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Into the Future: Where Do We Go from Here?

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INTO THE FUTURE – WHERE DO WE GO FROM HERE?

What's possible?

I. The ABI Commission on Consumer Bankruptcy's final report.

The ABI Commission on Consumer Bankruptcy was created in December 2016 to research and recommend improvements to the consumer bankruptcy system that can be implemented within its existing structure. The Commission's Final Report contains recommendations for amendments to the Code and Rules designed to make the consumer bankruptcy system more accessible and efficient for both financially struggling Americans and the professionals who serve them. After soliciting public feedback, Commission members identified nearly 50 discrete issues for study and divided these issues among three advisory committees composed of 52 bankruptcy professionals. The commissioners and committee members represent all diverse stakeholders in the bankruptcy system.

Among the issues and recommendations addressed in the Final Report are the following:

Issue		Recommendation
1.01	Student Loans	Student loan debt significantly depresses U.S. economic activity, and current bankruptcy law ineffectively addresses it. The Commission recognizes that recent graduates should generally be required to repay government made or guaranteed student loans, but it recommends statutory amendments to discharge student loans that are • made by nongovernmental entities, • incurred by a person other than the person receiving the education, or • first payable more than seven years before the bankruptcy case was filed. Other recommended amendments would result in nondischargeable student loans being paid at a higher rate than other unsecured claims in Chapter 13 cases. These loans would be classified as priority claims, but payable only to the extent of available income during a five-year plan. Payment of interest on the claims would be allowed. In addition, the Commission recommends administrative procedures and interpretations of current law to facilitate reasonable relief from student loan indebtedness.

1.02	Remedies for Discharge Violation	Current law presents difficulties both in enforcing the discharge injunction and in determining its scope. Most courts allow enforcement of the discharge only through contempt proceedings, which may not provide effective relief. The Commission recommends: • creation of a statutory private right of action for violations of the discharge, like the right for violations of the automatic stay, which would provide the full range of sanctions, including costs, attorney fees, and punitive damages; and • amendments to the Bankruptcy Rules allowing motions to determine whether particular creditor conduct would violate the discharge.
2.01	Protection of Interests in Collateral Repossessed Prepetition	The circuit courts are divided on the question of whether collateral seized by a creditor before a bankruptcy filing must be returned to the party entitled to possession postpetition. To balance the need of the debtor for return of the collateral, often a vehicle, and need of the creditor for adequate protection, the Commission's principal recommendation is: • § 362(a)(3) should be amended to provide expressly that a creditor's retention of estate property violates the automatic stay, but only if proof of insurance or other security is provided for property subject to loss of value.
3.01	Chapter 7 Attorney's Fees	Current law largely prohibits collection of unpaid attorney fees for a chapter 7 debtor's representation after the bankruptcy case is filed, often leading either to delayed filings so that the anticipated fee can be paid in advance or to the filing of chapter 13 cases simply to assure fee payment. The Commission recommends: • several steps to reduce the overall fees needed for chapter 7 representation, allowing prompter advance payment, • consideration of changes in the debtor's discharge to allow collection of unpaid fees postpetition, including —delay of discharge to permit payment of attorney fees, and —an exception from discharge with judicial oversight.
3.04	Attorney Competency & Remedying Lawyer Misconduct	There are well-established rules of conduct governing attorney conduct in bankruptcy cases. The Commission recommends: • vigorous enforcement of these rules by the responsible entities, • the formation of committees or other bodies at the local level to investigate and resolve complaints against offending attorneys,

		• the publication of all disciplinary orders, and, • the award of enhanced fees, as authorized by § 330(a)(3)(E), for board certified or otherwise demonstrably skillful and experienced practitioners.
3.06	Credit Counseling and Financial Management Course	The Commission recommends: • Eliminating prepetition credit counseling. Requiring individuals to receive a credit counseling briefing as a prerequisite for any bankruptcy filing imposes costs in money, time, and complexity that are not outweighed by any benefit in helping them avoid unnecessary filings. • Eliminating the requirement for a course in financial management in chapter 7, but retain it in chapter 13, with further study of its effectiveness. Requiring completion of the course as a prerequisite for a discharge imposes costs in money, time, and complexity that are not offset by any benefit to chapter 7 debtors, but that may be of benefit in chapter 13. • Amending the Fair Credit Reporting Act to require consumer reporting agencies to report the debtor's successful completion of a financial management course, so that the effectiveness of the course may be measured by changes in the debtors' credit rating.
3.07	Means Test Revisions & Interpretations	The means test assesses a debtor's ability to repay debt by calculating the debtor's disposable income—the total income less defined living expenses. The means test determines both whether a debtor should be presumed to be abusing chapter 7 and so barred from relief under that chapter and whether a debtor's chapter 13 plan may be denied confirmation because it provides for inadequate payments on unsecured claims. The test incorporates numerous detailed provisions for determining both income and allowed deductions. The Commission recommends retaining the means test, but amending it • to require reduced documentation from debtors with below-median income; • to exclude from income public assistance, government retirement, and disability benefits capped by the maximum allowed Social Security benefit; • to remove the presumption of abuse if the debtor shows special circumstances even if the circumstances arose voluntarily; and • to allow certain statutory expense deductions from income only to the extent actually incurred by the debtor and necessary for support of the debtor and debtor's dependents.

3.10	Chapter 13 Debt Limits	To expand the availability of relief under chapter 13 and reduce the need for individuals to file under chapter 11, the Commission recommends: • increasing the chapter 13 debt limit to $ 3 million, eliminating the distinction between secured and unsecured debts, and • for married couples, applying the limit separately to each spouse and not aggregating the spousal debt, even in joint cases.
4.01	Racial Justice in Bankruptcy	The Commission finds, based on substantial empirical evidence, that African Americans are both disproportionately more likely to file chapter 13 cases than debtors of other races and disproportionately less likely to obtain a discharge. To ensure that all individuals have equal access to justice, the Commission recommends several actions, including: • organizational training programs for bankruptcy professionals aimed at reducing implicit racial bias, • amendment to 28 U.S.C. § 159, requiring both the collection of race and ethnicity information on bankruptcy petitions and the dissemination of that data by the Administrative Office of U.S. Courts, and • in the absence of such an amendment, consideration of collecting race and ethnicity information on bankruptcy filers through official bankruptcy forms, with appropriate privacy protections.
4.03	Reserve Fund in Chapter 13 Cases	Reflecting the advice of nearly all financial management professionals, the Commission finds that chapter 13 debtors should be allowed and encouraged to maintain a reasonable reserve fund, held by the trustee, to address unanticipated expenses. The Commission recommends: • amendments to § 1322(b) to allow such a reserve fund, not to exceed one month of scheduled expenses, subject to restoration to the extent drawn upon, excluded from disposable income, and payable to meet unanticipated expenses on notice and an opportunity to object, and • consistent amendments to the relevant bankruptcy rules and forms. In the absence of these amendments, the Commission recommends that current law be interpreted to allow the creation of such a limited reserve fund through the debtor's plan, with provisions for disbursement from the fund on notice and opportunity to object, and for differing disposition of the

		fund at the conclusion of the case depending on the debtor's income level: payment of the fund balance to debtors with below-median income and for above-median debtors, payment to the unsecured creditors.
5.01	Chapter 7 Trustee Compensation	The Commission finds that chapter 7 trustees are substantially undercompensated. The Commission recommends statutory amendments that would: • increase the trustees' base compensation from $60 to $120 dollars in each case, with the increase coming from existing fees rather than an increase in filing fees or a reduction in payments to creditors, and • increase the commission allowed under § 326(a) by increasing the levels of distributions to creditors at which lower percentages of the distributions are paid to the trustee.

II. Jurisdiction and Venue.

A. Will Congress or the Supreme Court change the bankruptcy courts' jurisdiction?

Congress has established the jurisdictional scheme related to bankruptcy cases in assorted parts of title 28 (the Judicial Code), largely sections 1334, 157, and 158.

Congress could constrict the current broad grant of bankruptcy jurisdiction in section 1334 to cover a far narrower set of matters. Congress also could restrict the right of appeal in bankruptcy cases, as the statute already does for some issues. *See* 28 U.S.C. § 1334(d) (no right to circuit court or Supreme Court appeal regarding certain abstention decisions); *id.* § 1452(b) (same regarding certain remand decisions); 11 U.S.C. § 305(c) (same regarding other abstention decisions). Indeed, in the past, the Supreme Court did not have appellate jurisdiction over pure "bankruptcy" issues at all. *See Wiswall v. Campbell*, 93 U.S. (3 Otto) 347 (1876) (dismissing appeal from order disallowing proof of claim for lack of appellate jurisdiction).

For its part, the Supreme Court has yet to exhaustively catalog what are or are not "*Stern* claims" outside the scope of a bankruptcy judge's final adjudicatory power (absent consent by the parties) or whether there is actually a "public rights" exception to Article III that encompasses truly core bankruptcy matters.

B. Will the venue of large chapter 11 cases be changed?

The Judicial Code currently includes a venue provision for bankruptcy cases, which allows filing in the ***district*** "in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such

commencement" or in which there is a pending bankruptcy case for an affiliated debtor. *See* 28 U.S.C. § 1408. This allows chapter 11 cases to be filed in Delaware or New York whenever there is a single entity in a corporate group that is incorporated or primarily located there. Some have argued that this results in a competitive battle among possible filing venues, which in turn results in a "race to the bottom" that negatively impacts debtors and their stakeholders. *See, e.g.*, Lynn M. LoPucki, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS (Michigan 2005).

One possible approach would be to alter the venue scheme to facilitate more "home court" filings based on where a bankrupt enterprise is truly located as a matter of economic reality, as was proposed in the Bankruptcy Venue Reform Act of 2018, S. 2282, 115th Cong. (Jan. 8, 2018). This is a complex issue on which reasonable minds can disagree. *See, e.g.*, National Conference of Bankruptcy Judges, *NCBJ White Paper on Venue* (released Jan. 7, 2019), *available at* https://cdn.ymaws.com/www.ncbj.org/resource/resmgr/docs_public/Venue_White_Paper_-_Final.pdf.

An alternative approach could be to formalize a "national" bankruptcy court that includes specially-selected judges from around the country to hear large cases beyond a certain size or complexity threshold. Indeed, the benefits of such specialization animate concepts included in recent proposed legislation regarding bankruptcy cases for large financial institutions. *See* Financial Institution Bankruptcy Act of 2016, H.R. 2947, 114th Cong. (April 13, 2016) § 4(a) (proposing to add a new section 298 to the Judicial Code under which "the Chief Justice of the United States shall designate not fewer than 10 bankruptcy judges to be available to hear a case under [new] subchapter V of chapter 11 of title 11," the designation for which may be requested by individual bankruptcy judges).

The "national court" concept could also be extended to bankruptcy appeals, with a special panel established to resolve all bankruptcy-related appeals in a uniform fashion rather than having appeals go through generalist circuit courts (perhaps like the United States Court of Appeals for the Federal Circuit).

Along these lines, does the unsecured creditors' committee process need to become uniform across all jurisdictions?

C. Will the venue of adversary proceedings be changed?

The current venue scheme generally allows for adversary proceedings to be brought in the "home" bankruptcy court, subject to an exception for several specified "small dollar" actions that need to be brought only in the district court for the district in which the defendant resides. *See* 28 U.S.C. § 1409(b). The "small dollar" thresholds could be increased or the concept could be expanded such that any adversary proceeding must be brought in the defendant's local district.

D. Will Congress ever make bankruptcy judges Article III judges?

Making bankruptcy judges Article III judges would solve many of the Constitutional concerns and procedural complexities (such as fights about withdrawal of the reference and the multi-level appellate system) associated with bankruptcy practice. This was considered in connection with enactment of the 1978 Bankruptcy Code, but ultimately did not occur because both politicians and the existing Article III judges opposed allowing President Carter to appoint more than 300 judges with life tenure.

Although making bankruptcy judges Article III judges would eliminate many Constitutional concerns and procedural complexities, it seems likely that such an action would create other issues.

1. Would there be two classes of Article III district court level judges, with certain Article III judges serving only in bankruptcy cases, or would all Article III district court level judges serve as district court judges do now, with the risk that this would reduce the overall expertise of the courts in financial matters?

2. Would chapter 11 cases be assigned randomly, or only to judges who do not have criminal trials scheduled that would conflict with hearing first day motions? Would this exacerbate forum and judge shopping?

3. If bankruptcy judges were made Article III judges, it seems likely that appeals to district courts would be eliminated. If that were to occur, would all Article III district court level judges be willing to sit on the BAP, or would the BAP also be eliminated, increasing the burden on the federal circuit courts of appeal?

4. Would new federal courthouses be required to house the increased number of Article III judges, or would there be two courthouses in the same community for Article III judges?

E. Will Congress eliminate the bankruptcy court system such that bankruptcy jurisdiction and cases revert back to the federal district courts?

There is no reason there necessarily even need to be any "bankruptcy courts." Bankruptcy jurisdiction generally rests in the federal district court, of which the bankruptcy courts are a permitted "unit." Those units could be eliminated such that bankruptcy issues are simply resolved by federal district courts in the same way as copyright, antitrust, or any number of other issues that are ultimately a creature of federal law.

III. Changes in Substantive Law.

A. Student loans and other discharge exceptions.

1. Eliminate nondischargeability of student loans, treating them simply as nonpriority unsecured claims.

2. Alternatively, return to the dischargeability limits on student loans set out in earlier versions of the Bankruptcy Code: allow discharge of all student loans not made or insured by a governmental entity; allow discharge of all student loans in Chapter 13, and allow discharge of student loans in Chapter 7 after a period (5 or 7 years) following the date on which the loans became payable. Additionally, allow discharge of student loans not incurred by student, but by a co-signer.

3. Other exceptions from discharge should be limited to situations in which either the debtor engaged in actual fraud or other deliberate misconduct, or the needs of the affected creditors (such as domestic support claimants and tax and governmental claimants) outweigh the importance of the debtor's fresh start.

B. Change/simplify/streamline the Code.

1. Individual bankruptcy.

a. Merge individual bankruptcies into a single chapter, eliminating the Chapter 7/Chapter 13 split, and setting out the situations requiring payment to creditors of a debtor's future income and the extent of any such payments.

b. Give consistent treatment to secured claims, such as:

(i) limiting protection of secured claims to collateral value at the time of filing;

(ii) allowing payment of secured claims by either conveyance to the creditor, or if the creditor prefers, a sale free and clear of claims; or

(iii) allowing no postpetition interest, regardless of the collateral value securing a particular secured claim.

c. Eliminate state exemptions except in involuntary bankruptcy cases.

2. Business and governmental bankruptcies.

    a. Formalize "too big to fail" doctrine?

    b. Expand Code to cover bankruptcies for U.S. states or territories?

As the financial conditions of more states (such as Illinois) become ever more troubled, some form of financial restructuring may become inevitable. Whether there should be "state bankruptcy" is a very complicated question, but one that may be necessary for Congress to address in the coming years. It is an issue that raises federalism concepts that have been part of the balancing behind municipal bankruptcy laws since the 1930s. *See, e.g.*, Thomas Moers Mayer, *State Sovereignty, State Bankruptcy, and a Reconsideration of Chapter 9*, 85 Am. Bankr. L.J. 363 (2011).

If Congress does not act, it is possible that the historic federal "equity receivership" could be used to solve the problem. Such an approach was used by the Northern Mariana Islands Retirement Fund after its attempted chapter 11 case was dismissed on the ground that the Fund was a governmental "instrumentality" (but not a "municipality") and hence ineligible to be a debtor under the Bankruptcy Code. *See In re N. Mariana Islands Ret. Fund*, 2012 U.S. Dist. LEXIS 131709 (D. N. Mar. I. June 13, 2012). Following dismissal of the Fund's bankruptcy case, a complex settlement agreement was entered into among (1) the plaintiffs in a putative class action lawsuit that had been filed in 2009 relating to the underfunding of the Fund (which lawsuit sought, among other relief, appointment of an equity receiver over the Fund); (2) the Fund; (3) the Commonwealth of the Northern Mariana Islands; and (4) certain related parties. *See Johnson v. Inos*, Case No. 09-cv-00023, Docket No. 468-1 (D. N. Mar. I. Aug. 6, 2013) (copy of *Final Amended Stipulation and Agreement of Settlement*). A combination of a federal equity receivership and class action certification was used to resolve the Fund's affairs in a comprehensive fashion. The end result is much like the result that could have been obtained if the Fund's chapter 11 bankruptcy case had not been dismissed.

    c. Special provisions in case of natural disasters?

    d. On-going changes to deal with disruption in industries, such as when self-driving vehicles eliminate the jobs of truckers or cab drivers.

    e. Should panel trustees be eliminated or replaced by government employees or AI that will perform their role?

    f. Should claims trading be eliminated? [Forces original lenders to have skin in the game and perhaps be more attentive to due diligence and underwriting standards].

g. Should the conflicts of interest/representation of adverse interests criteria be revised? [The owner of a small business can rarely afford separate chapter 11 counsel for himself and his business].

h. Should management or old equity be permitted to remain in place when it was in charge of a business that had to file a bankruptcy petition? How should the system treat "insider" claims generally?

The relationship between "insiders" and debtors in bankruptcy has created issues for the bankruptcy system for many decades. For example, in *Sawyer v. Hoag*, 84 U.S. (17 Wall.) 610 (1873), the bankruptcy assignee challenged the nature of certain claims that had been asserted by one of the debtor's former directors. In blessing what amounted to a form of bankruptcy-specific "recharacterization" of putative claims, the Supreme Court wrote:

> The stockholder is also relieved from personal liability for the debts of the company. But after all, this artificial body is but the representative of its stockholders, and exists mainly for their benefit, and is governed and controlled by them through the officers whom they elect. And the interest and power of legal control of each shareholder is in exact proportion to the amount of his stock. It is, therefore, but just that ***when the interest of the public, or of strangers dealing with this corporation is to be affected by any transaction between the stockholders who own the corporation and the corporation itself, such transaction should be subject to a rigid scrutiny***, and if found to be infected with anything unfair towards such third person, calculated to injure him, or designed intentionally and inequitably to screen the stockholder from loss at the expense of the general creditor, ***it should be disregarded or annulled so far as it may inequitably affect him***.

Id. at 623 (emphasis added). This is a powerful articulation of the need for bankruptcy courts to be skeptical of "insider" transactions, one that later runs through such cases as *Pepper v. Litton*, 308 U.S. 295 (1939).

This continues to often be a significant issue today, as evidenced by the disputes between the bankruptcy estates and Eddie Lampert in the *Sears* case. It likely will be an issue with which the bankruptcy system will always have to deal.

3. Litigation.

Given the cost of litigation and shrinking availability of court resources, should Congress implement changes that would limit the issues that courts would need to address or simplify procedures to obtain relief? For example, should trustees be limited to recovering only "net profits" in Ponzi cases? Should creditors be permitted to seek abandonment and relief from the automatic stay in a single motion, rather than having to file separately as required by some

courts? Should objections to claims be required to be filed within a limited period of time after the claims bar date?

C. Resolution of currently disputed issues.

1. Are key employee retention plans ("KERPs") and key employee incentive programs ("KEIPs") used appropriately, and do creditors really benefit from their use?

2. Future of uncodified principles (substantive consolidation, recharacterization, "collapsing," etc.).

The Supreme Court has increasingly sent a message that bankruptcy courts do not have powers, "equitable" or otherwise, to depart from the plain text of the Bankruptcy Code or to invent solutions to problems that cannot be grounded in the statute even when those solutions are readily justifiable on practical or policy grounds. *See, e.g.*, *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1665-66 (2019); *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 987 (2017); *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946-49 (2016); *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2169 (2015); *Law v. Siegel*, 571 U.S. 415, 425-27 (2014); *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 649 (2012); *Hall v. United States*, 566 U.S. 506, 522-23 (2012).

Yet the bankruptcy system depends on various uncodified doctrines, such as equitable disallowance, recharacterization, substantive consolidation, "collapsing," and other methods of identifying "a rose by another name" via a judicial analysis of substance over form. If the issue gets to the Supreme Court, will the Court strike down some or all of these doctrines? The denial of certiorari in *Nat'l Energy & Gas Transmission, Inc. v. Liberty Elec. Power, LLC (In re Nat'l Energy & Gas Transmission, Inc.)*, 492 F.3d 297 (4th Cir. 2007), operated to dodge the issue, but it likely will resurface.

Should Congress simply codify some or all of these principles to avoid doubt and risk of elimination?

D. Changes that could be made to make bankruptcy more useful for particular types of cases.

1. Small business cases.

Chapter 11 cases are expensive and often carry professional fees and other costs that are too substantial for many small businesses to bear. As alternatives, small businesses may instead resort to assignments for the benefit of creditors, state-court receiverships, or other available nonbankruptcy mechanisms to address excessive indebtedness.

There is legislation pending before Congress that would create a streamlined subchapter of chapter 11 for small businesses – the process would be similar to chapter 12. *See* Small Business Reorganization Act of 2019, S. 1091, 116th Cong. (Apr. 9, 2019). One criticism of this legislation is that the proposed eligibility "debt limit" is perhaps too low.

2. Multi-debtor/corporate group cases.

Difficult issues can arise in multi-debtor cases, such as how to handle intercompany claims, allocation of administrative expenses across estates, and related matters.

One such issue is the operation of Bankruptcy Code section 1129(a)(10), which requires that, "[i]f a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider."

In a case involving multiple affiliated but non-consolidated debtors, must section 1129(a)(10) be satisfied on a **per plan** basis (such that there may be only a single impaired accepting class with claims against a single debtor) or on a **per debtor** basis (such that there must be an impaired accepting class as to each debtor when votes are tabulated using an entity-by-entity approach)? This important question is not answered precisely by the statute.

In the Ninth Circuit, "section 1129(a)(10) applies on a 'per plan' basis" based on the appellate court's interpretation of the plain language and context of the statute. *See JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props. (In re Transwest Resort Props.)*, 881 F.3d 724, 729-30 (9th Cir. 2018).

No other circuit court has considered the issue (yet), but lower courts in other jurisdictions have instead adopted the "per debtor" approach. *See In re Tribune Co*., 464 B.R. 126, 180-83 (Bankr. D. Del. 2011). *But see JPMorgan Chase Bank, N.A. v. Charter Commc'ns Operating, LLC (In re Charter Commc'ns)*, 419 B.R. 221, 266 (Bankr. S.D.N.Y. 2009) (adopting "per plan" approach in reliance on two prior unpublished decisions).

3. Quasi-illegal businesses (*e.g.*, marijuana operations)?

Several states, most notably California, have legalized the recreational purchase and use of marijuana by people who are at least 21 years old. Other states have legalized medical marijuana to varying degrees. Marijuana, however, remains a Schedule I drug for purposes of the federal Controlled Substances Act, 21 U.S.C. §§ 801-971. As a result, the distribution, possession, use, and related acts remain criminalized as a matter of federal law.

As decriminalized marijuana is integrated into local economies, it will touch an increasing number of businesses and people. The most obvious examples are growers, dispensaries, and other businesses focused on selling recreational marijuana products. Those businesses, however, will in turn implicate employees and service providers (such as professionals, website or "app"

developers, and the like). Those businesses will also interact with many of the same counterparties as would any other business, including landlords, banks, insurers, taxing agencies, and the like. It is inevitable that some of these various parties will file bankruptcy cases.

The Executive Office for United States Trustees has formally taken the position that "[i]t is the policy of the United States Trustee Program that United States Trustees shall move to dismiss or object in all cases involving marijuana assets on grounds that such assets may not be administered under the Bankruptcy Code even if trustees or other parties object on the same or different grounds." *See* April 26, 2017 Letter from Clifford J. White III to Chapter 7 and Chapter 13 Trustees. Most local US Trustee offices have been actively seeking to implement this policy in any case that involves marijuana in any respect. As a result, bankruptcy courts have been required – and will continue to be required – to decide when marijuana plays a sufficiently significant role to warrant dismissal of a case or denial of plan confirmation.

Some believe it is proper to shut the bankruptcy courthouse doors in cases where the debtor has engaged or will engage in any act violative of the Controlled Substances Act, which is the approach taken by many courts that have considered this issue. *See, e.g.*, *Arenas v. United States Tr. (In re Arenas)*, 535 B.R. 845 (B.A.P. 10th Cir. 2015); *In re Medpoint Mgmt., LLC*, 528 B.R. 178 (Bankr. D. Ariz. 2015), *vacated in part regarding other issue*, 2016 Bankr. LEXIS 2197 (B.A.P. 9th Cir. June 3, 2016); *In re Rent-Rite Super Kegs W., Ltd*., 484 B.R. 799 (Bankr. D. Colo. 2012); *In re McGinnis*, 453 B.R. 770 (Bankr. D. Or. 2011).

Others believe this is an issue that should be addressed in a more nuanced way, based on the unique facts of every individual case. *See, e.g.*, *Olson v. Van Meter (In re Olson)*, 2018 Bankr. LEXIS 480, at *15-19 (B.A.P. 9th Cir. Feb. 5, 2018) (Tighe, J., concurring) (explaining that "[a]lthough debtors connected to marijuana distribution cannot expect to violate federal law in their bankruptcy case, the presence of marijuana near the case should not cause mandatory dismissal," and stressing "the importance of evaluating whether the Debtor is actually violating the Controlled Substances Act" and, if so, why dismissal is mandatory); *In re Arm Ventures, LLC*, 564 B.R. 77 (Bankr. S.D. Fla. 2017) (conditionally granting bank relief from stay, but subject to a 75-day period in which the debtor could propose "a plan that does not depend on the sale of marijuana as an income source"); *In re Johnson*, 532 B.R. 53 (Bankr. W.D. Mich. 2015) (concluding that dismissal was not required, provided that individual debtor took steps to cease conducting his medical marijuana business).

The Ninth Circuit Court of Appeals recently held that a potential continuing violation of the Controlled Substances Act is not a basis on which chapter 11 plan confirmation should be refused under Bankruptcy Code section 1129(a)(3). *See Garvin v. Cook Invs. NW*, 2019 U.S. App. LEXIS 13235 (9th Cir. May 2, 2019). What doors does this case open?

E. Whether current case law foreshadows decisions to come.

F. Increasing "cat-and-mouse" games between issuers / sponsors and bondholders / lenders regarding covenants and the like.

In many cases, there is a war of attrition between debtors and capital-markets creditors regarding enforcement of restrictive covenants in credit documents, often requiring a very fine reading of the documents. *See, e.g.*, Cleary Gottlieb Steen & Hamilton LLP, *Latest in European Leveraged Finance – PetSmart: Barking Up The Wrong (Covenant) Tree?*, *available at* https://www.clearygottlieb.com/-/media/files/alert-memos-2018/latest-in-european-leveraged-finance-petsmart-barking-up-the-wrong-covenant-tree.pdf (describing one such set of transactions and disputes). Are these sorts of fights a productive use of resources?

G. Impact of derivatives on cases.

Derivatives and other financial instruments allow capital structures to be sliced very finely but may also create destructive incentives. For example, allegations have been made that the hedge fund Aurelius effectively pushed Windstream into bankruptcy primarily in order to collect on credit default swaps (or CDS) that Aurelius had purchased – a form of behavior some have called "net-short debt activism." *See, e.g.*, Joshua A. Feltman, Emil A. Kleinhaus, and John R. Sobolewski, *The Rise of the Net-Short Debt Activist* (Aug. 7, 2018), *available at* https://corpgov.law.harvard.edu/2018/08/07/the-rise-of-the-net-short-debt-activist/.

Should bankruptcy or non-bankruptcy tools, such as vote designation, equitable subordination, or affirmative litigation claims, be used to check what is arguably a form of socially destructive activity?

H. Bankruptcy as the inevitable ground in which other difficult social and legal issues will get spilled (e.g., #metoo, sex abuse, California fire policy, coal, environmental issues, debt collection practices, housing crisis, "trade war," asbestos, etc., plus future unknowns).

I. Front-ending of negotiations in many business cases.

Many chapter 11 cases are now "prepacked" or "prenegotiated" around a prepetition "restructuring support agreement," which is not a concept expressly contemplated by the statute. *See, e.g.*, Douglas G. Baird, *Bankruptcy's Quiet Revolution*, 91 Am. Bankr. L.J. 593 (2017) (analyzing how "[a] new device - the restructuring support agreement - has transformed the plan-formation process over the last few years" even though "[i]t lacks any basis in the Bankruptcy Code").

These tools can lead to astonishingly quick chapter 11 cases. *See, e.g.*, Wall Street Journal, *Judge Approves FullBeauty's Record 24-Hour Bankruptcy Case* (Feb. 4, 2019), *available at* https://www.wsj.com/articles/fullbeauty-attempts-record-24-hour-bankruptcy-case-

11549310368. Wall Street Journal, *Sungard Speeds Through Bankruptcy in Under 24 Hours* (May 2, 2019*), available at* https://www.wsj.com/articles/sungard-speeds-through-bankruptcy-in-under-24-hours-11556836432.

Are these developments that should be encouraged or discouraged?

IV. The Impacts of Technology.

A. In the office.

1. Access to information.

Will counsel be able to pull all necessary information on assets, liabilities, and budget from a national database at the touch of a button to populate schedules, statements, and plans? Will parties have access to all of the detail necessary to better evaluate the accuracy of the schedules, such as a record of all credit card purchases that would identify the date an asset was acquired and the purchase price?

2. Data rooms.

Electronic data rooms are already used to share information among parties in Chapter 11 cases (primarily created by debtor's financial advisor and/or investment banker). Data rooms are also used to share information with potential buyers in a section 363 sale. Will future data rooms come equipped with algorithms that will analyze the data and project a course of action likely to lead to the greatest success?

3. Artificial intelligence.

There is no doubt that artificial intelligence will have a significant impact on the practice of law. Will it eliminate attorney and other adviser (claims agents, financial advisors, etc.) functions in bankruptcy cases? Only time will tell. If it were possible, do people want AI to replace the judiciary (*i.e.*, do we want a "robot judge" who [presumably] always gets it right?), or would that eliminate the flexibility needed in a court of equity?

A 2018 study pitted twenty experienced lawyers against an AI program in a competition to review five NDAs and identify 30 legal issues. The human lawyers, on average, were 85% accurate with an average time of ***92 minutes***. The AI was 95% accurate and completed the task in ***26 seconds***. *See* LawGeex, *Comparing the Performance of Artificial Intelligence to Human Lawyers in the Review of Standard Business Contracts* (February 2018), *available at* https://images.law.com/contrib/content/uploads/documents/397/5408/lawgeex.pdf.

AI may be able to take over some aspects of legal work, but will require double-checking by actual attorneys, and attorneys themselves will still be necessary—for now. *See* New York Times, *A.I. Is Doing Legal Work. But It Won't Replace Lawyers, Yet* (Mar. 19, 2017) ("[D]ata-

driven analysis technology is assisting human work rather than replacing it."), *available at* https://www.nytimes.com/2017/03/19/technology/lawyers-artificial-intelligence.html.

4. Remote meetings with clients or appearances in court? [Montana's bankruptcy court has a wonderful video system where people can appear on large screens in what is basically like facetiming].

5. Changes in law firm structures?

6. Conflict and disclosure issues as firms continue to consolidate?

Law firm merger negotiations between firms with disparate leverage can lead to poaching and, ultimately, the dissolution of the smaller firm if the negotiations fall apart. Firms considering a merger should perform conflict checks early on in the process, as "post-merger law firms have lost millions of dollars' worth of business after being disqualified as the result of a missed conflict of interest." *See, e.g.*, Bloomberg Law, *Conflicts, Succession, GDPR Worry Law Firm GCs* (Mar. 20, 2018), *available at* https://biglawbusiness.com/conflicts-succession-gdpr-worry-law-firm-gcs.

See also Law 360, *Merging Law Firms: Beware Conflicts Of Interest* (Nov. 14, 2016), *available at* https://www.law360.com/articles/854034/merging-law-firms-beware-conflicts-of-interest.

B. In the courtroom.

1. Remote appearances.

2. Holographic courtroom might permit everyone to appear remotely in 3D so expressions can be observed as if in person?

3. Use of AI for lie detection – facial recognition software to analyze eye movement or facial expressions to determine if a witness is lying.

A 2017 study concerning a machine-learning algorithm intended to identify "deception" in courtroom videos found that the algorithm was "almost 90 percent accurate, handily beating out humans assigned to the same task … [of evaluating] 104 mock courtroom videos featuring actors instructed to be either deceptive or truthful." The algorithm "uses computer vision to identify and classify facial micro-expressions and audio frequency analysis to pick out revealing patterns in voices." *See* Vice, *AI System Detects 'Deception' In Courtroom Videos* (Dec. 19, 2017), *available at* https://www.vice.com/en_us/article/zmqv7x/ai-system-detects-deception-in-courtroom-videos.

The EU recently implemented a pilot program for an AI-based lie detection system in some European airports. Known as "iBorderCtrl," the program consists of a "virtual border guard avatar" which will ask fliers a series of travel-related questions and use AI to analyze their facial expressions and determine whether they are lying. If the program detects deception, it will refer

the suspect flier to a human guard for further questioning. *See, e.g.*, CNN, *Passengers to face AI lie detector tests at EU airports* (Nov. 2, 2018), *available at* https://www.cnn.com/travel/article/ai-lie-detector-eu-airports-scli-intl/index.html.

4. Problem of "smart fakes" or "deepfakes" – fabricated video or documents. How do we know what is real and what is "fake news" (or just fake generally)?

Deep-learning computer applications are now able to generate convincingly-fabricated video and audio clips of politicians and other public figures, known as "deepfakes." An early example depicted Barack Obama making inflammatory statements. Researchers are working on algorithms to detect deepfakes, but "even the best detection methods will often lag behind the most advanced creation methods." Existing and proposed legal frameworks could be used to combat deepfakes, but doing so could interfere with the First Amendment, fair use doctrine, and the CDA 230 safe harbor. *See* Wall Street Journal, *Deepfake Videos Are Getting Real and That's a Problem* (Oct. 15, 2018), *available at* https://www.wsj.com/articles/deepfake-videos-are-ruining-lives-is-democracy-next-1539595787; The Verge, *Watch Jordan Peele use AI to make Barack Obama deliver a PSA about fake news* (Apr. 17, 2018), *available at* https://www.theverge.com/tldr/2018/4/17/17247334/ai-fake-news-video-barack-obama-jordan-peele-buzzfeed; Brookings, *Artificial intelligence, deepfakes, and the uncertain future of truth* (Feb. 14, 2019), *available at* https://www.brookings.edu/blog/techtank/2019/02/14/artificial-intelligence-deepfakes-and-the-uncertain-future-of-truth/.

A nonprofit AI research company recently declined to release the code for its "revolutionary" AI system that can write news stories and works of fiction out of fear of potential misuse. The system, dubbed "deepfakes for text," can replicate writing styles using a single page or less of sample text and could be used to generate fake news stories, complete with (convincing) fake quotes attributed to real politicians. *See, e.g.*, The Guardian, *New AI fake text generator may be too dangerous to release, say creators* (Feb. 14, 2019), *available at* https://www.theguardian.com/technology/2019/feb/14/elon-musk-backed-ai-writes-convincing-news-fiction.

A May 2019 viral video which appeared to show Nancy Pelosi drunkenly slurring her words while criticizing President Donald Trump was actually a doctored fake created by a Trump supporter. The video achieved over four million views and was shared by public figures including Rudy Giuliani. *See, e.g.*, The Daily Beast, *We Found the Guy Behind the Viral "Drunk Pelosi" Video* (June 2, 2019), *available at* https://www.thedailybeast.com/we-found-shawn-brooks-the-guy-behind-the-viral-drunk-pelosi-video.

In the aftermath of the doctored Pelosi video, termed a "cheap fake" (as it was merely a modification of an existing video rather than a computer-generated "deepfake"), the House Intelligence Committee announced a hearing on the risks posed by deepfakes, particularly with

respect to Russian interference in the 2020 elections. *See, e.g.*, CNN, *Congress to investigate deepfakes as doctored Pelosi video causes stir* (June 4, 2019), *available at* https://www.cnn.com/2019/06/04/politics/house-intelligence-committee-deepfakes-threats-hearing/index.html.

5. Ever-increasing complexity of expert issues, financial models, etc., perhaps accelerating well beyond the ability of courts to critically process.

The Supreme Court seemingly struggled with the mathematical models proposed to identify partisan gerrymandering while hearing arguments in *Gill v. Whitford*. Chief Justice Roberts referred to the efforts to quantify gerrymandering as "sociological gobbledygook," while Justice Breyer noted, "I think the hard issue in this case is [,] are there standards manageable by a court, not by some group of … computer experts?" The problem of persuading courts with statistical analyses is hardly novel; in the controversial 1986 Georgia death penalty case *McCleskey v. Kemp*, the Court rejected the defendant's expert witnesses' statistical analyses which showed that a defendant in Georgia was "more than four times as likely to be sentenced to death if the victim … was white compared to if the victim was black," with Justice Powell's majority opinion stating, "Statistics, at most, may show only a likelihood that a particular factor entered into some decisions." *See, e.g.*, FiveThirtyEight, *The Supreme Court Is Allergic To Math* (Oct. 17, 2017), *available at* https://fivethirtyeight.com/features/the-supreme-court-is-allergic-to-math/.

Judges face significant challenges when evaluating *Daubert* motions to disqualify expert witnesses. These motions require judges to analyze the reliability of expert testimony regarding "science, technology, and any other type of specialized knowledge beyond the understanding of the typical jury," but "most judges are generalists" who "do not regard themselves as specialists in science of technology, let alone the limitless types of 'specialized' knowledge that may be relevant to a case." *See, e.g.*, Paul W. Grimm, *Challenges Facing Judges Regarding Expert Evidence in Criminal Cases*, 86 Fordham L. Rev. 1601 (2018), *available at* https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5476&context=flr. A core concern in this area is the "epistemic competency" of judges to grasp and filter extremely complex and specialized material in a meaningful way.

A related issue is "virtual briefing," whereby scholars and activists attempt to influence Supreme Court justices and clerks outside of traditional briefing rules by publishing arguments online. *See, e.g.*, Jeffrey L. Fisher and Alli Orr Larsen, *Virtual Briefing at the Supreme Court*, 109 Cornell Law Review (2019, Forthcoming), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3388080.

6. Information security concerns for the judiciary – hacking, manipulation, etc.

Cyberattacks against governmental institutions have become increasingly common, and the judiciary is vulnerable. A 2014 cyberattack on the federal court system took PACER offline for

approximately four hours, during which time attorneys and courts could not electronically file pleadings or orders. A June 2016 DDOS cyberattack knocked the Minnesota Judicial Branch's website offline for 10 days. More recently, a ransomware attack disabled the city of Atlanta's computer systems, which meant that the Atlanta Municipal Court could not access its electronically-stored scheduling information, validate outstanding warrants, or issue failure-to-appear notices or warrants. Court systems possess sensitive information and are thus "rich targets for cyberattacks." *See, e.g.*, American Bar Association, *Cyberattacks on Courts and Other Government Institutions* (Jan. 17, 2019), *available at* https://www.americanbar.org/groups/judicial/publications/judges_journal/2018/summer/cyberattacks-courts-and-other-government-institutions/.

A *Courts Today* writer remarked after the 2014 PACER cyberattack, "court officials everywhere are beginning to acknowledge the event of a cyberattack on the courts is not 'if' but 'when.' Personal data of court patrons is at risk—compromising their identities and inviting fraud. Intrusion into the court systems could sabotage the workings of the judiciary—even introduce subversive information that could throw the outcome of a case." *See* Courts Today, *Gone Phishing* (Sept. 7, 2017), *no longer available online, quotation taken from the ABA article cited above*.

V. Cultural/Societal Changes.

A. Will American society move to economic socialism or communism, and if government is "taking care" of everyone, will bankruptcy even be necessary?

1. Will people be able to do whatever they want without paying?

2. If currency is eliminated in the United States, what is the impact on global trade?

B. Alternatively, will the United States become increasingly divided into even starker "haves" and "have nots" who will look at the bankruptcy system in very different ways?

C. Should there be an International Bankruptcy Code for multinational businesses?

1. Would the existence of an International Bankruptcy Code preclude multinational businesses from seeking relief in their country of origin, or could the businesses engage in forum shopping?

2. How would an International Bankruptcy Code reconcile the laws of different countries? For example, if the statutes of a country protect a foreign lender but there is no equivalent in that country to the Uniform Commercial Code, how would the foreign lender's interests be resolved

vis-à-vis a lender with a security interest in collateral perfected in the United States under the U.C.C.?

3. If an International Bankruptcy Code is enacted, will there be an International Bankruptcy Court to interpret it?

4. Where would an International Bankruptcy Court be located?

5. How would judges be selected?

6. Would appeals be available?

D. Will the United States remain a desirable jurisdiction for multi-national business bankruptcy cases in the face of significant international competition? *See, e.g.*, Jones Day, *Singapore Enacts New Corporate Bankruptcy Law in Bid to Become Center for International Debt Restructuring* (May/June 2017), *available at* https://www.jonesday.com/singapore-enacts-new-corporate-bankruptcy-law-in-bid-to-become-center-for-international-debt-restructuring-05-31-2017/#.

E. Role of hedge funds and other sophisticated parties in cases (both corporate and consumer).

F. Will the bankruptcy courts, and the judiciary generally, retain public confidence and legitimacy in the face of increasing distrust of government broadly and attacks by other branches?

G. Any impacts of a "cashless society" on the bankruptcy system?

H. If people can't get ahead financially (insufficient education, few higher-paying jobs, limited opportunities for advancement or raises), will people be less fiscally responsible in the future?

1. Should the Bankruptcy Code control lifestyles?

a. Have exemptions become too liberal?

b. Should debtors with substantial exempt assets get a head start over debtors with few exempt assets?

2. Would stricter enforcement of consumer protection laws reduce the number of consumer bankruptcy cases?

Less harassment may lead to less stress and some level of repayment over time.

3. Will socialized medicine reduce the number of bankruptcy filings?

4. Will providing a "living wage" reduce the number of bankruptcy filings?

I. Access to the bankruptcy courts.

1. Should attorneys be appointed to represent *pro se* debtors?

2. Will the U.S. Trustee system remain in place? What should the role of the U.S. Trustee be?