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BOOK REVIEW

*681 BANKRUPTCY AS A BUSINESS TOOL

STRATEGIC BANKRUPTCY: HOW CORPORATIONS AND CREDITORS USE CHAPTER 11 TO THEIR ADVANTAGE. BY KEVIN J. DELANEY. [\[FNd\]](#) BERKELEY: UNIVERSITY OF CALIFORNIA PRESS, 1992. PP. IX; 213. \$23.95. [\[FNdd\]](#)

Gregory E. Maggs [\[FNa\]](#)

Even if you have not been trying to follow developments in bankruptcy law, you probably have noticed that something significant is happening. Newspapers everywhere are reporting astonishing increases in the number of bankruptcy cases filed, [\[FN1\]](#) the Supreme Court seems to be tackling one bankruptcy issue after another, [\[FN2\]](#) and members of Congress increasingly are talking about bankruptcy reform. [\[FN3\]](#) The country, in short, *682 is experiencing what many are calling a "bankruptcy boom"-perhaps the biggest boom ever. [\[FN4\]](#) Bankruptcy law, as a result, rarely has received so much attention.

Some aspects of the bankruptcy system now under scrutiny involve technical details that surely could interest only specialists. Yet, many of the most controversial developments involve fundamental issues that require little bankruptcy expertise to understand. Those unfamiliar with the system who would like to know more now have an opportunity to catch up. A handful of authors, sensing the need for accessible commentary on bankruptcy law, recently have undertaken to write readable books informing the public about what is going on. These new publications include Strategic Bankruptcy by sociology professor Kevin J. Delaney. [\[FN5\]](#)

Delaney's book focuses on cases filed under Chapter 11 of the Bankruptcy Code. [\[FN6\]](#) Enacted in 1978 as part of a major revision of the federal bankruptcy laws, Chapter 11 shields troubled businesses from creditors while allowing them to "reorganize." In a reorganization, a corporation may reduce or reschedule its obligations, so long as it treats similarly situated creditors alike and pays them over time at least what they would receive in an immediate liquidation. [\[FN7\]](#) Although prior bankruptcy law also permitted corporations to reorganize, Chapter 11 bankruptcy is far more common: the number of firms in America attempting reorganization has risen from around 8000 per year at the end of the 1970s [\[FN8\]](#) to a record of nearly 24,000 in 1991. [\[FN9\]](#)

This dramatic upsurge in filings raises the question of whether Chapter 11 has altered the traditional nature of bankruptcy in some way. After examining several highly publicized corporate reorganizations of the past decade, Delaney concludes that it has. In Strategic Bankruptcy, *683 Delaney proposes to describe what he calls "a new way of thinking about bankruptcy." [\[FN10\]](#) He explains:

Rather than viewing [Chapter 11] as a punishment, a neutral debt-collection system, or a market mechanism to ensure nationwide efficiency, I prefer to think of the bankruptcy process [now] as a political arena in which organizations invoke bankruptcy to avoid current financial burdens and shift future financial risk to other, more vulnerable parties. [\[FN11\]](#)

In other words, according to Delaney, Chapter 11 has transformed the bankruptcy petition from a dreaded indication of failure into something much different: a powerful and popular tool for accomplishing business objectives unattainable outside bankruptcy.

Although Delaney relies a little too heavily on anecdotal evidence and fails to discuss several important matters relevant to his thesis, he accomplishes much of what he sets out to do. In Strategic Bankruptcy's six short chapters, he describes the development and current state of the law and documents various ways that corporations now can and do use Chapter 11 to their advantage. Moreover, despite whatever shortcomings the book may have, Strategic Bankruptcy deserves attention simply because of its excellent timing. Criticism of Chapter 11 is mounting, and Congress in the near future almost certainly will address some of the subjects that Delaney discusses.

I. Summary of the Book

A. Development of Strategic Bankruptcies

Strategic Bankruptcy begins with a discussion of the varied treatment of insolvent debtors throughout history. In chapter one, Delaney first touches upon the law during Roman times and in the Middle Ages, but then concentrates on the five principal bankruptcy laws passed by Congress in 1800, 1841, 1867, 1898, and 1978. [\[FN12\]](#) In reviewing these federal laws, Delaney attempts to describe the politics surrounding their enactment and their relationship to prior English practices. From this historical overview, he makes two general observations about bankruptcy law that have importance in the book's subsequent chapters.

First, Delaney notes that the stigma of bankruptcy gradually has decreased, and that bankruptcy courts increasingly have become institutions designed to resolve financial disputes and collect debts rather than to judge the morality of debtors. Invoking perhaps the standard example of this ^{*684} long-term trend, Delaney notes that a debtor formerly had to commit "an act of bankruptcy"-such as disposing of assets or attempting to flee a jurisdiction-before creditors could file an involuntary bankruptcy petition against him. [\[FN13\]](#) This requirement, however, became more and more fictional until, in the 1978 Code, bankruptcy became viewed entirely as a question of economic condition rather than a remedy for debtor wrongdoing. [\[FN14\]](#)

Second, Delaney asserts that, during the entire history of the United States, interest groups have recognized that "bankruptcy law is a political instrument that can elevate one group's interests at the expense of those of other groups." [\[FN15\]](#) He notes, for example, that southern farmers opposed early 19th century bankruptcy laws out of fear that northern lenders would use the threat of involuntary bankruptcy to coerce payment. [\[FN16\]](#) Yet, with the invention of voluntary bankruptcy and the possibility of a greater discharge, debtors gradually became the leading proponents of bankruptcy laws in this country. [\[FN17\]](#)

With these observations from history in mind, Delaney turns his attention in the second chapter to contemporary economic, legal, and popular theories about the nature of bankruptcy. Painting with a broad brush, Delaney suggests that economists largely see bankruptcy as a phenomenon of competition, hypothesizing that bankruptcies occur when more efficient firms drive less efficient firms out of business. [\[FN18\]](#) By contrast, he says, legal scholars typically envision reorganization as a procedure that, when properly functioning, can maximize the money available to the creditors of a distressed corporation. [\[FN19\]](#) Delaney asserts, ^{*685} however, that journalists have started to depict Chapter 11 differently-not as a market phenomenon or a law designed to enhance efficiency, but as a business device employed by management in a manner largely unrelated to a firm's economic condition and without regard to the interests of creditors. [\[FN20\]](#)

Delaney finds the journalists' view closest to reality but believes that its details need further explanation. He devotes himself to this cause in the remainder of the book. In chapters three, four, and five, he attempts to demonstrate how three well-known firms recently have used Chapter 11 to their advantage. He begins by describing Manville Corporation's now famous filing in 1982 in the midst of an avalanche of lawsuits by persons injured by asbestos. [\[FN21\]](#) He then discusses Continental Airlines' reorganization in 1983 during a period of disagreement over wages with labor unions. [\[FN22\]](#) Next, he recounts how Texaco declared bankruptcy in 1987 after Pennzoil won a \$10.53 billion jury verdict against it for tortious interference with contractual relations. [\[FN23\]](#)

Delaney attempts to show that the economic and legal-academic theories cannot explain these three bankruptcies, but that they all seem to fit within the journalists' view of Chapter 11 and the historical trends that he observed in chapter one. He points out that, in contrast to what the standard economic model would predict, none of the cases involved a truly failed business driven under by competition. Instead, he says, each case involved a corporation with a nonfatal business problem for which bankruptcy could provide a convenient solution. Similarly, notwithstanding the conception of bankruptcy held by legal scholars, Delaney argues that the three bankruptcies did not serve as efficient procedures for preserving going concerns to maximize the return to creditors. Rather, Delaney asserts, the bankruptcies may have prejudiced creditor interests.

These three cases, in Delaney's view, show that companies can use Chapter 11 for accomplishing specific business

goals at the expense of others. Delaney, for instance, argues that Manville filed bankruptcy largely so that it could stay collection of asbestos damage awards while it settled with its insurers and so that it could create a reorganization plan denying punitive damages to asbestos claimants. [\[FN24\]](#) Continental Airlines, Delaney explains, used bankruptcy to gain leverage in labor negotiations. [\[FN25\]](#) *686 Texaco, he asserts, used Chapter 11 to delay Pennzoil's attempt to collect its judgment, thereby persuading Pennzoil to settle for a lesser amount (i.e., \$3 billion instead of \$10.53 billion). [\[FN26\]](#)

Delaney describes each of these cases as a "strategic bankruptcy," meaning a bankruptcy declared for "a limited organizational or political goal that [a firm] had unsuccessfully pursued outside of the bankruptcy arena." [\[FN27\]](#) Strategic bankruptcies, he asserts, afford corporations the opportunity to "transform troublesome ties with other organizations," "avoid current financial burdens , and shift future financial risk to more vulnerable parties." [\[FN28\]](#) Reflecting on history, he does not find the use of strategic bankruptcies wholly unexpected. Given the decreasing stigma associated with bankruptcy over time and its traditional tendency to favor one group over another, Delaney maintains that Chapter 11 represents a further stage in the bankruptcy system's consistent pattern of development. [\[FN29\]](#)

B. How Strategic Bankruptcies Work

How can a financially sound company suddenly file a Chapter 11 petition? Delaney argues that, in order to use Chapter 11 strategically, a firm basically only needs to avoid an appearance of bad faith. [\[FN30\]](#) Thus, a business contemplating using reorganization proceedings to achieve goals unattainable outside bankruptcy must take actions to make itself look insolvent. [\[FN31\]](#) Companies succeed in this endeavor, Delaney asserts, by employing six key tactics. In what really makes up the heart of his book, Delaney denominates and describes these tactics as follows:

1. "Defining Assets and Liabilities." [\[FN32\]](#)-Healthy corporations foremost may shape a claim to bankruptcy, according to Delaney, simply by altering how they list their assets and liabilities in their accounting statements. [\[FN33\]](#) For example, until shortly before it filed its Chapter 11 petition, the Manville Corporation refused to state the potential future products claims as liabilities, because it considered them inestimable. Yet, immediately prior to filing-and without much explanation-the asbestos firm suddenly valued the claims at \$2 billion and listed them as liabilities. *687 This accounting change instantly made the company appear insolvent. [\[FN34\]](#)

2. "Defining the 'Bankrupt Unit.'" [\[FN35\]](#)-Delaney observes that businesses organized into parent and subsidiary corporations may exploit their structure by limiting how much of the business declares bankruptcy. He notes, for instance, that Texas Air owned 90% of Continental but did not declare bankruptcy when Continental filed its Chapter 11 petition. Although the two affiliated entities together might not have appeared insolvent, Continental by itself apparently did. [\[FN36\]](#)

3. "Shifting Assets from a 'Bankrupt Unit' to a 'Non-bankrupt Unit.'" [\[FN37\]](#)-Businesses, Delaney asserts, also may alter their financial appearance by shifting assets among any existing parent and subsidiary corporations prior to bankruptcy. For instance, he alleges, Continental Airlines transferred considerable property to Texas Air in preparation for its filing. [\[FN38\]](#)

4. "Taking Action to Ensure Bankrupt Status." [\[FN39\]](#)-Delaney suggests that firms also may take various actions to promote conditions that make bankruptcy look legitimate. Continental Airlines employed this tactic, he asserts, when it took negotiating positions calculated to bring about a strike that appeared serious enough to warrant declaring bankruptcy. [\[FN40\]](#)

5. "Process of Company Valuation." [\[FN41\]](#)-As others also have observed, [\[FN42\]](#) Delaney notes that corporations often can manipulate their apparent value by tinkering with estimates of future earnings and capitalization rates. Prior to bankruptcy, firms can make themselves look broke, while in bankruptcy they can attempt to reverse their financial picture. [\[FN43\]](#)

- *688 6. "Legal and Linguistic Strategies." [\[FN44\]](#)-Delaney suggests that new phrases and choice wording also can help legitimate a claim to bankruptcy. He notes that Texaco, which had a net worth of \$23 billion to \$26 billion, could

have paid Pennzoil's \$10 billion judgment without liquidating all of its assets. [\[FN45\]](#) Yet, in his view, by repeatedly describing full payment as "financially impractical," Texaco made bankruptcy appear less abusive. [\[FN46\]](#)

C. Concluding Observations

Delaney makes two important points in describing strategic bankruptcies and identifying the six tactics described above. First, he notes that businesses generally have to please two audiences. They want to make themselves look bankrupt to satisfy the bankruptcy court. Yet, at the same time, they do not wish to present themselves in a negative light to potential customers, lenders, and investors. Delaney illustrates this dilemma with a telling example from the Manville Corporation bankruptcy. Immediately after it filed a Chapter 11 petition indicating that asbestos claims were rendering it insolvent, the company took out full page advertisements in newspapers asserting inconsistently that "nothing is wrong with our businesses." [\[FN47\]](#)

Second, Delaney surmises that firms have differing abilities to make themselves look like legitimate candidates for reorganization. He suggests:

At one extreme of the continuum are firms with a single concrete, indisputable liability and a single concrete, indisputable asset. There is thus little debate over the assets and liabilities of the firm and hence little strategic action to shape the claim to bankruptcy. [\[FN48\]](#)

Other corporations have a greater opportunity to paint their financial picture to suit the bankruptcy courts. He states:

At the other end of the continuum are firms with very vague, arguable liabilities (e.g., contestable damage awards such as future asbestos liabilities; non-concrete costs associated with labor contracts, such as seniority provisions and work rules) and vague, arguable assets (e.g., patents, inventions, products with high risk/return potential, firm value attached mainly to company name and reputation rather than to actual products). [\[FN49\]](#)

*689 Manville, Continental, and Texaco, he asserts, resemble the latter firms more than the former and thus could use Chapter 11 relatively easily. [\[FN50\]](#)

Delaney concludes by observing that, just as the reasons for filing bankruptcy have changed, so too have the topics that bankruptcy courts must address. Because Chapter 11 does not have the stigma that other forms of bankruptcy have had in the past, Chapter 11 proceedings invite nontraditional issues. [\[FN51\]](#) "Bankruptcy court," he states, "is now a political arena where we are resolving such crucial social issues as the asbestos crisis, the IUD health crisis, the relationship between workers and owners, the sanctity of legally negotiated labor contracts and pension plans, and the rules of the corporate takeover game." [\[FN52\]](#) As a task for the future, he states, we will "need to assess whether the bankruptcy arena is the proper place to make these decisions." [\[FN53\]](#)

II. Strategic Bankruptcy in the Context of Recent Criticisms of Chapter 11

Delaney has written on a timely subject. If the year 1991 marked the high point in Chapter 11 filings, the year 1992 emerged as the record year for complaining about how the system works. Critics from many different backgrounds now are urging Congress to reform or repeal Chapter 11. [\[FN54\]](#) Congress, in response, recently has contemplated forming a blue-ribbon panel to study the Bankruptcy Code and to recommend revisions. [\[FN55\]](#)

Delaney takes little part in this criticism. As a sociologist, he seeks *690 to suggest a new way of thinking about bankruptcy. He thus abstains from finding particular faults with the law or suggesting specific reforms. Yet, what others now are saying about Chapter 11 helps to place Strategic Bankruptcy's contribution into context. In some ways, Delaney's understanding of corporate reorganizations coincides with that of those now criticizing Chapter 11. In other areas, however, Delaney either has diverged from their views or overlooked their criticisms despite the criticisms' relevance to his thesis.

A. Use of Chapter 11 by Solvent Firms

Critics of the bankruptcy system have long suggested that firms are abusing Chapter 11 by attempting reorganizations when they are not "really broke." [FN56] Many writers have cited the Manville, Continental, and Texaco filings discussed at length in *Strategic Bankruptcy* as examples. [FN57] Delaney, in some ways, has gone beyond what others have said. His catalog of the maneuvers that corporations use for what he calls "gaining the designation 'bankrupt,'" [FN58] for example, appears unique and may prove helpful to those considering legal reforms. He also does a fine job of stating potential business advantages of reorganization, such as reducing the leverage of creditors and labor unions as in the Texaco and Continental cases, or in limiting liability as in the Manville case.

The book's treatment of the subject, however, has a few weaknesses. Most significantly, although Delaney occasionally cites sections of the Bankruptcy Code, the vast majority of the text speaks in general terms without focusing on what the law specifically states. For instance, although the book spends a great deal of time stating that healthy corporations are taking actions to make themselves look "sufficiently" bankrupt, Delaney does not investigate adequately the legal need for these actions.

The Bankruptcy Code imposes no explicit financial requirements on ***691** debtors seeking to use Chapter 11. Firms, at most, face only indirect obstacles. The Code, for instance, requires that debtors file their reorganization plans in "good faith" [FN59] and allows the bankruptcy court to dismiss Chapter 11 actions "for cause." [FN60] Some courts have held that, in light of these provisions, firms actually must file Chapter 11 cases in good faith. [FN61] Yet, the issue whether the Code provides a basis for dismissing "strategic bankruptcies" for lack of good faith remains quite unclear. [FN62]

The book, similarly, does not address adequately the Code provisions aimed at preventing corporations from manipulating their financial condition prior to bankruptcy. Delaney, for example, states that corporations may affect the appearance of their financial condition in part by altering their methods of accounting for liabilities, shifting assets to affiliated entities not in bankruptcy, and tinkering with the estimates of their future earnings. [FN63] Yet, he gives scant attention to the Code's requirement that bankruptcy courts must determine for themselves the value of creditors' claims, [FN64] or the Code's various prohibitions against parting with assets on the eve of bankruptcy. [FN65] These matters also will need more attention before serious efforts to reform Chapter 11 may proceed.

Finally, Delaney might have improved the book by gathering more empirical evidence about the strategic use of bankruptcy by solvent firms. The book's argument essentially rests on only three cases. Yet, as indicated above, about 24,000 firms declared bankruptcy in 1991. [FN66] Drawing conclusions about such a broad-based activity from such a small sample, needless to say, carries great risks. [FN67] Even if Delaney's thesis appears largely correct in a limited context based on the examples that he uses, the subject requires much further rigorous work.

***692 B. Social Problems**

Many observers, in addition to Delaney, also have noted that bankruptcy courts increasingly are dealing with difficult subjects, like the asbestos and IUD crises, that go beyond traditional debtor-creditor disputes. Critics of Chapter 11 maintain that this trend has made bankruptcy courts a "dumping ground for unsolved social problems," [FN68] distracting them from their intended duties and preventing other bodies from devising proper answers. Defenders of Chapter 11, however, assert that the law's ability to allow private parties to work out these nontraditional matters among themselves may very well provide better solutions than socialized forms of relief. [FN69]

Delaney, as noted, recognizes the changing character of the issues in bankruptcy toward the end of his book. He even contributes to the discussion of this phenomenon by emphasizing the historical background that led to its development. Yet, he falls somewhat short in dealing with the topic on the merits. Merely raising the question whether bankruptcy courts should resolve such matters accomplishes little now that others already have seen the issue and begun taking sides on it.

C. Other Current Complaints About Chapter 11

Given the relatively short length of *Strategic Bankruptcy*, Delaney could address only a limited number of topics.

Certainly, he did not have to explore all of the problems with current bankruptcy law in one book. However, given what he does say, Delaney probably should have discussed at least three other principal problems with Chapter 11 now widely perceived and asserted by critics.

1. Costs.-One criticism of Chapter 11, repeated in newspapers, law reviews, and the halls of Congress, now overshadows all others: the reorganization process takes too long and costs too much for it to help most debtors. Experience indicates that the longer reorganization proceedings take, the less likely the debtor will survive. [FN70] Although the Bankruptcy Code, in theory, allows the process to take place rapidly, [FN71] Chapter 11 proceedings in practice may drag on for more than half a decade.

*693 What accounts for the delay? Commentators increasingly are suggesting that management and legal counsel, at present, have too little incentive to hurry. The officers and directors of a company may lose their jobs after a reorganization, [FN72] and although courts must approve all fees paid to professionals, [FN73] attorneys often reap huge sums so long as a case remains in court. The LTV Corporation, for example, recently spent about \$200 million in legal fees in reorganization proceedings spanning six years. [FN74]

If Chapter 11 really does take too long and cost too much, then readers of Delaney's book must wonder how firms can afford to pursue bankruptcies for strategic reasons. Delaney, unfortunately, says little about the costs and delays associated with Chapter 11. His examples of the Manville, Continental, and Texaco bankruptcies, even if accurately described, do not appear to tell the full story.

2. Too Rich or Too Poor?-While some critics agree with Delaney that corporations using Chapter 11 tend to have sufficient assets to make reorganization proceedings unnecessary, others believe that the opposite occurs more frequently. Credible statistics, in fact, show that, at most, only about ten to twelve percent of all reorganizations succeed. [FN75] Professor Michael Bradley and attorney Michael Rosenzweig, moreover, have completed a study suggesting that corporations seeking to reorganize under the Bankruptcy Code have significantly lower potential earnings than those of firms filing under pre-1978 bankruptcy law, and that bondholders and stockholders now lose far more in reorganizations than they did previously. [FN76] As they put it, "existing law pushes troubled companies toward reorganization ..., even where liquidation might make more sense." [FN77]

Strategic Bankruptcy would have benefitted from some discussion of this contrary thesis. Again, although Delaney's analysis of the *694 Manville, Continental, and Texaco cases may appear correct, these cases very well may constitute exceptions to what happens generally. If so, then strategic bankruptcies may deserve additional scrutiny when Congress looks at possible reforms to the law.

3. Treating All Businesses Alike.-Numerous critics are saying that Chapter 11 improperly treats all debtors pretty much the same, regardless of their size or the nature of the claims against them. Some have suggested, for example, that a small firm's creditors (often few in number) may need less of the slow and expensive procedural mechanisms that are designed to protect anonymous security holders with little knowledge of the debtor's affairs. [FN78] Others have called for special provisions for firms facing claims for asbestos-related injuries. [FN79] By focusing exclusively on large corporations and failing to distinguish them by the types of their creditors, Delaney may have acted too hastily in attempting to characterize what is happening under Chapter 11. What may hold true for Texaco and Manville may not hold true for businesses nowhere close to making the Fortune 500 list.

D. Conclusion

When Congress enacted the Bankruptcy Code in 1978, it may not have had a clear idea of what Chapter 11 would accomplish or how it would work in practice. Even questions as basic as whether Congress wanted creditors to sacrifice their rights for the good of others, such as the employees of failed businesses, remain disputed. [FN80] Yet, regardless of what Congress originally intended, bankruptcy courts and litigants now have experimented with corporate reorganizations for fourteen years. This experience should provide a suitable basis, to those willing to look, for making normative judgments about the system and for devising reforms.

Delaney, as noted, primarily sought to document a social phenomenon in writing Strategic Bankruptcy and not to

advocate any particular position. He has succeeded in producing a readable book that general audiences will find informative. The question whether Chapter 11 should encourage or discourage the strategic uses that Delaney believes he has discerned deserves the attention of Congress as it contemplates revision of the Bankruptcy Code in the near future. Strategic Bankruptcy, although *695 not comprehensive in its treatment of the relevant issues, at least should suggest ways in which revisions of the Code might proceed.

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[FNdd]. Hereinafter cited by page number only.

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[FN1]. See, e.g., Bankruptcies Up in Period, N.Y. TIMES, June 16, 1992, at D14 (citing a 9.5% increase in first-quarter bankruptcy filings nationwide from 1991 to 1992); John H. Kennedy, Facing the Cash Crunch: Bankruptcy Filings Skyrocket, BOSTON GLOBE, June 3, 1992, at 1 (reporting a record number of bankruptcy filings in Massachusetts in 1992); Mary L. Vellinga, More Debtors Going Without Lawyers, SACRAMENTO BEE, Mar. 1, 1992, available in DIALOG, SCRMTO-BEE File ("Bankruptcy is booming right now").

[FN2]. See Gregory E. Maggs, The Pace Picks Up, LEGAL TIMES, Sept. 30, 1991, Spec. Supp. at 26.

[FN3]. See, e.g., Metzenbaum Charges Fees Leave Little for Those System Is Supposed to Protect, PENS. & BEN. DAILY (BNA), Mar. 31, 1992, available in LEXIS, BNA Library, BNAPEN File [hereinafter Metzenbaum Fees] (discussing the problem of high attorneys' fees in bankruptcy actions and debating possible solutions to be included in a comprehensive bankruptcy reform bill); Senate Passage of Bankruptcy Reform Bill Makes Action in House Vital, Bankers Say, BANKING REP. (BNA), June 22, 1992, available in LEXIS, BNA Library, BNABNK File (1992) [hereinafter Senate Reform Bill] (discussing the favorable reaction to the Senate's bankruptcy reform bill intended to end abuse of the bankruptcy system).

In October 1992, the House and Senate Judiciary Committees agreed on a compromise bill that would have amended several dozen sections of the Bankruptcy Code and created a commission to study further reforms. The proposal, however, did not become law because the House adjourned without voting on it. See Congress Adjourns; Bankruptcy Reform Bill Dies in the House, ABI LEGIS. BULL., Oct. 8, 1992, at 1, 1-2. Experts predict that the new Congress will pass a similar measure in 1993. See ABI Chairman Lauds Congressional Efforts, AM. BANKR. INST. J., Nov. 1992, at 1.

[FN4]. See Kurt Eichenwald, Wall Street Prepares for a Failure Boom, N.Y. TIMES, Dec. 31, 1989, § 3, at 1; David Satterfield, The Boom in Bankruptcies: Recession, Less Stigma Bring More Companies, Consumers to Court, MIAMI HERALD, Jan. 27, 1992, at B20. Writers about bankruptcy apparently do not have very creative vocabularies-for historical perspectives on increases in bankruptcy filings, see GEORGE SULLIVAN, THE BOOM IN GOING BUST: THE THREAT OF A NATIONAL SCANDAL IN CONSUMER BANKRUPTCY (1968); Vern Countryman, [Bankruptcy Boom](#), 77 HARV. L. REV. 1452 (1964).

[FN5]. Other recent, accessible books about bankruptcy include RONALD J. BACIGAL, THE LIMITS OF LITIGATION: THE DALKON SHIELD CONTROVERSY (1990); LAURENCE H. KALLEN, CORPORATE WELFARE: THE MEGABANKRUPTCIES OF THE 80S AND 90S (1991); RICHARD B. SOBOL, BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY (1991); SOL STEIN, A FEAST FOR LAWYERS: INSIDE CHAPTER 11: AN EXPOSE (1989).

[FN6]. [11 U.S.C. §§ 1101-1174 \(1988\)](#).

[FN7]. See *id.* § 1123(a)(4) (equal treatment); § 1129(a)(7)(A)(ii) (minimum payment).

[FN8]. See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 544 (1981).

[FN9]. Bankruptcies Surge, CORP. FIN. WEEK, Mar. 9, 1992, at 5. As of this writing, the Administrative Office of the United States Courts has not published its official count of last year's Chapter 11 filings.

[FN10]. P. 162.

[FN11]. *Id.*

[FN12]. Pp. 18-34.

[FN13]. P. 13.

[FN14]. Pp. 16-17. For similar observations, see ELIZABETH WARREN & JAY L. WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS* 416-17 (2d ed. 1991) (asserting that the "act of bankruptcy" requirement disregarded the financial condition of the debtor and caused delays in resolving the case); Israel Treiman, *Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law*, 52 HARV. L. REV. 189, 200 (1938) ("Instead of dealing primarily with the legal phenomenon involved in the debtor's conduct, [modern bankruptcy law] seeks to regulate the economic situation that arises out of the debtor's financial condition." (emphasis in original)).

[FN15]. P. 35.

[FN16]. P. 19.

[FN17]. Cf. pp. 19-21.

[FN18]. Delaney relies on HOWARD E. ALDRICH, *ORGANIZATIONS AND ENVIRONMENTS* (1979); ALBERT HIRSHMAN, *EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATESS* (1970); Armen A. Alchian, *Biological Analogies in the Theory of the Firm: Comment*, 43 AM. ECON. REV. 600, 600-03 (1953); Richard H. Day, *Adaptive Processes in Economic Theory*, in *ADAPTIVE ECONOMIC MODELS* 1-38 (Richard H. Day & Theodore Groves eds., 1975); and Michael T. Hannan & John Freeman, *The Population Ecology of Organizations*, 82 AM. J. SOC. 929 (1977). See p. 39.

[FN19]. Delaney relies on THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* (1986); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1972); Douglas G. Baird, *A World Without Bankruptcy*, *LAW & CONTEMP. PROBS.*, Spring 1987, at 173-93; John C. Weistart, *The Costs of Bankruptcy*, *LAW & CONTEMP. PROBS.*, Autumn 1977, at 107-22; and J. Fred Weston, *Some Economic Fundamentals for an Analysis*

of Bankruptcy, LAW & CONTEMP. PROBS., Autumn 1977, at 47-65.

[\[FN20\]](#). P. 47.

[\[FN21\]](#). Pp. 60-81.

[\[FN22\]](#). Pp. 82-125.

[\[FN23\]](#). Pp. 126-59.

[\[FN24\]](#). P. 79.

[\[FN25\]](#). P. 116.

[\[FN26\]](#). Pp. 152, 156.

[\[FN27\]](#). P. 161.

[\[FN28\]](#). P. 172.

[\[FN29\]](#). Pp. 188-89.

[\[FN30\]](#). P. 164.

[\[FN31\]](#). See p. 161.

[\[FN32\]](#). P. 163.

[\[FN33\]](#). Id.

[\[FN34\]](#). Id.

[\[FN35\]](#). P. 164.

[\[FN36\]](#). Id.

[\[FN37\]](#). Id.

[\[FN38\]](#). Id.

[\[FN39\]](#). P. 165.

[\[FN40\]](#). Id.

[\[FN41\]](#). Id.

[\[FN42\]](#). See Robert J. Rosenberg, Corporate Rehabilitation Under the Bankruptcy Act of 1973: Are Reports of the Demise of Chapter XI Greatly Exaggerated?, 53 N.C.L. REV. 1149, 1186-87 (1975) (noting that determining a firm's valuation is at best a "ballpark guess," and that suspicions arise in many cases that firms decide what value they wish to place on the firm and plug in numbers accordingly).

[\[FN43\]](#). Pp. 166-67.

[\[FN44\]](#). P. 167.

[\[FN45\]](#). Pp. 167-68.

[\[FN46\]](#). Id.

[\[FN47\]](#). P. 189.

[\[FN48\]](#). Pp. 161-62.

[\[FN49\]](#). P. 162.

[\[FN50\]](#). Pp. 162-63.

[\[FN51\]](#). P. 188.

[\[FN52\]](#). Id.

[\[FN53\]](#). Id.

[\[FN54\]](#). For recent scholarly condemnation of Chapter 11, see, for example, Michael Bradley & Michael Rosenzweig, [The Untenable Case for Chapter 11](#), 101 YALE L.J. 1043, 1058 (1992) ("We therefore conclude that the social costs of bankruptcy ... have increased under the 1978 Act. Our empirical findings ... cast strong doubt on the proposition that the more liberal use of bankruptcy reorganization ... has enhanced social welfare by preserving firm-specific capital and security holder wealth."); Edith H. Jones, [Chapter 11: A Death Penalty for Debtor and Creditor Interests](#), 77

[CORNELL L. REV. 1088, 1088 \(1992\)](#) ("[T]here is very little good to be accomplished, either from a social standpoint or in the particular case as it appears before our courts, under the rubric of Chapter 11 of the Bankruptcy Code."). But see Elizabeth Warren, "Why Have a Federal Bankruptcy System?", [77 CORNELL L. REV. 1093, 1098 \(1992\)](#) ("Chapter 11 does not work perfectly. But given the job it has to do, it is critical to keep the system very much intact.").

For several more popular critiques, see Howard Gleckman, Why Chapter 11 Needs to Be Rewritten, *BUS. WEEK*, May 18, 1992, at 116; Mary Graham, Bankruptcy-A Growth Industry: Chapter 11, a Well-Intentioned Law Designed to Give Failed Businesses a Break, Has Run Amok in the American Business World, *S.F. CHRON.*, Apr. 5, 1992, available in *DIALOG*, SF-CHRON File; John Greenwald, The Bankruptcy Game, *TIME*, May 18, 1992, at 60; Pat Wechsler, Is It Time to Close the Book on Chapter 11?, *PHILA. INQUIRER*, Mar. 29, 1992, available in *DIALOG*, PHILINQ File.

[\[FN55\]](#). See Senate Reform Bill, *supra* note 3.

[\[FN56\]](#). See, e.g., Martin I. Klein, Misusing Bankruptcy Court: Fiscally Sound Corporations Are Taking Refuge in the Bankruptcy Court to Avoid Their Litigation Problems, *CAL. LAW.*, Apr. 1986, at 11. The public often reacts most negatively to this charge. "To most people," scholars have noted, "abuse of the bankruptcy system means use of bankruptcy by those who could pay if they were willing to give up those assets that they had bought and now want to keep without paying." TERESA A. SULLIVAN ET AL., *AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA* 219 (1989).

[\[FN57\]](#). See, e.g., Graham, *supra* note 54 ("Continental went into bankruptcy, [chairman Frank] Lorenzo said at the time, 'not because it didn't have a future but because he thought it had a hell of a future.'"); Greenwald, *supra* note 54, at 60 ("Manville Corp. filed a 1982 petition solely to escape \$2 billion of liability suits brought by [plaintiffs] who claimed to have been harmed by the firm's asbestos products."); Wechsler, *supra* note 54 ("In the last five years, the nation has watched such giants as Texaco Inc. ... turn their backs on their debts and scurry to bankruptcy court.").

[\[FN58\]](#). P. 163 (emphasis in original).

[\[FN59\]](#). [11 U.S.C. § 1129\(a\)\(3\) \(1988\)](#).

[\[FN60\]](#). *Id.* § 1112(b).

[\[FN61\]](#). See, e.g., *In re Natural Land Corp.*, [825 F.2d 296, 298 \(11th Cir. 1987\)](#); [Little Creek Dev. Co. v. Commonwealth Mortgage Corp.](#), [779 F.2d 1068, 1071-72 \(5th Cir. 1986\)](#); *In re Winshall Settlor's Trust*, [758 F.2d 1136, 1137 \(6th Cir. 1985\)](#).

[\[FN62\]](#). See, e.g., *In re North Redington Beach Assocs.*, [91 B.R. 166 \(M.D. Fla. 1988\)](#) (declining to dismiss a Chapter 11 petition on bad-faith grounds even though the debtor had only one asset and filed its Chapter 11 petition ten minutes before that asset was sold at a foreclosure sale); *In re McStay*, [82 B.R. 763 \(E.D. Pa. 1988\)](#) (finding that a Chapter 11 petition was filed in good faith even though the debtor admitted to filing it almost solely to frustrate particular creditors' efforts to execute on a confessed judgment).

[\[FN63\]](#). See *supra* notes 32-34, 37-38, and 41-43 and accompanying text.

[\[FN64\]](#). Pp. 162-68; see [11 U.S.C. § 502\(b\) \(1988\)](#).

[FN65]. See [11 U.S.C. § 547\(1988\)](#) (prohibiting preferential transfers); *id.* § 548 (prohibiting fraudulent conveyances).

[FN66]. See *supra* note 9 and accompanying text.

[FN67]. As scholars who have studied consumer bankruptcy have discovered: "Bankruptcy reform requires hard information about the players. Without it, policymaking is little more than reading tea leaves, responding to political pressures, and acting out of unexamined prejudices." SULLIVAN ET AL., *supra* note 56, at 280.

[FN68]. Graham, *supra* note 54.

[FN69]. See Warren, *supra* note 54, at 1098 (arguing that private parties should work together to distribute assets through Chapter 11 without the government's help).

[FN70]. See Gleckman, *supra* note 54, at 116 (stating that permitting cases to drag on for years depletes the companies' assets); Greenwald, *supra* note 54, at 61 ("It really serves no one but attorneys to continue in bankruptcy for a long time.").

[FN71]. See [11 U.S.C. § 1121\(b\) \(1988\)](#) (giving the debtor the exclusive right to file a reorganization plan if the debtor acts within 120 days).

[FN72]. See Stuart C. Gilson, Not a Safe Haven for Managers, N.Y. TIMES, Apr. 5, 1992, § 3, at 15 (letter to the editor) (reporting that over 70% of chief executives, chairmen, and presidents of major companies declaring bankruptcy lost their jobs within four years).

[FN73]. See [11 U.S.C. § 330\(a\) \(1988\)](#).

[FN74]. See Wechsler, *supra* note 54. The reasons for the high fees remain unclear: some assert that the lawyers systematically charge excessive rates in bankruptcy, while others maintain that they simply bill for unnecessary work. For an expression of both viewpoints, see Metzenbaum Fees, *supra* note 3.

[FN75]. See Nancy Worth Davis, Statistical Analysis of Chapter 11 Completed by A.O.'s Bankruptcy Division, AM. BANKR. INST. NEWSL., Sept.-Oct. 1989, at 18.

[FN76]. See Bradley & Rosenzweig, *supra* note 54, at 1057, 1067-73. They assert that Chapter 11, by delaying the demise of corporations, primarily contributes to the wealth of management at the expense of security holders. See *id.* at 1049, 1056, 1076-77. For the contrary view that Chapter 11 does not help management in the long run, see Gilson, *supra* note 72, at 15.

[FN77]. Michael Bradley & Michael Rosenzweig, Time to Scuttle Chapter 11, N.Y. TIMES, Mar. 8, 1992, § 3, at 13.

[FN78]. See Graham, *supra* note 54. The bill passed by the Senate, in fact, contains a new experimental Chapter 10 that would cover small business reorganizations. See S. 1985, 102d Cong., 2d Sess. § 205 (1992).

[\[FN79\]](#). See Wade Lambert, Bankruptcy Bar Seeks Changes to Cover Asbestos Cases, WALL ST. J., July 7, 1992, at B2.

[\[FN80\]](#). See Jones, *supra* note 54, at 1089.