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BANKRUPTCY & CONSENT*

Daniel J. Bussel and Kenneth N. Klee**

Consent justifies pragmatic resolutions otherwise unavailable under prevailing legal rules. Bankruptcy law facilitates consent by exploiting inertia, ambiguity, proxies, relaxed legal standards, novel procedures and institutional structures, and altering substantive rights. Professors Bussel & Klee critique current consent standards in bankruptcy relating to (i) home mortgage modification; (ii) sales free and clear; (iii) third-party releases; (iv) sales of substantially all assets; (v) balloting of conflicted parties; and (vi) proxy consents by creditors' committees. Recently, most notoriously in the Chrysler and GM cases, the advantages of generating solutions by manufacturing consent rather than imposition have been too casually abandoned.

I. INTRODUCTION

Understanding how consent is manipulated in bankruptcy provides critical insight into the bankruptcy process. Imposing legal outcomes without consent comes at an ideological cost that undermines acceptance of the result. Bankruptcy law often less-forthrightly prefers to finesse conflict among legal rules and business needs by watering down the quality of the consent it finds necessary or sufficient to alter legal entitlements.

Competing pressures, for very loose consent standards arising out of the practical exigencies of bankruptcy cases, and for stringent rules to control historical abuses in consent-gathering, result in widely varying consent standards in bankruptcy. In descending order of rigor, transformative consent may require:

> (i) Informed subjective consent plus formal requirements such as disclosures and certifications; (ii) informed subjective consent; (iii) objective manifestations of assent; (iv) formal actions neither subjectively nor objectively manifesting assent but from which consent is presumed; (v) inaction; (vi) consent by proxies or similarly situated persons; (vii) inaction by proxies or similarly situated persons; or (viii) nothing—consent is conclusively presumed, notwithstanding timely objection by the "consenting" party.

The recent restructurings of Chrysler and GM are important landmarks in the ever-evolving role of consent in bankruptcy. As the financial situations of GM and Chrysler became dire at the end of 2008, some suggested that the magnitude of the auto industry's problems required a new process less reliant on consent than chapter 11. Shifting the forum for building a consensus over the complex restructuring options facing these firms from bankruptcy court to Congress, however, would only substitute Congressional for party consent. The Obama Administration preferred the cover of a bankruptcy court in imposing difficult political and economic choices on GM and Chrysler constituents. However, the Administration viewed traditional bankruptcy-style consent as unduly onerous given the urgent and complex economic and political problems raised by these reorganizations.

For Chrysler, the Administration orchestrated a § 363 sale in a transaction that was a reorganization plan in all but name. The nominal buyer, Fiat, holds only a minority stake in New Chrysler for which it paid nothing. Although § 363 sales ordinarily require the consent of secured creditors, they dispense with class consents and other confirmation requirements. Initial opposition from secured creditors collapsed under Government pressure, and, after the Supreme Court terminated a brief stay, the sale was consummated over the objections of certain pension funds, holding small amounts of secured debt, and certain tort claimants. The "consent" of dissenting secured parties was found in standard agency provisions the courts construed to permit the agent consent's to bind the objecting holders. The objection that § 363 sales cannot dictate distribution of value and other terms of a reorganization plan was overruled notwithstanding special treatment of particular constituents, especially labor and tort claimants, that left no real reorganizational or distributional issues for resolution through a chapter 11 plan.

While Chrysler may have been a case where prompt § 363 sale was the only viable alternative to a disastrous forced liquidation, it is implausible that the Government ever would have permitted forced liquidation of GM. Nevertheless, for GM, the Administration similarly short-circuited the plan process, using §363 to recapitalize a "Good GM" without obtaining the creditor and shareholder acceptances to confirm a reorganization plan. No third-party buyer even arguably existed for GM. The Government emerged with 60% of the equity in New GM, with the rest distributed to existing GM constituents, primarily representatives of GM's unionized workforce. Again all the key reorganizational issues (involving

a complex settlement among labor, management, the Administration, tort claimants, secured creditors and debentureholders) were resolved through the § 363 sale process.

Cloaking practical accommodations with manufactured consent is at the heart of our bankruptcy law as it evolved over the 19th and 20th centuries. Modern circumstances, in some instances, call for further exploitation of these techniques, or more mandatory rules, to better balance party autonomy against other values. We suggest, however, that recently, perhaps in exaggerated response to those circumstances, perhaps inadvertently, the role of consent has at times been unduly diminished. The GM and Chrysler cases are only the most extreme examples of this trend, the long-term systemic cost of which remains to be seen.

II. FACILITATING CONSENT BY ALTERING RIGHTS

Legal rights are adjusted and renegotiated in bankruptcy. Specialized bankruptcy procedures affect that renegotiation and remove obstacles to its success. Perhaps more importantly, bankruptcy creates new legal rights and alters established entitlements, often in unclear ways. The Code first alters parties' nonbankruptcy rights in order to create incentives for consent that then serve as a further basis for the transformation of rights. Frequently bankruptcy law enshrouds that alteration of rights in ambiguity and uncertainty, generating further pressure for compromise. New bankruptcy remedies are substituted for those available under nonbankruptcy law, priorities among creditors are reordered, and otherwise valid claims subordinated or disallowed on bases unknown to nonbankruptcy law. In short, bankruptcy alters legal entitlements as a matter of course.

Those substantive alterations structure a massive, concurrent renegotiation of the parties' rights and liabilities. Adverse and uncertain changes in nondebtors' rights make previously unattractive proposals appealing. To paraphrase Don Corleone, a previously unattractive offer may suddenly appear to a creditor as one "he couldn't refuse." Consent is manufactured more effectively, it turns out, if the consenting party is first softened up by a downward adjustment in its substantive entitlement.

Commentators decry vague and uncertain legal rules as impeding efficient resource allocation. Bankruptcy law, however, has long depended on uncertainty to force renegotiation of legal rights and facilitate reorganization. Plans must be

"fair and equitable" and secured parties are entitled to "adequate protection" of property interests securing their claims, which may be restructured according to a standard of "indubitable equivalence." Parties' rights are frequently made to turn on valuation of firms and collateral, although these are among the thorniest factual issues that courts regularly encounter. Moreover, bankruptcy courts determine value on the basis of testimony, not current market bids. "Though this be madness, yet there is method in't." By creating uncertainty, especially factual uncertainty, bankruptcy law encourages parties to compromise their rights. Transformation of legal rights becomes a two-step process where rights are first muddied up, and then clarified based on a negotiated solution. By focusing on step two, bankruptcy law manages to appear to accommodate conflicting rights on the basis of consent rather than imposition.

III. CONSENT IN 21ST CENTURY BANKRUPTCY LAW

A. *Relevant Factors*

Fixing consent standards demands experience, judgment, and attention to context. Useful factors to consider include:

- The sophistication and bargaining power of putative consenting parties;
- The number, and dispersion, of putative consenting parties;
- The availability of good proxies;
- The nature, value, and importance of putative consenting parties' legal rights;
- The cost of obtaining consent both in out of pocket terms and in terms of burdening (or even precluding) effective reorganization;
- Public and third party interests favoring reorganization;
- The risk of abuse by insiders in obtaining consents and imposing nonconsensual resolutions;
- The risk of strategic ("rent-seeking") behavior in the exercise of consent rights by those holding entitlements;
- The cost (including delay and legitimacy costs) of imposing coercive rather than consensual solutions; and
- The value of flexibility in consensual, particularized solutions.

By (i) lowering the standard for effective consent; (ii) relying on proxy consents; (iii) altering party baselines; and (iv) making the enforcement or content of legal rights uncertain, the consent bar can be manipulated downward. Moreover, mandatory rules may substitute for consent. Experience cautions, however, against too quickly jumping toward mandatory rules. Rules that seem appropriate in the abstract may not work in concrete cases. Congress or the judiciary may not know

what the right answer is, even if they think they do, or the right answer may differ in unanticipated or unusual circumstances. Even if an appropriate mandatory rule can be confidently framed, legitimacy and autonomy values must be weighed against the efficiencies of mandatory rules. The experience in bankruptcy shows that facilitating consent to, rather than imposing, a preferred resolution is often a better road leading to the same destination.

B. *The Need to Reassess Consent Standards*

Technology has vastly reduced the cost of communicating with and organizing dispersed constituencies. While new technologies facilitate consent-gathering, they also facilitate the orchestration of dissent. Whether the net effect is to facilitate or obstruct consent-gathering is unclear, but the force of inertia, although still powerful, is certainly reduced. Moreover, the general public's current reality of free and easy Internet access to large quantities of information reduces the need for traditional forms of disclosure.

Other changes clearly make it more difficult today to obtain individual consents. The financial world is far more complex today, with vast new markets for securitizations and financial derivatives. This complexity breeds conflicts of interest that impede consent-gathering. Legal and technological changes make it easy to perfect security interests in substantially all of a firm's property. Accordingly, few debtors enter bankruptcy today with significant unencumbered assets. Trade credit is less important as firms have turned to capital markets for financing and reduced working capital. Growing mass tort litigation means tort claimants (who are involuntary creditors) are an increasingly important part of the mix in large bankruptcy cases. Modern claims trading means new parties whose consent must be obtained emerge just as previously consenting or passive parties exit. Strategic behavior is even more a problem than in the past as bankruptcy processes are better understood. Sophisticated parties are more prone than ever to engage in such behavior, employing new financial engineering tools unconstrained by gentlemen's agreements honored in the past.

Other scholars (prior to the financial panic of 2008) have argued that the depth and liquidity of modern capital markets make resolution of bankruptcy cases by negotiated restructuring (rather than by sale and distribution in accordance with legal priorities) less advantageous than in the past.

So, broadly speaking, consent is on balance somewhat harder to obtain and less necessary to resolve a bankruptcy case today than in earlier times. Given this

broad perspective, greater scope for mandatory rules, a general lowering of the bar for transformative consent, and greater alteration of party baselines, is sensible under modern circumstances. Too high a consent threshold may unduly burden or even preclude efficient dispute resolution or successful business reorganization as parties engage in strategic behavior to extract value to which they are not otherwise entitled, perhaps by obstructing an otherwise desirable plan.

In light of current circumstances, we consider below some features of bankruptcy law that are candidates for further downward manipulation of consent standards, and others where consent standards might plausibly be further tightened to better reflect underlying policies in light of current circumstances. We intend this discussion to be provocative and illustrative, not exhaustive.

C. *Relaxing Certain Consent*

1. Home Mortgage Modification

In 1978, when home lenders obtained anti-modification protection for first mortgages on principal residences, the standard first mortgage was limited to 80% of the value of the home. Then mortgage lending was deregulated and increasing securitization of home mortgages insulated mortgage originators from credit risk. Indeed, somewhat perversely, mortgage originators were paid handsome fees to originate loans without much regard to collateral value or the borrowers' creditworthiness. Although in the long run and in the aggregate these practices proved disastrous, they flourished because originators expected to promptly offload any credit risk by reselling the loans in an anonymous securitization market where risk was supposedly mitigated by diversification and tranching and the assumption of ever-rising property values. The highest expression of this folly was in subprime markets where some homeowners, specially selected for their poor credit histories, could borrow up to 125% of current home value. As a result, from inception, some mortgages on principal residences were undersecured. With the recent plunge of home values the percentage of underwater mortgages has soared. Yet chapter 13 retains an outdated prohibition on the modification of first mortgages on principal residences unless the lender consents. This requirement has scuttled confirmation of chapter 13 plans and debtor rehabilitation. Moreover, since most home mortgages were pooled and securitized, often debtors cannot even identify, let alone negotiate with, the beneficial holders, and thus, have no meaningful way to obtain lender consent to loan modification. Mortgage loan servicers often have little discretion or economic incentive to modify home mortgages in light of changes in the housing market or the homeowner's circumstances.

Accordingly, it is time to allow modification of first mortgages on homes on the same standard applicable to other secured claims. The possibility of cram down based upon uncertain judicial valuation historically has led—in an overwhelming majority of cases—to realistic consensual renegotiation of the terms of secured claims in light of current market values, and there is every reason to believe that extending the general rule to home mortgages will have the same result.

Theory and experience, even if compelling, do not always overcome political realities. Although Congress considered amending the Code twice in 2009 to permit some form of cram down on home lenders, the bills failed to pass.

2. Third-party Releases

No issue in chapter 11 practice has divided courts more than the permissible scope of third-party releases under reorganization plans. Typically, plan proponents condition plans on the release of estate or debtor claims against parties that are critical to the successful reorganization or otherwise have leverage over "the deal." The plan proponent and these released parties may seek to condition the deal further on obtaining a general release not only of estate claims but of claims of other constituents. The common justification is that "global peace" requires broad general releases. Insiders often condition cooperation on obtaining such releases. Insurers, lenders, or others making cash or other contributions to the reorganization effort may also seek to condition their participation in the reorganization on such releases.

Some courts hold that parties cannot contractually consent to injunctions or releases not authorized by the Code under a chapter 11 plan. Others allow individual parties to waive rights against third-parties or consent to an injunction under a plan. Still other courts authorize plans that condition acceptances on such a waiver, presenting plan and waiver together to creditors as a take-it-or-leave-it package deal. Some courts allow accepting classes of claims to bind dissenters so that the entire class would release claims against designated third parties. Finally, some courts go so far as to approve plans releasing third-party claims over the objection of an entire dissenting class on the basis that a settlement was a crucial part of the plan.

Recently, in the mass-asbestos context, the Supreme Court was poised to address whether a bankruptcy court may enjoin creditors from asserting independent claims against third parties. The Second Circuit had determined that the

bankruptcy court lacked jurisdiction to do so. The Supreme Court, however, decided the case on narrow *res judicata* grounds without resolving the scope of the bankruptcy court's jurisdiction to enjoin claims against third parties.[1]

History and policy considerations counsel against the cram down of third-party releases over the objections of an entire dissenting class. Third-party releases may be the grease necessary to resolve a reorganization case, but there is a significant difference between imposing that release nonconsensually and conditioning the final deal on individual or class consent to global peace. On the other hand, a particular creditor's affirmative, informed consent to a release should be sufficient to make that release binding on that creditor. Moreover, there is no apparent reason to require that a contractual release be obtained outside the plan process when it is more efficient and convenient to solicit it within that process.

The remaining contestable issue is whether class consent should bind dissenters to third-party releases. In bankruptcy, class consents commonly effectuate all sorts of settlements not only vis-à-vis the bankruptcy estate and the debtor, but among the classes themselves, with respect to such matters as plan settlements, avoiding power claims, and subordination disputes. The acceptance of an offer of settlement from a third party conditioned on global peace may be little different. In an appropriate context a class vote should be sufficient to bind dissenting class members to the release. Unlike most intercreditor disputes (and disputes relating to estate or derivative claims or claims against the estate), however, class members may hold differing interests with respect to third-party releases. Classification generally turns on whether the class members hold similar rights against the debtor. Although, those with dissimilar rights against the debtor may not be classified together, those with dissimilar rights against putative third-party releasees may be.

Imposing a third-party release on dissenters by class vote should require that all class members hold similar rights against the putative releasee. If those that have no third-party claim are classified together with those that do, those without the third-party claim may happily bargain away the third-party claims of their fellows to obtain otherwise favorable plan treatment. Deals including third-party releases should be permitted, but consent to the deal should be measured by requisite majorities of classes composed of members with similar rights against the putative releasees.

3. Sales Free and Clear

The Code, as drafted, expressly limited secured claims to the value of the collateral and made liens void except to the extent securing an allowed secured claim so measured. Thus an "underwater" lien (that is a lien against collateral whose value was exhausted by senior liens) was void. As such, property subject to an undersecured first lien and a fully underwater second lien could be sold with the consent of the first lienholder. Consent of the underwater junior was not required once the lien was stripped.

Dewsnup v. Timm[2] upended this result by construing the Code (despite its plain language) to prevent the voiding of an underwater lien in chapter 7. This posed no issue in confirming chapter 11 plans because a lien could be stripped under a chapter 11 plan notwithstanding *Dewsnup*, but *Dewsnup* inadvertently gave the underwater lienholder (who until plan confirmation retained its underwater lien) a veto power over § 363 sales. Consent of the undersecured first lien no longer sufficed to authorize a sale under § 363 because the underwater junior had an interest in the property to be sold. This caused few problems in chapter 7 cases. Chapter 7 trustees can simply abandon property that lacks any equity or grant the senior lienholder relief from the automatic stay to foreclose. Recently, however, some courts have upheld vetoes by underwater junior liens over chapter 11 sales outside of a plan. Where preplan sales under § 363 are justified, there is no reason to give an out-of-the-money second lien a veto over an otherwise desirable sale. The confluence of *Dewsnup* and increased reliance on § 363 sales in chapter 11 cases confers undue leverage on the underwater junior lienholder. Allowing property to be sold free and clear of an underwater lien without the junior's consent will limit strategic behavior in situations where prompt § 363 sale is justified.

D. *Bolstering Certain Consent Requirements*

1. Sales of Substantially All Assets

Bankruptcy sales of all assets used to be exceptional. To conduct a sale outside the chapter 11 plan process, the debtor had to demonstrate exigent circumstances, such as rapidly wasting assets. As time passed, courts allowed such sales absent an emergency if supported by an articulated business purpose, but not simply to appease creditors. Later, courts simply balanced the interests of the parties in deciding whether to authorize the sale. Although courts rejected sales that restructured creditors' rights as *sub rosa* plans, they usually permitted sales leaving the proceeds for distribution under a plan.

Currently, § 363 sales have increasingly displaced chapter 11 plans. When the debtor seeks court approval of a § 363 sale, unsecured creditors do not vote. Rather, only

secured creditor consent is required, and then only in the limited case where there is no equity in the property and the lien is not subject to *bona fide* dispute. Frequently, the buyer is an affiliate of the secured party sometimes acting in concert with insiders. When the buyer is the secured party or acting in concert with the secured party the sale bears more than a passing resemblance to the *faux* foreclosure sales in old equity receivership practice. The secured party acts as both seller and buyer and its ability to capture post-sale appreciation motivates it to keep the sale price low. Data developed by Professors Lynn LoPucki and Joseph Doherty suggest that in fact § 363 sales tend to yield less value to the estate than chapter 11 reorganizations of comparable firms.

It is time to bolster consent requirements for a sale of substantially all of the assets outside the plan process, particularly if the buyer credit bids or teams up with insiders. Rushed sales under manufactured emergencies deny due process and preclude meaningful creditor input. Moreover, the statute bars meaningful appellate review of sale orders. Postpetition lenders (frequently the prepetition secured lenders themselves or allied institutions) have made maximizing value difficult by conditioning financing on very short sale periods. And more recently, terms of sale require certain debts be assumed or paid in derogation of the *sub rosa* plan doctrine. Practically, the cumulative effect is to reduce purchase prices, reorder priorities, pretermit plan bargaining, and unfairly treat creditors left behind.

One solution is to require that sales (or at least sales to constituents or affiliates) take place under a plan, a process designed to control the abuses that attended the orchestrated foreclosures in the equity receiverships of old. Alternatively, § 363 could selectively incorporate elements of the chapter 11 plan process. We prefer to limit the circumstances under which a sale of substantially all assets may be made outside of a plan to a true emergency, such as when the firm's assets are rapidly wasting, or when the buyer is a genuine third party and the § 363 sale is broadly supported by all the key constituencies. Otherwise, sales should be subject to the voting requirements, statutory protections, and consent rights established for chapter 11 plans.

2. Policing Proxy Voting

Bankruptcy's sophisticated use of proxies to bind their putative principals is a signature feature of American reorganization law upon which rests much of its legitimacy. There is a growing gap, however, between the interest of the consenting proxies and their bound constituents.

The rise of "hedge funds," the advent of claims trading, financial derivatives, the transformation of the banking industry through disintermediation and deregulation, all work together to multiply conflicts of interest in reorganization cases. Holders commonly acquire claims and interests at many different levels of the debtor's capital structure and hedge those interests through options and forwards in ways that obscure their true net position, which frequently changes during the course of the case.

i) Conflicts of Interest in Voting

Bankruptcy law's reliance on the consent of proxies, successors, or others similarly situated has become especially problematic as consent rights are increasingly divorced from economic rights through modern financial engineering. This separation is not entirely new: Certainly, the old robber barons understood that control of the vote of one constituency might advantage their other economic interests to the detriment of the voting class. But today undisclosed and nontransparent use of derivatives multiplies opportunities for this sort of manipulation and degrades courts' ability to control abuse. Using derivatives, security holders can and do commonly acquire or dispose of substantially all the underlying economic interests (or even short the relevant interest) without transferring the correlative right to vote on a reorganization plan or other legal consent rights. We must take account of these developments in determining whose consent is, or should be, relevant to maintain the credibility of the bankruptcy process. To date, the complexity of the issues, coupled with a general ideological commitment to deregulated financial markets, has precluded reform. The Great Recession of 2008-09, and resulting disrepute into which financial deregulation has fallen, may open a window to begin addressing this issue. More disclosure and more aggressive use of the court's power to disqualify votes are likely starting places. Greater regulation of over-the-counter financial derivatives may also mitigate some of these problems.

Disclosure of conflicts, and, in appropriate cases, disqualification from voting or committee service are obvious remedies. Demanding ongoing timely disclosure of all positions for all major constituencies and their respective affiliates is an easy first step. Similarly, disclosure should be required of all parties that support or oppose critical motions to approve financing, sales, or reorganization plans. Ethical walls are of questionable efficacy in many cases: decisionmaking is not effectively compartmentalized in many investment funds. Nevertheless, ethical walls may be useful if the conflicted institution is large enough and sufficiently compartmentalized to make them workable.

The harder problem is whether holding claims and interests in different classes (or short positions) should disqualify a holder's vote. Traditionally, each creditor may vote its claims and interests in accordance with its own aggregate economic interest as it sees it. Greater scrutiny has sometimes been applied to claims acquired after bankruptcy for strategic purposes, but even then courts generally allow creditors to vote claims in a junior class to advantage a senior position. Courts have been more skeptical of attempts to advantage junior interests or acquire stock or assets by strategically voting senior claims. Nevertheless, understandably courts rarely disenfranchise large holders. The uncertainty regarding voting rights in these circumstances has no doubt deterred creditors from pursuing these strategies in some instances. Here again bankruptcy law has used ambiguity and uncertainty to induce settlements that avoid adjudication of difficult questions.

For now, the best available means to control these abuses may be continued reliance on existing vague standards as a sword of Damocles dangling over the conflicted. Nevertheless, the ever-increasing incidence of these conflicts raises the question whether the traditional chapter 11 model of generating broad consensus among real economic parties in interest will remain viable long-term. That process hinges on identifying the real economic interest holders and bringing them to the bargaining table or at least the ballot box, an increasingly daunting enterprise. Thus, the lure of mandatory rules, or fiduciary models, or sales in lieu of plans, all of which seek to impose solutions outside the chapter 11 plan process.

ii) Committee as Proxy

Creditors' committees serve important functions and are a valuable check on debtors and secured creditors. The Code, however, does not expressly contemplate the current practice of committees giving *de facto* binding consent to preplan case-dispositive settlements, financings and sales. Certainly the most salutary check on overweening committee power to consent to case-dispositive sales and financings would be to require case-dispositive restructuring transactions to take place generally through plans (over which committee powers are properly circumscribed) rather than on motion. To the extent, however, that committees assume the key role of proxy in consenting to case-dispositive transactions, even greater care must be taken in structuring representative committees. When the committee is *de facto* final decisionmaker, less emphasis on its coalition-building function and more on its ability to represent faithfully the interests of a particular constituency is warranted. Sharply divergent interests may coexist

among unsecured creditors. If so, multiple committees, each representing a unified interest may be more appropriate surrogates than a single, divided, and conflicted committee when matters turn on committee consent to a particular motion rather than its negotiation of a plan that must be accepted by the requisite majorities of the holders. As chapter 11 practice moves away from plans toward case-dispositive financings, settlements and sales, a rethinking of the role, number, and structure of committees is appropriate.

IV. CONCLUSION

Practically accommodating conflicting rights is a perfectly sensible way of dealing with the issues of business failure and financial distress. That practical accommodation of conflicting legal rights is accomplished partly by consent and partly by imposition.

Although bankruptcy law generally determines consent on ordinary contract law standards, it relaxes, or, less commonly, heightens the standard in a variety of circumstances. Bankruptcy law facilitates consent by exploiting inertia effects, by putting consent-generating structures in place (for example, committees, futures representatives, class voting rules, and stays of litigation), and by substituting vague standards that depend heavily on judicial discretion for more crisply defined nonbankruptcy rights. By diluting, reallocating, and inducing consent, bankruptcy law subtly alters the meaning of consent to achieve its ends. Sometimes, this manufactured consent, disguised by elaborate ritual and reinforced by the symbols of judicial authority, masks imposition. Other times, the consent required, while real, is a tool to be manipulated as much as an obstacle to be overcome. Finally, in some instances, bankruptcy law substitutes mandatory rules for consent to advance certain goals of the bankruptcy process, protect the rights of nonconsenting third parties or protect the putative consenting party itself.

Sound bankruptcy reform requires sensitivity to bankruptcy's traditional reliance on party consent. Legal, business, and social changes place pressure on the system to lower the bar, further alter party baselines and increase judicial discretion by substituting vague standards for crisp rights, and ultimately adopt more mandatory rules. In some cases, bankruptcy law has not responded promptly to these pressures and maintains overly-restrictive consent standards: consider for example, home mortgage modification and the sale free and clear rules. In other areas, the law has overreacted by unduly and unnecessarily devaluing consent most particularly in connection with the substitution of settlement, financing, and sale motions for chapter 11 reorganization. Carefully recalibrating consent standards will be central to bankruptcy law reform for the 21st century.

ENDNOTES

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1 Travelers Indem. Co. v. Bailey, 129 S.Ct. 2195 (2009).

2 502 U.S. 410 (1992).