



AMERICAN
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INSTITUTE

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Does Chapter 11 Still Work?

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Prof. Jared A. Ellias

Harvard Law School | Boston

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Prof. Robert K. Rasmussen

USC Gould School of Law | Los Angeles

Robert J. Stark

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Panelists



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Skadden Arps



Prof. Jared A. Elias
Harvard Law School



Marshall S. Huebner
Davis Polk & Wardwell



Dean Robert K. Rasmussen
USC Gould School of Law



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Question 1:

**How does Chapter 11 today
differ from prior eras?**



Question 2:

**Why do debtors (and some academics)
favor this new Chapter 11 model?**



Question 3:

**What risks are heightened
by today's Chapter 11 model?**



Speed Round:

**What can we do to obviate risks
and otherwise improve the model?**

Faculty

Hon. Robert D. Drain is Of Counsel with Skadden, Arps, Slate, Meagher & Flom LLP in New York and previously served for 20 years as a U.S. bankruptcy judge for the Southern District of New York, presiding over many impactful business and consumer cases. Before retiring from the bench in 2022, Judge Drain oversaw proceedings ranging from large chapter 11 corporate restructurings — including Loral, RCN, Cornerstone, Refco, Allegiance Telecom, Delphi, Coudert Brothers, Frontier Airlines, Star Tribune, Readers Digest, A&P, Hostess Brands, Christian Brothers, Momentive, Cenveo, 21st Century Oncology, Tops, Global A&T, Sears, Full Beauty Brands, Sungard, Windstream, Purdue Pharma, Jason Industries, OneWebb and Frontier Communications — to chapter 15 and other cross-border cases, such as Varig, S.A., Yukos (II), SphinX, Galvex Steel, TBS Shipping, Excel Maritime, Nautilus, Landsbanki Islands, Roust and Untrapetrol. He also served as a court-appointed mediator in numerous cases, including New Page, Cengage, Quicksilver, Advanta, LightSquared, Molycorp, Breitburn Energy, China Fishery and PREPA. In his current practice at Skadden, Judge Drain advises on U.S. and cross-border chapter 11 and 15 reorganizations and litigation, out-of-court restructurings, distressed M&A and investments in troubled companies, debtor-in-possession loans and exit financings, as well as potential examiner or trustee roles and mediations. He is a Fellow of the American College of Bankruptcy, a member and former ABI board member, and a former board member and officer of the National Conference of Bankruptcy Judges (NCBJ). He was chair for several years of the Bankruptcy Judges Advisory Group established by the Administrative Office of the U.S. Courts, has testified before the Senate Judiciary Committee on home mortgage loss mitigation, and currently serves on the FDIC's Systemic Resolution Advisory Committee. Judge Drain was a founding member and chair of the Judicial Insolvency Network, which developed, among other issuances, guidelines that were adopted by courts in the U.S. and abroad for cooperation and communication in concurrent transnational insolvency cases. He also has long annually presided over a mock transnational bankruptcy case for the International Association of Restructuring, Insolvency & Bankruptcy Professionals' (INSOL's) training program and is a member of the International Insolvency Institute. In addition, he is a member of the Business Bankruptcy Committee of the U.S. Bankruptcy Court for the Southern District of New York. Judge Drain is an adjunct professor at Pace University School of Law and a former adjunct professor in St. John's University School of Law's LL.M. in Bankruptcy Program. He has contributed to treatises on bankruptcy law and frequently lectured on bankruptcy law in multiple programs for the Federal Judicial Center, NCBJ, ABI, AIRA, Turnaround Management Association, Practising Law Institute, American College of Bankruptcy, International Insolvency Institute, Federal Bar Council and Columbia University School of Law, and national, international and local bar associations, as well as judicial and professional interchanges with judges and practitioners in South America, Europe, China, South Korea, Singapore and India. Prior to his time on the court, Judge Drain spent nearly 20 years in private practice, including 10 years as a partner in the bankruptcy and restructuring practice of another global law firm. He also authored a novel, *The Great Work in the United States of America*. Judge Drain received his B.A. *cum laude* from Yale University and his J.D. from Columbia University School of Law, where he was a Harlan Fiske Stone Scholar for three years.

Prof. Jared A. Ellias is the Scott C. Collins Professor of Law at Harvard Law School in Cambridge, Mass., and he writes and teaches about corporate bankruptcy law and the governance of large firms

more generally. His current research focuses on the governance of large bankrupt firms and the role played by activist investors and the effect of bankruptcy filings on firms, and his research interests include corporate bankruptcy, corporate governance, contract law, empirical methods in social science and law, and economics. Prof. Ellias has served as a teaching fellow and lecturer at Stanford Law School, a visiting associate professor at Boston University School of Law, the Bion M. Gregory Chair in Business Law at the University of California, Hastings College of the Law, and the William Nelson Cromwell Visiting Professor of Law at Harvard Law School. He joined the Harvard Law Faculty in July 2022. Prof. Ellias's research on corporate bankruptcy topics has been published or is forthcoming in leading peer-reviewed law and social science journals (such as the *Journal of Legal Studies*, the *Journal of Legal Analysis* and the *Journal of Empirical Legal Studies*), as well as in leading student-edited law reviews (such as the *California Law Review*, the *Southern California Law Review*, the *Yale Journal on Regulation* and the *Columbia Law Review Sidebar*). He has presented papers at a large number of academic conferences, such as at the annual meeting of the American Law and Economics Association and the Conference on Empirical Legal Studies, and at faculty workshops at leading law schools. Prof. Ellias's work has been selected twice for the Stanford/Yale/Harvard junior faculty forum and for presentation at the Weil, Gotshal & Manges Roundtable at Yale Law School. One of his articles was designated by *Corporate Practice Commentator* as one of the Top 10 Corporate and Securities Laws Articles of 2020. Prof. Ellias has presented research at a wide variety of bankruptcy lawyer conferences and events, and he is widely quoted in the press, including by the *New York Times*, the *Wall Street Journal*, the *Washington Post*, the *Financial Times*, Bloomberg News and the *San Francisco Chronicle*, among many other media venues. In 2020, he was honored as one of ABI's "40 Under 40. Prof. Ellias frequently advises state and federal lawmakers on bankruptcy-related issues, and he has testified on corporate bankruptcy issues before the California State Senate and presented research at a wide variety of bankruptcy law conferences and events. He advised the California State Senate on the 2019 bankruptcy of the Pacific Gas & Electric Co., one of the top 10 largest industrial bankruptcies of all time, which touched on many core issues of interest to the State of California. Prior to joining the Harvard faculty, Prof. Ellias was the founding faculty director of the Center for Business Law at UC Hastings. He received the UC Hastings Foundation Faculty Award for Faculty Scholarship, the highest research award given by UC Hastings to faculty. Before entering academia, Prof. Ellias was an associate in private practice at Brown Rudnick LLP in New York, where he represented financial institutions and ad hoc and statutory creditor committees in corporate restructuring transactions, both in and out of bankruptcy court. He received his A.B. in 2005 from the University of Michigan and his J.D. in 2008 from Columbia Law School.

Marshall S. Huebner co-heads Davis Polk & Wardwell LLP's Insolvency and Restructuring Group in New York, where he focuses his practice on corporate restructuring and insolvency law. He advises purchasers, companies and boards of directors in many non-public distressed matters, and has provided risk-management and bankruptcy advice on derivative products and other complex transactions. Mr. Huebner has authored numerous articles on bankruptcy law, including the bankruptcy chapter of the leading guide to broker-dealer regulation, and is a contributing editor for the *Collier Bankruptcy Practice Guide*. He has played a key role in many of the most complex restructurings of the last 30 years. Mr. Huebner was lead counsel to the U.S. Treasury and the Federal Reserve in the \$182 billion rescue of AIG and lead counsel to companies including Delta, Ford, Purdue Pharma, Lehman Brothers Europe, Spirit Airlines and Arch Resources in their landmark restructurings. His dozens of lead lender and creditor roles include Hertz, Enron, Lyondell, American Airlines, Kodak, Polaroid and Toys "R" Us. Mr. Huebner testified by invitation before the House Judiciary Subcom-

mittee on Commercial and Administrative Law on how to restructure the Bankruptcy Code to strike a better balance between debtors' needs for reorganization tools and the needs of and issues facing employees of companies in chapter 11. He also has lectured at many preeminent law schools and HBS. Mr. Huebner has received top rankings and awards from such publications as *Chambers*, *Law360*, *The Deal* and the *American Lawyer*. He is a member of the National Bankruptcy Conference and the American College of Bankruptcy. Mr. Huebner received his undergraduate degree *magna cum laude* from Princeton University in 1988, where he was awarded Fulbright and Rotary Scholarships, and his J.D. from Yale Law School, where he was awarded a Ford Foundation Fellowship and was a senior editor of the *Yale Law Journal*.

Prof. Robert K. Rasmussen is a law professor at the University of Southern California Gould School of Law in Los Angeles, where he has been teaching since August 2007. His scholarship focuses on corporate restructurings, both inside and outside of bankruptcy. Prof. Rasmussen teaches contracts, business bankruptcy and syndicated loans, as well as an undergraduate class on the legal profession. He was named the J. Thomas McCarthy Trustee Chair in Law and Political Science in 2015. Prof. Rasmussen, who served as dean from 2007-15, previously taught at Vanderbilt Law School for almost 20 years. He also has been a visiting professor at the University of Chicago and University of Michigan law schools. A widely cited scholar, Prof. Rasmussen is the author or co-author of dozens of articles published in some of the country's leading law journals, including the *Supreme Court Review*, the *University of Pennsylvania Law Review*, the *Stanford Law Review*, the *Michigan Law Review* and the *Yale Law Journal*. He has played a role in shaping the jurisprudence in his field as the principal author of an *amicus curiae* brief on behalf of nine law professors in the 1999 U.S. Supreme Court case of *Bank of America v. 203 North LaSalle Street Partnership*; was the principal author of an *amicus curiae* brief on behalf of three law professors in *Integrated Telecom Express, Inc.*, a 2004 case decided by the Third Circuit Court of Appeals; and was the principal author of an *amicus curiae* brief on behalf of seven law professors in *Owens Corning*, a 2005 case also decided by the Third Circuit Court of Appeals. Prof. Rasmussen is a member of the American Law Institute and a Fellow of the American College of Bankruptcy. He also chairs the board of directors of the AccessLex Institute. Prof. Rasmussen received his B.A. *magna cum laude* from Loyola University of Chicago and his J.D. *cum laude* from the University of Chicago Law School, where he was comment editor of the *University of Chicago Law Review*.

Robert J. Stark is a partner with Brown Rudnick LLP in New York and chairs its Bankruptcy & Corporate Restructuring Practice Group. He focuses his practice on complex corporate restructuring, including in-court chapter 11 cases and out-of-court workouts. Mr. Stark has experience representing debtors/borrowers, secured and unsecured creditors, official creditor/equity committees, and other significant parties-in-interest in large corporate insolvency matters. He has been recognized and profiled by numerous directories and publications, including *Chambers Global*, *Chambers USA*, *The Legal 500 US*, *The Best Lawyers in America*, *Benchmark Litigation*, *Law360*, *Turnarounds & Workouts*, *Global M&A Network*, *IFLR1000*, *Lawdragon*, *Who's Who Legal*, *Super Lawyers*, *PLC Which Lawyer*, *National Law Journal* and Bloomberg/Business Week. In addition to his case work and many recognitions, Mr. Stark is a contributing editor of the nation's leading treatise on restructuring law, *Collier on Bankruptcy* (LexisNexis 2020), and he was the lead editor of two other legal treatises, *Contested Valuation in Corporate Bankruptcy* (LexisNexis 2011) and *Admitting Expert Valuation Evidence Before the U.S. Bankruptcy Courts* (ABI 2017). He has written or co-written articles in the *American Bankruptcy Law Journal*, *Business Lawyer*, *California Law Review* and the *Journal*

of Corporation Law, which have been quoted/cited in trial and appellate court decisions and in the published writings of leading legal scholars. In addition, he has guest-lectured on restructuring topics at numerous seminars and graduate schools around the country. Mr. Stark is admitted to the Bars of New York and New Jersey, the U.S. District Courts for the Southern and Eastern Districts of New York, the District of New Jersey and the Eastern District of Michigan, and the U.S. Court of Appeals for the Third Circuit. He received his B.A. in 1992 from Lafayette College and his J.D. in 1995 from Vanderbilt University Law School.