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Mega-Bankruptcies: Representing Creditors and Debtors in Large Bankruptcies

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Foreword: Mega-Bankruptcies: Representing Creditors and Debtors In Large Bankruptcies*

*Margit Livingston***

MS. LIVINGSTON: Thank you, Dean Weissenberger. I would like to add my words of welcome to those of the Dean. The topic today is mega-bankruptcies. Mega, of course, means large or grand, and, indeed, many of the high-profile bankruptcies in the news over the last couple of years have involved some of America's biggest companies such as Enron, WorldCom, United Airlines, Pacific Gas & Electric, and K-Mart.

As our distinguished group of speakers will discuss over the course of the day, mega-bankruptcies present unique challenges for attorneys, judges, and policymakers. The sheer size of the companies involved, the large number of potential claimants, and the often intricate nature of a big business's internal structure and external dealings make bankruptcy a complicated and sometimes frustrating venture for all participants.

The typical business bankruptcy of 20 years ago bears only a shadowy resemblance to the huge corporate reorganizations of today. Two decades ago corporate fraud or mismanagement was often at the root of business bankruptcies. In the face of financial straits or fraudulent dealings, the company's board of directors usually either fired the bad managers or liquidated the company.

One could characterize the problems of such companies as relatively straightforward. The complex mega-bankruptcies that dot the corporate landscape today were relatively rare. The robust economic climate of the 1980s and 1990s produced another distinct wave of corporate bankruptcies. Many companies took advantage of abundant commercial credit to finance rapid and sometimes foolhardy expansions and corporate buyouts. When economic recession hit and consumer demand slumped, many companies experienced serious "debt hangovers," as President Bush once put it.

* This is an edited version of the transcript from Professor Margit Livingston's opening remarks at the DEPAUL BUSINESS AND COMMERCIAL LAW JOURNAL SYMPOSIUM, *Mega-Bankruptcies: Representing Creditors and Debtors in Large Bankruptcies*, held on April 10, 2003.

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Corporate bankruptcy filings went up sharply during this period. Chapter 11 of the Bankruptcy Code became a safe haven for businesses seeking to reschedule their loan payments, to convert debt to equity to augment cash flow, or to locate a rescuer to turn the company around. Additionally, some companies such as Dow Corning and A.H. Robins used bankruptcy law to handle massive product liability claims. Liquidation remained an alternative, but Chapter 11 reorganization became a treatment of choice for ailing businesses.

The recent spate of mega-bankruptcies fits squarely within the contemporary mold. Many of these large companies faltered because of a combination of excessive debt, failure to attend to business fundamentals, sleight-of-hand bookkeeping, and bloated executive compensation packages. In addition to the particular causes of these corporate debacles, the modern outsized company experiencing serious financial stresses faces almost overwhelming incentives to file for Chapter 11 protection. With America's economic future continuing to be somewhat murky, it is unlikely that mega-bankruptcies will abate significantly in the near future. In other words, the big business bankruptcy with all of its complexities will be with us for a while.

As you probably know, once again Congress is considering bankruptcy reform legislation. Unfortunately, as I'm sure our speakers will discuss, the proposed legislation does not address some of the problems implicated by mega-bankruptcies such as forum non conveniens issues and standing on the part of creditors' committees to pursue claims against officers and directors for breach of fiduciary duty and other improper or fraudulent conduct. Congress has an excellent opportunity to enact reforms addressing some of the issues presented by mega-bankruptcies. It remains to be seen whether Congress will take advantage of that opportunity.

We are so fortunate today to have with us an extraordinarily impressive group of speakers. They have been on the front lines of some of the nation's largest bankruptcies and will be sharing with us their expertise and insights that they have acquired in hacking their way through the thick, dense foliage of issues raised by these complex cases. The symposium will employ a panel format, which will allow our speakers to trade ideas and points of view on the various topics.

Before we get to the first panel, I would like to thank some individuals who have contributed to the success of the *DePaul Business and Commercial Law Journal* in its inaugural year and to the planning and creation of the symposium. None of this would have happened without the unfailing support of our Dean, Glen Weissenberger. In addition, the Commercial Law League of America has provided

invaluable financial and editorial assistance to us. And most especially, I want to thank the student editorial board for the Journal. The student editors, as well as their staff members, have worked tirelessly to get this venture off the ground and to ensure a high level of editorial quality in the Journal.

As with any transition, there have been a few bumps in the road, but the students have persevered, and we are now looking forward to the upcoming publication of this year's third issue in a couple of weeks. This year's editors included Julie Herlien, Michael Borree, Jenny Kim, Kevin Banyon, and Sam Macaluso. I would like to especially acknowledge the outgoing editor-in-chief, John Mueller, and, of course, the symposium editor, Wei Lee, who has put forth an incredible effort to organize and bring the symposium to fruition. The incoming editor-in-chief for next year is Paige Barr, who will continue, I'm sure, the fine work of her predecessors.

