1 WHY BUSINESS INSOLVENCY LAW?

Let's begin by asking *why* business insolvency law? That is, why do we need any special laws dealing with business insolvency when we already have laws that allow creditors to collect on their unpaid debts?

When America became an independent nation, business bankruptcy and bankruptcy in general were one and the same. The 1800 Bankruptcy Act followed English traditions and made bankruptcy a process that only applied to "merchants" – individuals engaged in business.[1]

Early English laws were mostly aimed at ensuring equal collection by creditors. The fear was that debtors would play favorites or hide assets. Bankruptcy was a means to bring the debtor-merchant and his or her finances out into the open.

That gives us some insight into why we need business insolvency laws in addition to general creditor collection laws. Collection laws act as an adjunct to general contract law and are typically focused on a single creditor collecting debt from a single debtor.[2] In this country, some states prohibit favoring one creditor over another but many other states affirmatively permit it. In the second sort of jurisdiction, the same problems that motivated Elizabethan parliaments to enact bankruptcy laws clearly remain. Debt collection law in general is focused on providing a remedy to a creditor, rather than to creditors writ large.

[1] H. H. Shelton, Bankruptcy Law, Its History and Purpose, 44 *Am. L. Rev.* 394, 399–400 (1910). See generally Bruce H. Mann, *Republic of Debtors: Bankruptcy in the Age of American Independence* (Cambridge: Harvard University Press, 2002). Cf. Emily Kadens, The Pitkin Affair: A Study of Fraud in Early English Bankruptcy, 84 *Am. Bankr. L.J.* 483 (2010).

[2] E.g., *Faith Properties, LLC* v. *First Commercial Bank*, 988 So. 2d 485, 491 (Ala. 2008).

https://doi.org/10.1017/9781108100069.002 Published online by Cambridge University Press

But the widespread embrace of limited liability business entities – starting with New York's adoption of the French limited partnership concept in 1822,[3] and accelerating full speed with the 1990s invention of myriad unincorporated limited liability entities – necessarily split business and personal insolvency law. Once we moved beyond sole proprietorships and general partnerships, the failure of a business no longer meant the principals would be locked up in debtors' prison or their families hounded into the poorhouse. And thus business insolvency law truly begins as a distinct topic at this point.

Today there are innumerable business entities. There is an enormous variety of types of corporation alone – traditional business corporations, professional corporations, charitable corporations, mutual benefit corporations, religious corporations, cooperative corporations, corporations sole,[4] and even Native American tribal corporations.[5] Then there are the partnerships: limited partnerships, limited liability partnerships, limited liability limited partnerships, joint ventures, and of course, venerable old general partnerships. The latter can be formed intentionally, or by accident or inattention – more likely the latter these days. Limited liability companies, and their cousins, series limited liability companies (each "series" within these is almost, but not quite, a separate entity), round off the field.[6]

The equity and transparency concerns remain, but the commonly touted "fresh start" considerations fall by the wayside once the business

[3] *Ames* v. *Downing*, 1 Bradfr. 321, 329–32 (N.Y. Surr. 1850). See David C. King, Regulation of Foreign Limited Partnerships, 52 *B.U.L. Rev.* 64 (1972).

[4] Cal. Corp. Code § 10002.

[5] That is, corporations formed under tribal law. Many tribes also provide for limited liability companies. See also 25 U.S.C. § 5124 (section 17 of the 1934 Indian Reorganization Act) ("The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe …"); Evan Way, *Raising Capital in Indian Country*, 41 *Am. Indian L. Rev.* 167, 175 (2016). ("A section 17 corporation must be wholly owned by the tribe, which precludes any capital investment into the corporation from potential non-tribal investors.")

[6] Del. Code Ann. tit. 6, § 18–215. Illinois, Iowa, Nevada, Oklahoma, Tennessee, Texas, Utah, and Puerto Rico have also enacted series or cell LLC statutes. The California Franchise Tax Board has taken the position that each series in a series LLC is a separate entity and therefore must file its own tax return and pay its own LLC annual tax and fee, if it is registered to do business in California, which places a pretty significant damper on their use for any interstate businesses. Protected cells in insurance companies are somewhat similar.

is legally distinct from the founders.[7] In the 1980s this led a host of bankruptcy scholars – along with a few well-intentioned interlopers – to propose ways in which chapter 11 of the Bankruptcy Code, enacted in 1978, might be trashed in favor of more "contractual" solutions.

No doubt these efforts were at least in part consistent with the larger deregulatory agenda of the early, "unreconstructed" law-and-economics movement, and its real-world allies in the Reagan Administration, the idea being that no statute or other regulatory scheme could be justified if the "same thing" could be achieved by "private ordering." There is no indication that practicing lawyers or legislators ever took these academic schemes too seriously.

But hundreds of pounds (or kilograms) of law review articles did reveal a general consensus that "common pool" problems might justify business bankruptcy or insolvency laws.[8] Namely, just like a bank run, the rush of individual creditors to collect from a distressed debtor might ultimately destroy value for everyone.[9]

In reality, the much-ballyhooed common pool problem was simply a fancy new name for a long-recognized issue. In the early 1930s, Learned Hand pithily observed that in the absence of a railroad receivership process that addressed all creditors at once, those creditors would levy against the debtor-railroad "until the road was stripped to the bone."[10] Judge Hand crucially did not state that federal bankruptcy law must solve this problem, but rather that some sort of collective insolvency process was needed to supersede routine debt collection law.[11]

The law-and-economics scholars of the Reagan era focused a bit too narrowly on this specific issue, neglecting other benefits like the efficiency of gathering litigation in a single forum, and applying a

[7] Charles Seligson, Major Problems for Consideration by the Commission on the Bankruptcy Laws of the United States, 45 *Am. Bankr. L.J.* 73, 106 (1971).

[8] Largely beginning with Thomas H. Jackson, The Logic and Limits of Bankruptcy Law (1986), and his earlier law review articles that provide the basis for the book. Jackson's picture of bankruptcy law is bottomed on a belief that bankruptcy should be a transparent procedure that mirrors non-bankruptcy law, and his strange conception of debtor passivity or indifference, in the face of the debtor and its owner's realization that the unsecured creditors are the "true" owners of the debtor.

[9] Vern Countryman, The Concept of a Voidable Preference in Bankruptcy, 38 *Vand. L. Rev.* 713, 728 n. 100 (1985).

[10] Ex parte Relmar Holding Co., 61 F.2d 941, 942 (2d Cir. 1932).

[11] David Gray Carlson, Philosophy in Bankruptcy, 85 *Mich. L. Rev.* 1341, 1346 (1987).

https://doi.org/10.1017/9781108100069.002 Published online by Cambridge University Press

single set of rules to a company's collapse, regardless of whether its assets might be located in Irvine or Nashua. There is also some benefit in triggering every creditor's right to collect simultaneously, once a sufficient number have begun to collect.

The simultaneous treatment of all creditors not only addresses the "common pool" problem, but also advances governmental policies like protection of employees or other creditors with less bargaining power than banks or bondholders.[12] Creditors with defaults that are triggered easily or early could well walk off with all of the debtor's assets, while other creditors face a debtor with doubtful ability to pay, but who has not done enough to default just yet.

As summarized by the Canadian Supreme Court:

> The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise.[13]

In short, once the press of creditors against a business has moved beyond a few raindrops, and appears heading toward a deluge, there are clear benefits in moving to a collective insolvency procedure in place of traditional, individualistic debtor-creditor law. These benefits are not limited to improving creditor welfare, but advantage society as a whole.

Moreover, by conceiving of the insolvent firm as a "pool," one is naturally drawn to see everything in liquidation terms. A firm operating as a going concern does not pay from its asset pool, but rather pays from the income it generates. Insolvency law is as much about restructuring as it is about liquidation, and it is not clear that liquidation is necessarily the correct starting point for all analyses in this area.

Where, then, is the line between these two types of law? That is, what makes an insolvency law an *insolvency law*?

[12] Donald R. Korobkin, Rehabilitating Values: A Jurisprudence of Bankruptcy, 91 *Colum. L. Rev.* 717, 772 (1991).

[13] *Century Services Inc.* v. *Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at ¶ 22.

The issue is one that courts continue to struggle with in the context of chapter 15 of the Bankruptcy Code, where a foreign insolvency proceeding can be "recognized" – that is, given effect under US law – only if it is "a collective judicial or administrative proceeding in a foreign country."[14] While the second half of the definition is self-evident – France counts, Freedonia does not – what it means to be a "collective" procedure is often uncertain.

In the chapter 15 context, courts considering whether a proceeding is "collective" often state that the key question is whether the proceeding "is one that considers the rights and obligations of all creditors. This is in contrast, for example, to a receivership remedy instigated at the request, and for the benefit, of a single secured creditor."[15]

There is, of course, a good bit of space between a proceeding that addresses "all creditors" and one that addresses a single creditor.[16] In the United States, it is quite common for prepackaged chapter 11 cases – where bondholders agree to a reorganization plan before the case is filed – to convert bondholders to shareholders while leaving all other creditors, especially trade creditors, untouched. Few would doubt that this is nonetheless a "collective" proceeding.

In addressing "collectivity," it arguably makes more sense to consider if the proceeding adjusts one or more classes of creditors, as contrasted with a proceeding that works as a collection device for a single creditor or with respect to a single debt.[17] Thus, some forms of receiverships clearly are within the scope of this book because they represent a comprehensive restructuring of at least an entire class of debt, while other receiverships will not be covered, except in contrast to general receiverships, because I view them as simply one more tool in the debt collection toolbox.[18]

[14] 11 U.S.C. § 101(23).

[15] *In re Betcorp Ltd.,* 400 B.R. 266, 281 (Bankr. D. Nev. 2009).

[16] What it means to "consider" the rights of creditors is also more than a bit vague.

[17] *In re Gold & Honey, Ltd.*, 410 B.R. 357, 370 (Bankr. E.D.N.Y. 2009). ("The Israeli Receivership Proceeding is primarily designed to allow FIBI to collect its debts, and is not a scheme of arrangement or a winding up proceeding, both of which are instituted by a debtor for the purposes of paying off all creditors with court supervision to ensure evenhandedness.")

[18] I also avoid those receiverships that are unrelated to debtor-creditors matters, but instead involve things like regulatory enforcement.

That is, there is necessarily a good deal of line drawing involved here.[19] And some of it is frankly a pure exercise of writer's privilege. I will attempt to draw the line between what is necessary to separate core functions and policies in insolvency law and everything else.

A particularly difficult case is presented by syndicated bank loans. If the loan was made by a single bank, efforts to collect or restructure the debtor's obligations on the loan clearly would fall outside of "insolvency law." Does that answer change when the loan is broken up among dozens of lenders, who may in turn sell their pieces of the loan to other investors, mostly not banks, some of which would never have any contact with the debtor company, at least until default?

This begins to look more like a class of creditors rather than a single creditor. A restructuring of this class that is effectuated according to the terms of the loan – shades of the 1980s law-and-economics dream here – I view as not implicating insolvency law. Thus, when the loan agreement provides that a deal agreed to by two-thirds of the loanholders will be binding on the rest is outside of my field of vision in this book.

But if that same deal is imposed upon the loanholders by statutory law or regulation, I suddenly become interested. That is, my focus here is more on the insolvency process that is imposed by law, and less on the process that is simply facilitated by law.

Lots of laws also attempt to steer the outcome of a future insolvency proceeding, but I likewise do not view them as being insolvency procedures themselves.[20] For example, Article 8 of the Uniform Commercial Code, the state law regarding transfers of investment securities, contains elaborate provisions regarding the priority of various ownership interests in securities upon a stockbroker's insolvency. This has led some to term Article 8 an "insolvency law in disguise," although I do not treat it as such in the present work.

On the other hand, my wanderings through state law have disclosed myriad specialized receivership statutes. Many are clearly designed to forestall insolvency proceedings of more general applicability – most

[19] Cf. *Schlesinger* v. *State of Wisconsin*, 270 U.S. 230, 241 (1926). (Holmes, J. dissenting) (The "great body of the law consists in drawing such lines, yet when you realize that you are dealing with a matter of degree you must realize that reasonable men may differ widely as to the place where the line should fall.")

[20] See Ronald J. Mann, The Rise of State Bankruptcy-Directed Legislation, 25 *Cardozo L. Rev.* 1805 (2004).

often those under the federal Bankruptcy Code – from taking hold in a specific industry, or with regard to particular types of firms. I nonetheless view these as insolvency laws, although the line between priority and fully fledged insolvency law might be subtler than this suggests, particularly if the goal of the receivership is to protect some favored group of creditors within the debtor company's capital structure.

The potential sources of American insolvency law are also more diverse than might appear at first blush. Certainly, my search began with federal and state statutes. But then there is the common law of receiverships, compositions, and assignments for the benefit of creditors. In several jurisdictions, including sometimes the federal courts, these procedures appear but fleetingly in court rules, if at all. In other cases – for example, chapter 7 cases of commodity brokers – the statute provides a skeletal outline of the procedure, while rules enacted by the Commodity Futures Trading Commission (CFTC) provide all the real detail of how the process might actually work.

Cutting in the other direction, and as will be discussed in more detail in Chapter 3, several states have statutes on the books that are of questionable applicability. On the face of it, they seem to apply to business insolvency but close examination reveals that the primary remedy is to offer the debtor a discharge – from debtors' prison. Certainly, these statutes would not apply to a corporate debtor – perhaps only a bankruptcy professor would spend time imagining what it would look like to apply such a statute to Lehman Brothers.

Likewise, many of these state statutes date from an age when federal bankruptcy statutes were hardly permanent. While the Supreme Court's preemption jurisprudence with regard to the Bankruptcy Code is unclear and dated, a plausible argument could be made that most state insolvency statutes are in a kind of suspended animation, waiting for a future that may never come, namely the day when Congress repeals the Bankruptcy Code and fails to replace it.[21]

[21] *Stellwagen* v. *Clum*, 245 U.S. 605, 613, 615 (1918).

> In view of this grant of authority to the Congress it has been settled from an early date that state laws to the extent that they conflict with the laws of Congress, enacted under its constitutional authority, on the subject of bankruptcies are suspended. While this is true, state laws are thus suspended only to the extent of actual conflict with the system provided by the Bankruptcy Act of Congress.

In the United States, we face the added challenge that things we might clearly call "insolvency laws" do not necessarily require the debtor to be insolvent. The Bankruptcy Code is the most obvious and direct example.[22]

Section 109 of the Code has no insolvency requirement for filing bankruptcy, save for that in chapter 9, which applies only to municipalities.[23] This contrasts with the law of almost every other jurisdiction.

For example, the Companies' Creditors Arrangement Act, Canada's equivalent of chapter 11, defines a "debtor company" to include only those companies that are insolvent or have committed "acts of bankruptcy," as defined under section 42(1) of the Canadian Bankruptcy and Insolvency Act, which means either being insolvent or engaging in what amounts to either a fraudulent transfer or a preference.[24]

In contrast, under the American Bankruptcy Code there is not even a requirement that the debtor have any assets to be distributed to its creditors.[25]

Section 109 of the Code also contains no requirement that the debtor be either a US citizen, a legal resident, or otherwise legally domiciled in the United States.[26] Foreign corporations file under chapter 11 with some regularity, either independently or as subsidiaries of American parent companies already in chapter 11.[27]

Nonetheless, there seems no doubt that the Bankruptcy Code and other laws that apply in advance of formal insolvency should be included within the scope of this discussion. Thus, the precise contours of the "law of failure" are somewhat uncertain, and surely subject to

[22] Karen Gross & Matthew S. Barr, Bankruptcy Solutions in the United States: An Overview, 17 *N.Y.L. Sch. J. Int'l & Comp. L.* 215 (1997).

[23] 11 U.S.C. § 109(c)(3). *Connell* v. *Coastal Cable T.V., Inc.* (In re Coastal Cable T.V., Inc.), 709 F.2d 762, 764 (1st Cir. 1983); see also *In re Johns-Manville Corp.*, 36 B.R. 727, 736 (Bankr. S.D.N.Y. 1984). ("Accordingly, the drafters of the Code envisioned that a financially beleaguered debtor with real debt and real creditors should not be required to wait until the economic situation is beyond repair in order to file a reorganization petition.")

[24] Companies Creditors' Arrangement Act, R.S., 1985, c. C-36 § 2 (1); see also Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 §42(1). Cf. Israel Treiman, Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law, 52 *Harv. L. Rev.* 189 (1938).

[25] *Vulcan Sheet Metal Co.* v. *North Platte Irrig. Co.*, 220 F. 106, 108 (8th Cir. 1910).

[26] In re Arispe, 289 B.R. 245 (Bankr. S.D. Fla. 2002); In re Merlo, 265 B.R. 502 (Bankr. S.D. Fla. 2001); In re Xacur, 216 BR 187 (Bankr. S.D. Tex. 1997).

[27] Oscar Couwenberg & Stephen J. Lubben, Corporate Bankruptcy Tourists, 70 *Bus. Law.* 719 (2015).

some debate. Nonetheless, my focus is on the insolvency laws of the nation, as outlined above.

So, we have a workable definition of insolvency for our tour of American business insolvency law, but the careful reader will note that I have studiously avoided defining what I mean by "business." Our tour of business insolvency law will involve the consideration of laws that apply to at least one class of creditors of *for-profit* business enterprises. In some cases, particularly with respect to partnerships, the interaction of the insolvency law with the law that created the business enterprise will also be of interest.

As noted earlier, American law presently provides a plethora of business entities for the would-be entrepreneur. That leaves an equally broad array of entities that might experience financial distress.

While I occasionally note a special receivership provision for co-operatives, or something of that ilk, my focus is on the for-profit firm. Thus, I steer away from charitable and religious entities, and even some not-for-profit enterprises, like hospitals or universities, that operate in something of a gray zone. And I organize most of the discussion around the two most basic entities of American business law: corporations and partnerships. Sometimes I talk about limited liability companies too.

American statutory corporate law seemingly varies quite a bit. The famous Delaware General Corporation Law provides myriad examples of how to express a concept in a particularly confusing way or how to write a phenomenal run-on sentence.[28] Those states that follow the Model Business Corporation Act have statutes of greater readability, without necessarily greater clarity. New York and California provide something in between.

But, at heart, there is little substantive difference in American corporate law as actually applied.[29] And thus, once we get to the point of insolvency, a corporation's state of incorporation – New York, New Jersey, or other – rarely matters, unless the state has a unique, applicable insolvency statute.

[28] Several examples of both can be seen in Del. Code Ann. tit. 8, § 251.

[29] California presents some interesting differences on the point of cumulative voting, but those rules are largely countermanded by the insolvency regimes I consider in this book.

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With partnerships, on the other hand, it matters a good deal on which side of the Hudson the entity was formed.

Partnership law in the United States is based on one of two model statutes – both designed to replace the common law of partnership.[30] Most states, including New Jersey and other important jurisdictions like California, have adopted the Revised Uniform Partnership Act (RUPA). But the older Uniform Partnership Act (UPA), dating from 1914, remains in force in New York and a handful of other states. Because of New York's importance in commerce matters, its continued adherence to the UPA matters a lot, even if more states have gone over to the newer law.

In the insolvency context, the difference between New York and New Jersey law is stark. Both the UPA and the RUPA follow a basic rule that partnership creditors have first crack at the partnership assets upon insolvency.[31]

But the older UPA in force in New York follows the traditional "jingle rule,"[32] with regard to partnership creditors' ability to get at the partner's personal assets. That rule, as an early author explained, might be made to run like some jingle, "firm estate to firm creditors, separate estate to separate creditors, anything left over from either goes to the other."[33]

[30] Louisiana provides an additional wrinkle here, with a partnership law that limits the partner's liability to a proportionate share of the total liability. La. Civ. Code Ann. art. 2817. This is not the result of any ancient French influence, but rather a 1980 revision to the partnership law, which extended a rule previously applicable to non-commercial partnerships (an impossibility under the common law) to cover all partnerships. See Magan Causey, Limited Liability for General Partnerships: Another Louisiana Anomaly? 66 *La. L. Rev.* 527, 537–8 (2006):

> [T]here are no documented reasons for the strange liability choice in either the comments to Civil Code article 2817 or Act 150 of the 1980 revisions that created the anomaly. Today, partnerships engaged in the same commercial activity that pre-revision commercial partnerships were involved in enjoy limited liability rather than solidary [i.e., joint and several] liability for no apparent reason.

[31] Scott Rowley et al. Rowley on Partnership 758 (2d ed. 1960).

[32] Uniform Partnership Act § 40(h).

[33] F. D. Brannan, The Separate Estates of Non-Bankrupt Partners in the Bankruptcy of a Partnership under the Bankrupt Act of 1898, 20 *Harv. L. Rev.* 589, 592 (1907).

A catchy advertisement, to be sure. Each type of creditor obtains a priority claim against their primary debtor, and a subordinated claim against the secondary debtor. The rule was at one time followed throughout the common law world.[34]

But it has also been criticized for a very long time.[35] The late Frank Kennedy observed that the superficial symmetry of the rule "involves a serious departure from the basic rule of the common law of partnerships that the separate property of each partner is as fully liable for the payment of partnership debts as for his individual debts."[36]

Thus, the newer RUPA eradicates the jingle rule. Partnership creditors continue to have first priority against the partnership entity itself, but all creditors have equal claims against the individual partners.

The end result is that our examination of state insolvency law will necessarily involve consideration of not only the insolvency statutes, but also the type of business entity to which they might apply.

There are, of course, other legal entities, including limited partnerships, limited liability companies, and limited liability partnerships. While for governance purposes most of these look more like partnerships, from an insolvency perspective they are largely treated more like corporations. Most significantly, with these entities, as with corporations, liability typically begins and ends with the firm. Only in old-fashioned general partnerships (and with regard to the general

[34] See generally J. J. Henning, Criticism, Review and Abrogation of the Jingle Rule in Partnership Insolvency: A Comparative Perspective, 20 *S. Afr. Mercantile L.J.* 307 (2008).

[35] See *Bell* v. *Newman*, 1819 WL 1861, at *4 (Pa. 1819). ("It is very remarkable, that although this be the undoubted rule in cases of bankruptcy, yet no one can tell how it came to be so, nor is it approved by the present Chancellor of England (Lord Eldon), who submits to it only because he found it established by his predecessor.") See also *id.* at *5. ("It is not easy to discover the equity of excluding a creditor of the partnership from all share of the separate estates of the partners, until the separate debts are paid, nor of excluding a separate creditor from all share of his debtor's joint property, until the joint debts are paid, because the truth is, that persons who trust the partners, either in their separate or partnership character, generally do it, on the credit of their whole estates, both joint and separate.").

[36] Frank Kennedy, A New Deal for Partnership Bankruptcy, 60 *Colum. L. Rev.* 610, 631 (1960). But see Richard Squire, The Case for Symmetry in Creditors' Rights, 118 *Yale L. J.* 806, 838 n. 82 (2009) (terming Kennedy's criticism of the rule "misleading," because the partnership creditors are merely subordinated, rather than barred from recovery).

partners of limited partnerships) do we have to consider the role that the owners play in the law of failure.

One fundamental attribute of a corporation is that the ownership (equity) and most management rights are distinct from one another. In general, in partnerships, particularly smaller ones, owners are often the managers. And these owner-managers face personal liability if the business goes wrong. That necessarily will have effects on the insolvency of the entity.

The "new" business entities do draw us back to partnership law on the question of taxation, however. Section 61(a)(12) of the United States Tax Code provides that gross income includes "[i]ncome from discharge of indebtedness." For a corporation, that income is the entity's problem to deal with.

For partnerships, and related entities like limited liability companies (and even subchapter S corporations),[37] that income from the cancellation of debt can flow through to the owners. The total amount of cancellation of indebtedness income realized by the partnership is allocated among the partners of the partnership, and the partners are required to include the income in their gross income on their personal tax returns. Once again, this will influence the operation of insolvency law, and the choice of which insolvency mechanism to use.

Our focus remains with the entity throughout.[38] But it is also important to remember the incentives of those who control the entity.

Thus, we commence our review of American business insolvency law. The early stages are descriptive: we want to understand the full scope of study. The later stages turn more to an evaluation of the terrain. I consider the overall themes and the ways in which the law of failure might be improved.

Without getting too bogged down in broader theoretical debates about insolvency law – which tend to turn insolvency law into either a glorified debt-collection utensil or a solution to all (or most) of

[37] That is, regular corporations that have elected to be taxed as if they were partnerships under the US Tax Code. Shareholders of S corporations report the flow-through of income and losses from the corporation on their personal tax returns and are assessed tax at their individual income tax rates.

[38] See James W. M. Moore & Philip W. Tone, Proposed Bankruptcy Amendments: Improvement or Retrogression? 57 *Yale L.J.* 683, 710 (1948).

society's problems[39] – we will consider the substantive ends to be pursued by insolvency law or processes. Business insolvency law necessarily involves both public and private concerns, and we cannot evaluate the state of the law without illuminating these several interests and measuring the law against them.

The ultimate question is, "Does the law of failure effectively serve the goals that seemingly motivate it?"

[39] Vanessa Finch, The Measures of Insolvency Law, 17 *Oxford J. Legal Stud.* 227, 242 (1997).

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