

# **The Future of Bankruptcy: The Good, the Bad and the Supreme Court's View**

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COMMISSION TO  
STUDY THE REFORM 2012-2014  
OF CHAPTER 11  
FINAL REPORT AND RECOMMENDATIONS  
SPONSORED BY THE ARTHUR H.N. SCHALLING ENDOWMENT FUND

## ABI Commission to Study the Reform of Chapter 11

Overview of  
Recommendations and Findings

[www.commission.abi.org](http://www.commission.abi.org)

### *Why Reform? Why Now?*

- An effective and predictable business bankruptcy scheme rebuilds companies, preserves jobs, and fosters economic growth
- Distressed companies are not using chapter 11, or are waiting too long to use it, undercutting its utility for all stakeholders
  - Perception is chapter 11 does not work for many distressed debtors

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### *Approach to Reform*

- Who: The 18 voting and four *ex officio* Commissioners are among the most prominent chapter 11 professionals in the U.S. today, supported by more than 130 others who served on 13 topical advisory committees
- Objective study of chapter 11: *What is working and what is not working as well as it could?*

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### *Approach to Reform*

- How: Commissioners held 17 field hearings around the country to gather testimony, while considering hundreds of other written submissions, and evaluating empirical data
- Process included perspectives and significant input from representatives of all major stakeholders in chapter 11 cases

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### *Approach to Reform*

- There were no pre-determined principles, agendas, or outcomes
- Commission studied and considered all potentially competing interests in working to strike balanced approach under proposed principles

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### *Key Themes of Recommendations*

- Reduce barriers to entry
- Facilitate certainty and more timely resolution of disputed matters
- Enhance exit strategies for debtors
- Create an effective alternative restructuring scheme for small and medium-sized firms

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### *Key Principles: Resolving Splits*

- The permissibility of cross-collateralization and roll-up provisions in postpetition financing facilities
- The use of the doctrine of necessity in chapter 11 cases
- The standard of review applicable to the appointment of a chapter 11 trustee under section 1104

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### *Key Principles: Resolving Splits*

- The definition of “executory contract” for purposes of section 365
- The effect of rejecting an executory contract or unexpired lease under section 365
- The ability of a debtor to assume intellectual property licenses under section 365(c) (i.e., the hypothetical test versus the actual test) and the treatment of trademark licenses generally
- The proper calculation of a landlord’s claim against the estate (i.e., the accrual approach versus the billing date approach)

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### *Key Principles: Resolving Splits*

- The application of the safe harbor in section 546(e) to bar fraudulent transfer actions brought under applicable nonbankruptcy law
- The treatment of ordinary supply contracts as qualified financial contracts subject to the protection of the Bankruptcy Code's safe harbor provisions
- The meaning of "for the benefit of the estate" under section 550

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### *Key Principles: Resolving Splits*

- The permissibility of gifting and nonconsensual third party releases
- The application of the new value corollary
- The calculation of the cramdown interest rate
- The fiduciary duties of a debtor (as opposed to a debtor in possession) proposing a chapter 11 plan

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### *Key Principles: SME*

- For purposes of these principles, the term “**small or medium-sized enterprise**” (“**SME**”) means a business debtor with—
  - (i) No publicly traded securities in its capital structure or in the capital structure of any affiliated debtors whose cases are jointly administered with the debtor’s case; and
  - (ii) Less than \$10 million in assets or liabilities on a consolidated basis with any debtor or nondebtor affiliates as of the petition date
- SAREs excluded from SME principles

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### *Key Principles: SME*

- No mandatory creditors’ committee; may appoint estate neutral to help with business and plan
- No mandatory deadlines, but SME must propose, and court will approve, timeline tailored to particular case
- Prepetition equity holders may retain their interests, subject to certain conditions
  - These conditions include satisfying section 1129(b) for secured creditors
  - Granting unsecured creditors 85% of economic ownership interests in reorganized company with limited voting rights

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## *Conclusion*

- Principles intended to, among other things, create certainty and efficiencies in process
- Commission hopes that the Report will facilitate debate and meaningful dialogue concerning necessary and beneficial reforms to chapter 11

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