

Statement of

Clifford J. White III
Director, Executive Office for United States Trustees
United States Department of Justice

American Bankruptcy Institute
Commission to Study the Reform of Chapter 11

First Public Meeting
Thursday, April 19, 2012
Room 2237, Rayburn House Office Building

I am pleased to participate in the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11. Unlike other Commissioners, I sit as a non-voting member to offer assistance and perspectives as the Commission conducts its research and deliberations.

By statute, the United States Trustee Program, a component of the U.S. Department of Justice, is the watchdog of the bankruptcy system and carries out administrative, regulatory, and enforcement responsibilities in nearly all bankruptcy cases filed in the United States. In chapter 11, we play a vital role in ensuring that cases proceed expeditiously and efficiently for the benefit of all stakeholders – the debtor company, including its shareholders and employees; creditors; and the general public. When management does not do its job properly, or has engaged in questionable conduct, we seek to oust management in favor of an independent trustee, or we seek to appoint an independent examiner who can investigate the financial affairs of the company. When companies in chapter 11 seek to pay executive bonuses, even though employees are laid off and creditors lose their money, we are often the only party to enforce the bonus restrictions imposed by law. And when bankruptcy attorneys and other professionals in the case seek to be paid unreasonable sums, we again are often the only party to police the compensation in accordance with statutory standards.

In the seven years since the last major Bankruptcy Code amendments were signed into law, the nation's economic environment has changed and the conduct of bankruptcy cases has changed. Lending for debtors-in-possession increasingly includes more aggressive provisions that may tilt the process in favor of one set of interests at the expense of other interests. For example, more and more frequently, Chief Restructuring Officers with extraordinary powers and autonomy are installed by the bankrupt company's board and its lenders without the protections afforded by the appointment of an independent trustee or examiner. In addition, with seeming greater regularity, companies are selling substantially all of their assets on an expedited basis without the protections of a plan confirmation process.

All these approaches have advantages and disadvantages. But it is important periodically to assess these trends to make sure that all stakeholders in a case are being protected in accordance with the law. The business judgment of incumbent management is entitled to meaningful deference, but that deference has its limits. Institutional creditors have rights in a case, but employees, private equity funds, small trade vendors, and others also have legitimate interests in the case's outcome.

The traditional purpose of chapter 11 is to provide a viable business with a breathing spell to reorganize its operations and finances. The Bankruptcy Code, however, also provides that the assets of the company should be deployed in a way to maximize value for all stakeholders in the most efficient manner. That sometimes requires that the debtor transfer its assets to others who can more efficiently use those assets, including in new enterprises that ultimately may grow more jobs than the debt laden and inefficient business operation that entered chapter 11.

In considering these and so many other matters of emerging importance in the chapter 11 business reorganization arena, the experts assembled by the ABI will bring important insights based upon years of practical and scholarly experience. It would be hard to compile a list of more distinguished practitioners who also have demonstrated a deep commitment to public service and to the development of bankruptcy law and practice to serve the public good.

I know that their research and deliberations will be of great value to the United States Trustee Program as we carry out our broad duties in the bankruptcy system. I hope too that, on behalf of the United States Trustee Program, I may offer perspectives that enhance the important work of these distinguished Commissioners.

#####