Debtors Take Two Steps Back: Promoting Competition by Terminating Exclusivity Rights of Debtors Utilizing the "New Value" Exception*, 69 MISS. L.J. 789, 791 (1999) (noting debtor is given breathing room by exclusivity period).

[131] *See* Daniel B. Bogart, *Liability of Directors of Chapter 11 Debtors in Possession: "Don't Look Back -- Something May Be Gaining On You."*, 68 AM. BANKR. L.J. 155, 216 (1994) (reasoning debtor has "business acumen and knowledge to operate the debtor's business most effectively and to take it out of bankruptcy successfully").

interest is the objective of reorganization in bankruptcy.[132]

Very often, debtors view exclusivity as an instrument to put pressure on its creditors, with the objective of proposing a plan only in their own best interest.[133]

2. Creditors View

For many reasons,[134] creditors look very unfavorably on debtors' exclusivity rights.[135] Considering the debtor's plan(s) along with other interested parties' proposals is not necessarily inconsistent and in dissonance with the idea of the best interests of all interested parties. For creditors, time is money.[136] Any delay in the bankruptcy proceeding, that is not necessary for an effective reorganization, may be injurious to unsecured creditors[137] who do not receive any payments on pre-petition

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[132] *See* United Savs. Ass'n of Tex. v. Timbers of Inwood Forest Ass'n, Ltd. (*In re* Timber of Inwood), 808 F.2d 363, 373 (5th Cir. 1987) (stating goal of bankruptcy to benefit creditors); *In re* Dollar Assoc., 172 B.R. 945, 950 (Bankr. N.D. Cal. 1994) (listing debtor not taking into consideration goal of benefiting creditors as factor in not approving plan); BUSINESS BANKRUPTCY, *supra* note 2, at 7 ("The system is designed from top to bottom both to enhance the overall value of the failing business and to reduce the losses that creditors collectively must suffer–to implement what could be called the principle of collective benefit.").

[133] *See In re* Geriatrics Nursing Home, Inc., 187 B.R. 128, 131 (D. N.J. 1995) (stating during exclusivity period, debtor may negotiate plan without interference of creditors); RAYMOND NIMMER & JAMES WHITE, CASES AND MATERIALS IN BANKRUPTCY, § 9.2 (3d ed. 1996) (asserting debtor adopts certain negotiating position for duration of validity of exclusivity); Lynn M. LoPucki, *The Trouble With Chapter 11*, 3 WIS. L. REV. 729, 753–54 (1993) [hereinafter *The Trouble With Chapter 11*] (noting debtor may negotiate on own terms during exclusivity period).

[134] *See Bankruptcy Act Revision*, *Hearings before the Subcomm. on Civil and ConstitutionalRights of the Comm. on the* Judiciary, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part III, 1684 (March 12, 1976) *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 5, doc. 29 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (testimony of W.H. Basset, Jr., of Freynolds Metal Company of Richmond, Va.) ("From a creditor standpoint, we feel that the creditor has the most at stake, if you will. There has been some comment that another chance by that company's management through the vehicle of Chapter XI is just another opportunity to display the former bad business habits which the same management had before."); Karen Gebbia-Pinetti, *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship: A Different Interpretation*, 9 J. BANKR. L. & PRAC. 451, 468–69 (2000) (noting exclusivity precludes creditors from considering alternative plans); Shannon R. Oehlke Lieke, *Will Congress' Proposed "Cap" on Extensions to the Debtor's Exclusivity Period in Chapter 11 Solve the Problem of Creditor Preclusion from the Plan Negotiation Process?*" 43 S. TEX. L. REV. 1289, 1311 (2002) (contending creditors lose money when exclusivity extended).

[135] *See In re* Henry Mayo Newhall Mem'l Hosp., 282 B.R. 444, 448 (B.A.P. 9th Cir. 2002) (finding creditors mostly interested in proposing own plan of reorganization or liquidation, in order to maximize interest, or threatening to file plan to enhance credibility in plan negotiation); Megan Hamilton, *The Absolute Priority Rule and New Value: Before and After Bank of America National Trust and Savings Association v. 203 North LaSalle Street Partnership*, 105 COM. L. REV. 331, 333 (2000) (noting exclusivity gives debtor advantage over other parties to action); Lieke, *supra* note 134, at 1314 (discussing extension of exclusivity as being to the dismay of the creditor).

[136] *See* BUSINESS BANKRUPTCY, *supra* note 2, at 158 (indicating time is critical element in reorganization process); Hon. A. Thomas Small, *Small Business Bankruptcy Cases*, 1 AM. BANKR. INST. L. REV. 305, 305 (1993) ("To a creditor waiting for payment, time is money."). *See generally* Century Clove, Inc. v. First Am. Bank of New York, 860 F.2d 94, 102 (3d Cir. 1988) (discussing Congress' belief creditors want quick confirmation of plan).

[137] *See The Trouble With Chapter 11*, *supra* note 133, at 753–54 (asserting creditors suffer more than debtors from delay); H. Miles Cohn, *Protecting Secured Creditors Against the Costs of Delay in*

claims once the bankruptcy case is commenced. Creditors believe it is unfair, and perhaps cynical, that the debtor-in-possession may propose more than one plan at the same time,[138] while creditors are prohibited from proposing their own reorganization plan during of the debtor's exclusivity period.[139]

Once bankruptcy is filed, creditors may suffer more because of the delay in any distribution caused by extension of exclusivity.[140] Neither senior nor junior secured creditors are immune from monetary losses because of a delay in the bankruptcy proceeding.[141] When a secured creditor has an under-secured claim, the part of that claim[142] in excess of the value of the collateral is treated as an unsecured claim,[143] which is subject to the same treatment as any other unsecured claim.

A secured creditor may be affected even if its claim is over-secured and there is some cushion[144] on secured collateral. To the extent that the cushion interest will

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Bankruptcy: Timbers of Inwood Forest and Its Aftermath, 6 BANKR. DEV. J. 147, 148 (1989) ("But delay imposes an irreparable cost on the undersecured creditor, whose collateral is insufficient to allow for recovery of postpetition interest."); *see also* United Sav. Assoc. of Texas v. Timbers of Inwood Forest Assocs., Ltd. (*In re* Timbers of Inwood), 484 U.S. 365, 373 (1988) (noting under secured creditor denied interest compensation when faced with delay).

[138] *See In re* Media Cent., Inc., 89 B.R. 685, 688 (Bankr. E.D. Tenn. 1988) ("Chapter 11 debtor who wishes to propose alternative plans for reorganization may file more than one plan."); *In re* Werth, 29 B.R. 220, 222 (Bankr. D. Colo. 1983) ("Debtor-in-possession may submit more than one plan of reorganization at the same time, so long as the plans and disclosure statement are not unduly confusing and the equity holders and claimants are adequately appraised of their alternatives."); Rosen & Rodriguez, *supra* note 31, at 361 (stating more than one plan may be filed in chapter 11 case).

[139] *See* 11 U.S.C. § 1121(b) (2002).

[140] *See* Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. PA. L. REV. 669, 677 (1993) ("Once the stay is in effect, often the quickest way for a creditor to obtain a resumption of payments is to consent to a plan that restructures the debt."); Cohn, *supra* note 137, at 172 (discussing difficulties creditors face as result of extension of exclusivity); *see also* Chemical Bank v. First Trust (*In re* S.E. Banking Corp.), 179 F.3d 1307, 1309 (11th Cir. 1999) (finding rule interest stops accruing against debtor upon date of filing petition recognizes post-petition delay in distribution prevents creditors from profiting or suffering loss due to delay).

[141] *See In re S.E. Banking Corp.*, 179 F.3d at 1309–10 (noting creditors do not get post-assignment interest from delay in distribution); *In re* Bank of New England Corp., 295 B.R. 419, 422 (Bankr. D. Mass. 2003) (explaining post-petition interest, wrinkle in enforcement of subordination agreements, can be large sum of money); Cohn, *supra* note 137, at 172 ("In the ordinary case involving multiple assets and numerous creditors, protecting the secured creditor from the costs of delay is more problematic.").

[142] *See* United Savs. Assoc. of Tx. v. Timbers of Inwood Forest Assoc. (*In re* Timbers of Inwood Forest Assoc.), 793 F.2d 1380, 1385 (5th Cir. 1986), *aff'd*, 484 U.S. 365 (1988) (finding unsecured creditor has two types of claims, allowed secured claim and unsecured claim treated as any other unsecured claim); Cohn, *supra* note 137, at 170:

> If the claim is undersecured, in the sense that the value of the collateral is less than the claim as of the date on which the petition was filed, Section 506(a) divides the claim into two separate portions: 1)an allowed secured claim to the extent of the value of the security, and 2) an allowed unsecured claim to the extent of any deficiency.

Id. at 170. *See generally* Assoc. Commercial Corp. v. Rash, 520 U.S. 953, 959 (1997) (noting secured creditor's claim divided into secured and unsecured portions).

[143] *See generally* 11 U.S.C. § 506.

[144] "Cushion" is a positive difference in a value between the greater value of a property securing a claim and the smaller value of the actually allowed claim secured by the same property. *See In re* Jones Truck Lines, Inc., 156 B.R. 608, 613 (W.D. Ark. 1992) (defining "cushion"); *see also* LNC Invs., Inc. v. First Fid. Bank, 173 F.3d 454, 458 (2d Cir. 1999) (finding creditor with over secured claim and equity cushion affected when market value dropped); Koopmans v. Farm Credit Serv. of Mid-America, 102 F.3d 874, 876 (7th Cir. 1996) (noting cushion of security does not reduce risk to zero).

continue to accrue, the debtor often has to make adequate protection payments on the secured debt.[145] That amount increases with any delay and drains the amount that might otherwise go to unsecured creditors. A secured creditor cannot accrue interest, nor will the secured creditor accrue attorney's fees and other expenses that may normally be added to the debt, after the cushion is eaten.[146] In that instance, extension of the exclusive period may place additional financial burdens on the secured creditor. A junior secured creditor, because of the accumulated interest claim of the senior creditor, may end up with an unsecured claim or partially secured and partially unsecured claim. With an extension of exclusivity and the subsequent delay of the proceeding, the debtor creates more expenses in the bankruptcy proceeding, placing greater risks on possible reorganization.[147]

Thus, exclusivity during bankruptcy can be costly to unsecured, under-secured and even secured creditors. Creditors are reluctant to acquiesce in any extension of the exclusivity period, if they believe that the debtor's plan will not satisfy their demands. Most questions remain open, such as, whose money the debtor plays and bargains with;[148] whether the debtor's exclusivity right is fair[149] to the creditors; and how to stop the debtor abusing its rights.

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[145] *See* Delta Res. Inc. v. Orix Credit Alliance, Inc., 54 F.3d 722, 728 (11th Cir. 1995) (stating creditor is entitled to adequate protection to extent of cushion); *In re* Burr Underwood, 87 B.R. 594, 598 (Bankr. D. Neb. 1988) (asserting secured creditor's equity cushion entitled to adequate protection); Cohn, *supra* note 137, at 170 (finding section 506(b) allows oversecured creditor to recover post-petition interest on value of its collateral).

[146] *See In re Timbers of Inwood Forest Assocs.*, 484 U.S. at 374 (asserting interest payments come only out of cushion); *In re* Westchase I Assoc. v. Lincoln Nat'l Life Ins. Co., 126 B.R. 692, 694 (W.D.N.C. 1991) (quoting *In re Timbers*); *see also* Cohn, *supra* note 137, at 170 ("the statute allows the oversecured claim to accrue interest and attorney's fees, even to the extent they accrue after the date the petition was filed, up to the value of the collateral securing the claim.").

[147] *See* BUSINESS BANKRUPTCY, *supra* note 2, at 125 (cautioning against debtor's unwise promises and delay tactics because they decrease value of creditor's claims); *see also In re* Serv. Merch., Co., 256 B.R. 744 (Bankr. M.D. Tenn. 2000) (noting possible expense resulting from debtor's delaying of bankruptcy proceeding, necessitating countless attorneys, investment bankers, and potentially other professionals).

[148] *See generally In re* Geriatrics Nursing Home, Inc., 187 B.R. 128, 128 (Bankr. D. N.J. 1995) (discussing creditors motion to terminate debtor's exclusive period); John Burke, *Last In Line: Encouraging Creditor Involvement,* 1996 ABI JNL. LEXIS 168, *10 (1996) (noting creditors often lose substantial value as result of extensions of exclusivity); LoPucki & Whitford, *supra* note 140, at 694:

> Delay imposes cost on creditors. First, while the case remains pending, the debtor is required to make only adequate protection payments to secured creditors, and is rarely permitted to make any payments to unsecured creditors. Second, creditors usually bear risk of loss from continuing business operations while the case remains open that is out of proportion to their possibility of gain.

Id.

[149] The debtor usually has more knowledge about the business and operation of the enterprise, which gives a better starting position in proposing a plan. *See In re* Henry Mayo Newhall Mem'l Hosp., 282 B.R. 444, 451 (B.A.P. 9th Cir. 2002) (explaining importance of careful consideration of circumstances in each case to encourage fair and equitable resolution of bankruptcy); *In re* Pine Run Trust, Inc., 67 B.R. 432, 435 (Bankr. E.D. Pa. 1986) (establishing extension of exclusivity right fair where debtor negotiated in good faith and without delay). *See generally In re* Tony Downs Foods Co., 34 B.R. 405, 407 (Bankr. D. Minn. 1983) (recognizing both House and Senate intended court to exercise discretion in determination of exclusivity by allowing cause to be shown based upon all facts and circumstances of particular case).

3. Courts' View

In the court's view, exclusivity reflects a battle for long-term control of the bankruptcy process.[150] Courts consider the debtor in possession as a fiduciary to all interested parties in the bankruptcy proceeding.[151] Primarily for that reason,[152] the

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[150] *See In re Henry Mayo*, 282 B.R. at 448:

> This appeal reflects a battle for long-term control of the Hospital. Existing management wishes to remain in place and in control of the reorganization process by extending the debtor's exclusivity right to propose a plan. Unsecured creditors want to be able to propose a competing plan because they think that more of the accumulated debt might be paid either if another entity took over the Hospital or if the credible threat of that happening caused various parties in interest to take more accommodating positions in plan negotiations.

Id.; *see also In re* Dow Corning Corp., 208 B.R. 661, 664–65 (Bankr. E.D. Mich. 1997). The court in *In re Dow Corning* listed the following nine factors:

> 1. the size and complexity of the case;
> 2. the necessity of sufficient time to permit the debtor to negotiate a plan of reorganization and prepare adequate information;
> 3. the existence of good faith progress toward reorganization;
> 4. the fact that the debtor is paying its bills as they become due;
> 5. whether the debtor has demonstrated reasonable prospects for filing a viable plan;
> 6. whether the debtor has made progress in negotiations with its creditors;
> 7. the amount of time which has elapsed in the case;
> 8. whether the debtor is seeking an extension of exclusivity in order to pressure creditors to submit to the debtor's reorganization demands; and
> 9. whether an unresolved contingency exists.

Id. (listing certain factors courts have distilled in deciding whether to extend or terminate debtor's statutory period of exclusivity in battle for control of bankruptcy process). *Compare In re* Gibson & Cushman Dredging Corp., 101 B.R. 405, 409 (E.D.N.Y. 1989) (explaining section 1121 passed to place limits on debtor's exclusive right to propose plan and in recognition of creditor's stake in debtor's business), *with* United Savs. Assoc. of Tex. v. Timbers of Inwood Forest Assocs. (*In re* Timbers of Inwood Forest Assocs.), 808 F.2d 363, 372 (5th Cir. 1987) (comparing old chapter XI's imbalance between debtor and creditor with new section 1121 design, which should be faithfully interpreted to limit delay which makes creditors hostages to chapter 11 debtors).

[151] As a debtor-in-possession, according to 11 U.S.C. § 1107, with some limitation, the debtor has the same right and duties of a trustee serving in a case. This equation implements to a debtor in possession fiduciary duties to other parties in the bankruptcy procedure. *See* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 355 (1985) ("the fiduciary duty of a bankruptcy trustee runs to a debtor's shareholders as well as to creditors . . . the willingness of courts to leave debtors in possession 'is premised upon an assurance that the officers and managing employees can be depended upon to carry out the fiduciary responsibilities of a trustee.'"); Koch Ref. v. Farmers Union Cent. Exch., Inc., 831 F.2d 1339, 1342 n.3 (7th Cir. 1987) ("The authority granted to a debtor-in-possession supervising a Chapter 11 case is virtually identical to that granted to a trustee . . ."). *See generally* Andrew W. Shaffer, *Corporate Fiduciary - Insolvent: The Fiduciary Relationship Your Corporate Law Professor (Should Have) Warned You About,* 8 AM. BANKR. INST. L. REV. 479 (2000) (explaining to whom debtor-in-possession owes fiduciary obligation when debtor is insolvent or in financial distress).

[152] Because of debtor's fiduciary duties, a debtor-in-possession has to take into consideration and to act in interest of all parties in the bankruptcy procedure. *See* Shaffer, *supra* note 151, at 540 (stating that a " debtor in possession owes a fiduciary obligation to all parties in in interest in the bankruptcy case"); *see also* 11 U.S.C. § 1121(d); *In re* Van Brunt, 46 B.R. 29, 30 (Bankr. W.D. Wis. 1984) ("The Chapter 11 debtor is a fiduciary of his creditors, and is obligated to prosecute his bankruptcy proceeding in an expeditious manner.").

court is most likely to extend the exclusivity period and allow the debtor to propose a plan that will be accepted, if not by all, by most of the participants in the proceeding.

Unlike the creditors or other interested parties, the courts treat a debtor-in-possession in a manner similar to their treatment of the trustee.[153] In the courts' view, creditors are most interested in how to maximize payments on their own claims. If a creditor can get paid in full on its claim, the creditor will not be concerned if some other party gets nothing.[154] Debtors on the other hand, generally are parties who want to proceed with reorganization and stay in business. The debtor pursuing reorganization and acting in its own interest is often acting in the best interest of creditors. By revitalizing its own business the debtor theoretically maximizes payments on all its debts.[155]

B. Disassembling Section 1121

1. Section 1121, Who May File a Plan[156]

Subsection (a) provides that "[t]he debtor may file a plan with a petition commencing a voluntary case, or at any time in a voluntary case or an involuntary case."[157] This subsection is fundamental, it gives the debtor the right to propose a plan at any time in a voluntary case or in an involuntary case. It also allows a debtor to file a prepackaged plan with a petition starting a voluntary case. Basically it authorizes the debtor to file a plan at any moment in the case.[158]

Subsection (b) says, "Except as otherwise provided in this section, only the debtor may file a plan until after 120 days after the date of the order for relief under this chapter."[159] The debtor's exclusive right to propose a plan arises from subsection (b).[160] Only the debtor may file a plan until after 120 days after the date

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[153] The Bankruptcy Code in section 1107 makes the debtor-in-possession and the trustee somewhat equivalent regarding their duties and ability. The Code treats the debtor-in-possession as the most objective party, in a same way as it would treat a trustee if a trustee were appointed in the case. *See* 11 U.S.C. § 1107(a) (2002); *In re* Silver Bros. Co., 179 B.R. 986, 1010 n.14 (Bankr. D. N.H. 1995) (recognizing debtor-in-possession under reorganization of Code essentially acting as fiduciary having powers and obligations of trustee); *see also In re* Frankel, 77 B.R. 401, 403–04 (Bankr. W.D.N.Y. 1987) ("As debtor-in-possession, it wore 'the shoes of a trustee in every way' . . . In executing that obligation, the Debtor was duty-bound to exercise the quantum of care that a person or ordinary intelligence and prudence would exercise.").

[154] *See* Burke, *supra* note 148, at *3 (noting creditors often want to collect distributions as quickly as possible, even if such plan does not maximize values for all unsecured creditors).

[155] *See* Wabash Valley Power Ass'n v. Rural Electrification Admin., 903 F.2d 445, 451 (7th Cir. 1990) (explaining debtor is supposed to maximize estate's value to serve creditors' interests).

[156] 11 U.S.C. § 1121(a) (2002); *see also In re* Hawkins, 81 B.R. 183, 184 (Bankr. D. C. 1988) (concluding debtor has non-exclusive right to file plan at any time under section 1121(a)); *In re* Werth, 29 B.R. 220, 222 (Bankr. D. Colo. 1983) (interpreting section 1121 to be read to allow debtor to file more than one plan).

[157] *See* 11 U.S.C. § 1121(a) (2002).

[158] *See id*.

[159] *See* 11 U.S.C. § 1121(b).

[160] *See id*.; *see also In re* Mother Hubbard, Inc., 152 B.R. 189, 195 (Bankr. W.D. Mich. 1993) ("The

of the order for relief[161] under the Chapter 11. It clearly states that exclusivity is given to the debtor: (a) beginning on the date of the order for relief, and (b) continuing for 120 days thereafter. This subsection makes a window of opportunity not just to file a plan but also to make a request for extension or termination of exclusivity. It clarifies dimensions of "the window," the beginning and the end[162] of the exclusivity period, fixing the time for exclusivity and any request regarding exclusivity.

Subsection (c) provides:

> Any party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may file a plan if and only if -
>
> (1) a trustee has been appointed under this chapter;
>
> (2) the debtor has not filed a plan before 120 days after the date of the order for relief under this chapter; or
>
> (3) the debtor has not filed a plan that has been accepted, before 180 days after the date of the order for relief under this chapter, by each class of claims or interests that is impaired under the plan.[163]

Subsection (c) provides that the plan may be filed, under certain circumstances, by any party in interest,[164] including but not limited[165] to the debtor, the trustee, a

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purpose of § 1121 is two-fold. First, it allows the debtor a reasonable time to obtain confirmation of a plan without the threat of a competing plan. Second, it ensures creditors will not endure unreasonable delay after a debtor files chapter 11."); *In re* Nat. Safe Ctr., Inc., 54 B.R. 239, 240 (Bankr. D. Haw. 1985):

> However, Section 1121(b) of the Bankruptcy Code expressly states that only the debtor, and no one else, *may* file a plan of reorganization within the 120 days after the date of the order for relief. In other words, the debtor is not required to file a plan of reorganization within the 120 days after the filing of an order for relief, but is given during that period of time the exclusive right to file a plan, if it so chooses, without having to worry about any interference by its creditors. After the 120 days from the date of the order for relief, if debtor fails to file any plan, a creditor or a party in interest may then file its own plan of reorganization.

Id. (emphasis in original).

[161] In accordance with 11 U.S.C. § 102(6), stating that "order for relief" means entry of an order for relief, 11 U.S.C. § 301 says that the commencement of a voluntary case constitutes an order for relief, and under 11 U.S.C. § 302(a) the commencement of a joint case, constitutes an order for relief. In involuntary cases, according to 11 U.S.C. § 303(h), order for relief shall be granted if the petition is not timely controverter, or after trial. *See In re* Lamb, 40 B.R. 689, 692 (Bankr. E.D. Tenn. 1984) (finding filing of voluntary petition is not good defense to filing of order for relief pursuant to involuntary petition).

[162] *See, e.g., In re* Wash.-St. Tammany Elec. Coop., Inc., 97 B.R. 852, 853 (E.D. La. 1989) ("Section 1121(b) . . . gives the debtor the exclusive right to file a plan of reorganization for a period of 120 days after the commencement of its chapter 11 case and the exclusive right to obtain acceptances of its plan for 180 days after the commencement of the case."); *see also* 11 U.S.C. § 1121(b) (2002); *In re* Trainer's, Inc., 17 B.R. 246, 248 (Bankr. E.D. Pa. 1982) (recognizing section 1121 has effect of limiting debtor's exclusive right to file plan because creditors only silenced if debtor files plan and secures acceptance in time allotted). *See infra* Part III. providing discussion on extension and termination of exclusivity.

[163] *See* 11 U.S.C. § 1121(c).

[164] *Id*.; *see* Roslyn Savs. Bank v. Comcoach Corp. (*In re* Comcoach Corp.), 698 F.2d 571, 573 (2d Cir.

creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee.[166] The first requirement of subsection (c), that the proponent be a party in interest, is a subjective one. The proponent of the plan has the burden of establishing that it is a party in interest.[167]

The second cumulative requirement of subsection (c) is an objective one because it allows any party in interest to file a plan if one of the following conditions are met: (1) a trustee has been appointed under chapter 11 of the Bankruptcy Code; (2) the debtor has not filed a plan prior to 120 days after the date of the order for relief under chapter 11 of the Code; or[168] (3) the debtor has not filed a plan that has been accepted before 180 days after the date of the order for relief under this Chapter, by each class of claims or interests that is impaired under the plan.

Subsection (d) provides that "[o]n request of a party in interest made within the respective periods specified in subsections (b) and (c) of this section and after notice and a hearing, the court may for cause reduce or increase the 120-day period or the 180-day period referred to in this section."[169] On request of a party in interest,

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1983):

> The term "party in interest" is not defined in the Code. Generally, the "real party in interest" is the one who, under the applicable substantive law, has the legal right which is sought to be enforced or is the party entitled to bring suit. . .
>
> When interpreting the meaning of Code terms such as "party in interest", we are governed by the Code's purposes. One of those purposes is to convert the bankrupt's estate into cash and distribute it among creditors. Bankruptcy courts were established to provide a forum where creditors and debtors could settle their disputes and thereby effectuate the objectives of the statute. Necessarily, therefore, the Bank must be either a creditor or a debtor to invoke the court's jurisdiction.

Id. (internal citations omitted); *In re* Dark Horse Tavern, 189 B.R. 576, 583 (Bankr. N.D.N.Y. 1995) (stating upon termination of debtor's period of exclusivity to file plan, any party in interest, including equity security holders, may file disclosure statement and plan of reorganization).

[165] *In re* River Bend-Oxford Assoc., 114 B.R. 111, 114 (Bankr. D. Md. 1990) ("In determining party in interest status, the court must determine on a case by case basis whether the party has a sufficient stake in the outcome so as to require representation."); *see In re* Amatex Corp., 755 F.2d 1034, 1042 (3d Cir. 1985) (concluding future claimants have sufficient stake in outcome so as to require representation); *see also In re* Ionosphere Clubs, Inc., 101 B.R. 844, 849 (Bankr. S.D.N.Y. 1989) (stating party in interest must have legal right that is sought to be enforced or be entitled to bring suit).

[166] It is not a definitive list of parties in interest. This subsection does not try to define what a "party in interest" means but is simply providing examples of who a "party in interest" might be. *See In re Amatex*, 755 F.2d at 1042 (noting list not exclusive); *In re* Cash Currency Exch., 37 B.R. 617, 628 n.10 (N.D. Ill. 1984) (declaring term should be construed broadly); 7 COLLIER ON BANKRUPTCY, ¶ 1109.02[1], at 1109–1110 (Lawrence P. King et al. eds., 15th ed. Rev. 1997) (citing examples of unlisted parties who do and do not qualify). The first example of a party in interest is the debtor. We can only assume that the reason for listing the debtor first is to make sure that the debtor is still viewed as a party allowed to file a plan even if exclusivity is terminated.

[167] *See, e.g., In re* Mother Hubbard, Inc., 152 B.R. 189, 194 (Bankr. W.D. Mich. 1993) (noting competing plan proponents must satisfy party in interest requirement).

[168] Section 102(5) specifies that "or" is not exclusive. 11 U.S.C. § 102(5) (2002); *see also* S. REP. NO. 95-989, at 28 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5814 ("[I]f a party "may do (a) or (b)", then the party may do either or both. The party is not limited to a mutually exclusive choice between the two alternatives."); 2 COLLIER ON BANKRUPTCY, ¶ 102.07, at 102-9 (Lawrence P. King et al. eds., 15th ed. Rev. 1997) (explaining applicability of section 102(5)).

[169] 11 U.S.C. § 1121(d) (2002).

subsection (d) gives the court authority to increase or reduce the 120-day period or the 180-day period for cause.[170] However, if there is any request for an extension or reduction of exclusivity, notice and a hearing[171] is required before a court affects exclusivity in any way.

The Code requires a request for an extension or termination to be made within the respective periods specified in subsections (b) and (c). Subsection (b) specifies the period of time in which a debtor and only a debtor may file a plan. Subsection (c)(3) specifies a set period of time, which prohibits anyone from filing a plan while a debtor is seeking an acceptance of its filed plan. Application of subsection (c)(3) starts once the plan is filed. Subsection (c)(2), also specifies a period of time which, when expired, creates a right for interested parties to file a plan.[172]

Subsection (e) says,

> in a case in which the debtor is a small business and elects to be considered a small business-
>
> (1) only the debtor may file a plan until after 100 days after the date of the order for relief under this chapter;
>
> (2) all plans shall be filed within 160 days after the date of the order for relief; and
>
> (3) on request of a party in interest made within the respective periods specified in paragraphs (1) and (2) and after notice and a hearing, the court may -
>
> (A) reduce the 100-day period or the 160-day period specified in paragraph (1) or (2) for cause; and
>
> (B) increase the 100-day period or the 160-day period specified in paragraph (1) if the debtor shows that the need for an increase is caused by circumstances for which the debtor should not be held accountable.[173]

Subsection (e) deals with small businesses, and was added through section 217 of the 1994 amendments.[174] The language of subsection (e) is quite different from the other subsections of section 1121. Subsection (e)(2) says that all plans shall be

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[170] *See id*.

[171] For the meaning of the phrase "after notice and a hearing" *see* 11 U.S.C. § 102(1) (defining "after notice and a hearing" as "after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but (B) authorizes an act without an actual hearing if such notice is given properly and if--(i) such a hearing is not requested timely by a party in interest; or (ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act").

[172] *See* 11 U.S.C. § 1121(c)(2) (2002).

[173] 11 U.S.C § 1121(e).

[174] *See generally* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 108 Stat. 4106, 4127.

filed within 160 days, and (e)(1) gives an exclusive period to the debtor for the first 100 days after the date of the order for relief. The court may reduce the 100 days period or 160 days period, respectively, for cause. The court is given the power to increase the 100-day period for cause only in specific circumstances, but cannot increase the 160 days period.[175]

2. 120-Day and 180-Day Periods

A distinction between the 120-day period and the 180-day period is clearly made in subsection 1121(d).[176] Reading the plain language as is written, the court may extend or reduce the 120-day period or the 180-day period. Under this language it would seem that the court may extend or reduce any period specified under subsection (b) and (c).[177] However, extending or reducing one period does not automatically affect the other period.[178] A 120-day period and 180-day period are actually two different periods of time[179] affording debtors with two exclusivity rights. The 120-day period is based on section 1121(b) and it is known as debtor's right exclusively *to file* a plan.[180] The 180-day period is based on section 1121(c)(3) and is known as debtor's exclusive right *to seek* acceptance of a plan.[181] This latter

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[175] 11 U.S.C. § 1121(e); *see* 11 U.S.C. § 101(51C) (defining "small business"); 7 COLLIER ON BANKRUPTCY, ¶ 1121.LH[3], at 1121–13 (Lawrence P. King et al. eds., 15th ed. Rev. 1997) (emphasizing subsection (e) only applies when debtors elect to be considered small businesses). *See infra* Part II.C. for further discussion concerning subsection (e) and the small business provision.

[176] *See* 11 U.S.C. § 1121(d).

[177] *Id*.

[178] *See In re* Trainer's, Inc., 17 B.R. 246, 248 (Bankr. E.D. Pa. 1982) (holding debtors did not obtain extension of 180-day period although they obtained extension of 120-day period); *In re* Barker Estates, Inc., 14 B.R. 683, 685 (Bankr. W.D.N.Y. 1981) (concluding straightforward reading of statute suggests each limitation independent of other and therefore extension of one time period should not automatically extend other); 7 COLLIER ON BANKRUPTCY ¶ 1121.03, at 1121–4 (Lawrence P. King et al. eds., 15th ed. Rev. 1997) ("The better practice, when moving to extend the exclusivity period would be to file a simultaneous motion to extend the acceptance period."). *But see In re* Ravenna Indus., Inc., 20 B.R. 886, 891 (Bankr. N.D. Ohio 1982) (disagreeing with *In re Trainer's* and *In re Barker Estates*).

[179] *See In re Ravenna Indus.*, 20 B.R. at 891 (explaining how section 1121(c) created two "distinct time periods," 120 days to file plan and 180 days for plan to be approved); *see also In re* Gibson & Cushman Dredging Corp., 101 B.R. 405, 407 (E.D.N.Y. 1989) ("The debtor is then granted 180 days in which to obtain acceptance of the plan. The 120 and 180 day periods run concurrently."); Nelan, *supra* note 4, at 456 (1989) ("There is a case law conflict as to the independence of the 120-day and 180-day periods.").

[180] *See In re* Federated Dep't Stores, No. 1-90-0013, 1990 Bankr. LEXIS 711, *5 (Bankr. S.D. Ohio 1990) (explaining debtor's exclusive right to file plan and what exclusive time period is for filing plan along with how that exclusive time period can be extended); *In re* Wash.–St. Tammany Elec. Coop., 97 B.R. 852, 853 (E.D. La. 1989) (explaining for 120 days debtor has exclusive right to file reorganization plan); *see also* Button Hook Cattle Co. v. Commercial Nat'l Bank & Trust Co. (*In re* Button Hook Cattle Co.), 747 F.2d 483, 484 (8th Cir. 1984) (affirming interested party can submit plan if debtor does not submit plan in 120 day exclusivity period).

[181] *See In re Federated Dep't Stores*, 1990 Bankr. LEXIS 711, at *5 (stating if debtor files during exclusive time under section 1121 (b) he has additional 60 days to seek or obtain acceptances of plan and no other party can file during that exclusive period where debtor is seeking acceptance); *In re Wash.–St. Tammany*, 97 B.R. at 853 (describing debtor's exclusive right to obtain acceptance of his plan for 180 days after case begins).

right bars interested parties from filing their own plan.[182] Without a 180-day debtor's exclusivity period, once a plan is filed, exclusivity is gone and anybody would have the right to file a plan after 120 days after the date of the order for relief.[183] With subsection (c)(3) in place, once a debtor files a plan, no one can file a plan up to 180 days from the order for relief while the debtor seeks acceptance of the plan.[184] Subsection (c)(3) reinstates the exclusivity for a debtor during the process of acceptance of the plan, preventing other parties from filing a plan while the debtor is seeking acceptance of its own plan.[185] When requesting a termination or extension an interested party should specify which is the required period to be affected by the court order in its motion.

Extension or termination of the 120-day period should be requested simultaneously for the periods, under subsection (b) and (c)(2).[186] Otherwise, hypothetically if exclusivity under subsection (b) is terminated before the initial 120-day period expires, there will be no authority for anybody to file a plan until the 120-day period under (c)(2) expires.

Unless it is a prepackaged plan, a debtor-in-possession needs some time from the date of the order for relief to develop a plan.[187] During that time subsection (c)(3) is not applicable. Subsection (c)(3) applies with the filing of the debtor's plan.[188] Referring to the 180-day period of subsection (c)(3) as a 60-day right to seek acceptance of the plan is confusing.[189] If a debtor files a plan before the 120-day period expires, the debtor still has up to 180 days from the date of the order for

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[182] *See In re Federated Dep't Stores*, 1990 Bankr. LEXIS 711, at *5 (noting no other party may submit plan while debtor is seeking acceptances of debtor's plan); *In re Wash.–St. Tammany*, 97 B.R. at 853 (stating for 180 days debtor has exclusive right to obtain acceptance of its reorganization plan); *see also In re* Corvus Corp., 122 B.R. 685, 686 (Bankr. E.D. Va. 1991) (describing how debtors had 180 days from filing of petition to solicit acceptance).

[183] *See* 11 U.S.C. § 1121(c)(2) (2002) (stating interested party may file plan if debtor has not filed plan within 120 days after order for relief filed); *In re Wash.–St. Tammany*, 97 B.R. at 853 (explaining after 120 day and 180 day periods expire, any interested party can file plan); *In re* Nat'l Safe Ctrs., Inc., 54 B.R. 239, 240 (Bankr. D. Haw. 1985) (discussing under 11 U.S.C. § 1121(b), the debtor's exclusive right to file plan is 120 days).

[184] *See generally* 11 U.S.C. § 1121 (c)(3) (2002).

[185] *Id*.

[186] *See generally* 11 U.S.C. § 1121(b), (c)(2). Subsection 1121(c), for extension and termination of the period, refers to the periods in subsections (b) and (c) from the same section.

[187] *See* Harvey R. Miller, *Chapter 11 Reorganization Cases and the Delaware Myth*, 55 VAND. L. REV. 1987, 2018 (2002) [hereinafter *Chapter 11 Reorganization Cases*]("After absorbing the initial trauma of filing, a debtor must be given a reasonable amount of time in Chapter 11 to formulate, test, and adjust a business plan before proposing a plan of reorganization.").

[188] *See* 11 U.S.C. § 1121 (c)(3).

[189] *See In re* Express One Int'l, 194 B.R. 98, 100 (Bankr. E.D. Tex. 1996) ("If the debtor-in-possession files a plan of reorganization within the 120 days after the petition date, the debtor-in-possession has an additional 60 days (up to 180 days after the petition date) to obtain acceptance of the plan before any other party in interest may file a competing plan."); *In re* Federated Dep't Stores, No. 1-90-0013, 1990 Bankr. LEXIS 711 *5 (Bankr. S.D. Ohio 1990) ("Bankruptcy Code grants the debtor an additional 60 days in which to obtain acceptances of such plan, during which time no other party in interest may file a plan."); *In re* Texaco Inc., 76 B.R. 322, 325 (Bankr. S.D.N.Y. 1987) (discussing 11 U.S.C. § 1121 as providing debtor with 120 days to file plan and additional 60 days to have plan accepted).

relief, to exclusively seek acceptance of the plan[190] during which time no one else may file a plan. When we look at this issue from this perspective, it becomes clear that the periods under subsections (b) and (c)(3) are not linked and not dependent on each other.[191]

If the only reason Congress created two periods was to make a distinction between the period of time when a debtor can file a plan, and the period of time when the debtor can solicit acceptance of the same plan, then there should be language to indicate that the two periods are connected and that the first is a condition to the second. For example, the period for acceptance of the plan should be formulated as: a 60-day period from the day when the plan was filed. However, this is not the case, the Code clearly establishes a 180-day period from the day of the order for relief.[192] The 120-day period is also based on the same starting point.[193] Obviously, Congress made these time periods to be calculated independent of each other.

Bearing this assumption in mind, understanding subsections (c)(2) and (c)(3) becomes easier. With subsection (c)(2), the Code points out that because the debtor has an exclusive right, not an obligation, to file a plan for the first 120 days, by not filing a plan the debtor loses only the exclusiveness to file a plan.[194] Subsection (c)(3) is formulated to govern after the plan is filed, independently from subsection (c)(2).[195]

Nonetheless, if a debtor requests the court to extend the 120 day exclusivity period, without requesting an extension of the 180 day period, exclusivity will remain in place until the debtor files a plan, but there will be no exclusivity during the process of acceptance of the plan if the initial 180 day period has been expired.

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[190] *See In re Express One Int'l*, 194 B.R. at 100 (noting after debtor files plan he has up to 180 days after petition date to obtain acceptance). *Compare In re* Barker Estates, Inc., 14 B.R. 683, 684 (Bankr. W.D.N.Y. 1981) (stating "fixed 60 day grace period is only a possible conclusion not a necessary one."), *with In re* Judd, 173 B.R. 941, 943 (Bankr. D. Kan. 1994) (finding 120 day period and 180 day period related and therefore, extension of 120 day period automatically extends 180 day period).

[191] *See In re* Corvus Corp., 122 B.R. 685, 686–87 (Bankr. E.D. Va. 1991) (describing debtor sought extensions for both 120 day exclusivity period and 180 day acceptance period); 7 COLLIER ON BANKRUPTCY ¶ 1121.04, at 1121–24 (Lawrence P. King et al. eds., 15th ed. Rev. 1997) ("If the debtor files a plan within the 120 day exclusivity period, section 1121(c)(3) provides that exclusivity is extended for an additional sixty days to a maximum of 180 days to allow acceptance by each class of claims or interests that is impaired by the plan."); Nelan, *supra* note 4, at 455–56 (noting either 120 day filing period or 180 day acceptance period, or both periods, could be extended or reduced by court).

[192] *See* 11 U.S.C. § 1121(c)(3).

[193] *See* 11 U.S.C. § 1121 (b), (c)(2).

[194] *See In re* Perkins, 71 B.R. 294, 295 (W.D. Tenn. 1987) (noting competing plans can be proposed after exclusivity period ends); *In re* Nat'l Safe Centers, Inc., 54 B.R. 239, 240 (Bankr. D. Haw. 1985) (discussing how debtor has exclusive right to file plan in first 120 days, but debtor is not required to file plan in this period); *In re* Tony Downs Food Co., 34 B.R. 405, 408 (Bankr. D. Minn. 1983) ("Section 1121 does not create a deadline for filing a plan; the debtor is free to take as much time to develop and file its plan as it feels appropriate. The risk is, of course, that while it is developing its plan, another party in interest will file a plan. However, that is as Congress intended.").

[195] The bi-conditional "if and only if" used in subsection (c) additionally boosts the confusion of any correlation between the conditions in subsection (c). *See generally* 11 U.S.C. § 1121 (2002).

An interested party should consider that successful request for termination only of one of the periods can make their success moot. Subsection (c)(2) is independent of subsection (b). For example, if the exclusivity period under subsection (b) is terminated, the debtor may not be able to exclusively file a plan under (b), but under (c)(2) no one may file a plan during the 120 days while the debtor is still authorized to file a plan under subsection (a). Or, if subsection (c)(3) is not terminated, a 120 day exclusivity period may be terminated, but if the debtor files a plan after termination of the 120-day exclusivity period subsection (c)(3) may still produce its effect.

C. The Uncertain Area of the Exclusivity Right

Section 1121 can be, and has been, interpreted in very different ways.

1. More Than a One Time Extension

It is a well-established approach to extend the exclusivity period as many times as courts find it appropriate to do so. These extensions have been based, in part, on the assumption that if the exclusivity right is extended, the right to ask for an extension of exclusivity is viable. If an interested party files a motion for extension during the exclusivity period, the courts have found no difficulty further extending exclusivity, so long as cause for the extension can be shown.[196]

2. One Time Extension

The application of section 1121(c) may be viewed differently from the mainstream perspective.[197] Considering that subsection (b) clearly marks two points for determination of the initial exclusivity period,[198] which the Code refers to as 120

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[196] *See infra* Part III.

[197] *See In re* Westgate Gen. P'ship, 55 B.R. 562, 564 (Bankr. E.D. Pa. 1985) (denying debtor's motion for extension of exclusivity period "where request is made beyond 120 or 180 day period but during pendency of previously granted extension."). The court predicated its decision on the plain language of section 1121 and held that the motion for second extension of exclusivity was denied because the request wasn't made within the original 180-day period and the first extension of the exclusivity period would not carry with it an extension of the time to request a further extension. *Id*. *See also In re* Trainer's, Inc., 17 B.R. 246, 248 (Bankr. E.D. Pa. 1982) (stating "extension of one time period should not extend the other automatically") (citing *In re* Barker Estates, Inc., 14 B.R. 683, 685 (Bankr. W.D.N.Y. 1981)). *But see In re* Perkins, 71 B.R. 294, 297 (Bankr. W.D. Tenn. 1987) (declining to follow *In re Westgate Gen. P'ship*, concluding bankruptcy courts authorized to extend initial exclusivity period "upon motion made beyond initial exclusivity periods but within the pendency of a previous enlargement."); *In re* Nicolet, Inc., 80 B.R. 733, 741 (Bankr. E.D. Pa. 1987) (rejecting holding of *In re Westgate Gen. P'ship*); *In re* United Press Int'l, 60 B.R. 265, 268 (Bankr. D.C. 1986) (avoiding "anomalous result" of *In re Trainer's, Inc.* and *In re Barker Estates, Inc.*, court concluded section 1121 "can and should be construed as if it read that the exclusive period ends if 'the debtor has filed a plan but that plan has not been accepted' within 180 days (or any extension thereof).").

[198] *See In re* Dow Corning Corp., 208 B.R. 661, 664 (Bankr. E.D. Mich. 1997) ("[T]he Code itself delimits the periods of a debtor's exclusivity generally to 120 days, and 180 days respectively. . ."); *In re* Amko

or 180 day periods,[199] it is debatable if the debtor has any right to file a motion for extension after the first 120 or 180 days expires. It seems that congressional intent in support of this view of section 1121 was emphasized with the amendments in subsection (d), created by the Bankruptcy Amendments and Federal Judgeship Act of 1984.[200]

Pursuant to section 1121, as previously stated, the Code sets a period of time for exclusivity beginning with the order for relief.[201] The Code fixes the period in which the debtor has the right to file a motion for an extension between the date of the order for relief, and the hundred and twentieth day after that date.[202] The Code permits that period to be extended for cause if the debtor requests an extension within the initial 120 day or 180 day period specified in subsections 1121(b) and (c).[203] The Code does not provide that the motion for extension is permissible within the additional time as the court, for cause, fixes. The Code does permit the request to be made within "the respective periods specified in subsections (b) and (c)"[204] of section 1121. Therefore, upon the expiration of that time, the debtor loses any right to file a motion for extension.[205] If the debtor does not file a motion for extension within that period, the debtor cannot get an extension and exclusivity will expire.

The expiration of exclusivity as provided in the Code is clear when interpreting the plain language of the Code.[206] In section 365(d)(4)[207] there is similar language

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Plastics, Inc., 197 B.R. 74, 75 (Bankr. S.D. Ohio 1996) (referring to this period as "the initial" exclusivity period); *see also In re* Lehigh Valley Prof'l Sports Clubs, Inc., Bankr. No. 00-11296DWS, 2000 Bankr. LEXIS 237, at *11 (Bankr. E.D. Pa. Mar. 14, 2000) (discussing debtor's limited exclusivity period); *In re* Gibson & Cushman Dredging Corp., 101 B.R. 405, 407 (Bankr. E.D.N.Y. 1989) ("[T]he time period referred to in Section 1121 is referred to as the debtors 'period of exclusivity.'").

[199] *See In re Barker Estates, Inc.,* 14 B.R. at 685 ("Both these time periods run from the date the order for relief was granted and are set out in separate paragraphs without reference to the other."); *see also In re Westgate Gen. P'ship,* 55 B.R. at 564 (stating extension of one exclusivity period does not automatically extend time to request extension of other period); *In re Trainer's*, 17 B.R. at 248 (concluding extension of one deadline does not automatically extend other deadline).

[200] *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98–353, § 506(b), 98 Stat. 333, 385 (1984) (current version at 11 U.S.C. § 1121 (2003)) (amending section 1121(d) to state ". . . made with the respective periods specified in subsection (c) of this section. . ."); Harvey R. Miller et al., "Formulation and Confirmation of Chapter 11 Plans under the Bankruptcy Code," C371 A.L.I.-A.B.A. 173, 356 n.10 (A.B.A.'s Williamsburg Conf. on Bankr.: Critique of the First Decade under the Bankruptcy Reform Act and Agenda for Reform, October 17-19, 1988) ("The amendment effected by the Bankruptcy Amendments and Federal Judgeship Act,. . . may be construed to permit only the extension requested before expiration of the original 120 day and 180 day periods specified in Code § 1121(c).").

[201] *See supra* Part II.B.2. addressing the 120 day and 180 day periods.

[202] *See* 11 U.S.C. § 1121(b) (2002) ("Except as otherwise provided in this section, only the debtor may file a plan until after 120 days after the date of the order for relief under this chapter."); *see also In re Gibson & Cushman*, 101 B.R. at 407 (noting under section 1121 debtor given exclusive right "to file a plan within 120 days of the filing of the petition"); *In re* Nat'l Safe Ctrs., Inc., 54 B.R. 239, 240 (Bankr. D. Haw. 1985) (stating section 1121(b) "expressly states" debtor may "file a plan of reorganization within the 120 days after the date of the order for relief.").

[203] *See* 11 U.S.C. § 1121(d) (2002).

[204] *Id*.

[205] *See* 11 U.S.C. § 1121(b), (c)(2) (2002).

[206] *Id*.

[207] 11 U.S.C. § 365(d)(4) (2002).

regarding the courts' ability to provide an additional period of time in connection with assumption or rejection of lease.[208] For example, pursuant to subsection 365 (d)(4), the trustee may assume or reject a lease within 60 days after the order for relief, or, if the court, for cause, chooses to extend that 60-day period, the trustee then has that additional time to assume or reject a lease.[209] The Code establishes a period of time beginning with the order for relief. The Code further states that this time is extendable for cause, and that the trustee may assume or reject the lease within the extended period, but it does not allow for further extensions.[210]

A parallel comparison of the language of sections 365 and 1121 reveals that both sections use analogous language with respect to methods for determining how the time may be extended. By comparing sections 365 and 1121, it seems that a debtor has no right, more than once, to file a motion for an extension of the exclusivity period because after the first 120 days, the debtor has no right to file a motion for extension within the additional time of exclusivity that was granted by the court, as the language of 365 provides. Perhaps Congress has realized the ambiguity of section 365(d)(4) and a new proposal to section 365 uses different language that clearly resolves the ambiguity of subsection (d)(4).[211] However, the new proposed amendments to section 1121 shorten and limit the opportunity of the debtor to prolong exclusivity,[212] which is not inconsistent with the interpretation of section 1121(d) that limits the time and possibility for a request within initial 120-day period.[213]

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[208] *See* 11 U.S.C. § 365(d)(4) (stating trustee may assume or reject unexpired lease within 60 days, after order for relief, or within such additional time as court, for cause, within such 60-day period, fixes). *Compare* 11 U.S.C. § 365(d)(4), *with* 11 U.S.C. § 1121(b), (d) (using similar language regarding courts ability to extend time period).

[209] *See* 11 U.S.C. § 365(d)(4).

[210] *See generally* 11 U.S.C. § 365.

[211] *See* Bankruptcy Abuse Prevention and Consumer Protection Act, H.R.975, 108th Cong., (1st Sess. 2003) (proposing to amend 11 U.S.C. § 365(d)(4)):

> Sec. 404. Executory Contracts and Unexpired Leases.
> '(a) IN GENERAL - Section 365(d)(4) of title 11, United States Code, is amended to read as follows:
> ' (4)(A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does no assume or reject the unexpired lease by the earlier of--
> '(i) the date that is 120 days after the date of the order for relief; or
> '(ii) the date of the entry of an order confirming a plan.
> '(B)(i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.
> '(ii) If the court grants an extension under clause (i) the court may grant a subsequent extension only upon prior written consent of the lessor in each instance. '.
> (b) EXCEPTION - Section 365(f)(1) of title 11, United States Code, is amended by striking 'subsection' the first place it appears and inserting 'subsections (b) and'.

Id.

[212] *See supra* note 102.

[213] *See* 11 U.S.C. § 1121(d); *see supra* Part II.C.2. "One time Extension"; *see also* cases cited *supra* note

3. Court's Discretionary Right to Consider a Request for Extension

The Code asserts that any request for extension or termination of exclusivity requires notice and a hearing.[214] However, under a different view, a court may decline to exercise its power to either extend or reduce the exclusivity periods.[215]

The debtor or any other party in interest has a right to make any request regarding exclusivity.[216] Courts have a discretionary right to increase or reduce the exclusivity.[217] However, the Code's requirement seems to be that if there is any request within the respective periods, notice and a hearing must be provided regarding that request, notwithstanding whether the court will increase, reduce or stay silent regarding the exclusivity.[218] Without a hearing, the court has no way to obtain any information and determine whether the extension of exclusivity is necessary.[219]

4. Extension of 180 Days in Order to Confirm a Cram-Down Plan

Any party in interest may file its own plan if the debtor's plan has not been accepted during the 180 day period after the date of the order for relief, by each class of claims or interests that is impaired under the plan.[220] In an attempt to confirm a cram-down plan, it is questionable whether the debtor is entitled to an extension of the exclusivity period to reach its objective.[221] Therefore, when it is

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[214] *See* 11 U.S.C. § 1121(d).

[215] *See In re* Murray, 116 B.R. 6, 9 n.3 (D. Mass. 1990) ("Further, the lack of hearing does not appear to violate 11 U.S.C. § 1121(d) where the bankruptcy court declined to exercise its discretion to either extend or reduce the exclusivity periods."); *see also In re* Gibson & Crushman Dredging Corp., 101 B.R. 405, 407 (E.D.N.Y. 1989) ("Section 1121 grants the Bankruptcy Court discretion, upon the request of a party in interest and finding of 'cause,' to reduce or increase the debtor's period of exclusivity."). *But see* 11 U.S.C. § 1121(d) (providing in relevant part "[o]n request of a party in interest made within the respective periods specified in subsections (b) and (c) of this section and after notice and hearing, the court may for cause reduce or increase the 120 day period for the 180 day period referred to in this section"); *In re* RCN II, 118 B.R. 460, 462 ("[t]hus under Section 1121(d), the bankruptcy court is required to conduct a hearing to determine whether, in it's discretion, there is cause to extend the exclusivity period.").

[216] *See* 11 U.S.C. § 1121(d) (2002).

[217] *See id*.

[218] *See id*. *See generally In re* Wash.-St. Tammany Elec. Coop., 97 B.R. 852, 855 (E.D. La. 1989) (noting requirement of notice and hearing to make determination on limiting or extending exclusivity) (citing In re Timbers of Inwood Forest Assoc., 808 F.2d 363, 372 (5th Cir. 1987).

[219] *See* 11 U.S.C. § 1121(d) ("On request of a party in interest made within the respective periods specified in subsections (b) and (c) of this section and *after notice and a hearing*, the court may for cause reduce or increase the 120-day period for the 180 period referred to in this section.") (emphasis added); *see also In re Wash.–St.Tammany*, 97 B.R. at 855 (recognizing same). *But see In re Murray*, 116 B.R. at 9, n.3 (indicating lack of hearing may not be violative of section 1121(d)).

[220] *See* 11 U.S.C. § 1121(c)(3).

[221] *See In re* Davis, 262 B.R. 791, 794 n.5 (Bankr. D. Ariz. 2001) ("It is open to serious doubt whether Debtor would be entitled to an extension of the 180 day exclusivity period in any event, given that it exists to allow a Debtor to obtain acceptances for a consensual plan, not to confirm a cramdown plan."); *see also In re* Grand Traverse Dev. Co., 147 B.R. 418, 421 (Bankr. W.D. Mich. 1992) (espousing policy of encouraging consensual reorganizations). *See generally* Richard M. Cieri et al., *Applying an Axe When a Scalpel Will Do:*

unlikely to obtain a consensual plan, exclusivity should be terminated when an interested party can show cause and would be likely to submit its own plan.

D. Small Business Provisions

Although the small business provisions of section 1121 are not the focus of this thesis, they will be briefly addressed here.[222] The provision, subsection (e), was intended to provide a person who had aggregated non-contingent liquidated secured and unsecured debts and who elects[223] to be treated as a small business[224] with a cost effective[225] and fast track[226] procedure through bankruptcy. The small-business debtor's exclusivity period is shortened to 100 days and the period when any plan can be filed is limited to 160 days after the date of the order for relief.[227] The reduction of the 100 or 160 day periods can be granted for cause,[228] but an increase can be granted only for the 100-day period and only if the debtor needs the increase because of circumstances for which a debtor cannot be held accountable.[229] Extension of the 160-day period is not allowed.[230] This would seem to limit the

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The Role of Exclusivity in Chapter 11 Reform, 2 J. BANKR. L. & PRAC. 397, 410 (1993) (summarizing *In re Grand Traverse*).

[222] *See* 11 U.S.C. § 1121(e).

[223] *See id*. (allowing application of provision only if debtor has chosen to be treated as small business and obtain associated benefits); *see also In re* Haskell-Dawes, Inc., 188 B.R. 515, 519–20 (Bankr. E.D. Pa. 1995) (holding Bankruptcy Code provisions for small business providing accelerated timetable apply only to debtors who elect to be treated as small businesses). *See generally* Richard A. Greene, Recent Development, *Recent Developments In Small Business Bankruptcy* Law, 7 J. SMALL & EMERGING BUS. L. 215 (2003) (discussing voluntary small business election made by debtors).

[224] *See generally* 11 U.S.C. § 101(51C) (2002) (as amended by Bankruptcy Reform Act of 1994, Pub. L. No. 103–394, 108 Stat. 4106, 4127) (defining "small business" as "a person engaged in commercial or business activities (but does not include a person whose primary activity is the business of owning or operating real property and activities incidental thereto) whose aggregate non-contingent liquidated secured and unsecured debts as of the date of the petition do not exceed $2,000,000.").

[225] *See* Gross & Redmond, *supra* note 11, at 299–300 (stating "[t]he small business election gives a debtor two primary benefits: (1) upon a showing of cause, the debtor may escape the formation of a creditors' committee and its attendant expenses; and (2) the court may combine the plan and disclosure hearing to expedite the reorganization process."). *See generally* Angela K. Layden, *Inconsistencies in the Small Business Amendments*, AM. BANKR. INST. J., Feb. 1996, at 26 (discussing small business election and special treatment afforded to small businesses undergoing reorganization).

[226] *See* 11 U.S.C. §§ 1121(e)(1), (2), 1125(f) (2002) (providing accelerated and streamlined procedures for small business debtors to file and obtain confirmation for chapter 11 reorganization); *see also* Gross & Redmond, *supra* note 11 at 301 (stating "[t]he time savings will be felt in other areas—consolidation of the plan and disclosure statement hearings and solicitation of acceptances without formal disclosure statement approval.").

[227] 11 U.S.C. § 1121(e)(1), (2) (granting debtors statutorily mandated exclusive 100-day period to file plan and disclosure statement).

[228] *See* 11 U.S.C. § 1121(e)(3)(A) (applying "for cause" standard applicable in chapter 11 cases); *see also* 11 U.S.C. § 1102(a)(3) (providing court may order not to appoint committee of creditors in action involving small business debtor for cause). *See generally In re* Coleman Enters., 266 B.R. 423 (Bankr. D. Minn. 2001) (holding cause existed to remove case from fast track afforded to small business organizations), *aff'd*, 275 B.R. 533 (2002).

[229] *See* 11 U.S.C. § 1121(e)(3)(B) (extending debtors exclusivity only upon showing of "circumstances for which the debtor should not be held accountable"); *see also* Gross & Redmond, *supra* note 11, at 300 (discussing applicable standards debtor must meet in order to reduce specified period).

[230] *See* § 1121 (e)(3)(B) (noting increase only in reference to 100 day period, not 160 day period); *see also*

extension of the 100-day period to a maximum of a 60 day increase because all plans must be filed within 160 days after the date of the order for relief.[231]

The main reason for shortening the exclusivity period is due to the debtor's character as a small business.[232] There is relatively little chance for competing plans in such a situation because usually only the debtor is interested in the reorganization. Frequently it's "not worth the creditors' time or money to participate in such case."[233] However, if there is a possibility of a competing plan, the debtor can use the right of exclusivity and possible extension of the exclusivity, to prevent any interested party from filing a plan in the limited 160-day filing period.[234]

The Code language is ambiguous concerning whether the bankruptcy court can increase the 100-day period to more than 160 days. There is no real limitation on the court to prevent it from extending exclusivity for an additional 100 days, but a serious question arises if the court chooses to do so. This action would appear to be a violation of the 160-day limit in subsection (e)(2), which makes any extension for more than 60 days moot. If there is no plan filed in the 160-day period, the court may dismiss the case[235] or convert the case to a Chapter 7 liquidation procedure.[236] A question then arises as to whether the court may dismiss the debtor's choice to be treated as a small business and give other interested parties a chance to file a plan under subsection (c).

Gross & Redmond, *supra* note 11, at 300 (noting all plans must be filed *by* 160 days of commencement of the case) (emphasis added).

[231] *See* Gross & Redmond, *supra* note 11, at 301 (describing negative implications of small business provisions):

> Ironically, the new provisions for small businesses could work against the interests of creditors. Suppose that the 160-day outside limit for submission of a plan expires; however, a party emerges in the case capable of proposing a feasible plan of reorganization. The plain language approach mandates a strict construction of the provision and would bar the filing of any plan after the 160th day from the order for relief.

Id.

[232] *See* Gross & Redmond, *supra* note 11, at 301 (noting typical small business is privately held corporation and that exclusivity period is shortened due to lack of threat of competing plans by creditors); *see also* Donald R. Korobkin, *Vulnerability, Survival, And The Problem Of Small Business Bankruptcy*, 23 CAP. U. L. REV. 413, 423 & n.31 (1994) (noting majority of privately held businesses probably classified as small businesses).

[233] Gross & Redmond, *supra* note 11, at 301.

[234] *See id*.; *see also In re* Mother Hubbard, Inc., 152 B.R. 189, 195 (Bankr. W.D. Mich. 1993) (stating purpose of exclusivity provision is to allow debtor time period where plan of reorganization can be established without interference of competing plans). *But see In re* Kent Terminal Corp., 166 B.R. 555, 561 (Bank. S.D.N.Y. 1994) (stating right of exclusivity does not provide relief from stay where effective reorganization not reasonably feasible).

[235] *See, e.g., In re* W. Steel & Metals, Inc., 200 B.R. 873, 875 (Bankr. S.D. Cal. 1996) (noting 160 day period cannot be extended and dismissal or conversion is appropriate where no plan is filed within that period); *see* 7 COLLIER ON BANKRUPTCY ¶ 1112.04[5][c] at 1112-41 (Lawrence P. King et al. eds., 15th ed. Rev. 1997) ("[A]s a general rule, if the debtor fails to file a plan of reorganization within the time frames set by section 1121, or any extension granted by the court, and the failure is prejudicial to creditors, cause may exist to convert or dismiss the case.").

[236] *See supra* note 235.

III. APPLICATION AND EFFECTS OF SECTION 1121

A. Extension and Termination ("for cause")

Pursuant to section 1121, a court may, for cause, extend or terminate a debtor's exclusive period.[237] A debtor has a right, based on cause, to require an extension of the exclusivity period to file a plan.[238] On the other hand, based on cause, any interested party may request termination of the exclusivity period.[239] The term "cause" is not defined by the Code, and there is no statutory standard as to what represents cause.[240] Rather, the courts determine on a case by case basis what constitutes cause in a particular situation.[241] Some courts have made an attempt to enumerate factors that should be considered when determining what constitutes cause for extension[242] or termination of exclusivity.[243]

For the purposes of this thesis, these factors are listed only to present a guide and the list is not exhaustive of all possible factors that the courts may take into consideration when determining what constitutes cause. Selection of factors for cause is classified based on which party has the burden of proving them.[244] The

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[237] *See* 11 U.S.C. § 1121(d) (2002).

[238] *Id*.

[239] *Id*.

[240] *See* BUSINESS BANKRUPTCY, *supra* note 2, at 124 ("Once again, the Code offers no statutory guidance to the court on the grounds for altering the period of exclusivity."); *see also In re* All Seasons Indus., Inc., 121 B.R. 1002, 1005–1006 (Bankr. N.D. Ind. 1990) (examining legislative intent to determine statutory meaning of term "cause."); *Extensions of Exclusivity*, *supra* note 104, at 26 (explaining since statutory language of section 1121 unclear, bankruptcy courts have interpreted term "cause" in various ways).

[241] *See* BUSINESS BANKRUPTCY, *supra* note 2, at 124 (discussing various factors courts examine when deciding whether to shorten period of exclusivity); *see also In re* McLean Indust., Inc., 87 B.R. 830, 833 (Bankr. S.D.N.Y. 1987) (stating legislative history points toward term "cause" being viewed in manner allowing for debtor flexibility); *In re* United Press Int'l, Inc., 60 B.R. 265, 269 (Bankr. D.C. 1986) (examining factual situations surrounding debtor to determine "cause" has been established).

[242] *See* Official Comm. of Unsecured Creditors v. Elder Beerman Stores Corp. (*In re* Elder-Beerman Stores Corp.), No. C-3-97-175, 1997 U.S. Dist. LEXIS 23785, at *12 (S.D. Ohio June 23, 1997) ("[M]any courts have chosen to rely upon relatively few factors - albeit different ones."); *see also In re* Serv. Merch. Co., 256 B.R. 744, 751 (Bankr. M.D. Tenn. 2000) (listing nine factors courts have considered in determining "cause," including existence of good faith and time case pending); *In re* Express One Int'l, 194 B.R. 98, 100–101 (Bankr. E.D. Tex. 1996) (stating likelihood of agreement of consensual plan must be considered by a court).

[243] *See In re* Federated Dept. Stores, No. 1-90-00130, 1990 Bankr. LEXIS 711, at *6 (Bankr. S.D. Ohio April 13, 1990) (listing several factors courts weigh in deciding "cause," and stating courts inquiry is based on whether debtor had opportunity to formulate plan of reorganization); *see also In re* Southwest Oil Co., 84 B.R. 448, 451 (Bankr. W.D. Tex. 1987) (stating probable success in plan or reorganization is required element to demonstrate "cause"); *In re* Pine Run Trust, Inc., 67 B.R. 432, 435 (Bankr. E.D. Pa. 1986) (stating traditional grounds for allowing extension are based upon large size of debtor and difficulty in formulating reorganization plan).

[244] *See In re* Gibson & Cushman Dredging Corp., 101 B.R. 405, 409 (E.D.N.Y. 1989) (holding party seeking to change statutory time period bares burden of proof); *see also In re* Wash.–St. Tammany Elec. Coop., 97 B.R. 852, 854 (E.D. La. 1989) ("The debtor bears the burden of establishing 'cause' for an extension of its exclusive period."); *In re* Am. Fed'n Television & Radio Artists, 30 B.R. 772, 774 (Bankr. S.D.N.Y. 1983) (stating debtor required to show reorganization can probably succeed).

named factors are sorted as follows: If a factor is favoring an extension or opposing termination of exclusivity, it will be classified as an affirmative factor. A factor favoring termination or opposing extension of exclusivity will be referred as a negative factor. The burden to prove an affirmative factor is on a debtor,[245] and the burden to prove a negative factor is on an interested party.[246]

Any one of the factors or others may be a ground for termination or extension of exclusivity. It is within a court's discretion to evaluate the factors and determine which side will prevail in the case. The artificiality of a distinction between affirmative and negative factors relevant to termination or extension of exclusivity is exposed, for instance, when courts combine a motion for extension and a motion for termination of exclusivity into one hearing.[247]

1. Factors Favoring Extension or Opposing Termination of Exclusivity (Affirmative Exclusivity Factors)

A debtor may file a motion to extend the exclusivity period within the first 120 days after the date the order for relief is granted.[248] After a notice and hearing, the court has discretionary power to grant an extension.[249] The burden of establishing cause is on the party that requests a change in the statutorily prescribed time period.[250] The debtor-in-possession has the burden of proving the existence of

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[245] *See generally In re Gibson*, 101 B.R. at 409 (implying since extending exclusivity would favor debtor, debtor would have burden to proof cause for extension).

[246] *See generally id*. (indicating creditor or other interested party would have burden to prove cause to terminate extension of exclusivity period because they would be likely party seeking such measure).

[247] *See In re Express One Int'l*, 194 B.R. at 99 (justifying motion combination because both involve exclusivity period); *see also In re* Grand Traverse Dev. Co., 147 B.R. 418, 420 (Bankr. W.D. Mich. 1992) (stating exclusivity may be shortened or lengthened based upon showing of cause). *But see In re* Sharon Steel Corp., 78 B.R. 762, 763 (Bankr. W.D. Pa. 1987) (explaining in most cases, courts grant several extensions before another party challenges extension).

[248] *See* 11 U.S.C. § 1121(d).

[249] *See* Hon. Steven W. Rhodes, *Eight Statutory Causes of Delay and Expense in Chapter 11 Bankruptcy Cases*, 67 AM. BANKR. L.J. 287, 311 ("[M]ost often the debtor is simply not self-motivated to file a plan 'as soon as practicable.'"); *see also In re* Murray, 116 B.R. 6, 7 (D. Mass. 1990) (stating after there has been notice and hearing, bankruptcy court has discretion to allow extensions); *In re Gibson*, 101 B.R. at 409 ("[T]he decision of whether or not to grant a request to extend or shorten the exclusivity period lies within the sound discretion of the Bankruptcy Judge."); *In re* Tony Downs Foods Co., 34 B.R. 405, 407 (Bankr. D. Minn. 1983) (stating Bankruptcy Court has discretion whether or not to grant extension of exclusivity under 11 U.S.C.S. § 1121, and such decision should be for cause shown based upon all facts and circumstances). *But see* Official Comm. of Unsecured Creditors v. Elder Beerman Stores Corp. (*In re* Elder-Beerman Stores Corp.), No. C-3-97-175, 1997 U.S. Dist. LEXIS 23785, at *8 n.7 (S.D. Ohio June 23, 1997) ("Although the Debtors' second extension was set to expire on February 17, 1997, the Bankruptcy Court and the parties agreed that it would remain in effect until March 17, 1997, in order to give the parties the time necessary to complete preparation for a hearing on the Debtors' third request for an extension.").

[250] *See In re Gibson*, 101 B.R. at 409 ("The party seeking the change in the statutory time period bears the burden of establishing that the requisite cause exists."); *see also In re* Texaco, Inc., 76 B.R. 322, 326 (Bankr. S.D.N.Y. 1987) ("The party who seeks the extension or the reduction of the exclusivity periods has the burden of establishing cause."); *In re Tony Downs Foods Co.*, 34 B.R. at 407 (stating moving party has burden).

cause.[251] An extension may be granted if the debtor can demonstrate sufficient cause for an extension.[252] The following factors will be considered as affirmative factors:[253]

a) *Probability of successful reorganization* - If the exclusivity period were to be extended[254] and there is a high probability that the debtor will be able to file a viable reorganization plan, and successfully reorganize the business as a going concern to the benefit of all creditors, it is deemed to be critical positive factor in granting an extension of exclusivity;[255]

b) *Large size of debtor or complexity of the case* - Based on the theory that a large size debtor[256] or a highly complex case[257] requires more time for

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[251] *See In re Express One Int'l*, 194 B.R. at 100 (placing burden on debtor); *In re* Gen. Bearing Corp., 136 B.R. 361, 367 (Bankr. S.D.N.Y. 1992) (establishing debtor's responsibility to show cause); *In re* Ravenna Indus., Inc., 20 B.R. 886, 889 (Bankr. N.D. Ohio 1982) (placing burden to show cause on party seeking time extension or reduction).

[252] *See In re* Southwest Oil Co., 84 B.R. 448, 450 (Bankr. W.D. Tex. 1987) (noting courts will not routinely grant extensions and will act only where cause is shown, since section 1121(d) "represents a compromise between the dual goals of giving the debtor time to reorganize and protecting the creditors' legitimate interests" and was designed to "limit the delay that makes creditors hotage of Chapter 11 debtors."); *In re* Nicolet, Inc., 80 B.R. 733, 742 (Bankr. E.D. Pa. 1987) ("…the submission of evidence to support allegations of cause is a prerequisite.") (quoting *In re Ravenna Indus.*, 20 B.R. at 889); *In re Sharon Steel Corp.*, 78 B.R. at 763–64 (requiring sufficient cause to justify extension under 11 U.S.C. § 1121(d)); *In re* Pine Run Trust, Inc., 67 B.R. 432, 434 (Bankr. E.D. Pa. 1986) (placing burden on debtor to demonstrate existence of good cause when seeking extension); *In re* Parker St. Florist & Garden Ctr., Inc., 31 B.R. 206, 206–07 (Bankr. D. Mass. 1983) (precluding debtors from putting off creditors in absence of causal finding under section 1121(d)).

[253] The author asks one to take note that the list of both affirmative and negative factors are in no particular order of preference and that all or some of these are considered by the courts to varying degrees.

[254] *See In re* Amko Plastics, 197 B.R. 74, 77 (Bankr. S.D. Ohio 1996) (displaying reasonable business judgment, turn-around effort offers reasonable possibility of success); *In re* Curry Corp., 148 B.R. 754, 756 (Bankr. S.D.N.Y. 1992) (noting debtor's failure to produce reorganization plan as one reason for denying requested extension); *In re Southwest Oil Co.*, 84 B.R. at 451 (granting extension based upon debtor's "extraordinary diligence" in formulating reorganization plan); *In re* Perkins, 71 B.R. 294, 300 (W.D. Tenn. 1987) (using plan for reorganization, debtor can probably be rehabilitated); *In re* Swatara Coal Co., 49 B.R. 898, 900 (Bankr. E.D. Pa. 1985) (allowing extension for debtor to reorganize and rehabilitate); *In re* Am. Fed'n of Television & Radio Artists, 30 B.R. 772, 774 (Bankr. S.D.N.Y. 1983) (expressing debtor did not show successful reorganization plan to grant exclusivity extension); S. REP. NO. 95-989, at 118 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, at 5904 ("Since the debtor has an exclusive privilege for [six] months during which others may not file a plan, the granted extension should be based on a showing of some promise of probable success."). *See generally In re* Henry Mayo Newhall Mem'l Hosp., 282 B.R. 444, 447 (B.A.P. 9th Cir. 2002) (giving debtor 60-day extension under viable plan).

[255] *See generally supra* note 254.

[256] *See In re Curry Corp.*, 148 B.R. at 755 (denying debtor's extension request, given small size of operations); *In re* All Seasons Indus. Inc., 121 B.R. 1002, 1005–06 (Bankr. N.D. Ind. 1990) (noting size common cause for extension); *In re Nicolet*, 80 B.R. at 741 (recognizing large size of debtor to constitute good cause for extension); *In re* Texaco, Inc., 76 B.R. 322, 326 (Bankr. S.D.N.Y. 1987) (deeming large size important when extending exclusivity period).

[257] *See In re Texaco, Inc.*, 76 B.R. at 327 (finding Texaco complex multi-national oil company to establish cause for extension by sheer size alone); *In re Perkins*, 71 B.R. at 300 (expressing overwhelming caseloads constitute cause, as they entail unusually large and complex claims); *In re* Manville Forest Prod. Corp., 31 B.R. 991, 995 (S.D.N.Y. 1983) ("The sheer mass, weight, volume and complication of…filings…justify a shake-down period. The overall complication has perhaps itself constituted 'cause'…for extensions."). *But*

the preparation of a plan of reorganization;[258]

c) *Difficulty in formulating a plan of reorganization*;[259]

d) *The fact that the debtor is paying its bills as they become due*;[260]

e) *Seasonal business*[261] *and Nature of the business* - Courts may consider the nature of the debtor's business;[262]

f) *Best interest of the estate* - Extension of exclusivity is in the best interest of the estate;[263]

g) *Demonstrating progress in formulating a plan* - Demonstrating progress in formulating a plan in face of creditor's recalcitrance or unusual procedural or substantive difficulties;[264]

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see In re Wash.–St. Tammany Elec. Coop., 97 B.R. 852, 854–55 (E.D. La. 1989) (stating size and complexity must be accompanied by other factors); *In re* Pub. Serv. Co. of N. H., 88 B.R. 521, 537 (Bankr. D.N.H. 1988) (holding size and complexity alone insufficient causes for extension of exclusivity).

[258] *See In re* Serv. Merch. Co., 256 B.R. 744, 751–52 (Bankr. M.D. Tenn. 2000) (recognizing tremendous coordination required to manage large and complex reorganization); Official Comm. of Unsecured Creditors (*In re* The Elder-Beerman Stores Corp.), No. C-3-97-175, 1997 U.S. Dist. LEXIS 23785, at *15–16 (S.D. Ohio June 23, 1997) (finding retail bankruptcy case both sizable and complex thereby accounting for time extension); *In re* Express One Int'l, 194 B.R. 98, 100 (Bankr. E.D. Tex. 1996) (considering "large and complex" language of section 1121 to encompass more than "Texaco[s]…or Ames Department Stores."); *In re* Federated Dept. Stores, No. 1-90-00130, 1990 Bankr. LEXIS 711, at *9 (Bankr. S.D. Ohio Apr. 13, 1990) (noticing "[t]he large size of the debtor and the consequent difficulty in formulating a plan of reorganization for a huge debtor with a complex financial structure are important factors which generally constitute cause for extending the exclusivity periods.").

[259] *See In re* Hoffinger Indus., Inc., 292 B.R. 639, 643 (B.A.P. 8th Cir. 2003) (citing difficulty in making plan when dealing with debtor's complex financial structure); *In re Nicolet*, 80 B.R. at 741–42 (acknowledging difficulty in formulating plan of reorganization); *In re* United Press Int'l, Inc., 60 B.R. 265, 269–70 (Bankr. D.C. 1986) (granting additional time to file plan since debtor was large and complex to administer).

[260] *See In re Express One Int'l*, 194 B.R. at 100 (defining payment of bills as factor determining whether cause for extension exists); *see also In re* McLean Indus., Inc., 87 B.R. 830, 834 (Bankr. S.D.N.Y. 1987) (noting payment of bills as factor); *In re* Trainer's, Inc., 17 B.R. 246, 247 (Bankr. E.D. Pa. 1982) (stating payment of bills as cause for extension).

[261] *See, e.g., In re* Amko Plastics, Inc., 197 B.R. 74, 76 (Bankr. S.D. Ohio 1996) (noting extra time needed to see results of plan to stabilize seasonal business); *In re* Chadwick Bay Hotel Assocs., 180 B.R. 47, 50 (Bankr. W.D.N.Y. 1995) (requesting full business cycle to assess debtor's reorganization options due to it's highly seasonal business and peak summer activity). *But see In re* Crescent Beach Inn, Inc., 22 B.R. 155, 160–61 (Bankr. D. Me. 1982) (shortening exclusive period for seasonal business debtor to enable more objective parties to file plan). *See generally* Banco Urquijo v. Signet Bank, 861 F. Supp. 1220, 1232 (M.D. Pa. 1994) (characterizing seasonal businesses to have swings in profit margins over course of year).

[262] *See In re Serv. Merch.*, 256 B.R. at 751 (considering seasonal nature of debtors' business); *In re Amko Plastics*, 197 B.R. at 77 (holding debtor showed cause for extension considering nature of his business); *In re* Ames Dep't Stores, Inc., 1991 U.S. Dist. LEXIS 17074, at *8 (S.D.N.Y. Nov. 25, 1991) (deciding upcoming Christmas selling season justifies extension of exclusivity period); *In re Manzey Land & Cattle Co.*, 17 B.R. at 335 (noting extension not unreasonable when debtors are farmers who have been occupied with fall harvest).

[263] *See In re Serv. Merch., Co.*, 256 B.R. at 751 (granting extension of exclusivity in part because it was in best interest of estate); *In re* Geriatrics Nursing Home, 187 B.R. 128, 133 (Bankr. D.N.J. 1995) (affirming refusal to extend exclusivity because it would not produce best possible result for all concerned); *In re* Gibson & Cushman Dredging Corp., 101 B.R. 405, 410 (E.D.N.Y. 1989) (favoring extension of exclusivity because it augmented debtor's assets).

[264] *See In re Nicolet*, 80 B.R. at 742 (recognizing progress in formulation of plan despite creditor's recalcitrance or unusual procedural or substantive difficulties may establish good cause for extension of exclusivity periods); *see also In re* Henry Mayo Newhall Mem'l Hosp., 282 B.R. 444, 447 (B.A.P. 9th Cir. 2002) (concluding debtor demonstrated reasonable prospect for filing viable plan); *In re* Perkins, 71 B.R.

h) *Developments and attempts in reorganization (due diligence)*- Developments in the case[265] and the debtor's diligent attempt to reorganize;[266]
i) *Pending litigation* - Pending litigation concerning the case that results in a delay or where plan preparation depends on the results in the litigation, may or may not be a factor for granting an extension;[267]
j) *First extension* - First extension as a supportive circumstance;[268]
k) *Creditor's refusal to negotiate in good faith* - Creditors' refusal to negotiate in good faith supports continuation of exclusivity.[269]

294, 300 (W.D. Tenn. 1987) (noting debtor showed diligence in filing and soliciting acceptances of plan).

[265] *In re Nicolet*, 80 B.R. at 742; *see In re Serv. Merch.*, 256 B.R. at 751 (considering debtor's progress in case to date); Official Comm. of Unsecured Creditors v. Elder-Beerman Corp. (*In re* Elder-Beerman Stores Corp.), No. C-3-97-175, 1997 U.S. Dist. LEXIS 23785, at *5–6 (discussing debtors' instituted an extensive turnaround plan and continued to meet or exceed its criteria); *In re* Federated Dep't Stores, No. 1-90-00130, 1990 Bankr. LEXIS 711, at *12 (Bankr. S.D. Ohio Apr. 13, 1990) (stating debtors making substantial progress resolving important issues requiring resolution before plan formulation and negotiation can begin).

[266] *See In re Express One Int'l*, 194 B.R. at 101 (explaining debtor diligent in attempts to reorganize); *In re Amko Plastics*, 197 B.R. at 76 (declaring debtor initiated and implemented substantial and significant turnaround efforts); *In re* Grand Traverse Dev. Co., 147 B.R. 418, 421 (Bankr. W.D. Mich. 1992) (acknowledging debtor has been diligent in moving case toward confirmation).

[267] *See In re* Sletteland, 260 B.R. 657, 671 (Bankr. S.D.N.Y. 2001) (favoring extension when debtor has authority to pursue appeal); *In re* Newark Airport/Hotel, 156 B.R. 444, 451 (Bankr. D. N.J. 1993) (treating pending appeal of state court foreclosure proceeding as factor favoring extension); *In re Gibson*, 101 B.R. at 410 (noting appeal may lead to finding of cause for extension); *In re* United Press Int'l, Inc., 60 B.R. 265, 269–70 (Bankr. D.C. 1986) (deciding extension is needed during appeals and adversary proceedings); *In re* Manzey Land & Cattle Co., 17 B.R. 332, 335 (Bankr. D. S.D. 1982) (allowing extension due to pending motion before court). *But see In re* All Seasons Indus., Inc., 121 B.R. 1002, 1005 (Bankr. N.D. Ind. 1990) (noting chapter 11 proceeding must not be placed in limbo until results of litigation are known); *In re* Southwest Oil Co., 84 B.R. 448, 452 (Bankr. W.D. Tex. 1987) (denying extension of exclusivity period because pending litigation with creditors not in itself sufficient cause); *In re* Scott, 37 B.R. 184, 186 (Bankr. W.D. Ky. 1984) (noting appeal not permitted to stand as substitute for filing of debtor's plan.); *In re* Parker Street Florist & Garden Center, Inc., 31 B.R. 206, 208 (Bankr. D. Mass. 1983) (reasoning debtor may propose its plan taking into consideration possible results of adversary proceeding); *In re* Am. Fed'n of Television & Radio Artists, 30 B.R. 772, 774 (Bankr. S.D.N.Y. 1983) (stating pending appeal does not constitute "cause" for extension of exclusivity periods); *In re* McLaury, 25 B.R. 30, 32 (Bankr. N.D. Tex. 1982) (refusing to extend exclusivity until appeal concluded); *In re* Lake in the Woods, 10 B.R. 338, 345 (E.D. Mich. 1981) (discussing pending litigation not valid cause for extension, even if it might prevent formulation of plan).

[268] *See In re Henry Mayo*, 282 B.R. at 447 (stating first extension supports finding of cause); *In re Newark Airport/Hotel*, 156 B.R. at 451 (granting extension because it is debtor's first request). *But see In re* Gen. Bearing Corp., 136 B.R. 361, 367 (Bankr. S.D.N.Y. 1992) (finding first extension request does not of itself constitute cause).

[269] *In re* Lehigh Valley Prof'l Sports Clubs, Inc., No. 00-11296DWS, 2000 Bankr. LEXIS 237, at *17 (Bankr. E.D. Pa. Mar. 14, 2000) ("Indeed the refusal of creditors to negotiate in good faith supports continuation of exclusivity."); *see In re Elder-Beerman Stores Corp.*, 1997 U.S. Dist. LEXIS 23785, at *22 (noting purpose of exclusivity factors is to motivate both debtor and creditor to negotiate consensual reorganization plan); *In re Federated Dep't Stores*, 1990 Bankr. LEXIS 711, at *6 (generalizing inquiry as whether debtor had sufficient opportunity to propose and negotiate plan with creditors); *In re Gibson*, 101 B.R. at 410 (considering recalcitrance of creditors and intent to liquidate rather than negotiate as factor).

2. Factors Favoring Termination or Opposing Extension of Exclusivity (Negative Exclusivity Factors)

In an indirect way, section 1121 not only gives a right, but also places a duty on a debtor in possession to formulate and file a plan of reorganization.[270] If a debtor does not fulfill such a duty, a party in interest may file a plan[271] or at least request termination of the exclusivity period.[272] Any party in interest, pursuant to section 1121(d), requesting a reduction of the exclusivity period has the heavy burden of proving cause for such reduction.[273] The following factors are considered as negative factors:

a) *New value* - Filing a new value plan should be viewed as "cause" to terminate the debtor's exclusivity;[274]

b) *Use of exclusivity to force creditors to accept an unsatisfactory or un-*

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[270] *See In re* Public Serv. Co., 88 B.R. 521, 542 (Bankr. D. N.H. 1988) (acknowledging debtor has duty to create plan); *In re Southwest Oil Co.*, 84 B.R. at 454 (noting debtor has duty to file plan even if extension is denied); *In re* Vermont Real Estate Inv. Trust, 25 B.R. 808, 809 (Bankr. D. Vt. 1982) (stating debtor has duty to formulate reorganization plan under section 1121).

[271] *See* 11 U.S.C. § 1121(c)(2), (3) (2002) (announcing which parties may file reorganization plan); *In re* River Village Assocs., 181 B.R. 795, 803 (E.D. Pa. 1995) (permitting creditors to file alternative reorganization plans after termination of debtor's exclusivity period and rejection of debtors plan). *See generally* Rosen & Rodriguez, *supra* note 31, (discussing provisions of section 1121(d) and reasoning behind statute).

[272] *See* 11 U.S.C. § 1121(d) (declaring debtor's exclusivity period may be increased or decreased by court for cause), Texas Extrusion Corp. v. Lockheed Corp. (*In re* Texas Extrusion Corp.), 844 F.2d 1142, 1160 (5th Cir. 1988) (holding Bankruptcy Court correctly granted motion to reduce debtor's exclusivity period since there was cause). *See generally* Lam, *supra* note 98, (analyzing case law that applied section 1121(d) to decrease or terminate debtor's exclusivity period).

[273] *See In re Lehigh Valley Prof'l Sports Clubs*, 2000 Bankr. LEXIS 237, at *9–10 ("The party seeking charge has the burden of establishing that cause exists and when that change is a reduction in the statutory period, the burden is especially heavy.") (citation omitted); *In re* Interco, Inc., 137 B.R. 999, 1000 (Bankr. E.D. Mo. 1992) ("A party requesting an immediate termination of the exclusive period as originally authorized by statute or as it may have been extended by the Court, bears a heavy burden."); *see also In re* Eagle-Pitcher Indus., 176 B.R. 143, 147 (Bankr. S.D. Ohio 1994) (holding where only grounds claimed for termination of debtor's exclusivity period so that creditor may file alternative plan are (1) creditor has been treated unfairly by being excluded from mediated negotiations and (2) filing of it's alternative plan will speed resolution on case, court will not find creditors' burden fulfilled).

[274] *See In re* Situation Mgmt. Sys., 252 B.R. 859, 865 (Bankr. D. Mass. 2000) (deciding where new value provision in debtor's plan provides for sale of stock in reorganized debtor, debtor has forfeited it's exclusivity period since any party could bid on debtor's equity interest and assume control of debtor if successful); *In re* Gen. Bearing Corp., 136 B.R. 361, 367 (Bankr. S.D.N.Y. 1992) (denying extension of exclusivity based on skepticism that secured creditors would accept something less than its allowed secured claim, therefore debtor's shareholders would be bound by modified absolute priority rule and would not be allowed to retain equity interest for confirmation purposes); NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT, at 545 (1997) (proposing that if debtor moves to confirm any new value plan, exclusivity should be terminated); *see also* Robert Zinman, *New Value and the Commission: How Bizarre!*, 5 AM. BANKR. INST. L. REV. 477, 481 (1997) (discussing the commission's proposal and new value in general). *But see In re* SM 104, Ltd., 160 B.R. 202, 225 (Bankr. S.D. Fla. 1993) (finding "new value" factor is not exception to absolute priority rule, but corollary to it because equity received by old owners given to them for new value contributed and therefore refused to terminate exclusivity period based on this ground).

confirmable plan - Debtor's use of exclusivity for its only advantage;[275]

c) *Delay in filing a plan* - Debtor's delay in filing a plan;[276]

d) *Gross mismanagement* - Gross mismanagement of the debtor's operations;[277]

e) *Acrimonious relations* - Acrimonious relations between the debtor's principals;[278]

f) *Acrimonious relations between parties* - Feuding between principal parties;[279]

g) *Attempts to prolong reorganization* - Whether the debtor is attempting to prolong reorganization for certain impermissible purposes;[280]

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[275] *See In re Situation Mgmt. Sys.*, 252 B.R. at 863 (recognizing debtor's use of exclusivity period to force creditors to accept unsatisfactory or unconfirmable plan as factor in determining termination); *In re* Standard Mill Ltd. P'ship, 1996 WL 521190, at *1 (Bankr. D. Minn. Sept. 12, 1996) (recognizing debtor's use of exclusivity period to force creditors to accept an unconfirmable plan may be "cause" to terminate exclusivity period); *In re* Texaco, Inc., 81 B.R. 806, 812–13 (Bankr. S.D.N.Y. 1988) (indicating court recognizes debtor's exclusivity period may not be used to pressure creditors to agree to unsatisfactory plan, but held no evidence to conclude debtor using exclusivity period in this fashion).

[276] *See In re Situation Mgmt. Sys.*, 252 B.R. at 863 (listing debtor's delay in filing plan as valid reason for termination of exclusivity period); *In re Eagle-Pitcher Indus.*, 176 B.R. at 147 ("A pertinent case [for termination of exclusivity period] might be delay by the debtor."); *see also In re Lehigh Valley Prof'l Sports Clubs*, 2000 Bankr. LEXIS 237, at *16 (discussing courts failure to find undue delay by debtor in *In re Eagle Pitcher Indus.*).

[277] *See In re Situation Mgmt. Sys.*, 252 B.R. at 863 (recognizing gross mismanagement of debtor's operations as cause for termination of exclusivity period); *In re Texaco*, 81 B.R. at 812 (stating gross mismanagement of debtor's operations is regarded as "cause" for termination of exclusivity period); *see also In re* Sharon Steel Corp., 871 F.2d 1217, 1227 (3d Cir. 1989) (rejecting debtor's argument that appointment of trustee is inappropriate where pre-petition gross mismanagement has been corrected and no post-petition gross management has occurred); *In re* Crescent Beach Inn, Inc., 22 B.R. 155, 159 (Bankr. D. Me. 1982) (refusing to find gross mismanagement since overdrawn checks are usual for debtor having financial difficulties and overdrafts never exceeded $2,000). *But see In re* Sletteland, 260 B.R. 657, 671–72 (Bankr. S.D.N.Y. 2001) (holding appointment of trustee not appropriate where creditors can only speculate debtor will again grossly mismanage its assets).

[278] *See In re Situation Mgmt. Sys.*, 252 B.R. at 863 (recognizing "acrimonious relations" between debtor's principals is cause for terminating exclusivity period); *In re* Geriatrics Nursing Home, Inc., 187 B.R. 128, 132 (D.N.J. 1995) (recognizing acrimonious feuding between debtor's principals as cause to terminate exclusivity period); *In re* Texas Extrusion Corp., 68 B.R. 712, 725 n.31 (N.D. Tex. 1986), *aff'd*, 844 F.2d 1142 (5th Cir. 1988) (finding acrimonious relations between debtor's principles where appellants accuse appellees of ethical violations, appellees moved for sanctions against appellants, and both appellees and appellants moved to disqualify each others attorneys and therefore terminate exclusivity period); *see also In re* Grand Traverse Dev. Com. Ltd. P'ship., 147 B.R. 418, 420 (Bankr. W.D. Mich. 1992) (finding source of problems was debtor-in-possession rather than acrimonious relations between debtors and therefore refused to terminate period of exclusivity).

[279] *See In re Crescent Beach Inn*, 22 B.R. at 160–61 (believing interests of creditors and debtor are best served by terminating exclusivity period of debtor where principal parties have acrimonious relations); *In re Texas Extrusion Corp.*, 68 B.R. at 725 (stating feuding between principal parties was obstacle in reorganization).

[280] *See In re* Henry Mayo Newhall Mem'l Hosp., 282 B.R. 444, 447 (B.A.P. 9th Cir. 2002) (factoring size, complexity, and previous extensions when deciding if debtor prolonged case); *In re* Sharon Steel Corp., 78 B.R. 762, 766 (Bankr. W.D. Pa. 1987) (rejecting debtor's first request for extension because debtor had not demonstrated any meaningful progress in negotiation, and 120 days should have been sufficient for exclusivity); Official Comm. of Unsecured Creditors v. Elder–Beerman Stores Corp. (*In re* Elder-Beerman

h) *Legislative history* - Legislative goals behind 11 U.S.C.S. §1121;[281]
i) *Impairment or prejudice* - Potential harm or prejudice[282] to creditors[283] that can be made with an extension of exclusivity;
j) *Delay of an alternative plan because of exclusivity* - Exclusivity as a means to delay submission of alternative plans;[284]
k) *Holding creditors hostage to the proceeding* - Whether extension of exclusivity may hold the creditors hostage to the bankruptcy proceeding;[285]
l) *Stalemate or impasse in negotiation* - Whether the parties have reached a stalemate or impasse in plan negotiations;[286]
m) *Prospect of concurring plan or other initiative* - Possibility of concurring plan or possibility of other initiatives may affect the court decision;[287]

Stores Corp.), No. C-3-97-175, 1997 U.S. Dist. LEXIS 23785, at *16 (S.D. Ohio June 23, 1997) (noting debtors motivation was not to pressure parties or gain leverage in negotiation process); *In re* Perkins, 71 B.R. 294, 300 (W.D. Tenn. 1987) (determining debtor not attempting to prolong reorganization for impermissible purposes); *In re* Lake In The Woods, 10 B.R. 338, 345–46 (E.D. Mich. 1981) (discussing debtor who attempted to prolong reorganization and continue operation of real estate complex); *In re* Foster Bros. Mfg. Co., 1 BAMSL 323 (Bankr. E.D. Mo. 1981) (denying application for extension because of debtor's attempts to forestall creditors and not to reorganize).

[281] *See, e.g., In re Elder–Beerman Stores*, 1997 U.S. Dist. LEXIS 23785, at *14–15 (rejecting Creditors' Committee's argument that extension would contradict Congress' intent); *see In re Lehigh Valley Prof'l Sports Clubs*, 2000 Bankr. LEXIS 237, at *12 (citing *In re* All Seasons Indus., 121 B.R. 1002, 1003 (Bankr. N.D. Ind. 1990)) (discussing bankruptcy court's duty to consider legislative intent); *In re* Ravenna Indus., Inc. 20 B.R. 886, 889 (Bankr. N.D. Ohio 1982) (ensuring ruling does not result from imbalances between debtors and creditors under chapter 11).

[282] *See In re* Amko Plastics, 197 B.R. 74, 77 (Bankr. S.D. Ohio 1996) (defining "prejudice" in exclusivity context as debtor "unwilling to negotiate in good faith with creditors."); *In re* McLean Indus. 87 B.R. 830, 835 (Bankr. S.D.N.Y 1987) (finding no prejudice because debtor and creditor agreed on preliminary direction for plan); *In re* Coram Graphic Arts, 11 B.R. 641, 645 (Bankr. E.D.N.Y 1981) (deciding further extensions would prejudice creditor when debtor already used delay tactics).

[283] *See, e.g., In re Elder–Beerman Stores*, 1997 U.S. Dist. LEXIS 23785, at *39 (finding creditors would not be prejudiced by extension). However, in footnote 18, Court says that the members of the Board of Directors' misconduct before and after the filing of the bankruptcy, regarding their ability to conduct good-faith negotiations with the creditors, if known to the Court, would have been relevant to determination of whether the creditors would be harmed by the extension. *Id*. at *38 n.18; *see In re* Southwest Oil Co., 84 B.R. 448, 453 (Bankr. W.D. Tex. 1987) (holding court must balance potential harm to creditors where debtors' financial position deteriorated during 120 day exclusivity period and likely will continue to deteriorate).

[284] *See In re* Pub. Serv. Co., 88 B.R. 521, 537 (Bankr. D.N.H. 1988) (identifying risk of alternative plans being delayed when extending exclusivity); *see also In re Elder–Beerman Stores*, 1997 U.S. Dist. LEXIS 23785, at *25 n.12. (evaluating appellants argument extension of exclusivity would delay alternative plans); *In re* Wash.–St. Tammany Electric Coop., 97 B.R. 852, 854–55 (E.D. La. 1989) (considering alternative creditor plans do not exist).

[285] *See In re Henry Mayo*, 282 B.R. at 447 (identifying pressuring effect on creditors upon grants of extension); *In re Elder–Beerman Stores*, 1997 U.S. Dist. LEXIS 23785, at *25 n.12 (weighing appellants concern extension of exclusivity would hold creditors hostage); *In re* Serv. Merch. Co., 256 B.R. 744, 754 (Bankr. M.D. Tenn. 2000) (holding extension not sought to pressure creditors).

[286] *See In re Henry Mayo*, 282 B.R. at 447 (necessitating debtors progress with key creditors); *In re Elder–Beerman Stores*, 1997 U.S. Dist. LEXIS 23785, at *14, *17 (identifying whether parties reached impasse as relating to decision to grant extension of exclusivity); *In re Serv. Merch. Co.*, 256 B.R. at 754 (finding debtor made sufficient progress in case to warrant further extention of exclusivity).

[287] *See In re Amko Plastics*, 197 B.R. at 77–78 (noting "[t]he UCC has not offered a plan in connection

n) *Depriving Creditors' Committee* - Depriving the Committee of material or relevant information.[288]

In some cases where there is nothing special in the case to justify alteration of congressional policy or any cause to increase time, the court should not extend the exclusivity period.[289] For example, the fact that a debtor is requesting an extension for the first time does not in itself constitute cause.[290]

The passage of time itself is a changed circumstance, but not sufficient cause in and of itself to allow the court to terminate exclusivity.[291] The same logic should be used for termination of exclusivity when time is in question. Time should not be the sole factor for cause to terminate exclusivity. "Not enough time passed" should not be an obstacle to termination of the exclusivity period.

B. The Nature of the Order for Extension or Termination of Exclusivity

Prior to the amendment of 1994, the order for extension or reduction of exclusivity, as an interlocutory order, was appealable only by leave of the court[292]

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with its opposition to the present motion, nor shared with the court what initiatives it would undertake if exclusivity were terminated."); *In re Pub. Serv. Co.*, 88 B.R. at 537 (acknowledging alternative plans were delayed by extensions of exclusivity); Martin J. Bienenstock, *Conflicts Between Management and the Debtor in Possession's Fiduciary Duty*, 61 U. CIN. L. REV. 543, 561–62 (1992) (suggesting when debtor stalls using exclusivity, interested parties, who are negatively affected, should be able to propose alternatives).

[288] *See In re Henry Mayo*, 282 B.R. at 447 (affirming bankruptcy court's extension of exclusivity period in part because Committee had access to relevant information); *In re* Dow Corning Corp., 208 B.R. 661, 665 (Bankr. E.D. Mich. 1997) (assessing sufficiency of time for debtor to prepare and provide adequate information to all parties). *See generally* Bienenstock, *supra* note 287, at 562 (discussing debtors fiduciary duty to provide all material information concerning business decisions to creditors).

[289] *See In re* Tony Downs Foods Co., 34 B.R. 405, 408 (Bankr. D. Minn. 1983) (denying extension in exclusivity period because court found neither cause, nor special circumstances, present and sufficient to warrant extending period provided by Congress "to put certain amount of pressure on the Debtor."); *see also In re Pub. Serv. Co.*, 88 B.R. at 534–36 (reviewing exclusivity period extensions and stressing courts should require cause to "avoid reinstituting the imbalance between the debtor and its creditors that characterized proceedings under the old Chapter XI."). *See generally In re* Hoffinger Indus., 292 B.R. 639, 643–44 (B.A.P. 8th Cir. 2003) (outlining nine factors used by courts in weighing exclusivity period modifications, noting not all need be present in any particular case, and affirming courts' discretion to give appropriate weight to each).

[290] *See In re* The Curry Corp., 148 B.R. 754, 755 (Bankr. S.D.N.Y. 1992) (noting, in non-complex case, debtor's first extension request does not, absent other factors, qualify as cause); *In re* Gen. Bearing Corp., 136 B.R. 361, 367 (Bankr. S.D.N.Y. 1992) (same); *see also In re Henry Mayo*, 282 B.R. at 447 (factoring first request into analysis of nine factors leading to extension grant); *In re* Newark Airport/Hotel, 156 B.R. 444, 451 (Bankr. D. N.J. 1993) (treating debtor's first request for extension, made early in proceedings, as indication debtor "not seeking an extension merely to pressure its creditors."). *See generally* HON. JOE LEE, 5 BANKR. SERVICE L. ED. § 44:36–37 (stating debtor's argument for extension "must be accompanied by other factors pertinent to particular debtor and its reorganization" and detailing other cause factors).

[291] *See In re Dow Corning*, 208 B.R. at 664 (observing time passage qualifies as changed circumstance, but does not, absent other factors, allow court to end debtor exclusivity period); *see also In re* Express One Int'l, Inc., 194 B.R. 98, 100 (Bankr. E.D. Tex. 1996) (listing factors court considers when deciding whether to terminate exclusivity and noting passage of time as one of these factors). *But see* Quinn v. City of Boston, 325 F.3d 18, 49 (1st Cir. 2003) (rejecting passage of time as changed circumstance within employment discrimination argument).

[292] *See* 28 U.S.C. § 158 (a), prior to 1994 amendments, Pub.L. 103-394 (HR 5116), 108 Stat. 4108–10, read:

and not as a matter of right. As a result, these issues were not frequently appealed, or, if they were, courts declined to hear the appeal.[293]

With the amendments of 1994,[294] section 158(a)(2) of the Judicial Code[295] changed the nature of the order for extension or reduction of the exclusivity period to an appealable interlocutory order.[296] Section 158 provides an opportunity for direct appeal from orders reducing or extending the exclusivity period.[297] To make

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> The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving;

28 U.S.C. § 158(a) (1990) (current version at 28 U.S.C. § 158 (2002)); *see also In re* RCN II., 118 B.R. 460, 463 (W.D. Mich. 1990) (agreeing expressly with *Gibson* court reasoning to find grant of motion extending debtor's exclusivity period not final order and not appealable as of right); *In re* Murray, 116 B.R. 6, 7–8 (D. Mass. 1990) (acknowledging bankruptcy proceeding final orders directly affect debtor's assets, determine outcome, or irrevocably decide issue of law or rights, and so denial of exclusivity period extension not final order and thus not appealable as of right); *In re* Gibson & Cushman Dredging Corp., 101 B.R. 405, 407–08 (E.D.N.Y. 1989) (finding first order granting extension of exclusivity period not appealable as of right because such order merely postpones creditor's right to propose plan); *In re* Leibinger-Roberts, Inc., 92 B.R. 570, 572–73 (E.D.N.Y. 1988) (stating leave to appeal interlocutory bankruptcy court orders are within court discretion); First Am. Bank of N.Y. v. Century Glove, Inc., 64 B.R. 958, 961 (D. Del. 1986) (noting under Bankruptcy Code in effect at time, "[n]o specific standards for determining when interlocutory appeals are appropriate are contained in the Bankruptcy Rules or the Code."); *In re* Johns-Manville Corp., 47 B.R. 957, 960–61 (S.D.N.Y. 1985) (outlining criteria when leave to appeal interlocutory orders should be granted).

[293] *See* Gross & Redmond, *supra* note 11, at 292 (explaining "[a]s a practical matter" interlocutory orders modifying exclusivity period were not frequently appealed under pre-1994 amendment to section 158 given "considerable time and expense [often required to determine] if the appeal could be heard."); *see also* cases cited *supra* note 292. *See generally* Consumer News & Bus. Channel P'ship v. Dow Jones/Group W Television Co. (*In re* Fin. News Network, Inc.), 931 F.2d 217, 220 (2d Cir. 1991) (concluding appellate court's threshold and "critical" issue is determining whether order decided by lower court was final or interlocutory). *But cf. In re Henry Mayo*, 282 B.R. at 448 (observing post-1994 exclusivity period modifications unique among bankruptcy appeals as sole category of interlocutory orders appealable as of right).

[294] Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 102 at 108 Stat. 4106, 4108 (codified as amended at 28 U.S.C. § 158 (1994)) (amending 28 U.S.C. § 158 as shown *infra* note 298).

[295] 28 U.S.C. § 158 (2002).

[296] *See id*.

[297] *See* 28 U.S.C. § 158(a), as amended by Bankruptcy Reform Act of 1994, *supra* note 294, read:

> The district courts of the United States shall have jurisdiction to hear appeals
> (1) from final judgments, orders, and decrees;
> (2) from interlocutory orders and decrees issued under section 1121 (d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and
> (3) with leave of the court, from other interlocutory orders and decrees;
> of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

Id.; *see also* H.R. REP. NO. 103-835, at 36 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3344, noting:

> Under current [pre-1994 Bankruptcy Code] law, an order extending the debtor's exclusive period to file a plan is an interlocutory order. [Title] 28 U.S.C. § 158(a) provides that appeal from interlocutory orders of a bankruptcy judge may be made to the district court only upon leave of the district court, and not as a matter of right. Section 102 of the bill would amend 28 U.S.C. § 158(a) so as to provide for an immediate appeal as of right to the district court from a bankruptcy court's order

this amendment effective,[298] courts should recognize the importance of a prompt, expedited briefing schedule[299] because most appeals might be moot[300] by the time they are decided. In a case with multiple extensions,[301] although the appeal period has already expired, the appeal is not moot[302] if the debtor still has the exclusive right to file a plan.

Legislative history reveals[303] that Congress did not set an applicable standard for review of the appeal.[304] Courts are split on what standard should be applied[305] on an appeal of the order for extension, termination, or denial of extension of exclusivity.[306] The split is between the standard of abuse of the court's discretion[307]

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extending or reducing that debtor's exclusive period in which to file a plan.

Id.

[298] *See* U.S. Trustee v. Vance, 189 B.R. 386, 389 (W.D. Va. 1995) (deciding district courts have jurisdiction pursuant to section 158(a), as amended in 1994, over non-final orders on appeal from bankruptcy courts to resolve important disputes without further delay); *Extensions of Exclusivity*, *supra* note 104, at 26 (noting 1994 amendments to 28 U.S.C. § 158(a) designed to streamline administration of chapter 11 cases, but concluding "it is unlikely a creditor's ability to appeal an extension of exclusivity . . . will be of much utility."); *see also* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 102 at 108 Stat. 4106, 4108 (codified as amended at 28 U.S.C. § 158 (1994)) (amending 28 U.S.C. § 158, as shown, *supra* note 297).

[299] *See In re* Henry Mayo Newhall Mem'l Hosp., 282 B.R. 444, 449 (B.A.P. 9th Cir. 2002) (observing transitory nature of exclusivity orders and revealing "[w]hen the Committee requested an expedited briefing schedule, we promptly granted the request even though it was not made immediately upon filing the appeal."); Gross & Redmond, *supra* note 11, at 293 ("If the amendment to § 158 is to be effective, there must be an expeditious appeal. . . ."); *see also* Klee, *supra* note 50, at 552–53 (arguing for further amendment of section 158(a) to "allow an appeal from any order or decree issued under section 1121(d), including an appeal as of right upon refusal to extend or reduce an exclusivity period.").

[300] *See, e.g., In re Henry Mayo*, 282 B.R. at 450 (noting pendency of motion for further extension of time saves appeal from being moot). "[T]his appeal cannot become moot unless and until the subsequent request for extension is finally denied." *Id*. at 450. *But see* Klee, *supra* note 50, at 553 ("It remains to be seen whether the mootness doctrine will undercut review of exclusivity orders.").

[301] *See* Klee, *supra* note 50, at 553 ("Tactically, well-counselled debtors may seek exclusivity extension of shorter duration so that, by the time the appeal is heard by the district court or bankruptcy appellate panel, it will be moot."). However, "[i]t is unclear whether review of these orders will be available . . . nullif[ying] the mootness doctrine to permit appellate review of recurring short-lived legal problems." *Id*. *But see, e.g., In re Henry Mayo*, 282 B.R. at 450 (stating presence of subsequent extensions preclude declaration of mootness until some finality is achieved).

[302] *See, e.g., In re Henry Mayo*, 282 B.R. at 450 ("A subsequent request that is made during an extension that does not survive appeal is not made 'within' a qualifying exclusivity period." (citation omitted)). *But see* United States *ex rel.* FCC v. GWI PCS 1, Inc. (*In re* GWI PCS 1, Inc.), 230 F.3d 788, 803–04 (5th Cir. 2000) (dismissing appeal as moot based on alternative considerations, i.e. rights of third parties); BC Brickyard Assocs. v. Ernst Home Ctr., Inc. (*In re* Ernst Home Ctr., Inc.), 221 B.R. 243, 247–48 (B.A.P. 9th Cir. 1998) (rejecting appeal of authorized extension as moot because of unfairness, as well as impracticality, precluding further action from ensuing).

[303] *See* H.R. REP. NO. 103-835, at 36 (1994) *reprinted in* 1994 U.S.C.C.A.N. 3340, 3344 ("The Committee intends that the district court carefully consider the circumstances of each case so appealed with a view to encouraging a fair and equitable resolution of the bankruptcy.").

[304] *See In re Henry Mayo*, 282 B.R. at 455 (Marlar, J., concurring) (describing Congress' statement as "not mandate[ing] a particular standard of review," instead being "'standard neutral" (citations omitted)); *see also* H.R. REP. NO. 103-835, at 36, *reprinted in* 1994 U.S.C.C.A.N. 3340, 3344 (requiring courts to "carefully consider the circumstances of each case so appealed").

[305] *See, e.g., In re Henry Mayo*, 282 B.R. at 450–52 (discussing appropriate standard of review before applying *de novo* standard); *see also* cases cited *infra* note 309 (evaluating each case *de novo*). *But see* cases cited *infra* note 310 (reviewing each case for abuse of discretion).

[306] *See In re Henry Mayo*, 282 B.R. at 451 (commenting "refusals to adjust exclusivity still require leave to appeal."). *See generally* H.R. REP. NO. 103-835, at 36, *reprinted in* 1994 U.S.C.C.A.N. 3340, 3344

and the standard of de novo review.[308] An abuse of discretion may be found if a lower court applies an incorrect legal standard, misapplies a correct legal standard, relies on a clearly erroneous finding of a fact,[309] or makes a clear error of a judgment.[310] A de novo review[311] is an inquiry of law and fact in which the historical facts are established, the rule of law is undisputed, and the issue is whether the facts satisfy the rule.[312]

(establishing right of interlocutory appeal as necessary to prevent further harm to creditors); Gross & Redmond, *supra* note 11, 292–93 (evaluating positive effect of creating right to appeal exclusivity orders after Congress' amendments to Bankruptcy Code).

[307] *See, e.g.*, Official Comm. of Unsecured Creditors v. Elder-Beerman Stores Corp. (*In re* Elder-Beerman Stores Corp.), No. C-3-97-175, 1997 U.S. Dist. LEXIS 23785, at *18 (S.D. Ohio June 23, 1997) (articulating standard of review in bankruptcy proceeding where bankruptcy court is finder of fact); *In re* Geriatrics Nursing Home, Inc., 187 B.R. 128, 131 (D. N.J. 1995) (providing standard of review on appeal from Bankruptcy Court is narrow in scope); Fishell v. United States Tr., No. 93-1182, 1994 U.S. App. LEXIS 3875, at *3 (6th Cir. 1994) (observing discretionary rulings made pursuant to the Bankruptcy Code are reviewable only if abuse of discretion by court is evident); *In re* Murray, 116 B.R. 6, 9 n.3 (D. Mass. 1990) (noting bankruptcy court decision would not be overturned absent a showing of abuse of discretion); *In re* RCN II., 118 B.R. 460, 462 n.1 (W.D. Mich. 1990) (explaining bankruptcy court's decisions would not be overturned absent abuse of discretion in order to facilitate flexibility in reorganization proceedings); *In re* Gibson & Cushman Dredging Corp., 101 B.R. 405, 409 (E.D.N.Y. 1989) (allowing review of merits in light of relaxed appealability standard applied in bankruptcy cases); *In re* Sharon Steel Corp., 78 B.R. 762, 765 (Bankr. W.D. Pa. 1987) (concluding court has discretion to determine whether debtor established sufficient cause to justify extension of exclusivity persiod); *In re* Tony Downs Foods Co., 34 B.R. 405, 406 (Bankr. D. Minn. 1983) (noting standard of review as being "for cause," but pointing out absence of definition of "cause" in Code); *In re* Lake in the Woods, 10 B.R. 338, 343 (E.D. Mich. 1981) (referring to legislative history to decipher what consistutes abuse). *Cf. In re* Slettleland, 260 B.R. 657, 661 (Bankr. S.D.N.Y. 2001) (considering dismissal of bankruptcy petition on bad faith grounds); *In re* All Seasons Indus., Inc., 121 B.R. 1002, 1004 (Bankr. N.D. Ind. 1990) (requiring consideration of history, as well as purpose of section 1121); *In re* Washington-St. Tammany Elec. Coop., Inc., 97 B.R. 852, 854 (E.D. La. 1989) (reversing decision that granted extension based on size and complexity; *In re* Perkins, 71 B.R. 294, 297 (W.D. Tenn. 1987) (analyzing whether bankruptcy court was erroneous as matter of law).

[308] *See, e.g., In re Henry Mayo*, 282 B.R. at 454 (applying de novo review); *In re* Miller, 262 B.R. 499, 503 (B.A.P. 9th Cir. 2001) (stating bankruptcy courts conclusions of law are reviewed de novo); *In re* Menk, 241 B.R. 896, 903 (B.A.P. 9th Cir. 1999) (raising issue of jurisdiction sua sponte and addressing issue de novo); Murray v. Bammer (*In re* Bammer), 131 F.3d 788, 792 (9th Cir. 1997) (claiming mixed questions of law and fact are reviewed de novo).

[309] *See* Schachner v. Blue Cross & Blue Shield of Ohio, 77 F.3d 889, 895 (6th Cir. 1996) (noting abuse of discretion occurs when wrong legal standard applied by district court, district court incorrectly applies correct law or relies on inaccurate facts); *see also* First Tech. Safety Sys., Inc. v. Depinet, 11 F.3d 641, 647 (6th Cir. 1993) (mentioning abuse of discretion found when district court relies on incorrect facts, applies incorrect legal standard, or incorrectly applies correct standard); Fleischut v. Nixon Detroit Diesel, Inc., 859 F.2d 26, 30 (6th Cir. 1988) (indicating abuse of discretion by district court exists when it uses erroneous legal standard, incorrectly applies law or relies on untrue fact findings).

[310] *See* Bowling v. Pfizer, Inc., 102 F.3d 777, 780 (6th Cir. 1996) (defining abuse of discretion as when trial court commits error of judgment); *see also* Logan v. Dayton Hudson Corp., 865 F.2d 789, 790 (6th Cir. 1989) (confirming abuse of discretion exhibited when trial court commits clear error of judgment); Taylor v. United States Parole Comm'n, 734 F.2d 1152, 1155 (6th Cir. 1984) (relaying abuse of discretion standard includes setting aside lower courts decision when clear error of judgment made).

[311] *See* Nicholson v. Isaacman (*In re* Isaacman), 26 F.3d 629, 631 (6th Cir. 1994) (discussing reviews of bankruptcy court's conclusions of law are done de novo); s*ee also In re Henry Mayo*, 282 B.R. at 452 (emphasizing *de novo* review available for mixed questions of fact and law); *In re* Bammer, 131 F.3d at 792 (pointing out *de novo* review is tool courts may use when appropriate).

[312] *See In re Henry Mayo*, 282 B.R. at 452 (saying *de novo* review occurs when issue is if facts satisfy law as facts are established and rule of law is undisputed); *In re Bammer*, 131 F.3d at 792 (explaining when issue is whether facts satisfy legal rule, *de novo* review appropriate); *see also* Moss v. Comm'r, 831 F.2d 833, 838

IV. ALTERNATIVE APPROACHES TO THE EXCLUSIVITY RIGHT

A. Adjusting Exclusivity Through a Status Conference

1. Status Conference, 11 U.S.C. § 105(d)

Section 105(d)[313] of the Bankruptcy Code grants a bankruptcy judge authority to hold a status conference and issue an order at any such conference prescribing limitations and conditions that the court deems appropriate to ensure that a case is handled expeditiously and economically. The possibility of setting limits on exclusivity extensions has been explored before,[314] but subsection 105(d)(2) explicitly grants courts the authority to use a status conference and to prescribe conditions and limitations for the expeditious and economical handling of the case.[315] A status conference on the court's own motion, or on the request of any party in interest,[316] may be held at the beginning of the case or while the exclusivity period is in existence. However, even if there is a request by a party in interest, the

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(9th Cir. 1987) (finding mixed questions of fact and law are subject to *de novo* review).

[313] 11 U.S.C. § 105(d) (2002):

> The court, on its own motion or on the request of a party in interest, may:
> (1) hold a status conference regarding any case or proceeding under this title after notice to the parties in interest; and
> (2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that–
> > (A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or
> > (B) in a case under chapter 11 of this title-
> > > (i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;
> > > (ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;
> > > (iii) sets the date by which a party in interest other than a debtor may file a plan;
> > > (iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such a plan.
> > > (v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or
> > > (vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

[314] *See, e.g., In re* Dow Corning Corp. 208 B.R. 661 (Bankr. E.D. Mich. 1997). Although the requirements for termination or modification of a right of exclusivity were not satisfied, the court used limitation of exclusivity in advance as an approach to issue a relief for a creditors' committee motion. The court, analyzing previous motions for extension and termination of exclusivity, had considered all causes that were shown for extension and for termination of exclusivity. The court's decision to limit exclusivity in advance, however, was not based on any immediate shown cause. *Id*.

[315] 11 U.S.C. § 105(d)(2).

[316] *See id*.

court has discretion as to whether or not to hold a status conference.[317]

The Bankruptcy Code does not clearly state that there is the option for a limitation on exclusivity in advance, but, it also does not prohibit the limitation, nor does it prevent the courts from setting the lapse of the exclusivity period in advance.[318] Based on section 105(d)(2), the court is allowed to discuss the exclusivity period during a status conference and may court issue an order asserting the exclusivity deadlines. The order may, in advance, set the date after which the exclusivity cannot be extended or in which any party in interest can file a plan.[319]

2. Requirement for Consistency Under Section 105(d)(2) and Section 1121

Section 1121 of the Bankruptcy Code requires cause to be shown with respect to termination or extension of the exclusivity period.[320] A party requesting a status conference to limit the exclusivity period, however, is not required to show cause.[321] Absent the cause requirement, an interested party still has to convince the court that limiting exclusivity is the best approach for carrying out the bankruptcy reorganization,[322] because ultimately assertion of a limitation on a debtor's exclusivity right will effect termination of the exclusivity right.

Section 105(d)(2) states that the court's order issued at any status conference has to be consistent with the provisions of the Bankruptcy Code or with Federal Rules of Bankruptcy Procedure.[323] Since section 1121 conditions a request for extension or termination of exclusivity on a showing of cause, it would not be inconsistent with the provisions of the Bankruptcy Code for a court to require the parties to show cause in a status conference.[324] The other alternative for the courts might be to set the expiration of exclusivity without a request for any party to show cause. The debtor will only be able to postpone or revoke the limitation on exclusivity if the debtor shows legitimate cause – a situation beyond debtor's control – for extension of exclusivity. The debtor's inactivity, reflected by no attempt to propose a plan or to void limitation on the exclusivity, or an unsuccessful attempt, will itself represent cause in favor of termination of exclusivity and will satisfy "cause" requirement of section 1121.[325]

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[317] *See generally* 11 U.S.C. § 105(d).
[318] 11 U.S.C. § 105(d)(2)(B)(iii).
[319] *See generally id*.; Harvey R. Miller, *The Changing Face of Chapter 11: A Reemergence of the Bankruptcy Judge as Producer, Director, and Sometimes Star of the Reorganization Passion Play*, 69 AM. BANKR. L.J. 431, 439 (1995) [hereinafter *The Changing Face of Chapter 11*] (discussing section 105 and how judges can begin to take more active roles in bankruptcy process via status conferences).
[320] *See* 11 U.S.C. § 1121(d) (2002).
[321] *See generally id*. (noting no language requiring cause).
[322] *See generally* 11 U.S.C. § 105(d)(2).
[323] *See id*.
[324] *See supra* discussion Part III.
[325] *See supra* Part III.A. discussing extension and termination for cause under section 1121.

3. Strategic Characteristic of a Status Conference

The issues of whether to move for a status conference to determine the last date of exclusivity or whether an interested party should be granted an order to propose a plan, are strategic questions. Once in bankruptcy, the debtor, particularly at the beginning of the case, may be burdened with work regarding the maintenance of a viable organization and may need time to adjust to this new working environment.[326] This is a time when creditors may find it to their advantage to take the status conference approach to deal with exclusivity. Assuming that an interested party simply wants to limit the debtor's ability to extend exclusivity, but does not want to terminate an existing exclusivity period, the party in interest may move to limit the exclusivity period and shift the pressure to the debtor's side. By this maneuver, the interested party, instead of the debtor, can dictate the tempo of the bankruptcy reorganization.

Considering the time, the request for a status conference from a creditor can be more useful and productive than a motion for termination of exclusivity.[327] In a situation where the reduction in the debtor's period of exclusivity is granted, and that order is stayed pending appeal, the time spent awaiting review by the appellate court could equal or exceed the debtor's original exclusivity period.[328] However, this situation would not occur if, in advance, the interested party requests and obtains a determination of the last day of the debtor's exclusivity time for filing a plan. Some creditors might find it in their best interest to wait for the debtors to move for an extension and then challenge the debtor's motion. Other interested parties might find it useful, instead of limiting the exclusivity period from the beginning of the case, to wait to see how the debtor progresses before they take an action in the proceeding.

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[326] *See, e.g., Chapter 11 Reorganization Cases*, *supra* note 187, at 2013 ("The first few months of Chapter 11are needed to absorb the initial shock of bankruptcy. In that time, the debtor is preoccupied with addressing the trauma of bankruptcy as it affects employees, suppliers, and customers. The debtor-in-possession must meet challenges to the automatic stay, seizures of property, and countless other problems. . . . It is not unreasonable to conclude that a debtor needs sufficient time to evaluate the effects of changes in its business and operations before it can formulate a plan.").

[327] *See* Gross & Redmond, *supra* note 11, at 298 ("[E]ven if a date is fixed for terminating exclusivity, the termination will not necessarily result in progress in the case."). *See generally The Changing Face of Chapter 11*, *supra* note 319, at 439–40 (noting status conferences can help to ensure cases are "handled expeditiously and efficiently").

[328] *See* Gross & Redmond, *supra* note 11, at 293 (noting in this type of situation "[t]he time spent pending review by the appellate court would . . . be tantamount to providing the debtor its original exclusivity period."); *see also The Changing Face of Chapter 11*, *supra* note 319, at 439 (describing how judges can really use status conferences to take charge to benefit of all parties and increase efficacy of overall bankruptcy process).

4. The New Amendment to Section 1121 and the Status Conference Provision

The proposed Bankruptcy Abuse Prevention and Consumer Protection Act of 2003 aspires to amend section 1121 with a limitation of the 120-day and 180-day periods.[329] Pursuant to the proposed amendments, the exclusivity right would be absolutely limited to 18 months for proposing a plan, and 20 months for seeking an acceptance of the plan.[330] It is a departure from the policy of flexibility[331] behind section 1121 because the proposal does not provide for the possibility of any extension – not even for cause.[332]

This proposed "one size fits all"[333] approach would narrow the present flexibility of the courts, in section 105(d)(2)(B)(iii), to set a date by which a party in interest may file a plan.[334] It may be more advantageous to use a status conference as a ground to limit the exclusivity right to 18 months, for example, since it is a discretionary right of the court that reviews the facts of each case. The court may apply limitations on the exclusivity right on a case by case basis instead of the "one size fits all" approach.

5. Benefit of a Status Conference

By the request for a status conference, an interested party alerts the court, or other parties, to the existence or possibility of the development of their own plan for reorganization. Even if the creditor's request for a status conference for limitation of exclusivity is simply a bluff, signaling the possibility of a competing plan, the pressure on the debtor to accelerate the process and to develop a more acceptable plan for the creditors may work. It also gives the creditors the opportunity to play a more active role in the bankruptcy from the beginning of the case. The use of the status conference from the beginning of the case, may at least help interested parties

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[329] Bankruptcy Abuse Prevention and Consumer Protection Act of 2003, H.R.975, 108th Cong., (1st Sess. 2003):

> Sec. 411. Period For Filing Plan Under Chapter 11.
> Section 1121(d) of title 11, United States Code, is amended-
> (1) by striking "On" and inserting "(1) Subject to paragraph (2), on"; and
> (2) by adding at the end the following:
> (2)(A) The 120-day period specified in paragraph (1) may not be extended beyond a date that is 18 months after the date of the order for relief under this chapter.
> (B) The 180-day period specified in paragraph (1) may not be extended beyond a date that is 20 months after the date of the order for relief under this chapter.

[330] *See Pay Attention to Business Provisions in House Bill*, BCD NEWS & COMMENT, July 7, 1998, vol. 32, No. 18 (noting acceptance of 18-20 month limitation in House bill, H.R. 3150); *Results of Our Poll on Limiting Exclusivity Are In!*, BCD NEWS & COMMENT, Sept. 22, 1998, vol. 33, No. 2 (discussing same).

[331] *See supra* note 48.

[332] *See supra* note 329. Note the lack of "for cause" language in the proposal.

[333] *See, e.g.*, Hon. Leif M. Clark, *Chapter 11 - Does One Size Fit All?*, 4 AM. BANKR. INST. L. REV. 167, 167–68 (1996) (describing 1978 Code as commitment to single unitary system of reorganization, but noting recent criticism to this approach).

[334] *See* 11 U.S.C. § 105(d)(2)(B)(ii) (2002).

to get some information from the debtor, develop factual issues and causes, and start to *poison the mind* of the judge with the objective of limiting or terminating exclusivity.[335]

B. Another Method of Termination: Appointment of Trustee

Section 1121(c) permits any party in interest to file a plan once a trustee has been appointed. Therefore, appointment of the trustee automatically terminates the debtor's exclusive right to file a plan. Instead of filing a motion for termination of exclusivity, the same result may be obtained using a different approach. The interested party may propose the appointment of a trustee pursuant to section 1104.[336]

Section 1104 requires that cause be shown in order to appoint a trustee.[337] This is not much of a departure from section 1121, but section 1104(a)(1) enhances the court's section 1121 understanding of the term "cause".[338] There is a guide in section 1104(a)(1) for the court to determine cause, including but not limited to "fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause"[339] This subsection is very important for an understanding of the meaning of the term "cause," which can also be applied under section 1121. Section 1104(a)(1) also explicitly states that the number of security holders of the debtor, the amount of assets or the liabilities of the debtor can not be considered as

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[335] The reference to the "poisoning of the mind" effect that a status conference may have on a judge was an interpretation by Professor Richard Lieb of an idea presented by the author during the defense of this thesis.

[336] *See* 11 U.S.C. § 1104 (2002); Klee, *supra* note 50, at 553 (stating election and appointment of trustee are equivalent events from debtor's perspective); *see also In re* Henry Mayo Newhall Mem'l Hosp., 282 B.R. 444, 455 n.6 (B.A.P. 9th Cir. 2002) (stating appointment of trustee can end exclusivity rights); Casco Northern Bank v. DN Assocs. (*In re* DN Assocs.), 3 F.3d 512, 513 (1st Cir. 1993) (finding creditor sought to end exclusivity period by, *inter alia*, appointment of trustee).

[337] *See* 11 U.S.C. § 1104(a)(1).

[338] *Id*.

[339] The trustee was appointed because of: gross mismanagement, *see, e.g., In re* Sharon Steel Corp. 86 B.R. 455, 488 (Bankr. W.D. Pa. 1988); *In re* Petralex Stainless, Ltd., 78 B.R. 738, 743 (Bankr. E.D. Pa. 1987) (stating same); *In re* Main Line Motors, Inc., 9 B.R. 782, 783 (Bankr. E.D. Pa. 1981) (stating same); incompetence, *see, e.g., In re* William A. Smith Constr. Co., 77 B.R. 124, 128 (Bankr. N. D. Ohio 1987) (explaining incompetence); *In re* Bible Speaks, 74 B.R. 511, 514 (Bankr. D. Mass. 1987) (stating same); *In re* Pittman, 58 B.R. 502, 503 (Bankr. S.D. Tex. 1986) (same); undisclosed and unauthorized transfers of assets, *see, e.g., In re* Ford, 36 B.R. 501, 502–03 (Bankr. W.D. Ky. 1983) (illustrating undisclosed and unauthorized transfers of assets of estate); conviction and imprisonment, *see, e.g., In re* New Haven Radio, Inc., 23 B.R. 762, 764 (S.D.N.Y. 1982) (showing conviction and imprisonment); fraud, *see, e.g., In re* Great N.E. Lumber & Millwork Corp., 20 B.R. 610, 611 (Bankr. E.D. Pa. 1982); *In re* McCordi Corp., 6 B.R. 172, 173 (Bankr. S.D.N.Y. 1980) (explaining fraud playing role). *But see* Comm. of Dalkon Shield Claimants v. A.H. Robins Co., Inc., 828 F.2d 239, 242 (4th Cir. 1987) (holding refusal to appoint trustee not abuse of discretion); *In re* Sletteland, 260 B.R. 657, 672 (Bankr. S.D.N.Y. 2001) (holding mismanagement not grave enough to warrant appointment of trustee); *In re* Fairwood Corp., 2000 WL 264319 at *4 (Bankr. S.D.N.Y. 2000) (stating colorable acts did not warrant appointment of trustee), *aff'd*, 2001 WL 11045 (2nd Cir. 2001); *In re* Gen. Oil Distribs., Inc., 42 B.R. 402, 410 (Bankr. E.D.N.Y. 1984) (denying motion to appoint trustee despite prior incompetence).

cause,[340] further shaping the definition of cause regarding the appointment of a trustee.[341]

Section 1104(a)(2) permits appointment of a trustee in the interest of creditors, any equity security holders, and other interests of the estate.[342] However, "cause" is not required for the appointment of a trustee,[343] which automatically terminates exclusivity. This reasoning is different from the requirements under section 1104(a)(1) or section 1121, but has the same effect on termination of exclusivity, because appointment of a trustee will terminate the exclusivity.[344]

Sections 1121 and 1104 address different issues, but with regard to exclusivity, they produce the same result - termination of the exclusivity right. In section 1104 termination of the exclusivity is a byproduct of appointment of the trustee. The standards used by both sections for terminating exclusivity are not synchronized because both sections have different requirements for producing the same effect.

Interested parties come to their decision as to which section their request for termination should be based on after an extensive strategic evaluation. The result will be the same if the goal is to terminate the exclusivity right. Considering how important the termination of exclusivity is, it is not surprising that creditors frequently ask for termination of exclusivity or ask for the appointment of a trustee as an alternative, or vice versa, in a same motion.[345]

C. Co-Exclusivity[346]

In a complex bankruptcy case, the bankruptcy court may decide that it would be in the interest of the bankruptcy proceeding to allow some, but not all of the parties

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[340] 11 U.S.C. § 1104(a)(1) ("[b]ut not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.").

[341] *Id*.

[342] *See In re* Sletteland, 260 B.R. 657, 672 (Bankr. S.D.N.Y. 2001) (stating appointment of trustee should be in interests of all those with stake in estate including debtor); 7 COLLIER ON BANKRUPTCY ¶ 1104.02 [3][d][i] (Lawrence P. King et al. eds, 15th ed. Rev. 1997) ("Use of the word 'and' suggests that creditors cannot on their own obtain the appointment of a trustee under the provision in order to disenfranchise equity security holders or other interests."); 9 AM. JUR. 2D *Bankruptcy* § 289 (1999) (finding court will order appointment of trustee if in interest of holders of interest in estate).

[343] *See* 11 U.S.C. § 1104(a)(2).

[344] *See* 11 U.S.C. § 1121(c)(1) (2002).

[345] *See generally In re* Henry Mayo Newhall Mem'l Hosp., 282 B.R. 444, 455 n.6 (B.A.P. 9th Cir. 2002) (pointing out creditors right to seek termination of exclusivity or appointment of trustee, which would have same effect).

[346] The concept is forged by the courts to express a situation where one or more parties can share with the debtor his exclusive right to propose a plan. The same situation sometimes is described as "joint exclusivity" or "modified exclusivity." *See generally* In re United Press Int'l. Inc., 60 B.R. 265, 271 (Bankr. D.C. 1986) (stating creditor could file plan before expiration of debtor's exclusivity period). *See generally The Committees' View of the Oren Benton Bankruptcies*, BCD NEWS & COMMENT, March 26, 1996, vol. 28, No 16. (using term co-exclusivity to describe situation where creditor and debtor shared right to propose plans); *Chapter 11 Update*, ANDREWS PUBLICATIONS, INC., MANUFACTURING, May 1997, at 6, 6 (referring to modified exclusivity in which creditor would be allowed to file plan without terminated debtor's exclusivity outright).

in interest[347] to file a plan during the debtor's exclusivity period.[348] The issue that is raised is whether the court has the power to modify the exclusivity right and allow some parties to file a plan while avoiding the implications of section 1121(c).[349] Allowing some interested parties, but not all, to file a plan may be useful and preferable especially for the party in whose favor the modification is granted. The party in whose favor the exclusivity right is modified receives the benefits that were intended by Congress to be available only to the debtor and thereby gains a powerful tool. On the other hand, the court does not want to open the door to every interested party to file a plan, fearing unnecessary delay and a burdening of the bankruptcy proceeding.[350] The courts might want to give a right to file a plan to those interested parties whose ability to file a plan might help expedite the proceedings. Thus, under this "middle" approach to exclusivity, some courts have opened up the right to file a plan on a limited basis.[351]

1. Consensual or Judicial Co-exclusivity

For the purposes of this thesis, whether the co-exclusivity is achieved with the consent of the debtor or without its consent, co-exclusivity will be defined as consensual or judicial co-exclusivity. Consensual co-exclusivity is usually achieved as a resolution of the negotiation process between the debtor and an interested party, on the debtor's initiative, and with debtor's consent to share its exclusive right with somebody else or to propose a joint plan.[352] Judicial co-exclusivity is usually done when, after a motion and a hearing, on the initiative of the court or the request of an interested party, without the debtor's concurrence, the court modifies the debtor's exclusivity right.[353]

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[347] *See* 11 U.S.C. § 1121(c) (" . . . party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee").

[348] *See In re United Press Int'l*, 60 B.R. at 271 (rejecting argument that creditors' plan totally voided exclusivity); *In re* Pub. Serv. Co., 88 B.R. 521, 534 (Bankr. D. N.H. 1988) (stating statute construed to provide flexibility); *In re* Perkins, 71 B.R. 294, 297 (W.D. Tenn.1987) (stating flexibility hallmark of interpretation of statute).

[349] Section 1121(c) implies that any interested party may file, once any of listed conditions is fulfilled. *See* 11 U.S.C. § 1121(c) ("Any party in interest…may file a plan if, and only if" one of three situations apply).

[350] *See In re United Press Int'l*, 60 B.R. at 271 n.12 (*quoting* 11 U.S.C. 105(a)) ("'Opening the floodgates' to allow each and every [creditor] to file a plan, no matter how poorly conceived or supported, would not serve 'to secure the expeditious and economical administration of' this case nor 'to carry out the provision of' the Bankruptcy Code.'"); *cf. In re* Hoosier Hi-Reach, Inc., 64 B.R. 34, 38 (Bankr. S.D. Ind. 1986) (stating two purposes and objectives of chapter 11 are "expeditious resolution of disputes and speedy payment to creditors.").

[351] *See generally In re* Aspen Limousine Serv., 187 B.R. 989, 995 (Bankr. D. Colo. 1995) (dealing with accelerated and streamlined treatment of small business debtors in chapter 11 and stating all creditors do not have cart blanche to file plans, implying filing permitted to promote efficiency).

[352] *See, e.g., In re* Pub. Serv. Co., 99 B.R. 155, 157 (Bankr. D. N.H. 1989) (providing example of creditor supporting request for extension of exclusivity period).

[353] *See, e.g., In re Aspen Limousine*, 187 B.R. at 996 (modifying exclusivity right of debtor on motion of creditor).

2. Legal Basis for Co-Exclusivity

For each, consensual or judicial co-exclusivity, the legal basis for granting such co-exclusivity is questionable. Although it seems that the Code does not expressly prohibit this middle course, it is still arguable whether the Code or the policy behind the exclusivity right[354] permits it.

A debtor's right, stipulated in section 1121, is itself well known as an exclusivity right,[355] because explicitly under subsection 1121(b) only the debtor, except as otherwise provided in the same section, may file a plan.[356] Section 1121 grants judicial power to the bankruptcy court, if cause exist, to terminate or extend exclusivity. This section provides for termination of exclusivity as to all interested parities equally.[357]

Section 105 has been used to justify modification of the exclusivity right.[358] Even though section 105(a) is broadly interpreted,[359] it is still questionable whether it can be used for purposes of modification of the language of section 1121(b). Section 105(a) can be interpreted broadly to give a court the power to issue any order, process, or judgment, but only for any purpose that is necessary or appropriate to carry out the provisions of the Bankruptcy Code.[360] Section 1121(b), however, expressly state that only the debtor has a right to propose a plan, thereby excluding any other party from the exclusivity right and prohibiting any variation or middle course approach to the debtor's right exclusively to propose a plan.[361] It is therefore questionable whether section 105(a) can be used for a purpose that appears to be contrary to a provision of the Bankruptcy Code.[362]

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[354] *See, e.g.*, Harvey R. Miller & Jacqueline Marcus, *The Crumbling Debtor Leverage in Chapter 11 Cases: An Implementation or Perversion of the Bankruptcy Reform Act of 1978*, in The Williamsburg Conference on Bankruptcy: Critique of the First Decade under the Bankruptcy Code and Agenda for Reform, 445, 476 n.3 (ALI-ABA's Invitational, Williamsburg Conference on Bankruptcy, October 17-19, 1988) ("Despite any specific statutory provision, modification of exclusivity under section 1121 is limited to certain parties in interest rather than all parties. In effect, the court is exercising control over plan proponents and the process.").

[355] *See* THE AMERICAN HERITAGE DICTIONARY 639 (3d ed. 1996) (defining "exclusive" as "not divided or shared with others"); BLACK'S LAW DICTIONARY 564 (6th ed. 1991) (providing definition of exclusive to mean, *inter alia*, "[s]hutting out; debarring from interference or participation; vested in one person alone.").

[356] *See* 11 U.S.C. § 1121(b) (2002).

[357] *See* 11 U.S.C. § 1121(d).

[358] *See In re* United Press Int'l, 60 B.R. 265, 271 n.12 (Bankr. D.C. 1986) (stating court adopted middle approach allowing two parties with most at stake to file plans since statute does not expressly prohibit such approach); *cf.* Nelan, *supra* note 4, at 451 (discussing propriety of non-debtor activity during exclusivity period).

[359] *See* United States v. Energy Res. Co., 495 U.S. 545, 549 (1990) (noting bankruptcy courts have broad authority to modify creditor-debtor relationships under section 105); U.S. Lines, Inc., v. Am. Steam Ship Owners (*In re* U.S. Lines, Inc.), 197 F.3d 631, 640 (2d Cir. 1999) (indicating bankruptcy courts have "broad, well-established powers" to preserve integrity of reorganization process and issue orders to carry out provisions of section 105); *In re* Duratech Indus., 241 B.R. 283, 288 (E.D.N.Y. 1999) (stating section 105 provides basis for broad exercise of powers in administration of bankruptcy cases).

[360] *See* 11 U.S.C. § 105(a).

[361] *See* 11 U.S.C. § 1121(b).

[362] *See* MARY DAVIES SCOTT & LAWRENCE P. KING, 2002 COLLIER PAMPHLET EDITION BANKRUPTCY

Section 1121 does not provide any power to modify or alter exclusivity,[363] not even to the court. Even a consensual sharing of the exclusivity right or proposing a joint plan during the exclusivity period is questionable. If the debtor finds it useful, it can accept and adopt any party's plan but the debtor must propose it in its own name.[364] The debtor even has a right to propose more then one plan.[365] If the debtor does not accept or adopt the other party's plan and the Court concludes that filing another plan will be useful, the exclusivity right should be terminated and any interested party should be allowed to propose a plan. Otherwise, by allowing co-exclusivity, the court has to respond to any motion of an interested party to be included in the "exclusivity club"[366] or to terminate exclusivity. Furthermore, exclusivity can still be terminated for cause and is limited in time.[367]

Despite the statutory plausibility and controversial nature of the co-exclusivity right, the co-exclusivity right itself raises other issues that are not covered or mentioned by the Bankruptcy Code. If we assume that co-exclusivity is statutorily allowed, if any of the parties with co-exclusivity files a plan but the other moves for another extension, will the court terminate exclusivity and proceed with the acceptance of the plan or wait until second plan is filed? What will happen if one of the parties files for an extension but not the other one? Will an extension automatically apply to both of them or only to the party who requested extension and terminate the privilege of the other party?

The above issues are quite distinct from the issues normally encountered by bankruptcy courts in addressing exclusivity. The Code does not provide any direction as to the way these problems should be resolved. This indicates that the

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CODE § 105, 62 (LexisNexis 2001) ("Although section 105(a) provides that the bankruptcy court may issue any order, process or judgment necessary or appropriate to carry out Code provisions, a court may not disregard a specific Code section addressing an issue and instead employ its equitable powers to achieve a result not contemplated by the Code."); *see also* Graves v. Myrvan (*In re* Myrvang), 232 F.3d 1116, 1125 (9th Cir. 2000) (stating exercise of section 105 powers must be linked to another specific Bankruptcy Code provision); La. Pub. Serv. Comm'n v. Mabey (*In re* Cajun Elec. Power Coop.), 185 F.3d 446, 452 n.9 (5th Cir. 1999) (observing bankruptcy courts have limits in exercising equitable powers); Viking Assoc. v. Drewes (*In re* Olson), 120 F.3d 98, 102 (8th Cir. 1997) (noting court's powers are broad though not unlimited); *In re* Fesco Plastics Corp., Inc., 996 F.2d 152, 157 (7th Cir. 1993) (stating bankruptcy courts are not simply authorized to do whatever is necessary to effectuate equitable result); Chiasson v. J. Louis Matherne and Assocs. (*In re* Oxford Mgmt., Inc.), 4 F.3d 1329, 1334 (5th Cir. 1993) (*quoting* United States v. Sutton, 786 F.2d 1305, 1308 (5th Cir. 1986)) (specifying statute does not authorize bankruptcy courts to create rights otherwise unavailable under applicable law).

[363] *See* 11 U.S.C. § 1121(d). Observe that section 1121(d) does not use terms like modified or altered, rather it only gives the right to extend or terminate. *Id*.

[364] *See generally In re* Werth, 29 B.R. 220, 222 (Bankr. D. Colo. 1983) (discussing whether debtor may submit more than one plan for consideration by creditors).

[365] *See In re* Media Cent., Inc., 89 B.R. 685, 688 (Bankr. E.D. Tenn. 1988) (stating chapter 11 debtor who wishes to propose alternative plans for reorganization may file more than one plan); *In re Werth*, 29 B.R. at 222 (stating "debtor may submit multiple plans so long as the plans and disclosure statement are not unduly confusing and the equity holders and claimants adequately advised of their alternatives."). *But see In re* Woodbrook Assocs., 19 F.3d 312, 322 (7th Cir. 1994) (indicating bankruptcy courts have great deal of discretion to curtail filing of alternative plans).

[366] *In re* United Press Int'l, 60 B.R. 265, 271 n.11 (Bankr. D.C. 1986) (stating party in "exclusivity club" has rights to file plans during exclusivity period).

[367] *See* 11 U.S.C. § 1121(b) (2002).

intent of the Congress was not to allow any hybrid exclusivity right. If co-exclusivity is allowed, the debtor will be forced to compete with another plan (or plans) and exclusivity loses its purpose and objective.[368] Giving a right to file a plan to one party creates a precedent for other interested parties. This gives the other interested parties cause for termination of the exclusivity right making co-exclusivity meaningless. If there is reason to lift or modify the exclusivity right for some interested parties, then termination of exclusivity should be the only solution. The door should be either opened or closed to any interested party. Section 1121 does not permit employment of any discriminatory rule in the bankruptcy procedure. The bankruptcy court should have no right to discriminate against any equally situated party listed under section 1121(c). If there is cause, the court must terminate the debtor's exclusivity entirely and apply democratic rules that provide for voting on any proposed plan. The courts are generally reluctant to grant orders for co-exclusivity,[369] and prefer either to terminate exclusivity or not to modify it, both of which actions are completely in accordance with the Bankruptcy Code.

CONCLUSION

Section 1121 of the Bankruptcy Code, governing the debtor's very important right to exclusively propose a plan of reorganization, needs to be revised. Legislative history conclusively suggests that the debtor's right to propose a plan was implemented as a debtor's exclusive right in order to provide a balance between creditors and a debtor in a bargaining process, for a benefit to the bankruptcy estate, vesting a power for adjustments of that balance to the bankruptcy courts.

The plain language of section 1121 is ambiguous with regard to whether that section allows multiple extensions. Congress needs to clarify the language that will support a court's practice of multiple extensions[370]or explicitly define specified

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[368] For an explanation on the purposes and objectives of the exclusivity clause see *supra* Part II.

[369] *See In re* Cont'l Airlines, Inc., 125 B.R. 399 (Bankr. D. Del. 1991) (finding support in neither section 105 nor section 1121 for creditors' committee's motion for co-exclusivity); *see also In re* Dow Corning Corp., 208 B.R. 661 (Bankr. E.D. Mich. 1997) (denying Committees' motion to modify exclusivity, but ordering exclusivity period to be terminated if debtor fails to file new plan).

[370] In order to reflect courts' practice, section 1121 of the Code should be changed. In reviewing these proposed changes, please have in mind the discussion contained in Part II.B. & C. Section 1121 should read:

> (a)The debtor may file a plan with a petition commencing a voluntary case, or at any time in a voluntary case or an involuntary case.
> (b)Except as otherwise provided in **accordance with** this section, only the debtor may file a plan until after 120 days after the date of the order for relief under this chapter.
> (c)Any party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may file a plan if [and only if] -
>
> (1) a trustee has been appointed under this chapter;
> (2) the debtor has not filed a plan before [120 days after the date of the order for relief under this chapter] **the period permitted under subsection (b) of this section expires or is terminated**; or

periods in subsection (d)[371] In clarifying the language, Congress should also eliminate the duplicity presented by an equation 1121(a) + 1121(c)(2) = 1121(b).[372]

Although the meaning of "cause" under section 1121 is broad, and case law has polarized certain factors that are important to show cause for a termination or an extension of the exclusivity, the Bankruptcy Code is inconsistent in its cause requirement. Appointment of a trustee in the case, which as a side effect will terminate exclusivity, may be obtained without a requirement of cause to be shown.[373]

Though it may seem to courts to be useful, co-exclusivity or joint exclusivity is not supported by the Bankruptcy Code but is contrary to it. The Code requires that the exclusivity right should be terminated whenever there is cause that might allow anyone to file a plan, which is also consistent with the absolute priority rule requirement of open exposition of the property to offers.[374]

The "one size fits all" approach with regard to the debtor's right to propose a plan does not work.[375] A proposed new amendment[376] for an absolute legislative

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> (3) the [debtor has not filed a plan that has been accepted] **debtor's plan has not been accepted**, before 180 days after the date of the order for relief under this chapter, by each class of claims or interests that is impaired under the plan.
>
> (d) On request of a party in interest made within the respective periods specified in subsections (b) and (c) of this section **or any extension thereof** and after notice and a hearing, the court may for cause reduce or increase [the 120-day period or the 180-day period referred to in this section] **the periods under subsections (b) and (c) of this section**.

The proposed changes should eliminate the ambiguous language of section 1121 with respect to the dependency between the 120 and 180 day periods. The proposed language in (d) will allow for multiple extensions.

[371] *See* 11 U.S.C. § 1121(d).

[372] This equation represents the duplicity found within section 1121. When the right of the debtor to propose a plan at anytime during the procedure under section 1121(a), is combined with the provision in section 1121(c)(2) that restricts any party in interest from filing a plan before 120 days, the result is a benefit to the debtor identical to that provided for in section 1121(b), where it is stated that only a debtor may file a plan within the first 120 days.

[373] For example, section 1104(a)(2), which allows for the appointment of a trustee without requiring a showing of cause. This will affect a debtor's right to exclusively propose a plan because appointment of a trustee terminates exclusivity. *See* discussion *supra* Part IV.B.

[374] *See supra* Part III.A.2. discussing the first listed negative exclusivity factor.

[375] *See In re* Fernandez, 97 B.R. 262, 263 (Bankr. E.D.N.C 1989) ("It may be unwise in a complicated chapter 11 case to insist that a debtor file a plan prematurely to meet the court imposed 120 day deadline, while, on the other hand, it may be imprudent to allow the debtor the full 120 days when it is clearly not needed."). Amendments to the Bankruptcy Code of 1994 with respect to small businesses, demonstrated the failure of the "one size fits all" approach with regards to exclusivity right. *See also* Gross & Redmond, *supra* note 11, 287 (1995) (discussing 1994 amendments and recent attacks on chapter 11 reorganization).

[376] Bankruptcy Abuse Prevention and Consumer Protection Act of 2003, H.R.975, 108th Cong., (1st Sess. 2003):

> Sec. 411. Period For Filing Plan Under chapter 11.
> Section 1121(d) of title 11, United States Code, is amended-
> (1) by striking "On" and inserting "(1) Subject to paragraph (2), on"; and
> (2) by adding at the end the following:
> "(2)(A) The 120-day period specified in paragraph (1) may not be extended beyond a date that is 18 months after the date of the order for relief under this chapter.
> (B) The 180-day period specified in paragraph (1) may not be extended beyond a date

limitation of the exclusivity right with the "one size fits all" approach, rather than a fine polishing of the exclusivity right, may cause an imbalance between the creditors and a debtor in the bargaining process with added pressure on a debtor. In order to keep the balance between the creditors and a debtor there must be an uncertainty as to how long the exclusivity will last. That kind of an objective uncertainty, which supports the concept of flexibility, can only be provided by the courts.[377] The status conference section of the Code provides parties in interest with the opportunity to limit the debtor's exclusivity right to file a plan. This, along with the courts' discretionary power, is more in line with the idea of flexibility as opposed to absolutely limiting the exclusivity right in the Code.

Exclusivity has had a long history of development, which has resulted in inconsistency and confusion in interpreting the language of the statute. Reloading the original motivation behind exclusivity will be a step in the right direction towards clarifying this area of bankrutpcy law.

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that is 20 months after the date of the order for relief under this chapter.

[377] *See supra* note 48 providing legislative history on the importance of the concept of flexibility in relation to the debtor's exclusivity right.

APPENDIX A

[Excerpts from this source are referred to in footnotes 9, 20, 21 of this thesis, Part I.A.]

Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary, H.R., 94th Cong., 1st and 2d sess., on H.R. 31 and H.R. 32, Supplemental App. Part I, 917–20 (1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 8, doc. 32 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (Analysis of H.R. 12889, a bill to amend an act entitled "An act to Establish a Uniform System of Bankruptcy Throughout the United States," approved July 1, 1898, and acts amendatory thereof and supplementary thereto; and to repeal section 76 thereof and all acts and parts of acts inconsistent therewith. Committee Print, May 28, 1936, 74th Cong.)

"Sec. 12. ~~Composition, When Confirmed~~ Arrangements; Corporate Reorganizations; Real Property Arrangements; and Wage Earner Amortizations.

Subsection I. Arrangements

(NOTE --The "New Deal" in bankruptcy invites a retrospect of the history and development of the law dealing with the adjustment and settlement of debts between a debtor and his creditors under bankruptcy laws. During the past century, in keeping with the growth and development of commerce and trade, the tendency has been towards a broader and more liberal allowance of settlements under sanction of such laws.

Although composition settlements had been for a long time recognized in the common law and held binding upon the accepting creditors, the Federal Bankruptcy Acts of 1800 and 1841, and the original Act of 1867, contained no provision for such settlements. England first gave statutory sanction to compositions in 1825. The English Act, however, made the settlement binding only upon the assenting creditors. It was not until the English Act of 1849 that a composition, when accepted by the specified majority and confirmed by the court, was made binding upon, and discharged the claims of, all creditors affected, including the dissenting minority. The subsequent English Acts of 1869, 1883, 1914, and the amendatory Act of 1926, which were largely codifications of a series of intermediate amendments and decisions, reflected the development of the composition practice in bankruptcy. Under the Act of 1883 a composition was permitted after as well as before an adjudication. The Acts of 1914 and 1926 which largely constitute the present bankruptcy law of England, not only permit compositions in bankruptcy but give recognition to "deeds of arrangement", which are validated by separate statute and are permitted to be made between a debtor and his creditors outside of bankruptcy

Compositions were brought into our own bankruptcy law by the amendment of 1874 to the Act of 1867. The amendment was based upon the English Act of 1869. A composition was permitted in a pending bankruptcy proceeding either before or after adjudication. A meeting of creditors was then called, at which the debtor was

examined, and a resolution proposed for the acceptance of the composition offer. This resolution became operative if adopted by a majority in number and three–fourths in amount of the creditors present or represented at the meeting, and accepted in writing by two–thirds in number and one–half in amount of all the creditors. For the purpose of the vote, creditors whose claim did not exceed $50 were counted only as to amount, and not as to number. After compliance with these requirements, the judge called another meeting of creditors and confirmed the composition, if satisfied that the resolution was lawfully adopted and was for the best interests of all parties. Provision was also made for amendment of an accepted proposal, by the same procedure. Upon confirmation, the composition became binding upon all creditors listed by the debtor, and could be enforced by summary action of the court, and, if necessary, by contempt proceedings. If the composition was not confirmed, or could not be consummated after confirmation, the bankruptcy proceedings were reinstated. The consideration for a composition was required to be "money", which was interpreted however, to include notes.

The Bankruptcy Act of 1898 retained the scheme of compositions, but with certain important changes and innovations. As originally adopted, the Act permitted an offer to be made only *after* adjudication, and after the bankrupt had filed his schedules and had been examined. By the amendment of 1910, an offer was permitted to be made *before* adjudication, and provision was incorporated for a special meeting of creditors in such case, to consider the allowance of claims and the preservation or conduct of the estate, and to examine the bankrupt. It was also provided that the petition for adjudication should be stayed until it could be determined whether the composition would be confirmed. The amendatory Act of 1926, however, repealed the latter provision, and prohibited a stay of adjudication, except that for cause shown the court was given discretion to enter a stay upon such terms and conditions as would protect and indemnify the estate.

Under the present Act, the offer, to become binding on creditors, must be accepted in writing by a majority in number and amount of all claims allowed; the consideration to be paid to creditors, and the money necessary to pay priority debts and administration expenses, must be deposited subject to the control of the court, instead of being distributed by the bankrupt, as permitted by the Act of 1874; and the settlement is confirmed by the judge, if satisfied that it is in the best interests of creditors, that the bankrupt has not committed and act or failed to perform a duty which would bar his discharge, and that the offer ad acceptance are in good faith and have not been made or procured fraudulently.

It may be observed that the present Act substitutes the term "consideration" for the word "money", used in the prior Act. However, as far as the decisions indicate, the two words have been construed in virtually identical manner, to include cash, notes, and other evidences of indebtedness. Though there is no decision which specifically so rules it may nevertheless be doubted whether "consideration " includes securities such as corporate stock or certificates of beneficial interest in stock or in property.

It may further be noted that under the present Section 12 a bankrupt may make a composition offer either in cash, or partly in cash and partly in deferred payments,

or entirely in deferred payments; and he may thus in effect obtain an extension of time for the payment in full of his unsecured debts, except those entitled to priority, which must be paid in cash.

Section 74 of the Bankruptcy Act permits not only compositions, but also extensions of time, though, as pointed out, the latter may presently be obtained under Section 12; and also allows extensions of secured debts, though prohibiting a scaling down of such debts. However, the section is restricted to proposals before adjudication, and is applicable only to individuals and partnerships, expressly excluding corporations. The two most important innovations are: (1) the right to extend secured debts, and (2) the right of a debtor, not in bankruptcy, to file an original proceeding for relief. There are other significant new features. The referee is vested with original jurisdiction in proceedings under this section; and the court, which includes the referee, is vested with exclusive jurisdiction over the debtor and his property, wherever located. The estate may be liquidated without the entry of an order of adjudication, and an adjudication may be entered only where the debtor has commenced or prolonged the proceeding for delay or his proposal has been denied confirmation. Debts, in the case of extensions, are defined to include claims of every character, whether or not provable in bankruptcy. There is no requirement, as in Section 12, that the debtor be examined before making his offer. With respect to the confirmation of the offer, in addition to the requirements of Section 12 for such confirmation, the court must also be satisfied that the proposal, in reference to secured creditors, is equitable and feasible, and, generally, that it will insure the financial rehabilitation of the debtor. Priority debts and the costs of the proceedings may be paid in cash, or security may be deposited for their payment.

By reason of a number of grave defects, Section 74 has failed to accomplish its purpose. The provision for the extension of secured debts is particularly unsound. Any interference with the free exercise by secured creditors of their remedies is bound ultimately to impair a liberal extension of credit. Furthermore, in the majority of cases coming within the purview or this section the secured indebtedness is a single mortgage debt, or a few such debts, each due to a separate person, and each standing entirely in a class by itself, as contrasted with a bonded indebtedness, in which the mortgage is security for an issue of bonds, widely distributed among a large number of persons, all standing in the same class. Such individual mortgage debts cannot be satisfactorily treated en masse. In any event, it is often the case that such a mortgage is sufficiently large to make up the major portion of the debtor's total liabilities, both secured and unsecured; and it is manifest that the debtor can obtain no extension of his secured indebtedness, without the consent of his mortgagee. If the debtor is able to obtain such consent, he does not need the machinery of Section 74; if he requires relief against his unsecured indebtedness, he may readily resort to Section 12. Therefore Section 74, in the great majority of cases to which it was undoubtedly intended to apply, affords no relief.

Although the section deals with "compositions" and "extensions", and assigns to extensions certain exclusive incidents, it fails to define the terms or to make any clear distinction between them. The section is equally unsatisfactory in respect to the debtor's discharge. Section 14c of the Act gives to the confirmation of a

composition the effect of a discharge; but this provision was intended to relate to Section 12, which deals with compositions. Section 74 contains no express similar provisions; and though it provides that certain incidents of bankruptcy shall apply to a proceeding under the section, it includes among those incidents only the "duties of the debtor", and says nothing about his rights and privileges under the Act. Thus it may be doubted whether under Section the confirmation of a proposal discharges a debtor from the debts affected by such proposal; and it would seem rather clear that in the event of a liquidation under this section or even an adjudication, the debtor, though deprived of his property, is not entitled to the privilege of a discharge.

The section is equally lacking in protection of the fights of creditors. The approval of an answer requesting relief, filed in a pending bankruptcy proceeding, may stay such proceeding; and it would seem that thereafter the proceeding under the section is treated as a new proceeding, that is, as if a voluntary petition in bankruptcy had been filed and an adjudication entered on the date of the filing of the answer. Thus it would follow that the running of the period of four months in respect to preferences and fraudulent transfers, instead of being related to the date of the filing of the petition in bankruptcy, would be related to a later time, namely, the date of the filing of the answer for relief; and in the event of a liquidation or adjudication in a proceeding under this section, the trustee in bankruptcy may find himself barred from the recovery of the property affected by such preferences or fraudulent transfers.

Another objection is the ability of the majority of creditors to force upon the priority creditors and upon persons entitled to the costs of the proceedings, the acceptance of security for payment of their claims. In effect this is a postponement of payment with some uncertainty of ultimate realization. The provision is especially objectionable in respect to the costs of the proceeding, which include the compensation, costs, and expenses of the referee, receiver, trustee, appraisers, and attorneys.

For a full discussion of this general subject, see Weinstein, *Section 74, Compositions and Extensions*, 7 J. Nat. Assn. Ref. In Bktcy. 140 (July 1933); Legislation Note, April 1933 issue of Col. L. Rev., reprinted in 7 J. Nat. Assn. Ref. In Bktcy. 146 (July 1933); and Weinstein, *Chapter VIII of the Bankruptcy Act,* 38 Comm. L. J. 171 (April 1933).

We have recast Section 12 and incorporated therein such features of Section 74 as are deemed of value. These features will be indicated in subsequent notes. We have restricted the section to unsecured debts; and we are permitting the filing of a proposal after as well as before an adjudication in a pending bankruptcy proceeding. We are contributing a number of new features. We have expanded upon the scope of the proposal so that it may include any terms and be made upon any consideration, subject to approval by the court as fair, equitable, and in the interests of creditors. The unsecured creditors may be divided into classes, and the proposal may deal with all or any of these classes in different ways; and in such event each class votes separately. Provision is made for the rejection of contracts, executory in whole or in part, including unexpired leases of real or personal property. Debts which are incurred during the pendency of the arrangement may be given priority of

payment over debts affected by the arrangement. The debtor may be continued in possession of his property during the pendency of the proceeding and also during the period of the arrangement. A general provision is inserted which permits any other appropriate terms not inconsistent with the section. In several respects the proceeding has been speeded up. Other new features are indicated in the notes below.

We believe that the section as rewritten has been made sufficiently flexible to permit the offer of a settlement in a variety of situations not now covered either by Section 12 or by Section 74. The inclusion of corporations, will permit a large number of the smaller companies such as are now seeking relief under Section 77B but do not require the complex machinery of that section, to resort to the simpler and less expensive, though fully adequate, relief afforded by Section 12.–Weinstein.

APPENDIX B

[The following excerpt is referred to in footnote 10 of this thesis, Part I.A.]

Act of March 2, 1867, § 43, (1867), *Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st and 2d sess., on H.R. 31 and H.R. 32, Supplemental App. Part I, 29–53, 50 (1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 8, doc. 32 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (an act to establish uniform system of bankruptcy throughout the United States)

OF SUPERSEDING THE BANKRUPT PROCEEDINGS BY ARRANGEMENT.

Sec. 43. *And be it further enacted*, That if at the first meeting of creditors, or at any meeting of creditors to be specially called for that purpose, and of which previous notice shall have been given for such length of time and in such manner as the court may direct, three fourths in value of the creditors whose claims have been proved shall determine and resolve that it is for the interest of the general body of the creditors that the estate of the bankrupt should be wound up and settled, and distribution made among the creditors by trustees, under the inspection and direction of a committee of the creditors, it shall be lawful for the creditors to certify and report such resolution to the court, and to nominate one or more trustees to take and hold and distribute the estate, under the direction of much committee. If it shall appear to the court, after hearing the bankrupt and such creditors as may desire to be heard, that the resolution was duly passed, and that the interests of the creditors will be promoted thereby, it shall confirm the same; and upon the execution and film;, by or on behalf of three fourths in value of all the creditors whose claims have been proved, of a consent that the estate of the bankrupt be wound up and settled by said trustees according to the terms of such resolution, the bankrupt, or his assignee in bankruptcy, if appointed, as the case may be, shall, under the direction of the court, and under oath, convey, transfer, and deliver all the property and estate of the bankrupt to the said trustee or trustees, who shall, upon such conveyance and transfer, have and hold the same in the same manner, and with the same powers and rights, in all respects, as the bankrupt would have had or held the same if no proceedings in bankruptcy had been taken, or as the assignee in bankruptcy would have done had such resolution not been passed; and such consent and the proceedings thereunder shall be as binding in all respects on any creditor whose debt is provable, who has not signed the same, as if he had signed it, and on any creditor whose debt, if provable, is not proved, as if he had proved it; and the court, by order, shall direct all acts and things needful to be done to carry into erect such resolution of the creditors, and the said trustees shall proceed to wind up and settle the estate under the direction and inspection of such committee of the creditors, for the equal benefit of all such creditors, and the winding up and settlement of any estate under the provisions of this section shall he deemed to be

proceedings in bankruptcy under this act; and the said trustees shall have all the rights and powers of assignees in bankruptcy. The court, on the application of such trustees, shall have power to summon and examine, or [on] oath or otherwise, the bankrupt and any creditor, and any person indebted to the estate, or known or suspected of having any of the estate in his possession, or any other person whose examination may be material or necessary to aid the trustees in the execution of their trust, and to compel the attendance of such persons and the production of books and papers in the same manner as in other proceedings in bankruptcy under this act; and the bankrupt shall have the like right to apply for and obtain a discharge after the passage of such resolution and the appointment of such trustees as if such resolution had not been passed, and as if all the proceedings had continued in the manner provided in the preceding sections of this act. If the resolution shall not be duly reported, or the consent of the creditors shall not be duly filed, or if, upon its filing, the court shall not think fit to approve thereof, the bankruptcy shall proceed as though no resolution had been passed, and the court may make all necessary orders for resuming the proceedings. And the period of time which shall have elapsed between the date of the resolution and the date of the order for assuming proceedings shall not be reckoned in calculating periods of time prescribed by this act.

APPENDIX C

[The following excerpt is referred to in footnote 10 of this thesis, Part I.A.]

Act of June 22, 1874, § 17, (1874), *Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary*, H.R., 94th Cong., 1st and 2d sess., on H.R. 31 and H.R. 32, Supplemental App. Part I, 55–63, 60–61 (1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 8, doc. 32 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (an act to amend and supplement an act entitled "An act to establish a uniform system of bankruptcy throughout the United States.") (amending and supplementing the Act of March 2, 1867, especially regarding arrangement):

Sec. 17. That the following provisions be added to section forty-three of said act: That in all cases of bankruptcy now pending, or to be hereafter pending, by or against any person, whether an adjudication in bankruptcy shall have been had or not, the creditors of such alleged bankrupt may, at a meeting called under the direction of the court, and upon not less than ten days' notice to each known creditor of the time, place, and purpose of such meeting, such notice to be personal or otherwise, as the court may direct, resolve that a composition proposed by the debtor shall be accepted in satisfaction of the debts due to them from the debtor. And such resolution shall, to be operative, have been passed by a majority in number and three-fourths in value of the creditors of the debtor assembled at such meeting either in person or by proxy, and shall be confirmed by the signatures thereto of the debtor and two-thirds in number and one-half in value of all the creditors of the debtor. And in calculating a majority for the purposes of a composition under this section, creditors whose debts amount to sums not exceeding fifty dollars shall be reckoned in the majority in value, but not in the majority in number; and the value of the debts of secured, creditors above the amount such security, to be determined by the court, shall, as nearly as circumstances admit, be estimated in the same way. And creditors whose debts are fully secured shall not be entitled to vote upon or to sign such resolution without first relinquishing such security for the benefit of the estate.

The debtor, unless prevented by sickness or other cause satisfactory to such meeting, shall be present at the same, and shall answer any inquiries made of him; and he, or, if he is so prevented from being at such meeting, some one in his behalf, shall produce to the meeting a statement showing the whole of his assets and debts, and the names and addresses of tie creditors to whom such debts respectively are due.

Such resolution, together with the statement of the debtor as to his assets and debts, shall be presented to the court; and the court shall, upon notice to all the creditors of the debtor of not less than five days, and upon hearing, inquire whether such resolution has been passed in the manner directed by this section; and if satisfied that it has been so passed, it shall, subject to the provisions hereinafter contained, and upon being satisfied that the same is for the best interest of all concerned, cause such resolution to be recorded and statement of asset and debts to

be filed; and until such record and filing shall have taken place, such resolution shall be of no validity. And any creditor of the debtor may inspect such record and statement at all reasonable times.

The creditors may, by resolution passed in the manner and under the circumstances aforesaid, add to, or vary the provisions of, any composition previously accepted by them, without prejudice to any persons taking interests under such provisions who do not assent to such addition or variation. And any such additional resolution shall be presented to the court in the same manner and proceeded with in the same way and with the same consequences as the resolution by which the composition was accepted in the first instance. The provisions of a composition accepted by such resolution in pursuance of this section shall be binding on all the creditors whose names and addresses and the amounts of the debts due to whom are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors.

Where a debt arises on a bill of exchange or promissory note, if the debtor shall be ignorant of the holder of any such bill of exchange or promissory note, he shall be required to state the amount of such bill or note, the date on which it falls due, the name of the acceptor and of the person to whom it is payable, and any other particulars within his knowledge respecting the same; and the insertion of such particulars shall be deemed a sufficient description by the debtor in respect to such debt.

Any mistake made inadvertently by a debtor in the statement of his debts may be corrected upon reasonable notice, and with the consent of a general meeting of his creditors.

Every such composition shall, subject to priorities declared in said act, provide for a pro-rats payment or satisfaction, in money, to the creditors of such debtor in proportion to the amount of their unsecured debts, or their debts in respect to which any such security shall have been duly surrendered and given up.

The provisions of any composition made in pursuance of this section may be enforced by the court, on motion made in a summary manner by any person interested, and on reasonable notice; and any disobedience of the order of the court made on such motion shall be deemed to be a contempt of court. Rules and regulations of court may be made in relation to proceedings of composition herein provided for in the same manner and to the same extent as now provided by law in relation to proceedings in bankruptcy.

If it shall at any time appear to the court, on notice, satisfactory evidence, and hearing, that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may refuse to accept and confirm such composition, or may set the same aside; and, in either case, the debtor shall be proceeded with as a bankrupt in conformity with the provisions of law, and proceedings may be had accordingly; and the time during which such composition shall have been in force shall not, in such case, be computed in calculating periods of time prescribed by said act.

APPENDIX D

[The following excerpt is referred to in footnote 18 of this thesis, Part I.A.]

H.R. REP. NO. 1409 (July 29, 1937), *Hearings before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, H.R., 94th Cong., 1st and 2d sess., on H.R. 31 and H.R. 32, Supplemental App. Part 1, pg. 674–818, 710 *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 8, doc. 32 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979):

ABUSES

While the principle of the statute is sound and desirable as a practical expedient in proper cases and undoubtedly a fixture in our law, its application in actual experience under the new procedure has given rise to grave abuses. A number of these abuses, which the committee strongly feels require correction, are succinctly outlined in the following statement by one of the witnesses, Commissioner William O. Douglas of the Securities and Exchange Commission:

The record of corporate reorganizations of the past—and-particularly those of the recent depression—is not pleasant. It shows the absolute control exercised over reorganizations by the inside few; it shows the financial well-being of investors and the public sacrificed to the insiders' desires for protection and for further profit. It shows corporations struggling to reorganize for many year; return denied to investors; labor injured, and business damaged by the resulting uncertainties and instability. It shows that these delays, these futile prolongations of the agony of reorganization, were frequently due to deliberate sabotage by a group which had something to gain and was unwilling to compromise, or to the lack of motive power necessary to draft a feasible plan and procure its acceptance. The record also shows, with overwhelming proof, that plans of reorganization were frequently dictated by a single interest—by a closely knit inside group; primarily in the interests of that group and of dubious wisdom so far as interests outside the inner circle were concerned. These conclusions have indeed become so generally accepted and so widely known as to be commonplace. These conclusions indicate that something must be done to provide impartial, capable control over reorganizations; to produce impartially fair and sound plans of reorganization and to provide effective motive power which will lead to the production and consideration of reorganization plans.
* * *

Under section 77B as it now stands, there is no duty, and no real opportunity, to make an examination and appraisal of the management of the debtor. The debtor may remain in possession of the property; or one of it. officials may be appointed trustee for the debtor. As a matter of fact in over a majority of cases the debtor remains in possession, a strange and novel privilege for debtors in a bankruptcy proceeding or even in a receivership proceeding. The. debtor may propose a plan without conference or negotiation with any of the persons whose money is involved. No other person is so privileged. Investors must get 25 percent of a class

and not less than 10 percent of all classes of security holders in order merely to propose a plan. If the debtor can get the consent of 68 2/3 percent of each class of creditors and of a majority of each class of stock, and approval of the court, its plan becomes effective and binding upon all interested parties. By use of this machinery perpetuation in control of the company's assets absolute power over the funds of investors and the fate of creditors, is relatively easy for the debtor, with the aid of its investment banking and other allies, to gain. With the debtor so securely in the saddle, there is no possibility of genuine appraisal of the managements virtues or shortcomings; of its honesty or culpability; and of the desirability of continuing it in control. Anything that a creditor can do in a 21A examination involving large, publicly owned corporations, is apt to be superficial and ineffective. By use of the present machinery reorganization can be effected, with sacrifices perhaps only on the part of investors. The debtor continues in power perhaps without sacrifice or change in personnel or policy, and with practical immunity whatever be its acts of omission or commission. * * *

Management usually remains in dominance of the situation during and after reorganization, as before. It meets only casual scrutiny, at most; its plan is adopted; it does not account. Good, bad, or indifferent management continues in the saddle. It is beyond question that in many cases which are matters of public record, this state of affairs has resulted in hardship and loss. And I believe it equally beyond question that the present method promotes and induces superficial, surface reorganizations which leave uncured dangerous diseases in the corporate body; and that this superficiality of method thwarts the objective of reorganization—the production of a fair and equitable plan and the launching of a vital business enterprise under able, faithful management. * * *

Under the present system, the situation Is so completely controlled by the insiders that the hands of persons whose money is at stake—and often even the hands of the court—are tied. No matter what an investor may suspect, or what facts he may know, he often has little opportunity to act upon them. Likewise the amount of information the court may have, and its own opinion of the inadequacies of the plan of reorganization may be of little practical use. Reorganization plans are frequently presented to the court after a long period of negotiation, and after time, an money have been spent in obtaining the necessary consents from creditors and stockholders. Courts are then extremely reluctant to withhold approval of a plan or to require its modification. If the court disapproves the plan or requires substantial amendment, the time, effort, and money of the reorganizers may have been spent to no avail. A new plan may have to be negotiated; creditors and stockholders may have to be resolicited. Waste and additional expense result. * * *

With this system in operation, the court. could do very little. They could offer investor. and creditor. little protection. They were crippled by a reorganization system which was based upon the theory that reorganization was a procedure wherein the legal matters were left to the court; the business matters to the reorganizers. Obviously reorganization is not strictly a legal problem. It is a business and administrative matter of great complexity. And even though the courts wanted to exercise a broader conditioning influence over the whole process, they

frequently were in no position to do so, since they did not have nor were they in a position to get the facts. The bill recognizes this weakness in the system. It makes it necessary for the courts to deal with the business and administrative problems of reorganization. It makes it possible for the courts to do so by giving them administrative and expert assistance. In that way it vitalizes the role of the courts. In a variety of ways, it brings the court into association with the facts of the business; it assures that the court will be fully informed; it places in the court power to give impetus to a reorganization—to see that a plan is drafted and that moves are made to get the support of investors; and it gives the court genuine power to see to it that the reorganized company is provided with good management and a sound capital structure. In the public eye, the courts already have the responsibility; what the courts need are ample powers commensurate with their actual or ostensible responsibility.

APPENDIX E

[The following excerpt is referred to in footnote 76 of this thesis, Part I.B.]

Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part III, 1874–75, 1892 (Mar. 29, 1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 5, doc. 29 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (statement of Harvey R. Miller, William J Rochelle, Jr., J. Ronald Trost on Behalf of the National Bankruptcy Conference on Business Reorganizations):

In the context of the present economic conditions and the development of business entities over the past fifteen (15) to twenty (20) years with increasing public participation and sophisticated means of financing, the perpetuation of mutually exclusive chapters for debtor rehabilitation or reorganization is archaic and illogical. Chapter XI, which was originally designed for small "mom and pop" types of businesses has been molded and fashioned for use by large publicly-owned and financed business entities whose capital and debt structures have often been complex. Yet concomitant creditor safeguards have not been similarly incorporated or engrafted into such situations. Why, for example, restrict Chapter XI voluntary petitions, unsecured debt, and permit only a debtor to propose a plan? This question is particularly relevant when, under similar circumstances, the provisions of Chapter X lead to directly opposite results and, in the case of Chapter XII, there is a combination of the provisions of Chapters X and XI.

H.R. 31 would permit creditors to propose a plan in the type of reorganization case which could be characterized as the equivalent of a present Chapter XI case.[fn9] That authority is drawn from the provisions in present Chapter X and Chapter XII.[fn10]

fn. 9 Section 7-304

fn.10 Sections 167(6), 170 of Chapter X of the Bankruptcy Act, 11 U.S.C. §567(6), 570; Section 466 of Chapter XII of the Bankruptcy Act, 11 U.S.C. §866.

As indicated, under the present Chapter XI the debtor may have unnecessary power to force creditors to yield to the terms of its proposal. Within certain limits, the Chapter XI debtor can effectively dictate the essential ingredients of a Chapter XI plan to its creditors.[fn11] In many cases, the alternative to creditors may be to accept the proverbial "ten cents on the dollar" offered or be confronted with an adjudication in bankruptcy and the resultant liquidation. The bargaining power of creditors in such circumstances may be severely limited. The substantial loss that may be faced by creditors as a consequence of the forced auction sale of work inn process, inventory, machinery and plant may be overwhelming.

fn.11 Festersen, *Equitable Powers in Bankruptcy Rehabilitation: Protection of the Debtor and the Doomsday Principle*, 46 Am. Bankr. L.J. 311 (1972).

In some Chapter XI cases, a settlement proposal is made on condition that a major and controlling stockholder be offered a substantial sum for his interest in the business while the return to creditors is minimal. Indeed, creditors may not be privy to the negotiations of such a stockholder and the arrangements of the principal's interest;[fn12] a result which could not occur under Chapter X.

fn.12 *In re Tioga Textile Associates, Inc.*, 72-B 203 (S.D.N.Y. 1972). In this Chapter XI case, unsecured creditors were constrained to accept a minimal settlement of their claims while the principals of the debtor allegedly received very substantial consideration in exchange for their interests in the debtor. The alternative of liquidation in ordinary bankruptcy with the loss of going concern values might have yielded nothing to unsecured creditors. Consequently, the creditors yielded to the terms dictated by the debtor.

Of course, the bargaining position of the debtor under present Chapter XI may be further enhanced by the debtor's control of the business and the fear that a debtor through inter manipulation may destroy or diminish the value of the business if creditors do not acquiesce to the debtor's Chapter XI plan. The take-it-or-leave-it attitude on the part of debtors as permitted by Chapter XI is fraught with potential abuse. The granting of authority to creditors to propose plans of reorganization and rehabilitation serves to eliminate the potential harm and disadvantage to creditors and democratizes the reorganization process.

H.R. 31 provides that a reorganization plan may be filed by a trustee, debtor or disinterested person.[fn13] The NBC is in accord with the underlying premise that sole power to propose a plan should not repose in the debtor. However, it is cognizant that in certain types of cases the debtor should for some period of time possess the exclusive right to propose a plan. For example, in cases not affecting publicly-held securities the debtor or its principals may have invested substantial moneys, time and effort in the business. It would be unfortunate if upon the filing of a Chapter VII petition a disinterested person immediately could propose a plan eliminating such persons and thereby reap their years of toil and investment.

fn.13 Section 7-304.

The NBC recommends modification of Section 7-304 to provide that where no trustee or disinterested person is appointed, the debtor be given the exclusive opportunity to file a plan with his petition or thereafter for a period of 120 days and that for an additional period of 60 days the debtor be allowed to obtain acceptance thereof. The time period may be extended or reduced by the administrator where appropriate.[fn14] The provisions of H.R. 31 and the recommended modification by the NBC would serve to eliminate one potential abuse in Chapter XI type cases and still preserve the ability of the sole proprietor and a non-public business debtor from

losing the initial right to propose a plan of reorganization.

fn.14 The NBC proposal to change section 7-304is as follows:
(a) *Filing by Trustee, Debtor, or Disinterested Person*. On or before the date set by the administrator, the trustee, or if there is no trustee the debtor of disinterested person designated by the administrator pursuant to section 7-103(b), shall file with the administrator a plan or a report why a plan cannot be formulated.
(b) *By Others*. The debtor, a creditor, an equity security holder, a creditors' or equity security holders' committee, or an indenture trustee may file a plan with the administrator at any time prior to the date set by the administrator pursuant to subdivision (a) for the filing of a plan or report. *Notwithstanding the foregoing, if no trustee or disinterested person is appointed or designated, no person other than the debtor may file a plan until the expiration of 120 days after the filing of the petition, and, if a plan is filed within such period by the debtor, no other person may file a plan until the expiration of 60 days after the filing of the plan. After the expiration of such periods, which may be extended or reduced by the administrator, a person other than the debtor may file a plan unless the debtor's plan has been accepted by the majority required by the Act for confirmation with such period*.

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Section 7-304 - Filing of Plan

Section 7-304 follows the present practice of Chapter X and is derived from Sections 169 and 170 of the present Act. The NBC concurs that the trustee, consistent with present practice under Chapter X, should have the primary responsibility for the filing of a plan *in Chapter X type cases*. However, the NBC believes that in Chapter XI type cases, the debtor in possession should have the exclusive right, for a limited period of time, to file and obtain acceptance of a plan. This would preserve the present practice under Chapter XI. Under the NBC proposal, only the debtor, where no trustee or disinterested person has been appointed, may file a plan until the expiration of 120 days after the filing of the petition and the debtor in possession shall have an additional 60-day period after the filing within which to obtain acceptances. The administrator would have the discretion to extend or reduce these time periods. After the expiration of such time, a person other than the debtor may file a plan.

If the changes in proposed Sections 7-102 and 7-103 are made as recommended by the NBC, there will be no presumption requiring the appointment of a trustee and such appointment will be made only when the court finds that the protection afforded by a trustee is needed and that the expense will not be disproportionate to the protection afforded.

These proposed changes to Section 7-304 are consistent with the philosophy of the NBC that the beneficial procedures of Chapter XI which have been time-proven, should be preserved in Chapter VII.

APPENDIX F

[The following excerpt is referred to in footnote 79 of this thesis, Part I.B.]

Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part III, 1910–15 (Mar. 29, 1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 5, doc. 29 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (testimonies of Judge Arthur Moller, of Houston, Tex., and Judge Herbert Katz, of San Diego, Calif. on Behalf of the National Conference of Bankruptcy Judges, and testimonies of William Rochelle, Esq., Dallas, Tex., Harvey R. Miller, Esq., New York, N.Y., and J. Ronald Trost, Esq., Los Angeles, Calif., on Behalf of the National Bankruptcy Conference):

Mr. Rochelle. If I may be permitted, Mr. Chairman, to make comments at the end about taxes, I would greatly appreciate it. However, I did participate with Mr. Trost and Mr. Miller in the preparation of the statement in support of the National Bankruptcy Conference position. If I may say a word along those lines at this point, sir.

Judge Katz quite correctly points out that not infrequently reorganization and arrangement cases are filed by lawyers who do not have the experience and the expertise of a Harvey Miller as in *W. T. Grant,* or a Ron Trost as in *U.S. Financial.* However, he then arrived at a conclusion quite different from mine. He said that because, frequently, counsel in these cases are inexperienced, it should be easier *if* we had two separate chapters, two different sets of rules, two different tracks, and inexperienced counsel had to make the decision eventually which way to go, and so forth.

I suggest, sir, that where there are inexperienced counsel in a case, that a single chapter would be very helpful because under the Commission concept-with the changes that the Conference recommends- there is more creditor control in the case, more court control of the ease, than there is in present chapter XI proceedings.

And, of all the arguments that can be made in support of a single chapter, the fact that court and creditor control will be substituted for lawyer control, is a very, very good thing; and many evils which now exist under the system would be cured. I say that, and it may cost me dollars out of my pocket, and every other lawyer that practices in the XI area, because I can assure the committee that, given the choice, most bankruptcy lawyers will choose the XI route, for a number of reasons. The first reason is, the lawyer is in the "cat-bird" seat as far as control is concerned; only the debtor, under present practice in a chapter XI, may propose a plan, as a matter of law—nobody else can. Any control of the creditor is only negative-type control; and the debtor's lawyer says, "Take it, or leave it; your alternative, what you are going to get is liquidation." We feel that is bad. We feel that the creditors and the court should have something to say about what kind of a plan is going to be filed.

So, the lawyer, whether experienced or inexperienced, can entirely run the show. Now, one of the big reasons why—

Mr. Butler. While we are on this point, as a matter of a philosophy, why do you feel that the creditor is entitled to more than he can get in a liquidation?

Mr. Rochelle. Well, the entire purpose of a reorganization proceeding, as opposed to liquidation, is to preserve the going concern value of the business.

Mr. Butler. That is true.

Mr. Rochelle. And the only justification for reorganization is that the going concern value will exceed the liquidation value; and therefore the creditors certainly are entitled to their fair share of what that reorganization, going-concern value, will be. Also, I point out, what the liquidation value will be is frequently speculative.

Mr. Butler. Of course, it is quite obvious that if the creditors had more control in chapter XI proceedings, the plans would be more generous to the creditors. I assume that is the basis on which you are raising this question.

I am just not satisfied why creditor control is desirable, why greater control is desirable, that is the point. I am sure it is true, but I am not convinced on the basis of what we have heard this morning. I wish you would elaborate on that.

Mr. Rochelle. Well, sir, it is an elementary concept in insolvency law that the assets of an insolvent corporation are held in trust for the benefit of the creditors; they are the ones primarily entitled to those assets.

Creditor groups are frequently very knowledgeable. Creditors* committees are made up of trade creditor representatives who know what they are doing; not only credit managers, but counsel who represent creditors, can be extremely helpful in a reorganization proceeding. And their input to what a plan of reorganization should be could be very, very helpful.

And where the attorney for the debtor is in a position that is dominant and says, "Take this, or you get liquidation value and no more," then a great deal can be lost to creditors.

Mr. Miller. If I may interject, in the case of the chapter XI, where the creditors* committee sometimes is not even privy to negotiations which are being conducted by principals of the debtor organization, there have been cases where the principals of the debtor organization have proposed plans roughly equivalent to liquidation value, while they are conducting somewhat secret negotiations with third parties, and presuming the plan is confirmed, they sell out with tremendous profits because of the preservation of the going concern values. If the creditors were in a position where they could propose a plan, they would get the benefit of the preservation of the going concern value.

There is a case cited in our statement, I believe, entitled *Tioga Textile Associates,* in New York, in which a very minimal chapter XI plan was proposed and where two or three principals walked away with a very substantial amount of money when really, if we accept the principle that the assets of a corporation on the verge of insolvency, be it equitable or in the bankruptcy sense, really belong to the creditors, the creditors should be able to realize on these assets as a going concern by selling to a third party, or by bringing in new management, so that they really get the benefit of the additional value.

Mr. Butler. And you think absence of intent on the part of the debtor is a real problem?

Mr. Miller. In chapter XI type cases, it is a private proceeding. Very often you do not know who the debtor is negotiating with; and the ability to walk into the room after the proceeding has been pending for a year and say, "This is the plan, take it or leave it, there is nothing you can do about it except to cause a liquidation in which eventually you will get nothing after 2 or 4 years," is a tremendous letdown for the creditor.

Mr. Butler. Thank you, sir.

Mr. Edwards. Are you saying that in some of these chapter XI*s the plan is presented by the debtor, and an unfairly reduced amount is offered to the creditors; and then the debtor rehabilitates himself and goes on with a large and unfair value of the going concern?

Mr. Miller. The debtor ends up, Mr. Chairman, with all of the benefits of preserving the going concern value. It is not unusual to have a chapter XI case where a year has expired; there have been substantial administration expenses built up over the course of that year; and there is a lot of work in process. If you close down the business at that particular point in time, the work-in process will probably yield nothing and time works in a chapter XI context in favor of the debtor.

The debtor walks in and says, "This is my plan"; it's close to liquidation value, maybe 1 or 2 percent above what someone estimates liquidation value is. The creditors have all this time invested, they have no alternative but liquidation unless they accept the plan. It's sort of a "Well, this is the best we can do," and you find out subsequently that the principals have sold their stock, or their interest to a third party for very substantial amounts of money.

Mr. Trost. Mr. Chairman, if I may be permitted, I think that in this area I probably disagree with my colleagues from Texas and New York to the extent that they overstate this. I think that in the bargaining process that goes on between creditors and debtors, in most cases a fair result in reached. There may be a case where it's not so; but what is important is that the National Bankruptcy Conference and the Commission felt that it would be in the interest of all in these rare cases where Mr. Miller's point has some validity, it would be helpful to enable creditors to propose a plan.

But in most of the cases, the small chapter XI's, it is of little significance because debtor management is so important. Without the debtor's management you have no business in a lot of cases. In the large cases that they are used to in New York, Mr. Miller has a particular problem; but in most of the chapter XI's it is insignificant because if Ron Trost is running a business with his personal contacts, the creditors realize he must stay on, for them to share in this going concern value.

So, consequently, what happens—like in any good settlement negotiation—the debtor pays more than he thinks he has to, which is more than liquidation; and the creditors receive less than they think they are entitled to. It's a negotiation.

I think rather than force—and this is the important point—Mr. Miller says the creditors have no choice, well, they do have a choice, but it is distasteful, that's what he meant. The choice is to seek to convert it to chapter X. And the reason they consider that not a reasonable choice is because the procedural requirements of charter X are so time consuming that the experience, I guess, of the bar is that a

great many cases going to chapter X end up in liquidation. And if you talk to the banks across the country, they will tell you they think chapter X means liquidation. It has all the same elements which enable a business to survive, but because of the time delay it is an extremely cumbersome proceeding. It takes forever. You've got to have a hearing on everything. And because it takes so long, they consider it not a reasonable choice. So, consequently, the Commission proposed, and Professor Seligson I think, was a strong advocate of this–Mr. Chairman, you probably remember that—that in all the proceedings the creditors would have the right to propose a plan, the only effect of which would be, in the smaller cases, to force the debtor to meet the offer.

Mr. Butler, I think that the question you asked Mr. Rochelle is a very important question. I feel personally that this whole process is an ability to bring the parties together to a negotiation to save those businesses which are viable; and those businesses which are not viable should not be saved.

Mr. Miller. Mr. Butler, at the present time only chapter XI limits the ability to propose a plan to debtors; chapter X and chapter XII give creditors the right to propose a plan.

I don't want to disagree with my friend, Mr. Trost, but there are some cases which are classic chapter XI type cases in the sense that you have only unsecured debts, and you can get adequate relief under chapter XI, which is the negative of the necessary allegation to get into chapter X. In these cases the only alternatives are either to take the debtor's plan, or to go into ordinary liquidation with all the consequences that flow from that. Chapter X is simply not available.

Mr. Klee. Judge Moller, chapter VIII of the Judges bill allows neither an involuntary petition to be filed, nor for creditors to propose a plan.

Judge Moller. That is correct.

Mr. Klee. I wonder if you would comment on the statement made, therefore, with respect to creditor control in an arrangement proceeding?

Judge Moller. Of course, Mr. Klee, you do know that under the present setup the best way to force a debtor to come into some type of a proceeding is to file an involuntary by the creditors. The debtor will normally, if it has any viability, will normally counter with the filing in that involuntary case, file a chapter XI petition; that's the way it is converted over.

We simply did not have the time, nor did we have any staff to work with us to reframe the thing to accommodate all of these possibilities. There definitely is a desirability to be able to force a debtor into chapter case before everything is gone. I will go with that wholeheartedly.

Mr. Klee. And do you think creditors should have the right to propose a plan after a limited period of time, in an arrangement situation?

Judge Moller. I can see no reason why not. I agree with the situation that the NBC has agreed upon in Los Angeles, in January, that the debtor should have approximately 120 days in the nonpublic case, to be the only one to come up with a plan. And that would be a time, of course, that the court could either lengthen or shorten. It could conceivably result in the stalling off by creditors, so that they could counter with a different type of plan.

But, speaking of the NBC resolution, I do want to make one comment because I think Mr. Trost may have possibly overstated a little bit. He said that the NBC has proposed amendments to chapter VII to accomplish the things that were agreed upon, and that they are before the Committee.

May I state that I have been a member of the NBC since 1968, and I have yet to see those, except for a copy that I was able to purloin; they have not been submitted to the membership; they have not been passed upon by the membership. So, at best they have to be faced as being tentative and unofficial.

Mr. Trost. Mr. Moller if I may, the resolution—the way the National Bankruptcy Conference Operates, a series of resolutions are passed. Those resolutions are translated by the Drafting Committee—Professor Kennedy and Professor Countryman and Professor King—into specific legislative proposals, which may not have been circulated to the entire Conference. But the resolutions, those drafts are only of the statute, which are before this subcommittee, are based only upon resolutions passed by the National Bankruptcy Conference. They are not the work of individuals as to what their own personal views are.

Judge Moller. The membership, in turn, has an absolute right to review those and decide whether or not the substance of the resolution was adequate.

Mr. Trost. That's correct, that has not been done.

Judge Moller. I didn't want any misunderstanding on that.

Mr. Rochelle. I think none of us will disagree with Judge Moller in his liking of the simplicity, the speed, and the possibility of saving money in the present chapter XI type proceeding; there is no argument about this. Indeed, I think that the National Bankruptcy Conference would not have accepted the Commission's proposal as it was written—with all due respect to the Commission—because the Conference felt that it leaned rather too far toward chapter X, the absolute priority, disinterested trustee, elaborate investigative proceedings, time, and expense.

But, what the Conference has finally recommended are certain modifications of chapter VII, which I urgently feel will preserve the good things about chapter XI; still make a simple, quick procedure possible for a Mom & Pop type deal, or even a big company where all it needs is an arrangement with unsecured creditors.

APPENDIX G

[The following excerpt is referred to in footnote 80 of this thesis, Part I.B.]

Bankruptcy Act Revision: Hearing Before Subcomm. on Civil and Constitutional Rights, of the Comm. on the Judiciary, H.R., 94th Cong., 1st sess., on H.R. 31 and H.R. 32, Part III, 1923–25 (Mar. 29, 1976), *reprinted in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, vol. 5, doc. 29 (Alan R. Resnick & Eugene M. Wypyski, eds. 1979) (testimonies of Judge Arthur Moller, of Houston, Tex., and Judge Herbert Katz, of San Diego, Calif. on Behalf of the National Conference of Bankruptcy Judges, and testimonies of William Rochelle, Esq., Dallas, Tex., Harvey R. Miller, Esq., New York, N.Y., and J. Ronald Trost, Esq., Los Angeles, Calif., on Behalf of the National Bankruptcy Conference):

Mr. Parker. Also, I'm still having some trouble, the NBC says that according to the underlying premise, the sole power to propose a plan should not be reposed in the debtor. I have a little difficulty with that because then you have a proposal which indicates that within the first 120 days the debtor should be able to propose a plan, and an additional 60 days for the acceptances to be gained.

Mr. Miller. If no trustee is appointed.

Mr. Rochelle. And the court may shorten the term.

Mr. Parker. I assume that one of the thoughts that was bothering me was that by proposing this change, we are now going into a single chapter and talking perhaps about a small business, a small contractor, individual proprietor, a small mom and pop store, that you are changing the balance of the bargaining power. This change is bothering you somewhat, so you left this period.

But isn't it somewhat lost because you really put the power with the creditor in any event? If you had a couple of smart creditors that are going to lobby the other creditors, and there is more of a pinch between the creditors at this point in time than between the creditors and the debtor, and they would say, "Let's just sit back and wait, let the time run, and then we are going to control."

You really are changing the relative position enormously in terms of the small business who needs to effect some kind of arrangement.

Mr. Trost. I would disagree, Mr. Parker. I think Mr. Miller overstated the effectiveness of the provision that enables creditors to file a plan in small cases. I have heard Peter Coogan, a man of great experience both as a practicing lawyer and as a teacher, say that one thing creditors do not want is for the debtor to give them the key to the business. That power the debtor always has.

In the small cases it's very significant. In a General Motors type case it's not significant because there is always the superstructure, the administrative structure, the manager staying on.

But in the business that depends upon the personality, or the genius of the debtor principal, it is of very serious consequence; and it is for that reason that provision was inserted. In a public company you can change management with no problem, generally. But in the small company, if you change management, you may

have destroyed the business.

Creditors do not want to manage the business. Mr. Miller has some cases where there have been abuses, and those abuses would be corrected by the ability to file a plan. That's the way I would do it personally.

Mr. Miller. In addition, a small chapter XI type case, where you have speed, efficiency, and economy, is usually wound up in a 6-month period. When we are talking about this provision, 120 days to file the plan, and 60 days to obtain acceptances in the mom and pop type business, the leverage is still with the debtor.

Mr. Parker. It is less costly to the creditors.

Mr. Miller. Yes.

Mr. Trost. I think you have your finger on something that is very important, and that is the ability of creditors to propose a plan. Professor Seligson felt that was a very significant reform. And if you feel that is something that should not be accomplished, then that mitigates against the consolidation of the chapters.

Mr. Rochelle. I think you are correct, Mr. Parker, when you say it is possible that knowledgeable creditors will organize and delay, wait until the 6 months pass and file their own plan. I think that is quite all right, I see nothing wrong with that, if the debtor can't propose an acceptable plan in the first instance. I can see many situations where there will be motions made to the court to shorten that 120 days and 60 days.

Mr. Trost. Mr. Parker, I think you should know that the three of us at this table from the National Bankruptcy Conference are essentially debtors* lawyers. We are not essentially creditors' lawyers, and we nevertheless make these proposals.

Mr. Parker. Judge Katz and Mr. Moller, do you have any comments to make?

Judge Katz. I don't have any problem with the concept of creditors ultimately being able to propose a plan of arrangement, as long as what we now know as chapter XI proceeding the debtor has first crack at it; as long as there is discretion given to the court to either shorten or extend, if necessary, the time. Sometimes 120 days wind up as being too short a period for the debtor; but it keeps the gun, so to speak, to his head, it keeps the case moving, and I think that is what everybody wants.

Judge Moller. It has been very seldom in the last 8 or 10 years that I have seen plans that weren't the result of negotiations between the creditor representatives and the debtor. So, I mean, it's partially illusionary to talk about exclusive time, and all that.