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Historical and Revision Notes

legislative statements

Chapter 11 of the House amendment is derived in large part from chapter 11 as contained in the House bill. Unlike chapter 11 of the Senate amendment, chapter 11 of the House amendment does not represent an extension of chapter X of current law [chapter 10 of former title 11] or any other chapter of the Bankruptcy Act [former title 11]. Rather chapter 11 of the House amendment takes a new approach consolidating subjects dealt with under chapters VIII, X, XI, and XII of the Bankruptcy Act [chapters 8, 10, 11, and 12 of former title 11]. The new consolidated chapter 11 contains no special procedure for companies with public debt or equity security holders. Instead, factors such as the standard to be applied to solicitation of acceptances of a plan of reorganization are left to be determined by the court on a case-by-case basis. In order to insure that adequate investigation of the debtor is conducted to determine fraud or wrongdoing on the part of present management, an examiner is required to be appointed in all cases in which the debtor's fixed, liquidated, and unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5 million. This should adequately represent the needs of public security holders in most cases. However, in addition, section 1109 of the House amendment enables both the Securities and Exchange Commission and any party in interest who is creditor, equity security holder, indenture trustee, or any committee representing creditors or equity security holders to raise and appear and be heard on any issue in a case under chapter 11. This will enable the bankruptcy court to evaluate all sides of a position and to determine the public interest. This approach is sharply contrasted to that under chapter X of present law in which the public interest is often determined only in terms of the interest of public security holders. The advisory role of the Securities and Exchange Commission will enable the court to balance the needs of public security holders against equally important public needs relating to the economy, such as employment and production, and other factors such as the public health and safety of the people or protection of the national interest. In this context, the new chapter 11 deletes archaic rules contained in certain chapters of present law such as the requirement of an approval hearing and the prohibition of prepetition solicitation. Such requirements were written in an age before the enactment of the Trust Indenture Act [15 U.S.C. 77aaa et seq.] and the development of securities laws had occurred. The benefits of these provisions have long been outlived but the detriment of the provisions served to frustrate and delay effective reorganization in those chapters of the Bankruptcy Act in which such provisions applied. Chapter 11 thus represents a much needed revision of reorganization laws. A brief discussion of the history of this important achievement is useful to an appreciation of the monumental reform embraced in chapter 11.

Under the existing Bankruptcy Act [former title 11] debtors seeking reorganization may choose among three reorganization chapters, chapter X, chapter XI, and chapter XII [chapters 10, 11, and 12 of former title 11]. Individuals and partnerships may file under chapter XI or, if they own property encumbered by mortgage liens, they may file under chapter XII. A corporation may file under either chapter X or chapter XI, but is ineligible to file under chapter XII. Chapter X was designed to facilitate the pervasive reorganization of corporations whose creditors include holders of publicly issued debt securities. Chapter XI, on the other hand, was designed to permit smaller enterprises to negotiate composition or extension plans with their unsecured creditors. The essential differences between chapters X and XI are as follows. Chapter X mandates that, first, an independent trustee be appointed and assume management control from the officers and directors of the debtor corporation; second, the Securities and Exchange Commission must be afforded an opportunity to participate both as an adviser to the court and as a representative of the interests of public security holders; third, the court must approve any proposed plan of reorganization, and prior to such approval, acceptances of creditors and shareholders may not be solicited; fourth, the court must apply the absolute priority rule; and fifth, the court has the power to affect, and grant the debtor a discharge in respect of, all types of claims, whether secured or unsecured and whether arising by reason of fraud or breach of contract.

The Senate amendment consolidates chapters X, XI, and XII [chapters 10, 11, and 12 of former title 11], but establishes a separate and distinct reorganization procedure for ''public companies.'' The special provisions applicable to ''public companies'' are tantamount to the codification of chapter X of the existing Bankruptcy Act and thus result in the creation of a ''two-track system.'' The narrow definition of the term ''public company'' would require many businesses which could have been rehabilitated under chapter XI to instead use the more cumbersome procedures of chapter X, whether needed or not.

The special provisions of the Senate amendment applicable to a ''public company'' are as follows:

(a) Section 1101(3) defines a ''public company'' as a debtor who, within 12 months prior to the filing of the petition, had outstanding $5 million or more in debt and had not less than 1000 security holders;

(b) Section 1104(a) requires the appointment of a disinterested trustee irrespective of whether creditors support such appointment and whether there is cause for such appointment;

(c) Section 1125(f) prohibits the solicitation of acceptances of a plan of reorganization prior to court approval of such plan even though the solicitation complies with all applicable securities laws;

(d) Section 1128(a) requires the court to conduct a hearing on any plan of reorganization proposed by the trustee or any other party;

(e) Section 1128(b) requires the court to refer any plans ''worthy of consideration'' to the Securities and Exchange Commission for their examination and report, prior to court approval of a plan; and

(f) Section 1128(c) and section 1130(a)(7) requires the court to approve a plan or plans which are ''fair and equitable'' and comply with the other provisions of chapter 11.

The record of the Senate hearings on S. 2266 and the House hearings on H.R. 8200 is replete with evidence of the failure of the reorganization provisions of the existing Bankruptcy Act [former title 11] to meet the needs of insolvent corporations in today's business environment. Chapter X [chapter 10 of former title 11] was designed to impose rigid and formalized procedures upon the reorganization of corporations and, although designed to protect public creditors, has often worked to the detriment of such creditors. As the House report has noted:

The negative results under chapter X [chapter 10 of former title 11] have resulted from the stilted procedures, under which management is always ousted and replaced by an independent trustee, the courts and the Securities and Exchange Commission examine the plan of reorganization in great detail, no matter how long that takes, and the court values the business, a time consuming and inherently uncertain procedure.

The House amendment deletes the ''public company'' exception, because it would codify the well recognized infirmities of chapter X [chapter 10 of former title 11], because it would extend the chapter X approach to a large number of new cases without regard to whether the rigid and formalized procedures of chapter X are needed, and because it is predicated upon the myth that provisions similar to those contained in chapter X are necessary for the protection of public investors. Bankruptcy practice in large reorganization cases has also changed substantially in the 40 years since the Chandler Act [June 22, 1938, ch. 575, 52 Stat. 883, amending former title 11] was enacted. This change is, in large part, attributable to the pervasive effect of the Federal securities laws and the extraordinary success of the Securities and Exchange Commission in sensitizing both management and members of the bar to the need for full disclosure and fair dealing in transactions involving publicly held securities.

It is important to note that Congress passed the Chandler Act [June 22, 1938, ch. 575, 52 Stat. 883, amending former title 11] prior to enactment of the Trust Indenture Act of 1939 [15 U.S.C. section 77aaa et seq.] and prior to the definition and enforcement of the disclosure requirements of the Securities Act of 1933 [15 U.S.C. 77a et seq.] and the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.]. The judgments made by the 75th Congress in enacting the Chandler Act are not equally applicable to the financial markets of 1978. First of all, most public debenture holders are neither weak nor unsophisticated investors. In most cases, a significant portion of the holders of publicly issued debentures are sophisticated institutions, acting for their own account or as trustees for investment funds, pension funds, or private trusts. In addition, debenture holders, sophisticated, and unsophisticated alike, are represented by indenture trustees, qualified under section 77ggg of the Trust Indenture Act [probably should be ''section 307'' which is 15 U.S.C. 77ggg]. Given the high standard of care to which indenture trustees are bound, they are invariably active and sophisticated participants in efforts to rehabilitate corporate debtors in distress.

It is also important to note that in 1938 when the Chandler Act [June 22, 1938, ch. 575, 52 Stat. 883, amending former title 11] was enacted, public investors commonly held senior, not subordinated, debentures and corporations were very often privately owned. In this environment, the absolute priority rule protected debenture holders from an erosion of their position in favor of equity holders. Today, however, if there are public security holders in a case, they are likely to be holders of subordinated debentures and equity and thus the application of the absolute priority rule under chapter X [chapter 10 of former title 11] leads to the exclusion, rather than the protection, of the public.

The primary problem posed by chapter X [chapter 10 of former title 11] is delay. The modern corporation is a complex and multifaceted entity. Most corporations do not have a significant market share of the lines of business in which they compete. The success, and even the survival, of a corporation in contemporary markets depends on three elements: First, the ability to attract and hold skilled management; second, the ability to obtain credit; and third, the corporation's ability to project to the public an image of vitality. Over and over again, it is demonstrated that corporations which must avail themselves of the provisions of the Bankruptcy Act [former title 11] suffer appreciable deterioration if they are caught in a chapter X proceeding for any substantial period of time.

There are exceptions to this rule. For example, King Resources filed a chapter X [chapter 10 of former title 11] petition in the District of Colorado and it emerged from such proceeding as a solvent corporation. The debtor's new found solvency was not, however, so much attributable to a brilliant rehabilitation program conceived by a trustee, but rather to a substantial appreciation in the value of the debtor's oil and uranium properties during the pendency of the proceedings.

Likewise, Equity Funding is always cited as an example of a successful chapter X [chapter 10 of former title 11] case. But it should be noted that in Equity Funding there was no question about retaining existing management. Rather, Equity Funding involved fraud on a grand scale. Under the House amendment with the deletion of the mandatory appointment of a trustee in cases involving ''public companies,'' a bankruptcy judge, in a case like Equity Funding, would presumably have little difficulty in concluding that a trustee should be appointed under section 1104(6).

While I will not undertake to list the chapter X [chapter 10 of former title 11] failures, it is important to note a number of cases involving corporations which would be ''public companies'' under the Senate amendment which have successfully skirted the shoals of chapter X and confirmed plans of arrangement in chapter XI [chapter 11 of former title 11]. Among these are Daylin, Inc. (''Daylin'') and Colwell Mortgage Investors (''Colwell'').

Daylin filed a chapter XI [chapter 11 of former title 11] petition on February 26, 1975, and confirmed its plan of arrangement on October 20, 1976. The success of its turnaround is best evidenced by the fact that it had consolidated net income of $6,473,000 for the first three quarters of the 1978 fiscal year.

Perhaps the best example of the contrast between chapter XI and chapter X [chapters 11 and 10 of former title 11] is the recent case of *In re Colwell Mortgage Investors*. Colwell negotiated a recapitalization plan with its institutional creditors, filed a proxy statement with the Securities and Exchange Commission, and solicited consents of its creditors and shareholders prior to filing its chapter XI petition. Thereafter, Colwell confirmed its plan of arrangement 41 days after filing its chapter XI petition. This result would have been impossible under the Senate amendment since Colwell would have been a ''public company.''

There are a number of other corporations with publicly held debt which have successfully reorganized under chapter XI [chapter 11 of former title 11]. Among these are National Mortgage Fund (NMF), which filed a chapter XI petition in the northern district of Ohio on June 30, 1976. Prior to commencement of the chapter XI proceeding, NMF filed a proxy statement with the Securities and Exchange Commission and solicited acceptances to a proposed plan of arrangement. The NMF plan was subsequently confirmed on December 14, 1976. The Securities and Exchange Commission did not file a motion under section 328 of the Bankruptcy Act [section 728 of former title 11] to transfer the case to chapter X [chapter 10 of former title 11] and a transfer motion which was filed by private parties was denied by the court.

While there are other examples of large publicly held companies which have successfully reorganized in chapter XI [chapter 11 of former title 11], including Esgrow, Inc. (C.D.Cal. 73–02510), Sherwood Diversified Services Inc. (S.D.N.Y. 73–B–213), and United Merchants and Manufacturers, Inc. (S.D.N.Y. 77–B–1513), the numerous successful chapter XI cases demonstrate two points: first, the complicated and time-consuming provisions of chapter X [chapter 10 of former title 11] are not always necessary for the successful reorganization of a company with publicly held debt, and second, the more flexible provisions in chapter XI permit a debtor to obtain relief under the Bankruptcy Act [former title 11] in significantly less time than is required to confirm a plan of reorganization under chapter X of the Bankruptcy Act.

One cannot overemphasize the advantages of speed and simplicity to both creditors and debtors. Chapter XI [chapter 11 of former title 11] allows a debtor to negotiate a plan outside of court and, having reached a settlement with a majority in number and amount of each class of creditors, permits the debtor to bind all unsecured creditors to the terms of the arrangement. From the perspective of creditors, early confirmation of a plan of arrangement: first, generally reduces administrative expenses which have priority over the claims of unsecured creditors; second, permits creditors to receive prompt distributions on their claims with respect to which interest does not accrue after the filing date; and third, increases the ultimate recovery on creditor claims by minimizing the adverse effect on the business which often accompanies efforts to operate an enterprise under the protection of the Bankruptcy Act [former title 11].

Although chapter XI [chapter 11 of former title 11] offers the corporate debtor flexibility and continuity of management, successful rehabilitation under chapter XI is often impossible for a number of reasons. First, chapter XI does not permit a debtor to ''affect'' secured creditors or shareholders, in the absence of their consent. Second, whereas a debtor corporation in chapter X [chapter 10 of former title 11], upon the consummation of the plan or reorganization, is discharged from all its debts and liabilities, a corporation in chapter XI may not be able to get a discharge in respect of certain kinds of claims including fraud claims, even in cases where the debtor is being operated under new management. The language of chapter 11 in the House amendment solves these problems and thus increases the utility and flexibility of the new chapter 11, as compared to chapter XI of the existing Bankruptcy Act [chapter 11 of former title 11].

Those who would urge the adoption of a two-track system have two major obstacles to meet. First, the practical experience of those involved in business rehabilitation cases, practitioners, debtors, and bankruptcy judges, has been that the more simple and expeditious procedures of chapter XI [chapter 11 of former title 11] are appropriate in the great majority of cases. While attempts have been made to convince the courts that a chapter X [chapter 10 of former title 11] proceeding is required in every case where public debt is present, the courts have categorically rejected such arguments. Second, chapter X has been far from a success. Of the 991 chapter X cases filed during the period of January 1, 1967, through December 31, 1977, only 664 have been terminated. Of those cases recorded as ''terminated,'' only 140 resulted in consummated plans. This 21 percent success rate suggests one of the reasons for the unpopularity of chapter X.

In summary, it has been the experience of the great majority of those who have testified before the Senate and House subcommittees that a consolidated approach to business rehabilitation is warranted. Such approach is adopted in the House amendment.

Having discussed the general reasons why chapter 11 of the House amendment is sorely needed, a brief discussion of the differences between the House bill, Senate amendment, and the House amendment, is in order. Since chapter 11 of the House amendment rejects the concept of separate treatment for a public company, sections 1101(3), 1104(a), 1125(f), 1128, and 1130(a)(7) of the Senate amendment have been deleted.

AMENDMENTS

2005—Pub. L. 109–8, title III, § 321(a)(2), title IV, § 436(b), Apr. 20, 2005, 119 Stat. 95, 113, added items 1115 and 1116.

1988—Pub. L. 100–334, § 2(c), June 16, 1988, 102 Stat. 613, added item 1114.

1984—Pub. L. 98–353, title III, §§ 514(b), 541(b), July 10, 1984, 98 Stat. 387, 391, added item 1113 and substituted ''Implementation'' for ''Execution'' in item 1142.

1983—Pub. L. 97–449, § 5(a)(1), Jan. 12, 1983, 96 Stat. 2442, substituted ''subtitle IV of title 49'' for ''Interstate Commerce Act'' in item 1166.

SUBCHAPTER I—OFFICERS AND ADMINISTRATION

§ 1101. Definitions for this chapter

In this chapter—

(1) ''debtor in possession'' means debtor except when a person that has qualified under section 322 of this title is serving as trustee in the case;

(2) ''substantial consummation'' means—

(A) transfer of all or substantially all of the property proposed by the plan to be transferred;

(B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and

(C) commencement of distribution under the plan.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2626.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

This section contains definitions of three terms that are used in chapter 11. Paragraph (1) defines debtor in possession to mean the debtor, except when a trustee who has qualified in serving in the case.

Paragraph (2), derived from section 229a of current law [section 629(a) of former title 11], defines substantial consummation. Substantial consummation of a plan occurs when transfer of all or substantially all of the property proposed by the plan to be transferred is actually transferred; when the debtor (or its successor) has assumed the business of the debtor or the management of all or substantially all of the property dealt with by the plan; and when distribution under the plan has commenced.

Paragraph (3) defines for purposes of Chapter 11 a public company to mean ''a debtor who, within 12 months prior to the filing of a petition for relief under this chapter, had outstanding liabilities of $5 million or more, exclusive of liabilities for goods, services, or taxes and not less than 1,000 security holders.'' There are, as noted, special safeguards for public investors related to the reorganization of a public company, as so defined.

Both requirements must be met: liabilities, excluding tax obligations and trade liabilities, must be $5 million or more; and (2) the number of holders of securities, debt or equity, or both, must be not less than 1,000. The amount and number are to be determined as of any time within 12 months prior to the filing of the petition for reorganization.