REORGANIZATION REVISED

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Section 77B, a statute enacted to remedy the substantive and procedural difficulties inherent in reorganization through equity receivership, has in turn been supplanted by a statute designed to eliminate the weaknesses that survived in, or stemmed from, reorganization under 77B. The significant reforms embodied in the latter statute, Chapter Ten of the Chandler Act, may be classified as either supervisory or socializing in character. These categories are not self-contained and the reforms treated under one division project their influence into the other. But in the main, the supervisory innovations involve the erection of safeguards to protect investors who are dependent on honest, sound reorganizations to salvage their investments, by compelling the appointment of disinterested trustees, by utilizing the advisory offices of the Securities and Exchange Commission and by the chastening of reorganization committees. The socializing features of Chapter Ten aim to achieve the same object by increasing the opportunities for investor articulation, investor information and investor participation, by revising the compensation provisions and by injecting considerations of "public policy" into the reorganization picture.

I. THE SUPERVISORY REFORMS

Many of the evils of friendly receiverships were carried into 77B reorganizations by way of debtors in possession or friendly trustees. Control of the distressed corporation permitted the old management not only to insulate itself from potential prosecution for its previous practices but to maintain a position of prestige and power, from which it could influence security holders to support its plan and projects. Thus were made possible the intrenchment of officers, efficient or inefficient, the suppression of investigations into the conduct of the old management, honest or dishonest, and the foisting of unfair plans upon masses of innocent investors, helplessly unorganized, or hopelessly uninformed. These evils, exhaustively reported by the Securities and Exchange Com-

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2. Chandler Act, Chapter X, 52 STAT. 883, 11 U. S. C. § 501 (1938). In 1937, Congress passed a "Chapter X" for municipal debt adjustments. This part of the bankruptcy act has become Chapter IX of the Chandler Act.
3. See letter from Dean James M. Landis, then Chairman of the Securities & Exchange Commission, printed in Hearings before the Committee on the Judiciary on H. R. 6439 (reintroduced and passed as H. R. 8046), 75th Cong., 1st Sess. (1937) 423-426. Hereinafter, this source will be referred to as House Hearings.
mission, so impinged themselves upon the consciousness of those familiar with the mechanics of reorganization that, with a few exceptions, the Bar either favored or did not violently oppose the reforms recommended by the S.E.C.

The mandatory appointment of a disinterested trustee in all cases involving liabilities of $250,000 or more is generally regarded as the keystone of the reform program. Provision for the compulsory appointment of a trustee would in itself have been sufficient to shock the friends of management; the additional requirement that the trustee must be disinterested, free of connections not only with the old management but with all its associates, provoked charges of novelty and radicalism. But efforts to secure independent and faithful administration of distressed properties are neither novel nor radical. This fact does not of course establish the desirability of the change, and any analysis must review the cavalcade of contentions that have been, or may be, raised against the mandatory appointment of trustees. Most frequently adduced is the argument that in numerous cases there is no reason to suspect that there has been mismanagement or misconduct, the appointment therefore being unnecessary in the interest of either efficient or honest management. Obviously, however, some investigation is necessary before it can be


6. See Swaine, "Democratization of Corporate Reorganization (1938) 38 Col. L. Rev. 256. Critics of Chapter X generally recognized the existence of reorganization evils but, as in the past, hoped for purification by incantation rather than by legislation.


8. Chapter X, § 156. The trustee's attorney must also be disinterested except that for purposes other than representation of the trustee in the Chapter X proceedings, the trustee may, with court approval, retain a non-disinterested attorney. § 157.


10. § 158 defines non-disinterestedness. Subsection (4) of § 158 declares that a person is not disinterested if, for any reason, it appears he has an interest materially adverse to any creditors or stockholders. Will one who has a proprietary interest in a competing corporation be so classified? Will an attorney in the same office with an "interested" person be so disqualified? See In re Gosden, C. C. H. Bankr. Serv. ¶ 51343 (E. D. N. Y. 1938) (held not disqualified).


safely concluded that no investigation is necessary, and a hornbook rule is unavailable to control the selection of cases which require a change in management. To delegate to individual security holders the onus of apprising the court when an investigation is required is to ignore the dismal result of such delegation in equity receiverships and 77B reorganizations. The possible displacement of some capable, honest management cannot discourage the erection of safeguards for the protection of investors in numerous other cases where an independent trustee, free from self interest and ulterior motives, is indispensable if investors are to be adequately represented.

Another objection, often implied and sometimes expressed, is that the restrictions of Chapter Ten will require trustees to be recruited from among the ignorant or the unemployed. Over and above its hyperbolic effect, the objection has practical overtones in suggesting the possible difficulties of obtaining suitable persons, wholly without business connections with the old management, the debtor or the underwriter, to act as trustee, and to operate the debtor. The difficulties suggested are not likely to prove insuperable. There are two types of management that the trustee may displace titularly, and the word "titularly" is advisedly emphasized because Section 191 permits the trustee to employ officers of the debtor and enables him to capitalize on their knowledge and experience. These managements may be either honest or dishonest. In all probability honest managements will actively cooperate with the trustee even during an investigation, not only because they have nothing to hide or fear but because by doing effective work with the trustee they may convince the court that they should be restored to their titular positions or, in any event, that they should be returned in their old capacities to the reorganized corporations. On the other hand, if the management is dishonest and attempts to sabotage the investigation or completely refuses to co-


15. This possibility seems rather remote because the new trustee may retain members of the old management to assist him. § 191.


17. See statement of Heuston, Senate Hearings 30; Brownback, Senate Hearings 83.

18. § 158.

19. § 156 makes it possible for the court to appoint one who is not disinterested within the meaning of § 158 as co-trustee with a disinterested person.

20. The court, before confirming a plan, must be satisfied that the appointment of directors, officers or voting trustees of the reorganized corporation is consistent with public policy and the interests of security holders. § 221(5). Infra, p. 607.
operate in running the business, it is precisely the type of management which, everyone concedes, should be displaced. Opponents of the mandatory trustee provisions have suggested that if a disinterested trustee is appointed, an officer or director of the debtor should be appointed as co-trustee in order that the continuity of the business venture should not be impaired. Although the appointment of two trustees is preferable to none, courts should be slow to dignify a member of the old management with the trustee's title. The influence and blandishments of an additional trustee are bound to be much stronger and more effective than could be exerted by the same person occupying a managerial position. Until there is proof that the management has been honest and capable, there is danger that the ostensible desire to preserve the facade of functional continuity may be but another way of phrasing the desire to maintain the emoluments of management.

Of course, disinterestedness will not be the sole test of a trustee's qualifications. Even though the trustee should not be expected to be intimately familiar with the financial problems of a given corporation, he should have knowledge of the problems generally arising in corporate reorganization and he should be sufficiently familiar with the type of business involved to enable him intelligently to formulate a plan and to appraise the prospects and condition of the debtor, evaluate the caliber of the old management and determine whether an investigation is necessary. The character and ability of the trustee are so important that his selection should not leave the court with a Hobson's choice of relying upon nominations of the debtor, which would carry a distinct threat to the independence of the trustee, or of making unadvised selections, which would involve the judge either in independent investigations or patronage dispensation. Judges in a given district might therefore do well to create their own panel of qualified persons from which trustees would be selected. Applications for appointments as trustees could be submitted to the appropriate district, which should then delegate some administrative agency, perhaps the regional office of the S.E.C., to investigate the character, efficiency and business experience of the applicant. Once such a panel was established, judges could make their selections without undue fear that they were choosing blindly.

21. See Swaine, supra note 6, at 279; Gerdes, Corporate Reorganizations (1937) 71 U. S. L. Rev. 443, 453.
22. In the first part of its Report, the S. E. C. has discussed the patronage available to management in reorganizing the old corporation and launching the new. In any event, the alleged advantages of keeping management in control are not self-evident. See In re Barclay Park Corp., 90 F. (2d) 595, 598 (C. C. A. 2d, 1937).
23. See Senate Hearings 57; Rodgers & Groom, Reorganization of Railroad Corporations under § 77 of the Bankruptcy Act (1933) 33 Col. L. Rev. 571, 605; Lowenthal, The Railroad Reorganization Act (1933) 47 Harv. L. Rev. 18, 32.
24. The panel system of qualified trustees is being used in Canada. The Canadian Act provides for the appointment of a Superintendent of Bankruptcy to supervise the
If Chapter Ten is to be criticized for its provisions concerning trustees, it could more justifiably be criticized for failing to make mandatory the appointment of trustees in all cases. According to figures compiled by Dun & Bradstreet, 25 3583 applications for reorganization under Section 77B were filed between June 7, 1934 and September 22, 1938. Available breakdowns for 2741 of these cases reveal that 2139, or fully 74%, involved liabilities up to $250,000. Even if it were assumed that the remaining cases, all but 38 of which are other than commercial or industrial failures, involved liabilities of $250,000, the percentage of cases in which appointment of trustees would remain unobligatory would be just short of 60%. It is in this large class of optional cases that evils, more frequently than in the larger cases, are said to be concomitants of debtor control. While counsel representing large interests were altruistically asserting that appointments of trustees in small cases would be particularly unfortunate, 26 credit associations were selfishly insisting that the appointment of trustees in small cases was especially necessary. 27 Counsel for credit associations testified at Senate hearings that assets are often frittered away or dissipated in the small cases before either creditors or courts realize what is happening, and that the scheme of debtor-possession permits old officers and employees of the debtor to perpetuate their jobs and keep on losing money without any restraining check. 28

Under Chapter Ten, the possibility of appointing an independent trustee in all cases does exist but that practice is unlikely to develop in view both
of judicial hesitance to do what Congress definitely refused to do\textsuperscript{29} and of a not unwarranted reluctance to incur the expense of trustee appointment in the smaller cases. In order to safeguard small estates from the ravages of negligent or dishonest management, the old officers should not be left in unqualified, unguarded possession as under \textsuperscript{77B}. A solution looking to the retention of the old management with appropriate precautions to insure financial responsibility for mismanagement during the reorganization period would require the old management to be placed under bond conditioned on the faithful performance of its duties. Investors would thus receive some assurance that continuity of management would not operate to their ultimate disadvantage. There should be no difficulty in obtaining such bonds since, under Section \textsuperscript{188}, a debtor in possession has all the rights and duties of a trustee appointed under Section \textsuperscript{156} and, like a trustee, is subject to the control of the court. If a debtor, appointed trustee, could secure a bond, no reason exists why the same type of bond could not be obtained for the debtor without the formality of appointment as trustee.\textsuperscript{30} If in fact the impossibility of obtaining bonds for "debtors" in possession does appear, Chapter Ten should be amended to permit the appointment of debtors as trustees in non-mandatory cases.

An aspect of trustees' appointment which has met with criticism from friendly sources is that which authorizes the court to appoint a trustee without creditor advice.\textsuperscript{31} Section \textsuperscript{77B} required both notice to the debtor, and such others as the court might determine, and a hearing before appointment.\textsuperscript{32} Chapter Ten, however, requires that a meeting be held not before the appointment but within thirty to sixty days after the approval of the reorganization petition to advise the court whether to continue the debtor in possession or to retain the already-appointed trustee, as the case may be.\textsuperscript{33} If these critics have correctly construed Section \textsuperscript{156} to require the mandatory appointment to be made coincidentally with the approval of the petition, in cases of voluntary petitions immediately approved, the court would seem to have no alternative but to make the appointment at once, without hearing creditors. But in cases involving less than \$250,000 the court could proceed in a less precipitate manner. Immediate appointment may be undesirable because an unqualified person may be designated. Creditor objections, which might have been effective to prevent an appointment, lose their effectiveness with lapse of time. The longer a trustee is permitted to operate,

\textsuperscript{29} One of the first bills provided that appointment of trustees was to be mandatory in all cases. See H. R. 6439, c. IV, § 12, II, d(1) (1937).
\textsuperscript{30} Cf. Senate Hearings 52 (surety companies would not write such bonds).
\textsuperscript{31} Friebolin (1937) 42 Comm. L. J. 411; Hunt, Senate Hearings 50.
\textsuperscript{32} 11 U. S. C. § 207(c) (1) (1934).
\textsuperscript{33} §§ 161, 162.
the more secure becomes his position. At the same time, prompt appointment of trustees may have the virtue of depriving the debtor of opportunities to practice concealment or manipulate accounts. An elastic rule, recognizing a distinction between voluntary and involuntary petitions, might therefore be drawn. Where involuntary petitions are filed, appointments can be made immediately upon approval of the petition, without loss of creditor cooperation, because the petitioning creditors, as well as the debtor and the S.E.C., will know of the filing of the petition and will have opportunities to appear before the court. Where voluntary petitions are filed, and the debtor satisfies the court that it complies with the requirements of the chapter, it will be unlikely and unnecessary that a trustee would be appointed immediately; unlikely, because having approved the petition without waiting for creditors, stockholders or indenture trustees to controvert the allegations of the petition, the court is likely to have faith in the debtor; unnecessary, because the dangers of concealment and manipulation, having existed before the petition was voluntarily filed, are not likely to become aggravated. Hence, in cases involving a voluntary petition and an indebtedness of less than $250,000, appointment of trustees should be postponed until the hearing described in Section 161 is held and creditors are assembled.

Possibly the appointment of trustees may be postponed in all cases. Section 156 calls for the appointment of a mandatory trustee upon “the approval of the petition.” But “upon” approval may simply mean “sometime after,” as its use in other portions of the Act suggests. And if “upon approval” in Section 156 is taken to be indicative of futurity rather than immediateness, the court may withhold selection of a trustee even in the compulsory cases until after the hearing contemplated in Section 161. Under this construction of Section 156 the selection of a trustee could be made with the cooperation and advice of all parties in interest.

34. Of §77B proceedings instituted during 1936, about 90% involved voluntary petitions. House Hearings 421.

35. Section 141 provides that “Upon the filing of a petition by the debtor, the judge shall enter an order approving the petition, if satisfied” that the petition “has been filed in good faith.” The practice of immediately entering orders approving voluntary petitions is not likely to develop, particularly in view of §144 which contemplates that if an answer is filed to the debtor’s petition, the court will not approve the petition until it has passed upon the allegations in the answer. See also §163. But cf. §164. If the necessity for immediate replacement of the management in possession seems pressing, the appointment of a trustee may be postponed and the debtor ousted by utilizing the new provisions of Chapter X, which permit the appointment of receivers in reorganizations. §117.

36. This construction of §156 may be opposed to the intention of the draftsmen of the act. When, in H. R. 6439, the appointment of all trustees was to be mandatory [supra note 29], the “upon approval” phrase was also used. At the same time, the section corresponding to what is now §161 [p. 55 H. R. 6439 (1937)] provided that at the hearing, the court was to hear objections relating to the retention of the trustee in
If a panel plan of trustee selection be adopted, the hearing would still be useful in fixing upon a choice from those qualified on the panel list.

**Duties of the Trustee: Investigation**

The doubt and ambiguity that distinguish the appointment of a trustee are not likely to characterize the nature of the trustee's duties. By and large, the trustee has two functions other than administering the business affairs of the debtor: the investigation of the debtor's affairs and the management's conduct, and the formulation of a plan of reorganization.

One of the sinister features of management control of property in reorganization was the management's ability to forestall any investigation into its past record to determine whether or not any claims existed against the old officers or their associates, and to ascertain generally the management's fitness to be retained in office. The Commission sought to ensure an independent administration of the debtor's property based upon full knowledge of all facts surrounding the old stewardship by requiring in every case an investigation, the duration of which would be determined by the nature and circumstances of the case.\(^7\) The fear that investigations in all cases would often result in fruitless expense, and the bogey of persecuting honest management by inquisitorial investigations\(^8\) resulted in modification of the mandatory provisions and substitution therefor of provisions leaving it within the discretion of the judge whether to order an investigation.\(^9\) In such cases as inevitably involve or optionally result in appointment of trustees, the modification will not operate to any serious prejudice, since the trustee is required, as soon as practical, to prepare a report of his investigations of property, liabilities and financial condition of the debtor.\(^10\) In the course of acquiring information for this purpose, and even without contemplating an investigation, the trustee would probably audit the books and records as well as secure the advice of experts concerning the general routine and operation of the debtor.\(^11\) He will be asking questions, consulting, receiving complaints or suggestions from creditors, all resulting in the accumulation of information from which he could make a sound enough judgment in most cases as to the desirability of an investigation.

If a trustee is not appointed, the problem of investigation looms larger. A procedure which might prove neither too expensive nor dilatory would involve the appointment of a disinterested auditor as examiner under Section 168 to make a preliminary investigation of the acts and conduct of office. The debtor was not mentioned at all because it was evidently expected that the trustee would have been appointed before the meeting was held.

37. H. R. 6439, c. IV, § 12(II), d, (5)(a) (1937) 57.
38. See *House Hearings* 167.
39. § 167(1).
40. § 167(5); *infra*, p. 598.
of the management and the condition of the debtor. If such a fishing expedition, for it would be that, revealed grounds for a general investigation, the debtor could be displaced by a trustee. In order to avoid any element of wishful investigation by a job-seeking examiner, the examiner should not be eligible for appointment as trustee, despite his familiarity with the debtor’s affairs. This exploratory investigation should be completed by the time the meeting called for under Section 161 is held, so that the court may have a report available when it is called upon to determine whether or not to leave the debtor in possession. Unless some procedure calling for at least a tentative investigation is followed, the evils of debtor control will be unabated where trustees are not appointed. The appointment of an examiner might not only reveal information indispensable for intelligent, lasting rehabilitation but it may have an inhibitory effect upon all management in administration of property in their trust. Provisional investigations, with their accumulation of needful facts and their minatory reminders to all management, are far removed from vindictive witch-hunting and visionary chasing of will-o’-the-wisps.

**Duties of the Trustee: The Plan**

The most important of the trustee’s routine duties is that calling for him to submit a plan of reorganization within the time fixed by the judge. Both in equity and 77B reorganizations, self-seeking, self-serving, self-appointed groups representing managers and bankers monopolized the processes of reorganization, including the formulation of the plan. In order to break the monopoly and to procure plans that would not be drawn by those interested in saving themselves, the Securities and Exchange Commission recommended that initiative in the formulation of the plan be entrusted to an independent trustee, whose principal objective would be a genuine reorganization leading to a sound corporate structure. This recommendation is now embodied in Section 167, which authorizes the trustee to notify creditors and stockholders that they are to submit to him plans, proposals or suggestions. But the trustee is more than a mere collecting agency. Whether or not committees, having been deprived of unrestricted control of the emoluments

42. See Friebolin, *supra* note 31; *In re Utilities Power & Light Corp.*, 90 F. (2d) 736 (C. C. A. 7th, 1937), a § 77B case in which the court continued the debtor in possession but appointed an investigator.


45. See Swaine, *supra* note 6, at 264.

46. § 167.

of reorganization and having been subjected to stricter supervision, play an active role in effectuating a reorganization, the trustee will be expected to supply the motive power and to determine the direction of the reorganization proceeding. To ensure the active participation of the trustee in the formulation of a plan, Section 169 requires the trustee to prepare and file a plan, or report his reasons for believing that a plan cannot be effected.

Chapter Ten does not build any framework within which the trustee must formulate the plan. He is evidently free to adopt any procedure he deems advisable. In all likelihood, he will adopt the procedure common in previous reorganizations of bringing proponents and opponents of plans together at the proverbial round-table and threshing out an acceptable plan. The present practice will differ from previous procedures, however, in having the trustee at the table, representing those long unrepresented, and in making the adoption of a fair, sound plan the primary objective of the reorganization process. Whether the trustee decides to file a plan submitted by a security holder or whether he formulates his own, representing the result of compromises effected and bargains made, the plan he files is to be regarded as his plan. If opponents of the obligatory trustee sections have correctly assumed that almost all business is honest and if it is proper to assume that almost all honest managements will cooperate with the trustee in running the business, then the appointment of an experienced reorganization lawyer as trustee would be far from a deplorable choice, for a trustee, skilled in the management of men, familiar with the formulating of plans and experienced in the give and take of round-table conferences would have high chances of achieving a prompt, practical reorganization.

The propriety of the trustee's formulating a plan of reorganization has been questioned on the ground that such a function will destroy the trustee's disinterested, nonpartisan character. If qualified persons are appointed trustees, they will be working impartially for the successful rehabilitation of the debtor and the interests of all investors. Even after submitting a particular plan, the trustee may remain disinterested in the sense that he will be free of selfish interest and desirous of securing approval for a plan which he deems, from an impartial standpoint, to be fair and feasible. Whether this scheme for plans will be more successful than the old practice is of course but a matter for speculation. One suggestive bit of evidence appears in the records of the House Hearings on the Chandler Bill. In a letter supporting the appointment of disinterested trustees, a federal referee wrote that in 77B proceedings twice

48. See Brownback, Senate Hearings 89, quoting Senator Vandenberg as authority for proposition that 98% of business is honest.
49. House Hearings 319; Senate Hearings 43.
as many plans, on a proportional basis, had been adopted in cases wherein trustees had been appointed as in those wherein debtors had been allowed to remain in possession, and that the plans adopted in trustees reorganizations seemed fairer and more meritorious.

The Commission and the Court

The Securities and Exchange Commission must be considered in any discussion of the Chandler Bill, not only because of its status under the Act but also because of its sponsorship of the reform measures. After Representative Chandler introduced House Bill 12,889, which attempted to reform general bankruptcy procedure without eliminating fundamental weaknesses in the reorganization sections, the Commission began its campaign for genuine reform. One of the major points in its program was based upon the belief that a qualified administrative agency was indispensable in the analysis of the fairness and soundness of reorganization plans. The Commission's extensive excursion into the history of reorganization proceedings had convinced it that the reorganization was not exclusively a problem of law, that judges, trained to consider legal questions, were being called upon to decide business and financial problems, and that the courts were being overwhelmed by non-legal, administrative problems. The Commission therefore recommended that "The facilities of a qualified administrative agency should be made available to the court as an aid in the administration of the estates and in the analysis of the fairness, equity and soundness of plans." This administrative assistance to the court was to be provided by two measures: one, permitting the Commission to intervene in all cases and to be accorded full participation in all phases of the proceedings; the other, requiring plans of reorganization to be submitted to the Commission for advisory report before they were submitted to creditors and stockholders for acceptance.

House Bill 6,439 was then introduced, incorporating these recommendations. Opposition to the Commission's unlimited right to intervene was strong, and an amendment was drafted permitting the Commission to file an appearance, if the judge approves, but denying to it the right of appeal. This limitation should not seriously limit the effectiveness of the Commission's participation, for it will still be able to perform the function it deemed essential—intervention in cases wherein the interests of investors are not being adequately represented.

51. On May 28, 1936.
54. § 208. The language of the section is sufficiently neutral to make ambiguous the Commission's status in defending appeals as well as in joining in appeals initiated by others.
In addition to being able to file its appearance in any case, the Commission must, in cases involving more than $3,000,000, and may, in cases involving less, be given an opportunity to render an advisory opinion on whatever plan or plans the court deems worthy for its consideration.\(^5\) It is quite likely, and was so anticipated, that courts would make voluntary references in cases involving less than that amount.\(^6\) Some estimate of the proportion of cases which the court must submit to the Commission may be made on the basis of figures prepared by the Commission.\(^7\) In 1936, the number of applications for reorganization under 77B, for which information was available, totalled 914. Of these, 65 or less than 8\%, involved liabilities of $2,000,000 or more. Records of Dun & Bradstreet,\(^8\) limited to industrial and commercial reorganizations, reveal that of 2741 applications filed during the life of Section 77B, only 106 or about 4\%, involved liabilities of more than $3,000,000. The Dun & Bradstreet figures are admittedly too low because they do not take into consideration non-commercial and non-industrial applications, totalling 804, in which the liabilities are usually rather high. The breakdowns suggest, however, that the dread of the Commission's ubiquity is unfounded. If the Commission is called upon to consider plans in more than the indicated number of cases, it will be because of judicial confidence in the body rather than legislative coercion.

Not infrequently, the argument is advanced that the proposals for the trustee's active participation and the Commission's advisory function in formulating plans indicate "a lack of sympathy on the part of the Commission with the proposition that a reorganization plan is in essence a bargain between the various classes of security holders and creditors and that the parties should be free to agree upon the terms of the bargain, subject only to a judicial review of a limited scope."\(^9\) Implicit in this observation is the conviction that under 77B, the theory of private negotiations had been generally adopted. In addition to cases in which courts had insisted upon inspecting plans before submitting them to security holders,\(^6\) a common practice involved the submission of plans to the scrutiny of special masters who sat not only in formal, detached

\(^{55}\) § 172. One of the first drafts of the Chandler Act [H. R. 6439 (1937) 58] drew the line between mandatory and permissive references of reorganization plans at $5,000,000.

\(^{56}\) *House Hearings* 287, statement of A. N. Heuston.

\(^{57}\) *House Hearings* 423.

\(^{58}\) These data have not been published. See note 25, supra.


judgment on the fairness of the plans but often sought to bring the
parties together by bargain and compromise, suggestion and argument.
If the office of the Commission and the functions of the trustee are con-
sidered as limitations on private negotiations, the common practice under
77B involved similar live limitations. The special master, no less than
the trustee or the Commission, was an officer of the court and just as
seriously shattered the deceptive pattern of private negotiations among
supposedly enlightened parties. The change from the 77B procedure
is not a shift in theoretical approach but in practical emphasis. Private
negotiations are now to be interrupted by analysts who recognize
the active play in reorganization between legal and business problems.
The Commission, with its experience under the Holding Company Act,61
has an intimacy with reorganizations which will make its contribution
meaningful. In marked contrast to the Masters in Chancery, it is well-
equipped for the investigation and analysis necessary to assure thorough
performance of its functions.

Chapter Ten does not detail the Commission's work. In all likelihood,
the Commission will file reports, as special masters did in 77B. These
77B reports, while not drafted as counterplans, were by the nature of
their recommendations tantamount to amendments or counter proposals.
The prediction that this procedure will delay the reorganization pro-
cedings may be accurate,62 but whatever the disadvantages of delay,
they would seem to be offset by the advantages of analysis. The fear that
the new method will result in a shuttlecock between the Commission and
the courts seems altogether baseless. The report of the Securities and
Exchange Commission, unlike that of the Interstate Commerce Commis-
sion under Section 77, is entirely advisory. The court need not wait upon
the Commission but may fix a reasonable time within which it must file
its report.63 But it is not to be expected that the courts will deny ex-

61. 49 STAT. 803 (1935); 15 U.S.C. §79 (Supp. 1936). The admitted ability of
the personnel of the Commission and the display of the Commission's efficiency in public
utility reorganizations afford some assurance that the Commission will not duplicate the
uninspiring performance of the I.C.C. under §77. See Comment (1937) 47 Yale L. J.
247, 254.

62. Cf. Chairman Douglas's "considered view that the recommendations for improve-
ment in the reorganization machinery, as embodied in the Chandler Bill, will not increase
the expense of reorganizations or the time consumed to accomplish them." Senate
Hearings 125.

63. §§172, 173. Even before the enactment of the Chandler Act, courts had availed
themselves of the Commission's services, [Testimony of N. Y. District Judge John C.
Knox, House Hearings 365] and thus recognized the potential usefulness of the Chandler
Act. See Douglas, Improvement in Federal Procedure for Corporate Reorga-
nizations (1938) 24 A. B. A. J. 875. Of the first five occasions on which the Commission inter-
vened under Chapter X, four were the result of invitations from district judges. N. Y.
Times, Nov. 16, 1938, p. 34, col. 2. Should the reports of the Commission carry great
weight, it will be because of respect for, not fear of, the S.E.C. Compare Swaine, supra
note 6, at 273; Minority Report, Senate Committee on Judiciary 9 (June 7, 1938).
tensions of time to the Commission when necessary. The Commission acts not only as an arm of the court but as a representative of necessitous security holders when it expresses its concept of the investor viewpoint. In one or the other of these capacities, the Commission should be accorded those rights which the law accords to private representatives of organized security holders. Nor will the intervention of the S.E.C. lead to centralization of proceedings in Washington. The Commission, recognizing the predominantly local character of Chapter Ten cases, has decentralized the work of its reorganization division by vesting in its nine regional offices authority to appear in cases and to obtain the facts required by the Commission in the preparation of its advisory reports. Although the final form of the report is to be drafted in Washington, and general policies established there, attorneys will not have to go to Washington to present their cases, for the regional offices will be able to conduct auxiliary hearings, if any are necessary. Speeches by members of the Commission indicate that Washington blue prints of plans for all reorganizations will not be drawn, but that each reorganization will be regarded as an individual problem, to be solved in accordance with the needs of the debtor and not without reference to the wishes of the proponents of the scrutinized plans.

Chastening the Committees

As a consequence of the recommendations of the Securities and Exchange Commission, made after a study of protective committees and other representatives of security holders, the Lea Bill was introduced in Congress. The Bill, which failed of passage at the last session, subjects the solicitation of proxies and deposits in connection with any form of reorganization or readjustment to increased legal control and establishes specific fiduciary standards for committees. The Chandler Act, in anticipation of the Lea Bill’s passage, required representatives of security holders to comply with the requirements of all applicable laws before participating in the proceedings. Congress’s concurrent consideration of the Chandler and Lea Bills has caused some speculation whether Section 213 does not through inadvertance require compliance with laws

64. S.E.C. Corp. Reorg. Release # 2. The regional offices of the S.E.C. are situated in Atlanta, Boston, Chicago, Cleveland, Denver, Fort Worth, New York, San Francisco and Seattle. On the basis of a number of applications filed under §77B during 1938, the Commission estimates that three-quarters of the Chapter X proceedings will originate within the New York and Chicago regional offices.


66. H. R. 6968, 75th Cong., 1st Sess. (1937). It is expected that the bill will be revived at the present session. (June 25, 1938) Bus. Week 36.

67. §213.
other than those passed by Congress. Neither the intention of the draftsmen, as understood by the Senate Judiciary committee nor the language of the section, which is phrased broadly enough to compel representatives of security holders to meet the requirements of any applicable state and federal laws regulating their activities and personnel, leave any room for doubt but that such compliance is necessary, and intended by Congress. Apart from its reference to collateral legislation, Chapter Ten strengthens judicial supervision of representatives in reorganization by requiring all representatives (and the right to be represented is otherwise unlimited) to satisfy certain qualifications. Anyone representing more than twelve creditors or stockholders, as well as every indenture trustee, must satisfy specified informational requirements of Section 211, while every attorney representing a security holder must satisfy the requirements of Section 210. Obviously, the court should have all pertinent information to aid it in competent control of the proceedings; at the same time, some of the requirements of Chapter Ten seem unnecessary. For instance, sub-section four of Section 211 provides that all persons appearing in a representative capacity must show the claims, and amounts thereof, represented by them. This requirement extends not only to committees, as to whom it may be justified, but also to indenture trustees. An indenture trustee, by hypothesis, occupies a unique position as the representative of all claimants, and as to them the requirements seem excessive. Moreover, the effect of Section 211 is to require disclosures by committees representing security holders numbering more than twelve, whatever their amount, while not requiring disclosures of committees representing a smaller number of security holders, even though the holdings of the smaller group may be far in excess of those for whom disclosures are necessary.

The power that committees have hitherto been able to wield through legalistic, seductive deposit agreements has been considerably reduced by the Chandler Act. Of common knowledge was the practice of securing deposits of bonds under agreements which permitted the committee to be completely inactive, and, at the same time, prevented depositors from acting independently once they had deposited their bonds. The right to withdraw, if recognized at all, was merely a formal, linguistic concession, and the financial penalties for its exercise were substantial or prohibitive. Section 77B developed a procedure, and Chapter Ten adopts it, for handling deposit agreements in the same cavalier fashion that com-

68. See Gerdes, Corporate Reorganizations: Changes Effected by Chapter X of the Bankruptcy Act (1938) 52 Harv. L. Rev. 1, 27.
70. Comment (1937) 47 Yale L. J. 229.
mittees once used toward their depositors. Under both acts, the Judge is authorized to scrutinize the agreement and disregard any provisions which are either unfair or inconsistent with public policy.71 The tone of the Chandler Act should encourage the courts to apply the "scrutiny" section more boldly than they have done in the past. Through formulation and enforcement of a vigorous public policy, the courts could strengthen the fiduciary concept without waiting for the Lea Bill to be passed, by requiring the excision of responsibility-denying clauses from all agreements and by restraining the exercise of any powers under authorizations for persons with conflicting interests. The powers of the court to disregard committees entirely,72 to expunge all fee provisions from deposit agreements and to deny to committees the right to interpret their instruments and to amend their agreements at will, should be universally recognized and generously exercised.

The powers of committees are further curtailed by prohibiting the solicitation of acceptances for any plan until after transmittal of all duly approved plans to security holders.73 This provision should furnish security holders with a free and independent appraisal of the merits of a plan, given by a judge unswayed by accumulations of votes and undismayed by the prospects of undoing months of work.74 Persons desiring to form committees and to secure authority for the formulation of plans may still do so but they can no longer obtain blanket, or even conditional consents without having the acceptances declared invalid. It would be optimistic to predict that under Chapter Ten courts will not be influenced by advocates representing either large institutional interests or committees. The existence of these bodies, before voting and during the negotiations, and their activities in favor of certain plans, may be

71. § 77B(b)(10); Chapter X, § 212.

72. Recently, the Mississippi district court formulated its own plan and bludgeoned the committees into securing the requisite assents by threatening to dismiss them. In re Vicksburg Bridge & Terminal Co., C. C. H. Bankr. Serv. ¶ 4561 (D. Miss. 1937). And in In re London Terrace Corp., C. C. H. Bankr. Serv. ¶ 4561 (S. D. N. Y. 1937) the federal court disallowed the compensation claim of a company, one of whose officers had been restrained by the Kings County court from acting as a member of any reorganization committee dealing with the debtor. See also In re Schroeder Hotel Co., 86 F. (2d) 491 (C. C. A. 7th, 1936); In re Wabash-Harrison Bldg. Corp., 85 F. (2d) 395 (C. C. A. 7th, 1936); (1937) 46 YAL E. L. J. 1391.

73. § 176. The court may, however, consent to solicitations before transmittal. Ibid. The language of § 176 seems to preclude a ratifying consent; the consent of the court must be requested, and received, before the solicitation. Sen. 1916 (1938) 31.

74. The disinclination of many courts to exercise independent judgment and their inclination to approve a plan when confronted by the requisite majorities, regardless of how obtained, were the reasons leading to the requirement of the court's pre-submission approval. For recent examples of § 77B inertia see In re Baldwin Locomotive Works, 21 F. Supp. 94, 105 (E. D. Pa. 1937); In re A. C. Hotel Co., 93 F. (2d) 841, 843 (C. C. A. 7th, 1937); Gerdes, supra note 68, at 33, n. 191; Foster, Conflicting Ideals for Reorganization (1935) 44 YALE L. J. 923, 929.
forceful indications of their ability to obtain consents for, or dissents against, any plan sent out by the court.

Not without basis, fear has been expressed that Section 176 will even cause the invalidation of consents secured after transmittal of plans if, previously, a premature attempt has been made to solicit consents. The penalizing portion of Section 176 provides that any “authority or acceptance given, procured or received by reason of a solicitation prior to . . . approval and transmittal shall be invalid, unless such consent of the court has been so obtained.” Any attempt to construe the section to invalidate only acceptances received prior to the transmittal must prove abortive in view of the change from the language of H. R. 6439, which did so provide, to the language now in the act, invalidating acceptances procured by reason of a prior solicitation. However desirable it may be to prevent the solicitation of acceptances and authorizations from security holders who have not been acquainted with all of the facts pertinent to the reorganization, there seems little reason to permit a prior solicitation to defeat authorizations or acceptances given after all the facts have transpired and after information has been transmitted to the security holders. Consequently, the operation of Section 176 may be restricted by construing the words “by reason of” in the penalizing phrase to invalidate only such acceptances as are shown to have been induced solely by reason of the premature solicitation and not by any other reason. Obviously, any such proof would be extremely difficult since the submittal of the plan indicates the court’s belief in the existence of other reasons for acceptance. The use of the word “invalid” instead of the word “void” in Section 176 makes it at least arguable that if no one objects to the use of the premature consents, a plan approved on the basis of such consents would not be vulnerable because grounded on improper votes. When only one plan is submitted to security holders, as is likely to prove true in most instances, it is improbable that the court will take the initiative in nullifying the acceptances. In any event, if acceptances are ignored as invalid, the court should regard them as not having been voted in good faith, and should disqualify them for purposes of determining the necessary majority. Otherwise, a premature consent would

76. H. R. 6439, 60, c. IV, § 2, II, d, (8)(d) (1937).
77. A plan must receive the approval of two-thirds of the creditors. § 179; infra, p. 599. If more than one plan is submitted, all of course having received the court’s provisional approbation (§ 175), the difficulty of getting the requisite majority may prove insurmountable. Judges are hardly likely to adopt a procedure that will prolong the proceedings; they will probably submit but one plan at any given time. In re Pressed Steel Car Co. of N. J., 16 F. Supp. 325, 327 (W. D. Pa. 1935).
78. § 203.
operate to the complete prejudice of a plan by having the effect of a vote against the plan. 79

II. Socialization

The socialization or democratization of the reorganization process, long an elusive goal for reformers, has in some measure been achieved in Chapter Ten by presenting to investors opportunities for articulate participation. 80 Of course, the traditional inertia and indifference of security holders may deprive some of the reforms of any practical significance. But the Chandler Act cannot, any more than other statutes, coerce recourse to its democratic techniques; its contribution is sufficient in the creation of opportunities for participation. Yet in a few instances, fortunately unimportant, the provisions in the new statute appear to limit the democratic process. These departures involve such provisions as the increase of the amount of petitioning creditors' claims from $1000 to $5000, 81 the right of the court to appoint trustees before a hearing is held, 82 its right to remove trustees without cause 83 and a perhaps undue limitation on the right of bondholders to vote on plans. 84 In the main, however, Chapter Ten has been infused with democratizing ideals. A brief summary of the chronological formulation of a plan, in cases where a trustee has been appointed, will offer a convenient background for a closer study of the individual socializing influences.

Section 169 calls upon the trustee to formulate a plan within a time fixed by the court, which also sets a date for a hearing on the plan, and objections thereto. Notice of the hearing must be given to the debtor, creditors, stockholders, indenture trustee, the S.E.C., and such other persons as the court may designate. 85 The hearing date is then set, and the trustee must notify creditors and stockholders that they may submit to him proposals of their own. 86 After considering all suggestions, the trustee formulates a plan, files it with the court and then the hearing is held, at which creditors may persist in presenting their own plans. After

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79. If not more than one plan is submitted at any given time, the acquisition of requisite consents to a plan should not be more difficult under Chapter X than under § 77B, even though consents are not solicited until a late stage in the reorganization and committees have not been functioning as aggressively as under § 77B. The imposing imprimatur of a court's approval will probably have respectable influence with security holders and the modification of voting requirements will expedite the procurement of consents. See Downtown Investment Co. v. Boston Metropolitan Buildings, Inc., 81 F. (2d) 314, 322 (C. C. A. 1st, 1936).

80. Compare Swaine, supra note 6.
81. § 126; cf. § 77B(a).
82. Supra, p. 578.
83. § 160.
84. Infra, p. 599.
85. § 161.
86. § 167(6).
this hearing the judge may, or must if more than $3,000,000 is involved, submit to the S.E.C. for examination and report such plans as he regards worthy of consideration.\textsuperscript{87} Following the Commission's report or expiration of the time for its submittal, the Judge may enter an order approving such plans as he deems equitable and feasible and may fix a time within which those affected may file acceptances.\textsuperscript{88} The trustee must then send to all creditors and stockholders not only the proposed plans but a summary thereof, approved by the judge, and the report, or summary, of the Securities and Exchange Commission.\textsuperscript{89} Upon acceptance of a plan by two-thirds in amount of the claims filed and allowed, another hearing for consideration of final confirmation is scheduled.\textsuperscript{90} Either before or after confirmation, the court may approve modifications in the plan if no interests are adversely or materially affected. If parties in interest will be adversely or materially affected, a hearing on the modifications must be held and parties in interest given time to reject the modifications.\textsuperscript{91}

\textit{Proposing Plans}

At every step of the proceeding, from the submission to the adoption of plans, democratizing elements have been introduced, by increasing either protection or participation for investors.\textsuperscript{92} Under Section 77B the right to submit plans was confined to groups of creditors or stockholders who could muster substantial percentages of their classes.\textsuperscript{93} To acquire the required percentages, it was normally necessary to form committees. The committees, it is well known, were generally organized at the instigation of the insiders, management or bankers, who controlled the lists of security holders.\textsuperscript{94} To reduce the power of these groups, Chapter Ten throws the door wide open to complete investor participation by permitting any creditor or stockholder to submit proposals and plans to the trustee.\textsuperscript{95} At the same time, upon the recommendation of the S.E.C., the Chandler Act denies similar rights to the debtor, or more precisely, the management.\textsuperscript{96} This denial represents an effort to reduce the symbolic

\textsuperscript{87}. § 172.
\textsuperscript{88}. § 174.
\textsuperscript{89}. § 175.
\textsuperscript{90}. § 179.
\textsuperscript{91}. § 222. A creditor who disapproves of a modification must file a written rejection unless his acceptance was conditional on the absence of modifications. § 223.
\textsuperscript{92}. Cf. Swaine, \textit{supra} note 6.
\textsuperscript{93}. § 77B(d).
\textsuperscript{94}. See statement of S.E.C. Chairman Douglas, \textit{House Hearings} 170.
\textsuperscript{95}. § 167(6). In accord with efforts to strengthen the indenture trustee's participation in the reorganization, § 170 permits him to file a plan when the debtor is left in possession.
strength of the debtor concept by identifying it with the management and denying to the management, which has failed, the status accorded to investors. If any member of the management is a security holder, he will be able to file a plan in that capacity, but the management group as such is denied special recognition. Whether or not the attempt to dispel the debtor myth carries with it tangible benefits, the changes effected in practice are likely to be inconsequential. Under Chapter Ten, as under Section 77B, proponents of plans will probably meet to discuss all proposals. Since by hypothesis the trustee is disinterested and by hope he is independent and impartial, the origin of a particular plan should not carry undue weight with him. Moreover, if the debtor has a right to be heard on all matters and if the managers may submit plans as stockholders or creditors, little is left of the proposed distinction. And since there is no objection to organization among security holders, management may be expected to present a collective plan, with all the prestige that the position gives it. The attempt to destroy influence of management is completely frustrated by Section 169 which permits the debtor, along with creditors and stockholders, to propose a plan after the trustee files his. The result thus attained seems less desirable than permitting the "debtor" to file a plan immediately along with security holders, since strict adherence to the letter of Section 167 would result in postponement of the "debtor's" plan until after the trustee's plan has been submitted. An honest management, familiar with the business, may have beneficial influence in the consideration and drafting of a plan, before the trustee has been committed to a definite proposal. In practice, the restrictions of Section 167(6) will probably be ignored and management permitted to file plans because of the expedience of presenting all proposals to the trustee before he files his own plan. The effort of the Securities and Exchange Commission to weaken the identification of management with the corporate entity could have been more successfully realized by abandoning the use of the word "debtor" when management was meant and by limiting "debtor" to references to the corporate entity as the sum total of all investor interests.

Hearings, Intervention and Labor

In contrast to the formal limitations on the right to be heard in Section 77B proceedings, Chapter Ten permits the debtor, indenture trustee, and any creditor or stockholder to be heard on all matters. In addition, Chapter Ten, like 77B, authorizes the judge to permit interested parties, for cause shown, to intervene generally or specially. Although the existence of a significant distinction between the "right" to be heard

97. § 206.
98. Compare § 77B (c) (11) with § 206 of Chapter X.
99. Ibid.
and the right to intervene has often been assumed, it is probable that
Chapter Ten erases whatever distinction, if any, existed under Section
77B, and makes the right to be heard and the right to intervene substan-
tially indistinguishable. The essential distinction between the two rights
under 77B was said to lie in the attachment of a privilege to appeal to,
and only to, the right to intervene. The right to be heard was therefore
considered an inadequate substitute for intervention because it did not
carry similar appellate privileges. But the cases relied upon for this
conclusion all seem to indicate not that the right to be heard does not
carry with it a privilege of appeal, but that the privilege of appeal is
denied only when the right to be heard does not exist. Section 77B(c)-
(11) conferred upon creditors and stockholders the right to be heard
on the permanent appointment of the trustee and the proposed confirma-
tion of the reorganization plan and, upon granting of a petition to in-
tervene, on such other questions as the court might determine. Creditors
or stockholders under 77B therefore had a right to be heard on only
two questions; on other questions, any creditor or stockholder might be
heard if the court permitted. Security holders were permitted to appeal
without formal intervention on those matters on which they had a right
to be heard and only on other questions, where a mere opportunity
to be heard existed were creditors and stockholders denied appellate
privileges. The Seventh Circuit, where enough cases of this class have
been considered to create a pattern, has consistently dismissed appeals
where formal intervention was not granted and neither the confirmation
of a plan nor the appointment of a trustee was involved, upon the ground
that the creditor had no standing in court as a party to the suit. At
the same time, the opinions of the Court explicitly conceded that a creditor

100. See Levi and Moore, Federal Intervention: II. The Procedure, Status, and
Federal Jurisdictional Requirements (1938) 47 YALE L. J. 898, 935; WEINSTEIN, BANK-
RUPTCY LAW OF 1938 (1938) 229; MOORE, FEDERAL PRACTICE (1938) 2404. In the sub-
sequent discussion, “right” and “privilege” are used synonymously without reference to
Hohfeldian distinctions.

101. Levi and Moore, supra note 100, at 936.

102. Farlee & Co., Inc. v. Springfield-South Main Realty Co., 86 F. (2d) 931 (C. C. A.
1st, 1936). The appellant had filed intervention petitions but they seem to have been
denied. Id. at 934. The appeal was taken from the confirmation of a plan. In In re
 appeals were taken from an order confirming a plan. There is no showing whether any
of the parties had intervened and the court does state that one of the appellants had been
denied intervention. Id. at 941. In In re Day & Meyer, Murray & Young, 93 F. (2d)
657 (C. C. A. 2d, 1938) the court heard an appeal from an order of confirmation by bond-
holders who had not formally intervened, citing In re Barclay Park Corp., 90 F. (2d)
595 (C. C. A. 2d, 1937), wherein the district court’s order of confirmation was reversed.

103. In re Trust No. 2988 of the Foreman Trust & Sav. Bank, 85 F. (2d) 942
(C. C. A. 7th, 1936); In re Milwaukee & Sawyer Bldg. Corp., 79 F. (2d) 478 (C. C. A.
7th, 1935); In re Kenmore-Granville Hotel Co., 92 F. (2d) 778 (C. C. A. 7th, 1937).
is a party to the reorganization as to those matters on which he has a right to be heard. The Court recognized, as an appendage of that right, the privilege to appeal.\footnote{104} In Matter of Kenmore-Granville Hotel Company,\footnote{105} a non-intervenor attempted to appeal from an order of the district court confirming a plan of reorganization. The Court of Appeals dismissed the petitioner's appeal without opinion. The Supreme Court, in its opinion, clearly indicated by reliance on Section 24b of the old Bankruptcy Act that the appeal was dismissed because the appellant, intervenor or not, had to proceed under Section 24b, governing appeals relating to subject matters where the appeal rests within the discretion of the court. The Court of Appeals itself admitted in a later case that it had dismissed the Kenmore-Granville appeal in the exercise of its discretion under Section 24b and declared, as it had previously admitted, that on those matters as to which creditors have a right to be heard, they have a privilege to appeal.\footnote{106} Thus, the right to intervene is no more potent than the right to be heard, when in fact the statute confers a right to be heard. The right to intervene is greater than a "right" to be heard only when the right to be heard does not exist. Since Section 206 of the new Act gives the "debtor, the indenture trustee, and any creditor or stockholder" the right to be heard on all matters, the privilege to appeal will exist as to all matters unless the courts, distressed by the possibilities of numberless appeals by creditors having trifling financial interests, abandon the structure erected by the Seventh Circuit Court of Appeals.\footnote{107} If the privilege to appeal is permitted to follow the right to be heard, formal intervention will be unnecessary except for those who do not have a right to be heard and except for those who want to avail themselves of prerogatives, other than appeal, which may be incident to intervention.\footnote{108} The act of a court in suffering someone to be heard, when that someone did not have a right to be heard, does not serve as a substitute for either that right or formal intervention. If the court wishes "to hear him as an adviser, controller, or representative," it may do so, but this privilege

\footnote{104} See note 103, supra.
\footnote{105} 297 U. S. 160 (1936), affording, 78 F. (2d) 1018 (C. C. A. 7th, 1936).
\footnote{106} In re Kenmore-Granville Hotel Co., 92 F. (2d) 778 (C. C. A. 7th, 1937).
\footnote{107} It has been held that the right to be heard on all matters, granted to security holders under §77 does not make them parties to the cause. In re Denver & R. G. W. R. R., 13 F. Supp. 821, 823 (D. Colo. 1936). The Denver case is not directly applicable to the discussion here because, apart from its being a §77 case, it did not involve the privilege to appeal. The danger of appeals by those representing minute claims is no greater than under §77B because all appeals involving less than $500 require allowance of the appellate court. §24; see Gerdes, supra note 68, at 25. Moreover, one who does not exercise his right to be heard should be denied the privilege to appeal.
does not "give him the right to appeal as a party from the decree of the court." This statement, phrased long before the introduction of the Chandler Bill, constitutes a prescient portrayal of the status to be occupied by labor, as representative or economic adviser, and by the S.E.C., as amicus curiae. 

One of the most controversial features of the effort to socialize reorganization proceedings was the attempt to confer upon labor unions, employees' associations and other representatives of those in the debtor's employment, a right to be heard on the economic soundness of any plan. This attempt met immediate opposition based either upon doctrinal doubts as to labor's property interest in its job or on figmentive fears of sit down strikes in court houses and picketing of judges. The resistance to giving labor a forum for the expression of its views on matters that affect its interests as vitally as the interests of investors represents the traditional reluctance to allowing labor a share in shaping policies of industrial control. An employee who has worked at a job for a period of time has supplied "service capital" as his investment in the enterprise. Suspension or reduction of business leads to labor displacement, a loss as great as a loss of invested funds. Labor's interest, time and effort having contributed to the manufacture, distribution and sale of the corporation's products or services, labor should be given an interest sufficient to invest it with a right to be heard on the economic soundness of a plan and other matters. The arguments in favor of giving management a voice, not because of any pecuniary interest in the business but because of its insight and information, would appear applicable to labor, which is further motivated by a sincere desire to secure a corporate structure that has promise of solvency and ability to pay a decent wage. Despite the fact that the proposed "right" would simply have been a recognition of what some courts, without Congressional action, had been doing, it was diluted in the final bill into giving labor an opportunity

110. § 208 specifically denies to the Commission the privilege of appeal. Supra, p. 583. For the amicus curiae characterization see Senate Hearings 11. The hearings also indicate that one of the reasons for denying to labor a right to be heard was the fear that, on the basis of it, labor might gain the privilege of appeal. See colloquy between Congressman Celler and Chairman Douglas, House Hearings 192.
111. H. R. 6439, c. IV, § 2(II) h(8) (1937).
113. See Green, Case for the Sit-Down Strike (March, 1937) 90 New Republic 199.
114. This view is expressed in the foreword of an annual report issued by Johns-Manville Corporation to its employees. (1938) 46 Monthly Lab. Rev. 1147.
115. Statement of Commissioner Douglas, House Hearings 195. In some instances, judges have appointed representatives of labor on the directorial boards of the reor-
to be heard if the judge, upon cause shown, so permits. Chapter Ten therefore does little to recognize explicitly that labor has any claim on the industrial organization by virtue of a contribution different from, but equal to, that of security holders.

Organized employees will have a more advantageous status than unorganized employees in reorganization hearings. Where labor has a collective bargaining contract with the debtor, it can probably come into the proceeding as a creditor within the meaning of Section 106, entitled not only to be heard as a matter of right but to vote upon the plan of rehabilitation. Labor has other rights under Chapter Ten. Section 272 embodies the now conventional provision preserving to employees the right to join unions of their own choice. The same section also protects employees in their refusal to join, or to remain members of, a company union. Thus, the section explicitly destroys the binding nature of membership in a company union and implicitly protects contracts of legitimate unions by not guaranteeing the right of employees to remain outside of non-company unions. Despite the liberality of the labor provisions, attempts will no doubt be made under Chapter Ten, as they were under 77B, to use the reorganization machinery for insulation from disturbing labor problems or for termination of annoying union contracts.

Although as a matter of statutory construction, the perfunctory rejection of labor contracts would not be impossible, it would, as a matter of practical expediency, be impolitic. Contracts between employers and employees represent dynamic relationships; the rejection of such contracts does not end the relation but merely begins a new phase, a phase that may be marked by compromise or strike, contract or strike. Since the reorganization proceedings probably do not deprive labor of rights granted it by state, or other federal laws, the rejection of such contracts should

organized corporations. In the Matter of Pettibone Mulliken, Bankruptcy Docket No. 61011 (E. Div. N. D. Ill. 1937). Congressman Celler stated that labor unions might be included by court order within the class of persons to whom notices were to be sent under what is now § 120, and might be considered parties in interest within § 207 and permitted to intervene. House Hearings 191, 192.


117. § 77B(1), (m), 11 U. S. C. § 207(1), (m) (1934) ; § 77(p), (q), § 11 U. S. C. 205(p), (q) (1936).


119. Section 70 permits trustees to reject or assume executory contracts; § 216(4) permits a plan to contain provisions rejecting any contract not in the public authority.

be preceded by hearings and conferences to canvass the necessity for, and consequences of, rejection. Nor should the operation of the debtor under the aegis of the court deprive labor of its right to protest, before the appropriate administrative tribunal, the management's unfair labor practices. In one case at least, this privilege was rendered meaningless by a court which refused to make the reorganized corporation expressly answerable for the debtor's unfair labor practices, by professing its inability to formulate another plan and by protesting the inexpediency of modifying a plan for which the requisite acceptances had already been obtained. The "public policy" concept in Chapter Ten can reasonably be utilized to prevent such results in the future by requiring the adjustment of all labor difficulties before the final consummation of any plan.

Information to Investors

One of the most effective weapons of the reorganization managers was their control over security lists. In reorganizations, either in equity or 77B, the committee representing management and bankers had almost exclusive access to the names of security holders, making it possible for the committee to communicate with investors long before opposition groups were even organized. Chapter Ten reflects the belief that increased knowledge both of company affairs and the identity of contemporary investors, by increasing opportunities for independent organization, is a most effective antidote against management's self-perpetuating tendencies. It establishes a theoretical level of equality by making the names of investors accessible to all security holders. When a trustee is appointed, he must file in court a list of all creditors. If the judge believes that a list of security holders in another's possession is necessary to complement the trustee's list, the judge may order the possessor of the list either to produce it or to make it available for use. The list compiled by the trustee is open to inspection by bona fide security holders on such terms as the court may prescribe. This latter qualification, that the court may prescribe conditions for use of the lists, is but a precautionary phrase empowering the court to demand proof that the lists are

123. For amplification of "public policy" see infra, p. 607. In the Freundlich case, cited supra note 118, the plan provided that the order of the N.L.R.B. should be of full force and effect against the new corporation. See 2 N.L.R.B. 802, 804 (1937).
124. Spaeth and Friedberg, Early Developments under Section 77B (1935) 30 ILL. L. Rev. 137, 145; statement of Chairman Douglas, House Hearings 188.
125. §§164-166 establish and qualify the rights of security holders to use lists.
126. When the debtor is left in possession, it must file not only a list of creditors and stockholders but detailed schedules of its property. § 163.
not to be misused by reorganization racketeers or by profiteering peddlers of "sucker lists." The court may even deny to bona fide security holders the right to inspect the lists if, instead, it allows the security holder to communicate with the other investors through the offices of the court. This experiment, initiated in New York by Judge Lockwood, prevents the misuse of the security lists while at the same time permitting literature to be freely transmitted to investors on the lists.\(^{127}\)

Equally as important as the list sections of the Act are the report provisions, which are designed to ensure that both the court and security holders will be supplied with information about the status of the debtor. When a trustee is appointed he must submit a brief statement of his investigation of the property, liabilities and financial condition of the debtor, and a recommendation concerning the desirability of continuing the operations of the corporation. The language of Section 167(5) is destined to create some difficulty in determining whether the report mentioned therein must be submitted in every case in which a trustee is appointed or only in those cases where an investigation is ordered pursuant to subsection (1). That the report referred to in subsection (5) is unconnected with any investigation under the first subsection would seem to follow from the separate provision for a report in subsection (1). Moreover, the report required under subsection (1) is designed to disclose whether there has been any misconduct on the management's part, and is to be submitted to the court only; the report described in subsection (5) would seem to have as its primary reference a consideration of the debtor's condition, and is to be sent not only to the judge but to security holders and others who desire to use that information before or after plans are submitted.\(^{128}\)

Another step in the enlightenment of investors is taken under Section 190, which provides that the trustee or debtor in possession must file annual reports, copies of which are to be sent to security holders. And Section 189 permits the court to demand interim reports of the debtor's operations, the reports to be open to inspection at all times by parties in interest. The progress of the debtor is so important that monthly earning reports should be required. Especially in the case of debtors in possession, where the hazards of disastrous financial management are particularly great, should monthly histories of the company's operations

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be furnished. The management should be obliged to file periodical statements of receipts and disbursements, setting forth all items of loss and showing the advisability of continuing the business in the light of results achieved and anticipated.\textsuperscript{129} Regular exposure of the affairs of the debtor and the history of the management's operations would do much to ensure honest administration.

\textit{Claims and Votes}

The immediate objective of any reorganization proceeding is to obtain the necessary number of consents. Although a court may force a plan upon an unwilling majority, its indisposition to act under a section of doubtful constitutionality and its inclination to respect the judgment of security holders will ordinarily operate to prevent confirmation of a plan that has not received the requisite number of consents.\textsuperscript{130} The procedure for procuring the necessary number of favorable votes is therefore of no little importance. In the history of early reorganizations, the right of an indenture trustee to file claims on behalf of security holders who had not filed on their own behalf was, for some time, in doubt. Although the urge to protect uninformed bondholders was ultimately strong enough to win judicial recognition for the trustee's right to file claims for all bondholders, subject to reduction to the extent of claims filed by the holders themselves,\textsuperscript{131} the Chandler Act sought to make the existence of this right unequivocal in Section 198. The act tried to do even more by modifying the calculation of voting majorities to favor the approval of the plan. Since Section 77B(e)(1) required consents of 2/3 of all claims allowed, and since claims filed by the trustee were "allowed claims," the consents of 2/3 of all creditors, and not only of those who filed individual claims, were necessary. Adoption of such a majority standard, which required balloting by bondholders, including the indifferent or ignorant, unknown or unlisted, made difficult the task of getting the requisite number of consents for even the fairest of plans.\textsuperscript{132} Such diffic-

\textsuperscript{129} Rule X-14 of Bankruptcy Rules (S. D. N. Y. Sept. 28, 1938) requires trustees and debtors to file monthly reports and summaries. The report must include a classified statement of receipts and disbursements, indebtedness incurred, credit extended, obligations assumed and such other matters as the judge may specify. The S.E.C. may recommend the forms of reports. § 190. See also (April 27, 1936) \textit{TmE MAc.} 72. The reports should, of course, be available for examination to all securityholders and the S.E.C.

\textsuperscript{130} \textit{In re} Tennessee Publishing Co., 81 F. (2d) 463 (C. C. A. 6th, 1936), \textit{aff'd on other grounds}, 299 U. S. 13 (1936); \textit{Texas Hotel Securities Corp. v. Waco Development Co.}, 87 F. (2d) 395 (C. C. A. 5th, 1936); see \textit{In re Granville \& Winthrop Bldg. Corp.}, 87 F. (2d) 101, 102 (C. C. A. 7th, 1936).

\textsuperscript{131} \textit{In re} Allied Owners' Corp., 74 F. (2d) 201 (C. C. A. 2d, 1934); (1935) 2 U. of CHL L. REv. 644.

\textsuperscript{132} \textit{Report of Special Counsel to Senate Committee}, supra note 14, at 34.
culties could have been avoided by permitting the trustee to vote on behalf of non-voting bondholders, but reluctance to permit the modification of creditors’ rights by third persons, distrust of the corporate trustee’s ability to perform the function properly, and doubt as to the desirability of imposing unforeseen fiduciary obligations upon trustees participating in the formulation of reorganization plans led to general denial of the trustee’s right to vote. To obviate the consequences of making the total outstanding debt the basis for majority computations while denying voting privileges to the indenture trustee, a proviso was added to Section 198 to the effect that “in computing the majority necessary for the acceptance of the plan only the claims filed by the holders thereof, and allowed, shall be included.” While this section facilitates the securing of consents, it severely reduces the number of bondholders entitled to vote on a plan. Section 179 provides that the consents of 2/3 of the claims allowed shall be necessary for adoption of the plan. Since Section 198 provides that only claims filed by individual bondholders and allowed by the court shall be taken into consideration in determining the voting base, the conclusion necessarily follows that only those who filed individual claims are entitled to vote. Were Sections 179 and 198 construed not to limit the voting basis in this manner, paradoxical results might follow, for a plan could receive the approval of 2/3 of those whose claims are counted within Section 198 and yet not 2/3 of the total number of votes cast by all security holders.

The effect of Section 198 is to lead to an unnecessary limitation on the democratic techniques which the draftsmen otherwise sought to introduce. Experience has shown that many bondholders are either indifferent or rely on corporate trustees to file claims for them, so that the number of self-filers is likely to be small. To limit the right to vote to this self-filing group would, in many instances, mean that the vote was not representative, and would make it possible for an extremely small proportion of an entire bond issue to reach decisions conclusive not only on the indifferent non-voters but upon those who were not aware they were losing their right to vote when they permitted the trustee to file for them.


134. Gerdes, supra note 68, at 456. The task of filing claims of individual security holders having been made more difficult under Chapter X of the Chandler Act (§§ 57, 196), it may be expected that the trustee will be relied upon to safeguard the interests of bondholders. Heuston, Corporate Reorganization Under Chapter X of the Chandler Act (1938) 38 Col. L. Rev. 1199, 1223, n. 122.

135. This argument presupposes that bondholders are aware that the trustee may file for them and yet excusably unaware that only self-filers may vote, a limitation which did not exist in the practice under §77B. Supra, p. 599. It must be conceded, however, that the rubric that everyone is presumed to know the law may be pressed to the point of expecting bondholders to know that their non-filing will disenfranchise them.
It may be urged that such a result will not operate to the noticeable prejudice of security holders, because the interests of all parties are still protected by a judicial, and sometimes, in addition, an administrative agency, which passes upon the fairness of a plan before sending it out for acceptances. But however genuine the protection afforded by a court’s informed and impartial appraisal of a plan, limitations on independent expressions of creditors’ views should not be unnecessarily imposed. The considered judgment of all bondholders, and not only of those who filed, although the expressed right of the trustee to file made it unnecessary for them to do so, should be weighed in determining whether a plan has been accepted. Moreover, the method of calculation established in Chapter Ten unduly favors opponents of a plan by treating indecision or indifference like opposition. A more familiar democratic technique should be adopted, that of permitting all bondholders to vote, whether or not they filed claims for themselves, and of calculating the requisite majority on the basis of the number of votes cast. This technique would not make a neutral silence tantamount to a negative vote nor innocent reliance upon a trustee’s duty a disenfranchising pitfall. Amendment of Sections 179 and 198 to avoid this paradox of disenfranchisement would be desirable. Failing such amendment, it might still be possible to avoid either of these results by arguing that since the trustee files as agent of the bondholders, the act of voting by the security holders is merely a reassertion of their claim, and they should be considered to have filed within the intendment of Section 198.

Fair Practices

The purge of the reorganization procedure has not stopped with management and bankers but has extended to any parties violating the ordinary standards of investor morality. Under Section 77B some courts felt themselves powerless to dispose adequately of cases wherein claims were purchased for the purpose of blocking reorganizations. Chapter Ten renders such tactics innocuous by permitting the judge, for the purpose of determining the requisite majority for acceptance of a plan, to disqualify any vote not exercised in good faith. Like good faith in filing of petitions, good faith in accepting or not accepting a plan is a concept of uncertain content. As a minimum requirement, the courts should

136. Texas Hotel Securities Corp. v. Waco Development Co., 87 F. (2d) 395 (C. C. A. 5th, 1936); cf. Report of Special Master Jacob I. Grossman in In re Hoyne Manor Corp., Bankr. Docket No. 60753 (E. D. N. D. Ill., Jan., 1937) (bondholder denied the right to withdraw either his consent to a plan or his claim when the request was made pursuant to a bargain between the consentor and a committee attempting to block the reorganization), aff’d, 92 F. (2d) 822 (C. C. A. 7th, 1937), cert. dismissed sub. nom. Ex parte Heymann, 302 U. S. 653 (1937).

137. § 203; and see § 221(3).
demand honesty of object and propriety of motive. If the primary purpose of the voter is not the protection of his interest as an investor but the attainment of some private end, if his vote is not based on his views as to the feasibility or fairness of the plan but on a desire to exact tribute by threatening obstruction, his conduct could be characterized as in bad faith. The fact that securities were purchased shortly before the reorganization proceedings or at depressed prices should not foreclose the question of good faith. If, however, the claims were purchased to qualify the claimant for participation in a pending or imminent reorganization, the claimant's objective, the identity of the claimant's associates, as well as the question of whose money was used in payment for the securities, would be material to final determination, because in such cases a finding that the purchase was made to acquire a nuisance value or to create a hold-up would not be unfounded.

138. See Comment (1934) 48 Harv. L. Rev. 283, for discussion of good faith requirement under § 77B. "Good faith" remains undefined under Chapter X, although four instances of a petition not in good faith are set forth in § 146.

It may be argued that honesty and propriety of judgment should be both the minimum and maximum requirement and that consideration of other factors, such as the reasonableness of the objections, would trench too deeply into the rights of security holders. For discussion of whether an unreasonable but honest objector should be recognized see House Hearings 181.

139. Dodd, supra note 43.

140. H. R. 6439, c. IV, § 12(II)c(9) (1937) 65.

the amendment relating to consent was probably designed to avert penalizing those who acquired securities by gift, inheritance or other methods that do not involve fiduciary relations. Its language is broad enough to compel the courts to inquire into every transfer of securities to determine whether it involved the use of inside information or the transgression of fiduciary duties. Perhaps unwittingly and unnecessarily, the section places administrative duty of considerable magnitude upon the judge. The danger that judges, to avoid these administrative burdens, may blink at the fiduciary practices and permit an unexpected expansion of the exception is not illusory. A broader, safer rule has thus been narrowed in scope and made difficult in application. Furthermore, the fact that Section 249 imposes informational requirements only as to securities purchased after commencement of the proceedings and the fact that the second sentence of Section 249 imposes penalties only on transfers after the claimant has assumed to act in a representative or fiduciary capacity may invite misinterpretations and misconstructions. A speculating member of a committee which has not yet contacted security holders might avail himself of inside information to traffic in securities of the debtor. Management, or officers of the debtor, by virtue of their knowledge of business conditions or foreknowledge of a contemplated reorganization, might also transfer claims and securities, later contending that they had not as yet assumed fiduciary or representative capacities; and all of them might contend that since the informational requirements were limited to purchases after commencement of the proceedings, the penalties of Section 249 were also thus limited. This is not to say that Section 249 fails to achieve a worthwhile reform, for it does presage the proscription of practices that amounted to flagrant violations of the fiduciary concept. It does not, however, completely foreclose evasion by sophisticated refinements and subtle impingements.

Fees

Allowance of fees to counsel and committees has become one of the perennial problems of reorganization proceedings. Coincident with the tendency to increase court supervision of the fairness of plans has been

144. These techniques are illustrated under § 77B in Security-First Nat'l Bank of Los Angeles v. Ridge Land & Navig. Co., 85 F. (2d) 557 (C. C. A. 9th, 1936); In re Celotex Co., 12 F. Supp. 1 (D. Del. 1935). To some extent the loopholes of § 249 are closed by § 212 which prohibits trafficking in claims in contemplation of reorganization. Claims purchased in contemplation are to be limited to the actual consideration paid for them. Whether trading in the securities of a subsidiary whose parent is being reorganized will be prohibited is not explicitly determined. See McCaffery, supra note 75, at 659.
the tendency to enlarge the class of those eligible for compensation for their services, and both tendencies reflect an increasing recognition that reorganization should not continue as a monopoly of insiders. Before the enactment of Section 77B, the rights of independent and minority groups to reimbursement for expenses incurred and compensation for services rendered received scant acknowledgment. The language of Section 77B promised greater liberality of treatment for minority groups, but judges, conditioned to management monopoly, unsympathetically construed the statute to minimize the rights of independents.\textsuperscript{4} Chapter Ten, having been drawn to increase investor participation and to permit minority organization, unambiguously recognizes the compensatory rights of minorities doing valuable work, whether such work be in opposition to or in support of a plan. Section 242, one of several sections pertaining to fees, provides, \textit{inter alia}, that the judge may allow reasonable compensation for services rendered in connection with a plan, either provisionally or finally approved by the judge, whether or not it is accepted by security holders. And Section 243 permits the allowance of reasonable compensation for services which contributed to the confirmation, or refusal to confirm, a plan. Independents thus achieve a definite status and may be awarded compensation when their opposition to any plan results in its amendment or abandonment. Although these sections have been denounced as "Christmas tree" gifts,\textsuperscript{146} they are far from that. The language of Chapter Ten allows compensation only for services which are sufficiently effective to result in the adoption or rejection of a plan. Compensation for services that attain tangible results cannot temperately be considered a gift. The identity of an unattached performer in the reorganization arena should not forestall fair compensation for a meritorious performance. Nor will Section 241, which permits the allowance of fees to petitioning creditors, necessarily lead to the filing of involuntary petitions by creditors whose sole object is to obtain fees. The section having been phrased in permissive language, the court may in its discretion deny fees if it dismisses the petition for lack of good faith.\textsuperscript{147}

The most vexing fee problems under Section 77B involved not so much the types of service for which reimbursement should be permitted,\textsuperscript{145} Comment (1936) 3 U. OF CHI. L. REV. 476.

\textsuperscript{146} Statement of Garrett A. Brownback, \textit{Senate Hearings} 91.

but the amounts for which they were to be rewarded. The Chandler Act
does not advance a formula for determining what amounts are to be
allowed, because the reasonable value of services, no less than the qualities
of a reasonable man or the essence of a reasonable regulation are not
susceptible to compression within a formula. Knotty, new points may
appear in the course of administering the fee provisions, but the funda-
mental problem will remain to keep fee allowances from becoming ex-
cessive. Among both lawmen and laymen the fees demanded by reor-
ganization counsel have been caustically condemned as confiscatory and
exorbitant. But the excessiveness of allowances and the amounts spent
for legal services in a reorganization are not so much the result of im-
moderateness of single requests as of their collective number. Numerous
counsel intervene to represent numerous parties and numerous requests
for fees are filed. Each counsel, adopting as the pecuniary standard for
his requests a figure that will compensate him for his time and office
overhead, will then take into consideration the number of hours spent
on the case, rather than the intrinsic value of his contribution to the
reorganization. The problem of preventing the estate from being dis-
tributed among counsel becomes especially acute under Chapter Ten,
because of its provisions expanding the class of eligible recipients of
fees, and its solution may require the disallowance of fees for all services
except those which represent some definite individual contribution to the
approval, adoption or rejection of a plan or to the administration of the
estate. This policy would concede the desirability of permitting free
intervention for all, but would not concede the desirability of compensating
those who either have nothing to contribute to the reorganization apart
from their attendance at hearings and conferences, or whose contributions
are duplications of other services. In deciding whose services were not
duplicatory, preference would be given to those upon whom primary
responsibility for performing the services rested. Thus, in the adminis-
tration of the estate, the initial responsibility rests upon the debtor or
the trustee, and they should be compensated for their services while dupli-

148. The lawmen: *Arnold, Folklore of Capitalism* (1937) 258; Remington, *Some
Poor Lawyer* (July 11, 1936) Bus. Week 39; (Nov. 4, 1935) Time Mag. 74; Markey,

149. Some courts have found it expedient to determine the percentage of the debtor's
assets to be allocated among all claimants before determining individual allowances.
*In re 211 E. Delaware Pl. Bldg. Corp.* 13 F. Supp. 473 (N. D. Ill. 1936); *In re Irving
Austin Bldg. Corp.* 22 F. Supp. 583 (N. D. Ill. 1937); *In re 101 W. Thirty-first St.
Corp.* C. C. H. Bankr. Serv. ¶ 4152 (S. D. N. Y. 1936) (6% allowed); *In re Madison
Corp.* C. C. H. Bankr. Serv. ¶ 4965 (S. D. N. Y. 1938) (court fixed 6% of value
of the outstanding securities as the maximum total). By adopting, as a matter of local
district court rules, a percentage scale to guide, but not to bind, the judges, the courts
may give a greater prophylactic effect to that technique.
cators should be denied allowances.150 If those primarily responsible fail to perform their duties, or are only prodded into performance by others, those others should be compensated. The considerations relevant to compensation for services rendered in administering an estate are equally relevant to the consideration of services connected with plans. The problem of duplicating services seems no different in this connection and should be treated in the same manner. If it be argued that this approach will subvert the purpose of the Chandler Act by discouraging independent participation by those dependent on court allowances for their compensation, two answers may be made: first, it was probably the intention of the Commission in proposing, and Congress in enacting these free-participation provisions not that every security holder would intervene, but only those who felt they had something to offer. For those that do have something to offer, the compensation provisions and procedure are sufficiently wide. Moreover, contingent fees are not so strange to the legal profession in other fields as to make them entirely unacceptable in reorganizations.151

More important for independents than a change in statutory provisions would be a change in judicial attitude. In 77B cases (and these are rare indeed) where independents were compensated for services admittedly beneficial, the courts generally adopted a most grudging attitude and made allowances that seemed, on the basis of the reported facts, to compare unfavorably with allowances made to others in the cause.152 To carry over into Chapter Ten this discriminatory attitude would be to flaunt the legislative intent and to frustrate the equalizing attempt. A realistic attitude would require the reorganization atmosphere to be cleared of

150. See In re United Cigar Stores Co. of Am. 21 F. Supp. 869, 875, 879 (S. D. N. Y. 1937).


152. In re Consolidated Motor Parts, 85 F. (2d) 579 (C. C. A. 2d, 1936) (compensation for an objector must bear fair proportion to the claims he represented); In re Center Court Apartments, 22 F. Supp. 675 (W. D. Pa. 1937) (objector who successfully opposed an initial, and unsuccessfully opposed a final, plan was allowed only expenses); In re Wilsea Works, C. C. H. Bankr. Serv. ¶ 4051 (W. D. N. J. 1936) (the court queried whether successful objectors would be compensated). The timid hope has been expressed that under the new act, judges will not make allowances to hallowed names that perform formalities, but should pay for services actually rendered, though counsel be "actuated by the mundane desire to make a living." Jackson, A Realistic Approach to Amendment of §77B of the National Bankruptcy Act (1937) 3 Corp. Reorg. 311, 320.
the distinction between services rendered in the interest of the estate and services in the interest of a client, and it is around this distinction that disallowance to independents have been rationalized and allowances to committees justified. Lawyers render services to clients who are interested in preserving their own interests, but whether the clients hold a substantial percentage of the securities or but a qualifying security, the place of the client in the reorganization picture is his primary consideration. The judicial assumption that only counsel representing aggregated interests work for the benefit of the estate seems completely unfounded. In fact, when counsel represents but a modest financial interest, he may have a stronger incentive to think in terms of the entire estate because of his effort to fortify his position and to make conspicuous his contribution to the reorganization. In connection with all aspects of the reorganization procedure other than fees, courts and counsel for large committees have taken the attitude that reorganization is essentially a bargain between owners, each guided by self-interest and each looking out for himself. Yet with respect to fees, at least where independents are concerned, counsel are expected to perform services for the benefit of the estate rather than for their clients. If any distinction is to be drawn, it is between services to the client which contribute nothing at all to the reorganization of the property and services which contribute something. It is this distinction that the Chandler Act suggests.

Public Policy, Post-Reorganization Control and Federal Incorporation

The interest of the public, suggestions of which permeate all of Chapter Ten, is bluntly projected into Articles X and XI. The statutory concept of public interest, first introduced in railroad reorganizations under Section 77, has been changed to "public policy" and its generous, although ambiguous, proportions have been outlined in Sections 216 and 221. Before a reorganization is consummated, not only must the judge rule that the identity, qualifications and affiliations of the management of the reorganized company are consistent with public policy and the interests of security holders, and not only must the plan contain provisions that satisfy similar tests with respect to the manner of selecting directors, officers or voting trustees, but the charter of the reorganized corporation must include provisions prohibiting the issuance of non-voting stock, protecting preferred stockholders in the event of dividend defaults, pro-


scribing for the equitable distribution of voting power in the reorganized company and, as to corporations with liabilities of $250,000 or over, provisions requiring periodic reports to security holders. The compulsory provisions to which a corporation must assent represent a mild measure of federal control of the corporate structure after one, and before another, reorganization. The vagueness and vagrancies of Section 216 require, however, the enactment of an amendment or an implementing statute which will clarify the references to "sound business and accounting practices" and particularize the generalities of "public policy."\(^{155}\)

The inflorescence of a public policy concept in Chapter Ten has the additional merit of presenting an opportunity for ushering in federal incorporation on a small, experimental scale. Federal incorporation itself has a long history of scholarly discussion and Congressional inactivity, the first borne of misgivings as to its constitutional validity and the other, of misgivings as to its practical desirability. Without doing violence to either its constitutional or practical apprehensions, Congress could create a laboratory for studying the effects of federal incorporation by requiring corporations to accept federal charters as a condition of their reorganization under the federal acts. Insofar as the Borah-O'Mahoney\(^ {156} \) bill for federal licensing embodies reforms of the corporate structure, its provisions might serve as a pattern for a supplement to Chapter Ten. Without changing, but only filling in, the framework of Section 216, investors and creditors could be protected by explicitly placing management under fiduciary obligations, establishing qualifications for officers and directors, outlawing opportunities for questionable directors' profits, ensuring effective publicity by frequent and complete reports, eliminating non-voting securities and attending to the abuses which relaxed incorporation laws have made it impossible for states to handle. The answers to many constitutional and political problems would have to be formulated. Whether charters should be imposed upon all corporations, in reliance upon the bankruptcy power, or only upon those engaging in interstate commerce;\(^ {157} \) whether imposition of a federal charter should obviate the necessity for state charters;\(^ {158} \) whether state charters should be permitted, but limiting the free right to incorporate by requiring the reorganized corporation to...


accept a charter from the state wherein it has its principal place of business or its principal assets,\textsuperscript{159} whether all reorganized corporations or only those having liabilities of certain amount shall be subjected to the federal charter requirements; what, if any, advantages should be bestowed on federally chartered corporations to compensate for their being subjected to more stringent corporate regulations than other corporations, must all be considered. The proved ability of legislators to drift indefinitely between competing orientations might make it desirable to define public policy and sound business practice without awaiting the enactment of a federal incorporation law for reorganized corporations. Some of the benefits incidental to incorporation could thus be obtained before the Congressional decision on more controversial issues of federal incorporation.

\textsuperscript{159} Perhaps this can be done under § 216 as it stands. Just as shopping around for friendly jurisdictions within which to file reorganization petitions has been limited by § 128, so resort to "corporate Renos" may be limited by applying the theory of § 123 to the public policy concept of Chapter X.