Finance and Factionalism: The Uneasy Present (and Future) of Special Interest Committees in Corporate Reorganization Law

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I. INTRODUCTION

Over the last several years, corporate reorganizations under Chapter 11 of the Bankruptcy Code have broken records, both for the sheer number of filings and in terms of their scale.[1] Indeed, at the start of the twenty-first century, we have witnessed five of the ten largest corporate bankruptcy filings in U.S. history.[2] News of the corporate filings of WorldCom, Enron, Global Crossing, and Kmart dominate business headlines. Once rather obscure events followed only by those with a direct stake in the outcome, the largest corporate bankruptcies have now become a routine part of public discourse.

Although the long-term consequences of this latest wave of massive corporate bankruptcies are not clear, one point is indisputable. Corporate bankruptcy cases have wide social, economic, and political reach. Bankruptcy judges presiding over these immense and complicated proceedings routinely issue rulings that have wide-ranging effects on markets and individuals.[3] By contrast, Chapter 11's doctrinal framework is often constricted, focusing as it does on the financial reorganization of the business and on economic recovery for creditors. One of the challenges facing bankruptcy scholars has been to explore and explain the proper balance between the expansive reach of large corporate bankruptcy cases and bankruptcy's doctrinal constraints.[4] This Article follows in that tradition by examining the proper role of special interest committees in large Chapter 11 cases.

Special interest committees have been appointed in some of the largest

1. *See* Andrew Ross Sorkin, *Bankruptcy Doctors Are Most Definitely In*, N.Y. TIMES, July 14, 2002, § 3, at 1 (describing how corporate restructuring is now a big business).

2. *Id*.

3. *See* Jess Bravin, *Judges' Actions Have Wide Reach With Bankruptcy*, WALL ST. J., Aug. 24, 2001, at B1.

4. *See* KAREN GROSS, FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM (1997) (arguing that bankruptcy should focus on real questions involving a real system that affects real people); Nathalie D. Martin, *Noneconomic Interests in Bankruptcy: Standing on the Outside Looking In*, 59 OHIO ST. L.J. 429, 432 (1998) (challenging traditional notions of bankruptcy court standing and arguing that those standards are too narrow).

Chapter 11 cases. Courts have denied requests for the appointment of special interest committees as well. Regardless of whether committees are approved or rejected in individual cases, it seems clear that major players in a large bankruptcy case will have to contend with this dynamic somewhat more often than in the past.

This Article starts with a general doctrinal introduction to the Bankruptcy Code sections and case law that control the creation and appointment of committees. The Article then provides case studies from four large corporate reorganizations: Enron, Kmart, Global Crossing, and Pacific Gas and Electric. These case studies reveal the wide variety of factual and legal settings in which the appointment of special interest committees can become an important threshold legal issue in bankruptcy cases. Finally, the last section of the Article discusses several potential implications from the case studies. Special interest committees, properly constituted and employed, can improve both the process and the outcomes of corporate bankruptcy filings. However, this Article advances several reasons why special interest committees are likely to have an uncertain future in modern corporate reorganization law and practice.

II. DOCTRINAL BACKGROUND: SECTION 1102 OF THE BANKRUPTCY CODE

A. The Creation and Appointment of Creditors' Committees

Section 1102 of the Bankruptcy Code (the Code) provides the United States Trustee with the duty and authority to appoint committees in Chapter 11 cases.[5] The statute provides in § 1102(a)(1) that the Trustee must appoint a committee of unsecured creditors in Chapter 11 cases.[6] Additionally, the Trustee can appoint additional committees of creditors or of equity security holders "as [the Trustee] deems appropriate."[7] Upon its own motion or upon a motion by a party in interest, the court has the power to review the Trustee's appointment of committees or committee members.[8]

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5. *In re* America West Airlines, 142 B.R. 901, 902 (Bankr. D. Ariz. 1992) (stating that a U.S. Trustee has the power to remove, as well as appoint, members of official committees).
6. 11 U.S.C. § 1102(a)(1) (2000).
7. *Id.*
8. *In re* Plabell Rubber Prods., 140 B.R. 179, 181 (Bankr. N.D. Ohio 1992).

B. Standards for Appointment of Additional Committees

Section 1102 of the Code allows the Trustee to appoint additional committees if the Trustee, in her discretion, finds an appointment appropriate.[9] As the Code offers little guidance as to when additional creditors' committees should be appointed by the Trustee, the issue is resolved on a case-by-case basis. Section 1102(a)(2) provides that the court may order the appointment of additional committees upon the request of a party in interest and to ensure the adequate representation of creditors and equity security holders.[10] The party seeking an additional committee has the burden of proof on the question of whether the existing committee adequately represents the interests of all creditors.[11]

C. Factors Considered in the Appointment of Additional Committees

In determining whether to appoint an additional committee, courts have considered several factors, including:[12]

9. One court has held that the appointment of additional committees by the Trustee cannot be overturned or dissolved by the court. *See In re* New Life Fellowship, Inc., 202 B.R. 994, 996 (Bankr. W.D. Okla. 1996).

10. 11 U.S.C. § 1102(a)(2).

11. *See In re* Dow Corning Corp., 194 B.R. 121, 144 (Bankr. E.D. Mich. 1996) ("The burden is on the party seeking an additional committee to prove inadequate representation.").

12. *See generally* In re *Dow Corning Corp*., 194 B.R. at 141 (dividing the § 1102(a)(2) analysis into the following two components: (1) whether appointment of an additional committee is necessary for adequate representation, (2) if yes, whether the court should exercise discretion by making the appointment); *In re* Interco Inc., 141 B.R. 422, 424 (Bankr. E.D. Mo. 1992) (listing non-exclusive factors, such as the ability of the proposed committee to function, the nature of the case, cost, and delay, developed by courts); *In re* Hills Stores, 137 B.R. 4, 7 (Bankr. S.D.N.Y. 1992) (denying appointment of additional committee, and discussing the several factors of the case-by-case inquiry); *In re* Drexel Burnham Lambert Group, Inc. 118 B.R. 209, 210-12 (Bankr. S.D.N.Y. 1990) (denying motion to appoint joint liquidators to the creditors' committee, and holding that the Bankruptcy Code does not authorize such relief, the motion was untimely, and that movants failed to show inadequate representation); *In re* Orfa Corp., 121 B.R. 294, 297–99 (Bankr. E.D. Pa. 1990) (denying separate creditors' committee, citing the lateness of the motion in the process, and the avoidance of additional administrative costs as important factors); *In re* Sharon Steel Corp., 100 B.R. 767, 778 (Bankr. W.D. Pa. 1989) (finding a separate committee not necessary, and noting that in the Bankruptcy Code scheme, the reconciliation of differing interests of creditors within a single committee is the norm, and that the appointment of a separate committee is an extraordinary remedy); *In re* Public Service Co., 89 B.R. 1014, 1019-20 (Bankr. D. N.H. 1988) (denying the appointment of a creditors' committee, despite showing of questionable representation, because of the delay in the proceedings such appointment would cause, but granting the lesser remedy of expanding the existing committee); *In re* McLean Indus. Inc., 70 B.R. 852, 862 (Bankr. S.D.N.Y. 1987) (holding that concern for adequate representation is heightened where only one committee is appointed for two or more jointly administered cases, but that this does not require a separate committee per se); *In re* Texaco Inc., 79 B.R. 560, 567 (Bankr. S.D.N.Y. 1987) (ordering the merger of

A. The nature and complexity of the Chapter 11 case.
B. The composition of the existing committee.
C. The plan's treatment of differing classes.
D. The dissimilar interests of creditors.
E. The cost of additional committees.
F. The concern for adequate representation.
G. The stage at which recognition is sought.
H. The number of persons who would be represented.

III. SPECIAL INTEREST COMMITTEES IN LARGE CHAPTER 11 BANKRUPTCIES: CASE STUDIES

A. Enron

1. Employment-Related Issues Committee

The Enron bankruptcy case attracted an impressive amount of media attention. One of the most compelling aspects of the case was the plight of Enron workers and managers who suddenly found themselves in precarious financial and professional situations.[13] It was thus not

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two unsecured creditors' committees, noting the duplicative costs of separate committees, and the adequacy of a single committee to represent what is essentially the same class of unsecured creditors); *In re* Johns-Manville Corp., 68 B.R. 155, 164 (S.D.N.Y. 1986) (holding that refusal to appoint equity committee was not an abuse of discretion where equity interests were adequately represented, and such appointment would delay confirmation of debtor's reorganization plan); *In re* Beker Indus. Corp., 55 B.R. 945, 949 (Bankr. S.D.N.Y. 1985) (appointing additional committee to represent wide-spread equity holders, and noting that opponents to the motions did not show that the cost would be prohibitive); *In re* Emons Indus., 50 B.R. 692, 694 (Bankr. S.D.N.Y. 1985) ("[G]enerally no equity committee should be appointed when it appears that a debtor is hopelessly insolvent because neither the debtor nor the creditors should have to bear the expense of negotiating over the terms of what is in essence a gift."); *In re* Salant Corp., 53 B.R. 158, 161 (Bankr. S.D.N.Y. 1985) (finding separate employees' committee unwarranted where employees' claims not large enough to justify separate committee, and interest in continued employment is insufficient in itself to justify appointment of an employees' committee); *In re* Baldwin-United Corp., 45 B.R. 375, 376 (Bankr. S.D. Ohio 1983) (denying appointment of an unsecured creditors' committee where only a potential conflict was established, but granting the appointment of a common stockholders' committee to assure adequate representation and protect the interest of 15,000-plus holders of debtor's common stock).

13. *See* Shawn Young, *In Bankruptcy, Getting Laid Off Hurts Even Worse*, WALL ST. J., Sept. 30, 2002, at A1. Young states:

> Normally, employers offer benefits that soften the blow for many employees who lose their jobs. But bankruptcy changes all the rules. In many cases, workers have to get in line with other unsecured creditors for severance

surprising that the U.S. Trustee in that case appointed an official committee to represent the unique interests of Enron employees.[14] The employees argued that the unsecured creditors' committee did not adequately represent their interests. U.S. Trustee Carolyn Schwartz agreed, citing Enron's employee benefit plans' coverage of over 20,000 workers and retirees.[15] Once the official committee was appointed, it had legal power to take sworn statements and subpoena documents and witnesses. The appointment of the committee gave the ex-employees at least an expectation that they would have more power to shape the distribution of assets and the ultimate fate of the company than they might otherwise have if their interests were filtered through a general unsecured creditors' committee.

The employee committee went right to work and, along with others, helped to negotiate a $29 million severance settlement that was intended to pay most former workers approximately $7000 to $8000.[16] Given that Enron was under no legal requirement to pay anything beyond $5600, the additional severance recovery was a very significant development.[17]

The employee committee also played a key role in convincing the bankruptcy court to authorize efforts to seek the return of $53 million in controversial bonuses that went to key executives on the eve of bankruptcy.[18] The employee committee, on behalf of 4200 ex-Enron employees, argued that the bonuses contravened the Code's priority scheme[19] and were also unlawful preferential payments.[20] As of this writing, the litigation was still pending.

> benefits, unused vacation pay, expenses and commissions—a process that can leave them with mere pennies on the dollars that they're owed.

Id.; Ellen E. Schultz, *U.S. Taxpayers May Have to Pay Enron Workers' Pension Benefits*, WALL ST. J., Feb. 27, 2002, at C1 (describing Enron's possibly illegal scheme of permanently limiting pension benefits to a locked-in value of its employee stock ownership plan).

14. Rebecca Smith, *Enron's Employees, in a Court Victory, Are Permitted to Form Creditors' Panel*, WALL ST. J., Feb. 19, 2002, at A6.

15. Matthew Haggman, *Committee Granted: U.S. Trustee Agrees with Miami Lawyer's Request for Creditors Panel Composed of Ex-Enron Employees*, BROWARD DAILY BUS. REV., Feb. 20, 2002, at A9, WL 2/20/2002 BROWARDDBR 8; Severed Enron Employees Coalition, *Former Employees Win 'Place at Bankruptcy Table' at* http://www.theseec.org/press/02152002pressrelease.shtml (Feb. 15, 2002).

16. Eric Berger, *Former Enron Employees May Get $29 Million Severance Deal*, HOUSTON CHRON., June 5, 2002, 2002 WL 3268173.

17. Eric Berger, *Enron Settlement Final: Added Severance to be Paid by Early July*, HOUSTON CHRON., June 12, 2002, 2002 WL 3269826.

18. *Enron Bankruptcy Panel Authorized to Seek Return of Executive Bonuses*, BANKR. L. REP., Sept. 25, 2003, at 862.

19. 11 U.S.C. §§ 503, 507, 726 (2000).

20. *Enron Bankruptcy Panel Authorized to Seek Return of Executive Bonuses*, *supra* note 18, at 862.

2. *Energy Merchants' Committee*

A group of energy merchants also requested a special committee in the Enron case. The "Ad Hoc Committee of Energy Merchants" argued that a third committee was necessary because the energy trading company Enron North America had a distinct identity and creditor mix that was separate from Enron's main business: power plants, natural gas reserves, and pipelines.[21] Presumably, the concern was that creditors of Enron North America would not receive a fair distribution of assets if trading business revenues were allocated to general creditors of the main businesses. U.S. Trustee Schwartz resisted the idea and filed a formal objection with the court in which she argued, among other things, that the energy merchants were adequately represented by the creditors' committee.[22] The request for the special committee was denied.

B. Kmart

One of Kmart's top shareholders requested that the United States decide whether to appoint a shareholder panel in the Kmart bankruptcy case. In contrast to the movement for the appointment of an employee panel in the Enron case, the impetus for the Kmart shareholders' committee came primarily from one person—Ronald Burkle.[23] Burkle owned approximately one million shares of the company's common stock.[24] Not surprisingly, Burkle argued that shareholders needed their own committee because neither the debtor nor the other creditors' committee could adequately represent public shareholders.[25]

Prospects for the appointment of a shareholders' committee improved when the Securities and Exchange Commission (SEC) supported

21. Matthew Haggman, *Miami Lawyer Asks U.S. Trustee in Enron Case to Create a Third Creditors Committee, This One for Energy Traders*, BROWARD DAILY BUS. REV., Feb. 26, 2002, at A1, WL 2/26/2002 BROWARDDBR 1.

22. Objection of the United States Trustee to Motions of Certain Energy Merchants and Enron North America Creditors for Orders, Pursuant to Section 1102(a) of the Bankruptcy Code, Directing the Appointment of Additional Committees at 10, *In re Enron Corp.* (No. 01 B 16034 (AJG)) (Bankr. S.D.N.Y Feb. 22, 2002), *available at* http://www.usdoj.gov/ust/r02/pdf/Objection.pdf.

23. *Kmart Shareholder Wants Committee To Represent Stock Owner's Interest*, ASSOCIATED PRESS, April 19, 2002, 2002 WL 19258925.

24. *Id.*

25. *Shareholder Asks To Add Equity Panel To K-Mart Bankruptcy Case*, *http://www.abiworld.org*, Apr. 19, 2002 (on file with author).

Burkle's request.[26] The SEC gave a number of reasons why it supported the formation of such a committee, including the size of the case, the complexity of Kmart's business, the heterogeneity of its shareholders, and the dynamic nature of the pending negotiations between the debtor and its creditor.[27] Also lurking in the background was the concern of the SEC and others that Kmart's top executives had taken advantage of company-backed loans, and loan forgiveness, in the millions of dollars.[28]

The idea of appointing a shareholders' committee was not without its critics. One argument was that it would slow down the reorganization process considerably.[29] There was also a concern that it would draw unwanted attention to the executive loan forgiveness and thus create a public relations problem for the reorganizing debtor.[30]

After reviewing Kmart's annual report and recent financial statements, U.S. Trustee Ira Bodenstein appointed a shareholders' committee.[31] Bodenstein gave as his chief reason the possibility that Kmart would have enough money, in the end, to pay its shareholders.[32]

C. Global Crossing

A group of former Global Crossing employees also requested a separate committee to represent their interests. The company dismissed approximately 1500 employees and paid about $18 million in severance and vacation pay.[33] Of the $32 million owed by the company to approximately 1200 workers, approximately $5.5 million was entitled to priority payment. The employee group argued that the creditors' committee as constituted could not successfully protect the interests of employees.[34] Unlike the Enron bankruptcy, the debtor and senior creditors took a more active role in objecting to the employees' request.[35] U.S. Trustee Carolyn Schwartz declined the request.[36] An employee committee was not appointed. Interestingly, the day after the

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26. Amy Merrick, *SEC Supports Holder Committee For the Kmart Bankruptcy Case*, WALL ST. J., May 15, 2002, at B12.
27. *Id*.
28. *Id.*; Tim Craig, *Kmart Can't Afford a Loan Scandal*, DSN RETAILING TODAY, May 6, 2002 at 11, *available at* 2002 WL 10055402.
29. Craig, *supra* note 28, at 11.
30. *Id.*
31. Brent Snavely, *Shareholders Get Voice in Kmart Bankruptcy*, CRAIN'S DETROIT BUS., June 3, 2002, at 41, 2002 WL 10365487.
32. *Id.*
33. *Global Crossing*, *Lenders Oppose Forming Ex-Employee Panel*, http://www.abiworld.org, May 15, 2002 (on file with author).
34. *Id.*
35. *Id.*
36. *Id.*

bankruptcy court was scheduled to hold a hearing on the request, Global Crossing offered to pay priority claims of $5.5 million to some former employees.[37]

D. Pacific Gas and Electric (PG&E)

1. Local Government Panel

Cities and counties in California requested a special committee in the Pacific Gas and Electric bankruptcy. These local governments argued that a special committee was necessary because they faced unique issues not faced by private creditors, including tax obligations and environmental concerns.[38] Although U.S. Trustee Linda Stanley initially rejected the idea, even she conceded that the local governments have less of a consensual relationship with the debtor utility than do private creditors.[39] Bankruptcy Judge Dennis Montali refused to order the appointment of the local government committee, citing what he believed to be adequate representation on the main panel.[40]

2. Ratepayers' Committee

The U.S. Trustee appointed a ratepayers' committee to represent the interests of a broad group of consumers.[41] This move was open to legal challenge because ratepayers are not official creditors of a debtor utility. Thus, those who opposed the move, including PG&E, could argue that the ratepayers could not have their own committee even if it were justified, as a policy matter, under the broad standard of adequate representation. PG&E also argued that, even if ratepayers were entitled to participate, they could do so through government officials such as the state Attorney General.[42] Judge Montali denied the appointment.[43]

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37. *Global Crossing Offers Deal To Employees*, L.A. TIMES, May 17, 2002, at C2, *available at* 2002 WL 2476167.
38. Bob Egelko, *Governments are Denied PG&E Bankruptcy Panel*, S.F. CHRON., Dec. 8, 2001, at B1, 2001 WL 3421890.
39. *Id.*
40. *Id.*
41. *PG&E Files Opposition to Ratepayers' Committee*, BUS. WIRE, May 9, 2001, LEXIS, News Library, Bwire File.
42. *PG&E Issues Statement on Court's Decision on Ratepayers' Committee*, BUS. WIRE, May 18, 2001, LEXIS, News Library, Bwire File.
43. *Judge Rules Against Ratepayers*, ASSOCIATED PRESS, July 10, 2001, 2001 WL 24710621.

IV. POTENTIAL IMPLICATIONS

There are several potential implications that can be gleaned from this survey of recent developments. First, requests to appoint special interest committees are sometimes granted in high profile cases and sometimes denied in high profile cases. Much depends on the nature of the request, the size and complexity of the case, and the unique social, political, and economic environment of each case. Second, special interest committees can provide an equitable and efficient means to spread the losses that accompany massive financial distress. In addition to the potential financial benefits, special interest committees can provide crucial social support and institutional transparency. Special interest committees can also lend a sense of openness and legitimacy to a process than often seems quite mysterious to outsiders.

Despite these real and perceived benefits, the appointment of special interest committees will probably not become routine, even in very large cases. We might continue to see a fairly high number of requests, if only so that a group of creditors can gain leverage in the opening days and weeks of a filing. However, it is unlikely that we will see an equally high number of formal appointments. There are several legal and practical reasons for this, as the next section of this Article will explain.

A. Theoretical Dilemmas

Modern American bankruptcy law is a process that emphasizes a collective approach to the problem of debt collection. Indeed, one of the core benefits of bankruptcy is the way in which individual creditors exchange state law rights to a single action against a debtor for a different regime of federal rights and powers under the Code.[44] At least at the level of theory, the idea is that all creditors submit to a collective and compulsory process that leaves them better off than if they each pursued single collection efforts against an insolvent debtor in financial distress. This idea is reflected in, among other places, § 1102's mandate for a general unsecured creditors' committee to represent the interests of all unsecured creditors in a Chapter 11 case. In contrast, the theory animating the request for a special interest committee is that a single creditor group would be better off pursuing a singular agenda in a

44. Thomas H. Jackson, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 28–31 (1986) (arguing that bankruptcy's collective and compulsory approach to debt collection is desirable because it maximizes the value of a given pool of assets). *See generally* Mary Josephine Newborn, *The New Rawlsian Theory of Bankruptcy Ethics,* 16 CARDOZO L. REV. 111, 114–18 (1994) (describing the collective approach and contrasting it with state law theory of the "race to the courthouse").

separate committee than it would be casting its fate with a broader group.

The traditional collective action model assumes that bankruptcy is, at its core, a financial process, driven largely by economic returns and cold financial realities. The special interest model, by contrast, recasts bankruptcy as a political process.[45] Under this view, the reorganization process is always "political," in the traditional sense of the word. Issues of voice, representation, legitimacy, and transparency become key policies that must be considered along with the traditional bankruptcy policies (i.e., fresh start, reorganization policy, etc.). The unification of creditor interests that was thought to be a key component of traditional bankruptcy thinking must incorporate the fragmentation of interests that we usually associate with special interest politics. In fact, one suspects that some of the antipathy toward special interest committees among some in the bankruptcy bench and bar might be traced to the sense that the unchecked proliferation of such committees will politicize the bankruptcy process in unattractive and unproductive ways.

B. Vague Legal Standards

Section 1102 does not provide a clear and determinate set of guidelines for decision makers to use when considering the appointment of special interest committees. Without clear rules, outcomes are more uncertain. A rational creditor group can make the calculation that the odds of prevailing on a request for a special committee are about as good as the odds of not prevailing. Given that the cost of this litigation is rarely cost prohibitive, creditors have powerful incentives to request such committees.

Additionally, the vague standards in § 1102 give trustees and judges fairly wide discretion when making decisions on whether to appoint or approve a committee. It also means that decision makers can provide credible justifications for whatever outcomes they generate. So, while the vagueness of the standards makes it more likely that we continue to see a fairly high number of requests, those same "muddy" standards make it easier for trustees and judges to deny such appointments without giving highly detailed and elaborate reasons for doing so.

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45. Reid J. Epstein, *WorldCom Shareholders Get in Line*, WALL ST. J., July 24, 2002, at D2, *available at* 2002 WL-WSJ 3401576 (quoting Todd Zywicki, "Bankruptcy is both a financial and a political process").

Commentators have suggested legal reforms designed to provide more clarity and predictability in this area.[46]

C. Empirical Reality of Modern Corporate Reorganizations

According to Professor Douglas Baird's recent study of large corporate reorganizations, many large Chapter 11 cases today are characterized by assets sales to third parties and the ratification of pre-existing merger/acquisition deals.[47] While this study is not without its limitations,[48] one important implication of its findings is that an influential role for special interest committees is unlikely in most large Chapter 11 cases. For example, the study suggests that senior creditors are in firm control of these cases.[49] The study suggests rigid adherence to the absolute priority rule, meaning that equity and junior creditors, the usual initiators of special interest committees, do very poorly in terms of financial recovery.[50]

Finally, the study suggests that a meaningful percentage of large cases involve companies with little or no going concern value and no business perceived as worth saving.[51] This study presents a picture of modern corporate reorganizations as court-supervised mergers and acquisitions work. This is not an environment that lends itself to a high degree of special interest bargaining and political gamesmanship by junior creditors.

Anecdotal reports confirm that debtors and senior creditors are increasingly entering into previously negotiated agreements that largely set the terms of the Chapter 11 case well before the case is actually filed.[52] The use of debtor-in-possession financing and the willingness of some bankruptcy courts to approve so-called "first-day orders" potentially leaves many unsecured creditors without adequate notice or protection or both. Special interest committees might be disadvantaged even further since it typically takes them several weeks, if not months, to properly organize and develop a coherent strategy. By that time, the debtor and

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46. *See SABRE II Report*, 59 BUS. LAW. (forthcoming 2004) (manuscript at 9, on file with author) (proposing that in cases in which a committee is appointed, the U.S. Trustee shall appoint a single creditors' committee and shall not appoint additional creditors' or equity holders' committees except in extraordinary circumstances).

47. Douglas G. Baird, *The New Face of Chapter 11*, 12 AM. BANKR. INST. L. REV. (forthcoming 2004) (manuscript at 11, on file with author).

48. Mechele Dickerson, *The Many Faces of Chapter 11*, 12 AM. BANKR. INST. L. REV. (forthcoming 2004) (manuscript at 1-4, on file with author).

49. Baird, *supra* note 47 (manuscript at 11-12).

50. Baird, *supra* note 47 (manuscript at 13).

51. Baird, *supra* note 47 (manuscript at 12-13).

52. Several lawyers who routinely represent creditors' committees in Chapter 11 cases have reported this phenomenon to me.

senior creditors have likely made decisions that could undermine the committee's financial leverage and control.

V. CONCLUSION

Special interest committees can do a lot of good in corporate bankruptcies. They can play a crucial role in redistributing assets to reflect the values of fairness and equity. They can also provide much needed social support and they can help engender confidence in the bankruptcy process, particularly for those who have only sporadic interactions with it. However, special interest committees can also have potential downsides. Factionalism and inefficiency are obvious ones. A hidden danger lurks in the possibility that the special interest committee can itself become co-opted by those within the creditor body that have more resources and expertise than others in the group. Another potential problem could arise if the formal appointment of a special committee triggers a relaxation of informal protection mechanisms for more vulnerable creditor groups. While the appointment of special interest committees may not (and perhaps should not) become routine, the topic continues to be an important one because special interest committees force us to rethink what corporate bankruptcy law exists to do and how we might sensibly distinguish it from other legal systems.