LIFE OF A CHAPTER 11 BUSINESS BANKRUPTCY REORGANIZATION

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I. Introduction

Business reorganization under Chapter 11 of the U.S. Bankruptcy Code remains a popular vehicle for rehabilitation of troubled companies, even after the bankruptcy reforms of 2005. With dozens of new Chapter 11s being filed across the nation each week, energy credit professionals often find themselves in the thick of the proceedings. This presentation is intended to comprehensively explain the life of a Chapter 11 case, with the goal of taking the mystery out of such concepts as the automatic stay, cash collateral, the Creditors' Committee, and the Chapter 11 Plan.

II. Overview of Chapter 11 and Commencement of a Case

A. Typically, the prospect of BANKRUPTCY evokes an image of Court-supervised liquidation of a "broke" or financially overwhelmed debtor. Such is the role of "straight bankruptcy" or Chapter 7 of the U.S. Bankruptcy Code. But Chapter 11 bankruptcy provides procedures for Court-supervised reorganization and continuation of the debtor, not liquidation. Chapter 11 is a relatively modern innovation that grew out of the practical commercial reality of out-of-court "workout" or "composition and extension," *i.e.* an agreement between an insolvent debtor and his creditors (and also among the creditors as a group), whereby the creditors agree to accept in compromise a payment less than 100% of their actual claims, to be distributed fairly and equitably over some extended term per the composition plan, in discharge and satisfaction of the whole universe of claims. Chapter 11 formalizes these concepts by federal statute on the theory that it is better for our nation's economy to rehabilitate weakened and floundering but established businesses, than it is to see such businesses completely fail if dismantled by the usual state law creditor collection strategies, even if the price to be paid for such a system is impairment of recovery on the creditors' claims for debts justly owed. Under a plan approved by the Bankruptcy Court, creditors in Chapter 11 look to future performance of the debtor, not the property at the time of the initiation of the bankruptcy, to address their claims. The debtor retains its assets and remains "in possession," acting as its own Bankruptcy Trustee, unless there are reasons, such as mismanagement or failure to comply with legal requirements, which necessitate appointment of an independent Trustee.

B. Almost anyone can be a Chapter 11 debtor:

§ 109. Who may be a debtor.

(d) Only a railroad, a person that may be a debtor under chapter 7 of this title (except a stockbroker or a commodity broker), and an uninsured State member bank, or a corporation organized under section 25A of the Federal Reserve Act, which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991 may be a debtor under chapter 11 of this title.

The United States Supreme Court has confirmed that even individuals who are not engaged in business may be Chapter 11 debtors, as the Bankruptcy Code contains no "ongoing business" requirement for reorganization under Chapter 11. If an individual debtor opts for Chapter 11, then such debtor must obtain credit counseling from an approved agency within 180 days of filing his or her bankruptcy petition, pursuant to Bankruptcy Code §109(h). However, the more typical Chapter 11 debtor is a business corporation with an ongoing business which is hoped to be rehabilitated.

§ 109. Who may be a debtor.

(h)(1) Subject to paragraphs (2) and (3), and notwithstanding any other provision of this section, an individual may not be a debtor under this title unless such individual has, during the 180-day period preceding the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.

C. Voluntary

A bankruptcy petition may be filed by any entity that may be a debtor under the various chapters of the Code. Insolvency is not a condition to any form of voluntary bankruptcy action. No adjudication is necessary to "legitimate" the bankrupt status of the debtor. The Chapter 11 debtor files the petition (and pays a filing fee) pursuant to Bankruptcy Rule 1002, and lists of its creditors pursuant to Bankruptcy Rule 1007(a)(1). A "small business" debtor (with debts less than $2 million) must also file financial statements and tax returns under Bankruptcy Code §1116(1). The filing of the petition itself operates as a self-effectuating "order for relief," as provided by Bankruptcy Code §301.

Rule 1007. Lists, Schedules~~, and~~ Statements, and Other Documents; Time Limits.

(a) List of Creditors and Equity Security Holders, and Corporate Ownership Statement.

(1) Voluntary Case. **In a voluntary case, the debtor shall file with the petition a list containing the name and address of each entity included or to be included on Schedules D, E, F, G, and H as prescribed by the Official Forms. If the debtor is a corporation, other than a governmental unit, the debtor shall file with the petition a corporate ownership statement containing the information described in Rule 7007.1. The debtor shall file a supplemental statement promptly upon any change in circumstances that renders the corporate ownership statement inaccurate.**

(2) Involuntary Case. **In an involuntary case, the debtor shall file within 15 days after entry of the order for relief, a list containing the name and address of each entity included or to be included on Schedules D, E, F, G, and H as prescribed by the Official Forms.**

(3) Equity Security Holders. **In a chapter 11 reorganization case, unless the court orders otherwise, the debtor shall file within 15 days after entry of the order for relief a list of the debtor's equity security holders of each class showing the number and kind of interests registered in the name of each holder, and the last known address or place of business of each holder.**

§ 1116. Duties of trustee or debtor in possession in small business cases.

In a small business case, a trustee or the debtor in possession, in addition to the duties provided in this title and as otherwise required by law, shall—

(1) append to the voluntary petition or, in an involuntary case, file not later than 7 days after the date of the order for relief—

(A) its most recent balance sheet, statement of operations, cash-flow statement, and Federal income tax return; or

(B) a statement made under penalty of perjury that no balance sheet, statement of operations, or cash-flow statement has been prepared and no Federal tax return has been filed.

D. Involuntary

A Chapter 11 bankruptcy may be forced, against the wishes of the debtor, by the requisite number of creditors. Generally, three creditors with unsecured claims totaling at least $13,475.00 must join in the involuntary petition. If, however, the debtor has less than 12 unsecured creditors, a single creditor with an unsecured claim of at least $13,475.00 is good enough. The involuntary petition may be contested by the debtor, in which case it is incumbent upon the petitioning creditors to prove either that (1) the debtor is not paying debts as they come due, or (2) within 120 days before the petition was filed, a receiver took possession of substantially all of the debtor's property.

If an involuntary proceeding fails and is dismissed, the petitioning creditors may be liable for actual and punitive damages, attorneys' fees, and costs. A solicitation to join in an involuntary petition should always be handled with kid gloves (and the advice of an attorney) because the decision to participate carries with it a risk of failure and exposure. See e.g., *Basin Electric Power Coop. v. Midwest Processing Co.*, 769 F.2d 483, 13 C.B.C.2d 500 (8th Cir.), cert. denied, 474 U.S. 1083 (1985).

§ 303. Involuntary cases.

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title—

(1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute *as to liability or amount*, or an indenture trustee representing such a holder, if such *noncontingent, undisputed* claims aggregate at least $13,475 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;

(2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least $13,475 of such claims.

III. Automatic Stay Litigation

A. What is the Automatic Stay?

An immediate benefit to the debtor in filing a voluntary petition is an automatic injunction, applicable to every pre-bankruptcy creditor, precluding any effort to enforce or collect upon a pre-bankruptcy right or claim. This is part of the overall philosophy of "fresh start" and "breathing room" which underlies the current bankruptcy law. No matter how far along a creditor may be in enforcing his pre-bankruptcy rights against the debtor under State law, he must "cease and desist." The automatic stay is triggered by the filing of a bankruptcy petition (including Chapter 11 petitions, whether voluntary or involuntary). It is immaterial whether the creditor knows about it or not. The automatic stay continues until the bankruptcy case is closed or dismissed, or the debtor receives a discharge.

Virtually all creditor collection activity is enjoined—just as if the Bankruptcy Judge had ordered the creditor not to bother the debtor.

§ 362. Automatic stay.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning ~~the debtor~~ *a corporate debtor's tax liability for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.*

Some creditors have a cavalier attitude about the stay, or think that the debtor has some obligation to prove his entitlement to the protection of the stay. Such creditors proceed at their peril because willful violation of the automatic stay can result in liability for actual and punitive damages, attorneys' fees, and costs.

B. Lifting the Stay

The automatic stay is not, however, a completely impenetrable obstacle. A party-in-interest (often a secured creditor hoping to repossess collateral) may approach the Bankruptcy Court for relief from the automatic stay on the following grounds: (1) due to "cause," which includes a lack of "adequate protection" of the movant's interest in property, or (2) due to the debtor having no equity in the encumbered property, as well as such property not being necessary to reorganization. The motion to lift the stay is filed (along with a filing fee) under the authority and constraints of Bankruptcy Code §362(d) and Bankruptcy Rule 4001.

§ 362. Automatic stay.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization; ~~or~~

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) *or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later*—

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments *that*—

(i)* *may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property* to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien)~~, which payment~~; *and

(ii)* are in an amount equal to interest at ~~a current fair market rate~~ *the then applicable nondefault contract rate of interest* on the value of the creditor's interest in the real estate~~.~~*;

Rule 4001. Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements.

(a) Relief from Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property.

> *(1)* ***Motion.*** **A motion for relief from an automatic stay provided by the Code or a motion to prohibit or condition the use, sale, or lease or property pursuant to §363(e) shall be made in accordance with Rule 9014 and shall be served on any committee elected pursuant to §705 or appointed pursuant to §1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed pursuant to §1102, on the creditors included on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct.**

The creditor moving for relief from the automatic stay has the practical challenge to persuade and move the Court's discretion.

> The burden of proof on a motion to lift or modify the automatic stay is a shifting one. Section 362(d)(1) requires an initial showing of cause by the movant, while Section 362(g) places the burden of proof on the debtor for all issues other than "the debtor's equity in property," 11 U.S.C. § 362(g)(1). *See 2 Collier on Bankruptcy 362.10,* at 362-76. If the movant fails to make an initial showing of cause, however, the court should deny relief without requiring any showing from the debtor that he is entitled to continued protection.

In re Sonnax Industries, Inc., 907 F2d 1280 (2d Cir. 1990).

As of October 17, 2005, in cases filed by individual debtors, if a new bankruptcy is filed within one year after an earlier dismissed bankruptcy was pending, the automatic stay terminates 30 days after the new case is filed, unless the Court decides on motion to extend the stay on a finding that the new bankruptcy is filed in good faith. If a bankruptcy is filed after two or more dismissed bankruptcies were pending in the previous year, no automatic stay goes into effect at all. On motion the Court may order that the stay take effect on a finding that the latest bankruptcy is filed in good faith.

Under the procedural mechanisms of Bankruptcy Code §362(e), the stay expires 30 days after filing of the Motion, unless the Court continues it; and the stay terminates 60 days after the Motion, unless the Court renders a final decision. The final hearing shall be concluded not later than 30 days after the conclusion of the preliminary hearing.

> **§ 362. Automatic stay.**
>
> **(e)*(1)*** **Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.**

C. Valuation

The "no equity" issue under §362(d) requires the Court's valuation of the collateral relative to the debt which its secures. Additionally, any party in interest may move for the valuation of the collateral under a secured claim, pursuant to Bankruptcy Rule 3012, and the Court must hold a hearing to determine such value.

Rule 3012. Valuation of Security.

The court may determine the value of a claim secured by a lien on property in which the estate has an interest on motion of any party in interest and after a hearing on notice to the holder of the secured claim and any other entity as the court may direct.

D. An Exception to the Automatic Stay: Reclamation

Where a seller of goods discovers a buyer to be insolvent he may *refuse* delivery except for cash and may *stop* delivery under Uniform Commercial Code ("UCC") §2.705 relating to stoppage in transit. A person is insolvent who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, or is insolvent within the meaning of the federal bankruptcy law, that is, the balance sheet test. §1.201(23), Bankruptcy Code, §101(32).

But where does the seller stand when he *delivered* goods to the buyer on credit without taking or retaining a purchase money security interest in the sold goods per UCC Article 9? Here the seller is an unsecured creditor with no interest in the sold goods and with the result that upon liquidation of the buyer's estate per insolvency proceedings, the seller may receive only a small percentage of his claim. However, suppose the seller discovers the buyer has received goods on credit while insolvent. This amounts to a tacit business misrepresentation of solvency by the buyer and therefore is fraudulent against the particular seller. Likewise if the buyer furnishes the seller with a false financial statement indicating solvency (when the buyer was insolvent), this would probably be an explicit business misrepresentation of solvency. Should not this "defrauded seller" be in a somewhat more favorable position?

In response to this question the UCC states that where the seller discovers that the buyer has received goods on credit while insolvent, the seller may *reclaim* the goods upon demand made within ten days after the receipt of the goods. An exception to this ten day limitation is made when a written misrepresentation of solvency has been made to the particular seller within three months prior to the delivery.

The intervention of bankruptcy extends the reclamation deadline.

UCC § 2.702 Seller's Remedies on Discovery of Buyer's Insolvency

(a) Where the seller discovers the buyer to be insolvent he may refuse delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery under this chapter (Section 2.705).

(b) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery

the ten day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

As of October 17, 2005, the Bankruptcy Code has been amended to finally clarify that a seller's right of reclamation of goods delivered on the brink of bankruptcy is subject to the prior perfected rights of a lienholder with a security interest in such goods (previously, the caselaw was mixed). The timeframes for reclamation have also been relaxed. Reclamation will now be available as to goods received by the debtor within 45 days before bankruptcy. The seller will have until 45 days after receipt of the goods to demand reclamation, or within 20 days after commencement of bankruptcy if the 45 day period expires after bankruptcy. The Bankruptcy Court will no longer have the discretion to deny reclamation by granting an administrative priority to the seller, but under Bankruptcy Code §503(b)(9), **even sellers who do not make a timely reclamation demand may have an administrative claim nonetheless as regards goods delivered within 20 days before bankruptcy, sold to the debtor in the ordinary course of business.**

§ 546. Limitations on avoiding powers.

(c)*(1)* **Except as provided in subsection (d) of this section *and in section 507(c), and subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof,* the rights and powers of ~~a~~ *the* trustee under sections 544(a), 545, 547, and 549 ~~of this title~~ are subject to ~~any statutory or common law~~ *the* right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, *within 45 days before the date of the commencement of a case under this title,* but ~~(1)~~ such a seller may not reclaim ~~any~~ such goods unless such seller demands in writing reclamation of such goods—**

(A) ~~before 10~~ *not later than 45* days after *the date of* receipt of such goods by the debtor; or

(B) ~~if such 10~~ *not later than 20 days after the date of commencement of the case, if the 45*-day period expires after the commencement of the case~~, before 20 days after receipt of such goods by the debtor; and~~.

(2) ~~the court may deny reclamation to~~ *If* a seller ~~with such a right of reclamation that has made such a demand only if the court (A) grants the claim of such a seller priority as a claim of a kind specified~~ *of goods fails to provide notice in the manner described in paragraph (1), the seller still may assert the rights contained* in section 503(b)*(9)* ~~of this title, or (B) secures such claim by a lien~~.

§ 503. Allowance of administrative expenses.

(b) After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under section 502(f) of this title, including—

(9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

IV. Meeting of Creditors

A. Section 341 Meetings

Section 341 of the Bankruptcy Code provides for a meeting of creditors which is essentially an opportunity for the debtor to be examined under oath about its financial condition, reasons for bankruptcy, books and records, schedules and financial statements, as well as the validity

and extent of claims and liens. A debtor's attendance at the creditors' meeting is crucial to allow creditors and the Trustee the ability to gather information; however, the Court may waive a debtor's attendance when the debtor is too ill, is incarcerated, or has other reasons beyond his control. In such instances, the Court may permit creditors and the Trustee to question the debtor by telephone or interrogatories, or to examine a spouse or co-debtor.

The Notice of the Case typically sets the date for the §341 meeting. The U.S. Trustee holds the meeting of creditors 20 to 40 days after the "order for relief." The individual Chapter 11 debtor must file his most recent tax return 7 days before the §341 meeting.

§ 341. Meetings of creditors and equity security holders.[1]

(a) Within a reasonable time after the order for relief in a case under this title, the United States trustee shall convene and preside at a meeting of creditors.

Rule 2003. Meeting of Creditors or Equity Security Holders.

(a) Date and Place. **Except as provided in §341(e) of the Code, in ~~In~~ a chapter 7 liquidation or a chapter 11 reorganization case, the United States trustee shall call a meeting of creditors to be held no fewer than 20 and no more than 40 days after the order for relief. In a chapter 12 family farmer debt adjustment case, the United States trustee shall call a meeting of creditors to be held no fewer than 20 and no more than 35 days after the order for relief. In a chapter 13 individual's debt adjustment case, the United States trustee shall call a meeting of creditors to be held no fewer than 20 and no more than 50 days after the order for relief. If there is an appeal from or a motion to vacate the order for relief, or if there is a motion to dismiss the case, the United States trustee may set a later date for the meeting. The meeting may be held at a regular place for holding court or at any other place determined by the United States trustee within the district convenient for the parties in interest. If the United States trustee designates a place for the meeting which is not regularly staffed by the United States trustee or an assistant who may preside at the meeting, the meeting may be held not more than 60 days after the order for relief.**

(b) Order of Meeting.

(1) Meeting of Creditors. **The United States trustee shall preside at the meeting of creditors. The business of the meeting shall include the examination of the debtor under oath and, in a chapter 7 liquidation case, may include the election of a creditors' committee and, if the case is not under subchapter V of chapter 7, the election of a trustee. The presiding officer shall have the authority to administer oaths.**

§ 521. Debtor's duties.

(e) (2) (A) The debtor shall provide—

(i) not later than 7 days before the date first set for the first meeting of creditors, to the trustee a copy of the Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such return) for the most recent tax year ending immediately before the commencement of the case and for which a Federal income tax return was filed; and

(ii) at the same time the debtor complies with clause (i), a copy of such return (or if elected under clause (i), such transcript) to any creditor that timely requests such copy.

(B) If the debtor fails to comply with clause (i) or (ii) of subparagraph (A), the court shall dismiss the case unless the debtor demonstrates that the failure to so comply is due to circumstances beyond the control of the debtor.

(C) If a creditor requests a copy of such tax return or such transcript and if the debtor fails to provide a copy of such tax return or such transcript to such creditor at the time the

debtor provides such tax return or such transcript to the trustee, then the court shall dismiss the case unless the debtor demonstrates that the failure to provide a copy of such tax return or such transcript is due to circumstances beyond the control of the debtor.

B. Debtor Examinations

Creditors' meetings may present only a very cursory opportunity for an individual creditor to investigate at length the circumstances concerning the debtor's financial affairs which may be of interest in connection with such creditor's particular claim or rights in the bankruptcy. Fortunately, the Bankruptcy Rules provide a mechanism for a deposition procedure which the creditor, or any party-in-interest, can invoke for a more detailed and extensive examination.

Rule 2004. Examination.

(a) ***Examination on Motion.*** **On motion of any party in interest, the court may order the examination of any entity.**

(b) ***Scope of Examination.*** **The examination of an entity under this rule or of the debtor under §343 of the Code may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge. In a family farmer's debt adjustment case under chapter 12, an individual's debt adjustment case under chapter 13, or a reorganization case under chapter 11 of the Code, other than for the reorganization of a railroad, the examination may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefor, and any other matter relevant to the case or to the formulation of a plan.**

(c) ***Compelling Attendance and Production of Documents.*** **The attendance of an entity for examination and for the production of documents, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled as provided in Rule 9016 for the attendance of a witness at a hearing or trial. As an officer of the court, an attorney may issue and sign a subpoena on behalf of the court for the district in which the examination is to be held if the attorney is admitted to practice in that court or in the court in which the case is pending.**

A Rule 2004 examination permits a broad range of inquiry into all matters relevant to the debtor's financial affairs, which includes an inquiry into the validity of a creditor's disputed claim; accordingly, that creditor itself may be deposed to determine the facts and circumstances surrounding its claim.

VI. Discharge Litigation

A. Objection to Discharge

An underlying premise and philosophy of the entire Bankruptcy Code is to allow the debtor the relief afforded by a "fresh start" that absolves him/her/it of the burdens of his/her/its pre-bankruptcy obligations. This is, of course, totally contrary to our common law tradition and the aims of most of our state laws for enforcement of debts. Only individuals (not corporations) can earn a liquidation discharge under Chapter 7 of the Code. A corporation is eligible for discharge under Chapter 11, but only if the plan does not contemplate liquidation and termination of business. This is in recognition of the desirability of relieving individuals in the same way that a corporation or legal entity can easily accomplish by formal dissolution procedures. Congress deliberately excluded

corporations from eligibility for a liquidation discharge to avoid trafficking in corporate shells and in bankruptcy partnerships.

Discharge is earned in Chapter 11 cases in connection with confirmation of a plan of reorganization under Section 1141(d)(1)(A) of the Code. The debtor can, however, lose the important right of discharge in its entirety (rendering the bankruptcy filing a useless effort) by certain acts that frustrate the fundamental purposes of the Bankruptcy Code or are grossly inequitable to creditors. Such acts include fraudulent conveyances; unjustified failure to keep or preserve financial records; making a false oath; presenting a false claim; bribery; withholding books and records from the Trustee; or failure to satisfactorily explain loss or deficiency of assets. For example, an omission of assets from the debtor's schedules may constitute a false oath that would justify denial of discharge, if the omission relates to a material matter and is made wilfully with intent to defraud. An objection to discharge in its entirety is raised by a creditor or other party-in-interest by a timely filing with the Bankruptcy Court.

§ 1141. Effect of confirmation.

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not—

(i) a proof of claim based on such debt is filed or deemed filed under section 501 of this title;
(ii) such claim is allowed under section 502 of this title; or
(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) ~~The confirmation of a plan~~ *A discharge under this chapter* does not discharge *a debtor who is* an individual ~~debtor~~ from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if—

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

Rule 4004. Grant or Denial of Discharge.

(a) Time for Filing Complaint Objecting to Discharge; Notice of Time Fixed. **In a chapter 7 liquidation case a complaint objecting to the debtor's discharge under §727(a) of the Code shall be filed no later than 60 days after the first date set for the meeting of creditors under §341(a). In a chapter 11 reorganization case, the complaint shall be filed no later than the first date set for the hearing on confirmation. At least 25 days' notice of the time so fixed shall be given to the United States trustee and all creditors as provided in Rule 2002(f) and (k), and to the trustee and the trustee's attorney.**

B. Exceptions from Discharge

Exceptions from discharge present grounds for carving a particular debt or class of debts out of the coverage of the discharge. The debtor is granted a discharge, but the particular debt in question is excepted and the creditor is free to pursue non-bankruptcy remedies even after the discharge order is issued. Creditors must file a timely request for determination of the dischargeability of their claim, and litigate with the debtor as necessary for adjudication of the ramifications of disputed facts. The deadline for filing a complaint initiating an adversary proceeding to determine a debt non-dischargeable is 60 days after the first date set for the §341 meeting.

Rule 4007. Determination of Dischargeability of a Debt.

(c) Time for Filing Complaint Under §523(c) in a Chapter 7 Liquidation, Chapter 11 Reorganization, or Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual Debt Adjustment Case; Notice of Time Fixed. **Except as provided in subdivision (d), a ~~A~~ complaint to determine the dischargeability of a debt under §523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under §341(a). The court shall give all creditors no less than 30 days' notice of the time so fixed in the manner provided in Rule 2002. On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.**

§ 523. Exceptions to discharge.

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing—

(i) that is materially false;
(ii) respecting the debtor's or an insider's financial condition;
(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C) *(i)* for purposes of subparagraph (A) ~~of this paragraph,~~

(I) **consumer debts owed to a single creditor and aggregating more than ~~$1,225~~[2] *$500* for "luxury goods or services" incurred by an individual debtor on or within ~~60~~ *90* days before the order for relief under this title~~, or~~ *are presumed to be nondischargeable; and***

(II) **cash advances aggregating more than ~~$1,225~~[3] *$750* that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within ~~60~~ *70* days before the order for relief under this title, are presumed to be nondischargeable; *and***

(ii) *for purposes of this subparagraph—*

(I) *the terms "consumer", "credit", and "open end credit plan" have the same meanings as in section 103 of the Truth in Lending Act; and*

(II) *the term* "luxury goods or services" ~~do~~ *does* not include goods or services reasonably ~~acquired~~ *necessary* for the support or maintenance of the debtor or a dependent of the debtor, ~~an extension of consumer credit under an open end credit plan is to be defined for purposes of this subparagraph as it is defined in the Consumer Credit Protection Act;~~

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

VII. Allowance of Claims

A. Proof of Claim

When a debtor files a voluntary Chapter 11 petition, it is supposed to include a schedule that sets forth the names and addresses of the debtor's secured and unsecured creditors. Such schedules are to be filed within 15 days of the order for relief, and create a deemed filing presumption under Bankruptcy Code §1111(a). The list of creditors the debtor files behind the petition frequently will include the amount of debt admittedly owed to each of the listed creditors. This is the first available filed public document that a creditor can consult to verify whether its claim is recognized.

§ 1111. Claims and interests.

(a) A proof of claim or interest is deemed filed under section 501 of this title for any claim or interest that appears in the schedules filed under section 521(1) or 1106(a)(2) of this title, except a claim or interest that is scheduled as disputed, contingent, or unliquidated.

Under the bankruptcy reform amendments effective October 17, 2005, if a creditor, within 90 days before a voluntary bankruptcy, provides the debtor with an account number and a specified address, then any bankruptcy notice to be sent by the debtor to the creditor must be sent to that address and include the account number.

§ 342. Notice

(c)*(2)(A) If, within the 90 days before the commencement of a voluntary case, a creditor supplies the debtor in at least 2 communications sent to the debtor with the current account number of the debtor and the address at which such creditor requests to receive correspondence, then any notice required by this title to be sent by the debtor to such creditor shall be sent to such address and shall include such account number.*

In the larger Chapter 11 bankruptcy cases, time extensions are frequently and sometimes repetitively sought due to the complexity or size of the debtor and property of the estate. However, in a small business Chapter 11 case (*i.e.* less than $2 million in debt), the Court cannot extend the deadline for schedules to later than 30 days after the order for relief.

Online public access to the Bankruptcy Court's electronic records is readily available, but only by fee subscription. In many cases, especially involving smaller claims, it may be impractical for the typical creditor to review these filed documents, given the level of return to be expected in bankruptcy. In Chapter 11 cases, filing of a Proof of Claim is (theoretically) discretionary, allowing the creditor to "rely on the scheduling" of his claim by the debtor, unless (1) a claimant has actual notice of the Chapter 11 case and is not scheduled, or (2) the creditor's claim is scheduled as disputed, contingent, or unliquidated. See Bankruptcy Code §1111(a) above. The best practice on behalf of a creditor is to always file a Proof of Claim, whether or not the claim is secured, unsecured, or claims a priority, and regardless of whether or not it is a 7, 11, or 13 case.

The timing of the Proof of Claim is critical. The "bar date" for Chapter 7 and Chapter 13 cases is 90 days from the date set for the § 341 meeting of creditors. In Chapter 11 cases, the Court will set the "bar date" by order. See Bankruptcy Rule 3003(c)(3). Never miss the bar date, in any case, as it is a rigid statute of limitations with very few exceptions.

Rule 3001. Proof of Claim.

(a) *Form and Content.* A proof of claim is a written statement setting forth a creditor's claim. A proof of claim shall conform substantially to the appropriate Official Form.

(b) *Who May Execute.* A proof of claim shall be executed by the creditor or the creditor's authorized agent except as provided in Rules 3004 and 3005.

Rule 3003. Filing Proof of Claim or Equity Security Interest in Chapter 9 Municipality or Chapter 11 Reorganization Cases.

***(c)(3) Time for Filing.* The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed. Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), ~~and~~ (c)(4), and (c)(6).**

The importance of correctly filling out the Proof of Claim in all of its essential ingredients cannot be overstated. Failure to properly complete the Proof of Claim form or to carefully draft a Proof of Claim pursuant to the Bankruptcy Rules can result in the debtor or Trustee successfully objecting to the claim's substantive or procedural validity. Caution should be used in insuring that the Proof of Claim has attached the appropriate exhibits to document the claim. Since criminal penalties apply to filing a false claim, accuracy is essential and any doubts as to the efficacy of the claim should be disclosed. Follow the statutory form.

B. Objection/Allowance

Once a Proof of Claim is filed, it is presumptively valid and deemed allowed under Section 502(a) of the Bankruptcy Code. It is incumbent upon the debtor, the Trustee, or other party-in-interest, to object to a creditor's claim, at which point issue is joined and, although the objector has the burden of going forward with evidence, the claimant has the burden of persuasion in proving the claim, just as in any non-bankruptcy litigation over its validity, extent, and nature.

§ 502. Allowance of claims or interests.

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

Rule 3007. Objections to Claims.

An objection to the allowance of a claim shall be in writing and filed. A copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession and the trustee at least 30 days prior to the hearing. If an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it becomes an adversary proceeding.

Objections can either be procedural (raising issues such as filing after the bar date or deficient documentation) or substantive (challenging the underlying merits of the claim). Certain forms of relief, such as subordination or lien avoidance, require that an Adversary Proceeding, or lawsuit, be filed under Bankruptcy Rules 7001, et seq. The full array of discovery and pre-trial motions and procedures is available in these types of contested proceedings. The end result of such litigation is a determination by the Court of allowance or disallowance of the claim, coupled with an adjudication of the extent and nature thereof. The Court can hold hearings on unresolved objections to claims, either before or after plan confirmation, upon 30 days' notice.

§ 502. Allowance of claims or interests.

(b) ...[I]f such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured.

C. Secured/Unsecured

Proper characterization of a claim as either secured or unsecured is critical because a mischaracterization can result in a loss of advantage and options for the creditor. Calling a claim secured when in fact it is undersecured may leave the creditor with recourse to his collateral only, and no right to participate as an unsecured creditor for the deficiency portion. On the other hand, calling a claim unsecured when in fact it is secured to some degree can result in a waiver or abandonment of the collateral. Secured creditors should ideally prepare their Proof of Claim to accurately reflect not only their secured status, but also to preserve any rights to the extent that they are unsecured.

§ 506. Determination of secured status.

(a)*(1)* An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(b) To the extent than an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement *or State statute* under which such claim arose.

The Proof of Claim filed by the fully secured creditor should include the security agreement and any of its exhibits. Not only is this mandated by the official form, but inclusion of documentation that evidences the perfection of the lien can help forestall disputes with the debtor, Trustee, or unsecured creditors over rights to the collateral. Attach evidence of a judgment if you have one. Attach evidence of filing if you recorded anywhere. The attachment of such documents is especially important in the case of secured creditors whose lien arises outside of Article 9 of the Uniform Commercial Code. For instance, appropriate lien affidavits and invoices should accompany statutory mechanic's and materialmen's lien claims.

The partially secured creditor should also file a Proof of Claim to preserve the right to treatment as an unsecured creditor to the extent that a deficiency exists in the lien itself or in the value of the collateral. The Bankruptcy Code is tough on secured creditors, as debtors and Trustees are granted extensive avoidance powers to set aside liens. To the extent that a lien is avoided or subordinated, a debtor might argue successfully that failure to file a Proof of Claim to preserve a prospective unsecured claim precludes the formerly secured creditor from participating as an unsecured creditor.

VIII. Cash Collateral

Cash collateral is extremely liquid cash or near-cash securing an obligation.

§ 363. Use, sale, or lease of property.

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

In order to conduct business, Chapter 11 debtors usually have early and urgent need to use the cash collateral that secures their major creditors, so motions to allow use of cash collateral, although under appropriate limitations so as to adequately protect such secured creditors, are a "first day" priority and "scheduled in accordance with the needs of the debtor."

Rule 4001. Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements.

(b)(1) ***Motion; Service.*** **A motion for authorization to use cash collateral shall be made in accordance with Rule 9014 and shall be served on any entity which has an interest in the cash collateral, on any committee elected pursuant to §705 or appointed pursuant to §1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed pursuant to §1102, on the creditors included on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct.**

(2) ***Hearing.*** **The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 15 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 15 day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.**

(3) *Notice.* **Notice of hearing pursuant to this subdivision shall be given to the parties on whom service of the motion is required by paragraph (1) of this subdivision and to such other entities as the court may direct.**

§ 363. Use, sale, or lease of property.

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

§ 361. Adequate protection.

When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by—

(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;

(2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or

(3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

IX. The Chapter 11 Plan

A. Exclusivity

A Chapter 11 plan of reorganization, in addition to being an order of the Court, is a contract between the debtor and its creditors. Thus, Chapter 11 formalizes the old idea of "composition and extension." A Chapter 11 plan must therefore be (1) proposed, (2) disclosed, (3) voted on, and (4) confirmed.

Debtors have the exclusive right to file a proposed plan for creditor and Court consideration, but only for a finite period of time. Once exclusivity expires, the debtor is usually in

trouble because one or more creditors or the Creditors' Committee then have the right to submit a proposed plan. Creditor plans tend to be liquidating plans that wrest control of assets and/or usurp ongoing business from the debtor. While there is some discretion in the Court to extend debtor exclusivity periods on motion, such discretion is limited. The Chapter 11 debtor has the exclusive right to file the plan for 120 days from the order for relief, but the Court has no authority to extend that period beyond 18 months after the order for relief. The debtor's deadline to obtain sufficient acceptances to a debtor plan is 180 days after the order for relief, but the Court has no authority to extend that period beyond 20 months after the order for relief.

Among the changes wrought by the bankruptcy reform amendments of 2005, subsection (e) was added to Bankruptcy Code §1121 to give a small business debtor (*i.e.* less than $2 million in debt) a 180 day exclusivity period, and to provide that a plan and disclosure statement must be filed not later than 300 days after the order for relief. These small business deadlines may be extended under certain circumstances.

§ 1121. Who may file a plan.

(a) The debtor may file a plan with a petition commencing a voluntary case, or at any time in a voluntary case or an involuntary case.

(b) Except as otherwise provided in this section, only the debtor may file a plan until after 120 days after the date of the order for relief under this chapter.

(c) Any party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may file a plan if and only if—

(1) a trustee has been appointed under this chapter;

(2) the debtor has not filed a plan before 120 days after the date of the order for relief under this chapter; or

(3) the debtor has not filed a plan that has been accepted, before 180 days after the date of the order for relief under this chapter, by each class of claims or interests that is impaired under the plan.

(d) *(1)* ~~On~~ *Subject to paragraph (2), on* request of a party in interest made within the respective periods specified in subsections (b) and (c) of this section and after notice and a hearing, the court may for cause reduce or increase the 120-day period or the 180-day period referred to in this section.

~~**(e) In a case in which the debtor is a small business and elects to be considered a small business—**~~

~~**(1) only the debtor may file a plan until after 100 days**~~

***(2)(A) The 120-day period specified in paragraph (1) may not be extended beyond a date that is 18 months* after the date of the order for relief under this chapter;.**

(B) The 180-day period specified in paragraph (1) may not be extended beyond a date that is 20 months after the date of the order for relief under this chapter.

(e) In a small business case—

(1) ~~**(2) all plans shall be filed within 160**~~ ***only the debtor may file a plan until after 180 days after the date of the order for relief, unless that period is***

(A) extended as provided by this subsection, after notice and a hearing; or

(B) the court, for cause, orders otherwise;

(2) the plan and a disclosure statement (if any) shall be filed not later than 300 days after the date of the order for relief; and

(3) ~~on request of a party in interest made within the respective~~ *the time* periods specified in paragraphs (1) and (2) ~~and after notice and a hearing, the court may—~~, *and the time fixed in section 1129(e) within which the plan shall be confirmed, may be extended only if—*

(A) *the debtor, after providing notice to parties in interest (including the United States trustee), demonstrates by a preponderance of the evidence that it is more likely than not that the court will confirm a plan within a reasonable period of time;* ~~reduce the 100-day period or the 160-day period specified in paragraph (1) or (2) for cause; and~~

(B) *a new deadline is imposed at the time the extension is granted; and* ~~increase the 100-day period specified in paragraph (1) if the debtor shows that the need for an increase is caused by circumstances for which the debtor should not be held accountable.~~

(C) the order extending time is signed before the existing deadline has expired.

B. Disclosure

One premise underlying Chapter 11 is that if adequate disclosure is provided to all creditors and shareholders whose rights are to be affected, then they should be able to make an informed judgment of their own, rather than having the Bankruptcy Court inform them in advance whether the proposed plan is a "good" one. Therefore, the Bankruptcy Court does not evaluate a Chapter 11 plan before it is submitted for a vote. Instead, the Bankruptcy Court reviews the disclosure statement provided to creditors and shareholders to insure that they can exercise informed judgment. What constitutes "adequate information" for this purpose varies from case to case, but depends on factors such as (1) condition of the debtor's books and records, (2) level of sophistication of the creditors and equity interest holders, and (3) the nature of the proposed plan. When the debtor is the proponent of a proposed plan, the debtor files the plan of reorganization and proposed disclosure statement with the Court pursuant to Bankruptcy Rule 3016(b). The plan classifies claims and interests and specifies their treatment. Parties in interest file objections to the disclosure statement, and then the Court holds a disclosure hearing to consider approval of the disclosure statement. Assuming the disclosure statement is approved, the plan proponent then mails the plan, the disclosure statement, and the Court's order regarding voting, confirmation, and ballots, to creditors and shareholders.

§ 1125. Postpetition disclosure and solicitation.

(a) In this section—

(1) "adequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, ***including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case,*** **that would enable** ~~**a hypothetical reasonable investor typical of holders of claims or interests**~~

such a hypothetical investor of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan *and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information*; and

(b) An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information. The court may approve a disclosure statement without a valuation of the debtor or an appraisal of the debtor's assets.

§ 1126. Acceptance of plan.

(a) The holder of a claim or interest allowed under section 502 of this title may accept or reject a plan. If the United States is a creditor or equity security holder, the Secretary of the Treasury may accept or reject the plan on behalf of the United States.

(b) For the purposes of subsections (c) and (d) of this section, a holder of a claim or interest that has accepted or rejected the plan before the commencement of the case under this title is deemed to have accepted or rejected such plan, as the case may be, if—

(1) the solicitation of such acceptance or rejection was in compliance with any applicable nonbankruptcy law, rule, or regulation governing the adequacy of disclosure in connection with such solicitation; or

(2) if there is not any such law, rule, or regulation, such acceptance or rejection was solicited after disclosure to such holder of adequate information, as defined in section 1125(a) of this title.

(c) A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

(d) A class of interests has accepted a plan if such plan has been accepted by holders of such interests, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount of the allowed interests of such class held by holders of such interests, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

(e) On request of a party in interest, and after notice and a hearing, the court may designate any entity whose acceptance or rejection of such plan was not in good faith, or was not solicited or procured in good faith or in accordance with the provisions of this title.

(f) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.

(g) Notwithstanding any other provision of this section, a class is deemed not to have accepted a plan if such plan provides that the claims or interests of such class do not entitle the holders of such claims or interests to receive or retain any property under the plan on account of such claims or interests.

Rule 3016. Filing of Plan and Disclosure Statement in a Chapter 9 Municipality or Chapter 11 Reorganization Case

(b) Disclosure Statement. In a chapter 9 or 11 case, a disclosure statement under §1125 or evidence showing compliance with §1126(b) of the Code shall be filed with the plan or within a time fixed by the court, unless the plan is intended to provide adequate information under §1125(f)(1). If

the plan is intended to provide adequate information under §1125(f)(1), it shall be so designated and Rule 3017.1 shall apply as if the plan is a disclosure statement.

§ 1123. Contents of plan.

(a) ...[A] plan shall—

(1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)~~(1)~~*(2)*, 507(a)~~(2)~~*(3)*, or 507(a)(8) of this title, and classes of interests;

(3) specify the treatment of any class of claims or interests that is impaired under the plan;

C. Voting and Confirmation

The confirmation process is intended to be a full disclosure procedure, with notice and an opportunity to be heard, that results in a plan that is "fair and equitable," meeting the confirmation standards of Section 1129 of the Code. Parties in interest file written objections to confirmation of the plan under Bankruptcy Rule 3020(b)(1). Impaired creditors and shareholders file ballots accepting or rejecting the plan under Bankruptcy Rule 3018(a). The hearing on confirmation takes up the objections to the plan and allows the Court to determine whether such plan is confirmable, pursuant to Bankruptcy Rule 3020(b)(2). Valuation of assets or a determination on allowance of claims may be necessary to make a decision on confirmation. In a small business case, the Court must confirm the plan, if at all, within 45 days of such plan's filing.

Rule 3020. Deposit; Confirmation of Plan in a Chapter 9 Municipality or Chapter 11 Reorganization Case

(b)(1) ***Objection.*** **An objection to confirmation of the plan shall be filed and served on the debtor, the trustee, the proponent of the plan, any committee appointed under the Code and any other entity designated by the court, within a time fixed by the court. Unless the case is a chapter 9 municipality case, a copy of every objection to confirmation shall be transmitted by the objecting party to the United States trustee within the time fixed for filing objections. An objection to confirmation is governed by Rule 9014.**

Rule 3018. Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case

(a) ***Entities Entitled To Accept or Reject Plan; Time for Acceptance or Rejection.*** **A plan may be accepted or rejected in accordance with §1126 of the Code within the time fixed by the court pursuant to Rule 3017. Subject to subdivision (b) of this rule, an equity security holder or creditor whose claim is based on a security of record shall not be entitled to accept or reject a plan unless the equity security holder or creditor is the holder of record of the security on the date the order approving the disclosure statement is entered or on another date fixed by the court, for cause, after notice and a hearing. For cause shown, the court after notice and hearing may permit a creditor or equity security holder to change or withdraw an acceptance or rejection. Notwithstanding objection to a claim or interest, the court after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan.**

Rule 3020. Deposit; Confirmation of Plan in a Chapter 9 Municipality or Chapter 11 Reorganization Case

(b)(2) ***Hearing.*** **The court shall rule on confirmation of the plan after notice and hearing as provided in Rule 2002. If no objection is timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues.**

§ 1129. Confirmation of plan.

(a) The court shall confirm a plan only if all of the following requirements are met:[1]

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

(7) With respect to each impaired class of claims or interests—

(A) each holder of a claim or interest of such class—

(i) has accepted the plan; or
(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class of claims or interests—

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

(b) (1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

D. Effect of Confirmation

A confirmed Chapter 11 Plan is binding on creditors both contractually (as an agreement) and judicially (as an order of the Court). The judicially binding nature of a confirmed Chapter 11 Plan necessitates that creditors litigate their objections in a timely manner while the Court's jurisdiction is available. Confirmation constitutes a discharge in corporate cases, so long as the plan is not for liquidation. See Bankruptcy Code §1141(d)(1), (2), and (3).

§ 1141. Effect of confirmation.

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not—

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;
(ii) such claim is allowed under section 502 of this title; or
(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) ~~The confirmation fo a plan~~ *A discharge under this chapter* does not discharge *a debtor who is* an individual ~~debtor~~ from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if—

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

After the estate is fully administered, the Court, on its own motion or that of a party-in-interest, shall enter a final decree closing the case. See Bankruptcy Rule 3022. Cases may be re-opened for cause. After the final decree, the debtor continues to perform under the plan, and that performance may extend for many years.

Rule 3022. Final Decree in Chapter 11 Reorganization Case

After an estate is fully administered in a chapter 11 reorganization case, the court, on its own motion or on motion of a party in interest, shall enter a final decree closing the case.

X. Executory Contracts

Executory contracts are those, such as leases in mid-term, in which performance remains due to some extent on both sides. For example, a land sale "earnest money" contract is executory in nature when some performance remains due by both parties, and it is irrelevant whether it is the seller or the purchaser who files for bankruptcy protection Upon motion to and approval by the Court, the Bankruptcy Trustee (*i.e.* the Chapter 11 Debtor-In-Possession) may reject an executory contract that is considered to be burdensome to the estate; assume and retain an executory contract that is considered to be beneficial to the estate; or assume and assign an executory contract that would be valuable to a third-party, and therefore, contribute value to the estate.

Rejection is a breach of the executory contract as of the petition date, giving the non-bankrupt party an unsecured claim. Assumption requires curing arrearages and future compliance with the contract; in other words, assumption includes both the benefits and burdens of the executory contract. *O'Neill v. Continental Airlines, Inc.*, 981 F.2d 1450 (5th Cir. 1993).

§ 365. Executory contracts and unexpired leases.

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default *other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;*

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

Assignment requires curing arrearages, as well as "adequate assurance of future performance," but the debtor is absolved from further liability after the assignment. The timing of assumption or rejection of executory contracts is a function of whether the case is a "straight bankruptcy" or a rehabilitative proceeding. A Bankruptcy Court may grant multiple extensions of the time within which a debtor must assume or reject its executory contracts, so long as a motion to extend is brought prior to the expiration of the period previously extended, and as long as there is "cause" for granting the extension. In re American Healthcare Management, Inc., 900 F.2d 827, 22 C.B.C.2d 1740 (5th Cir. 1990).

The Chapter 11 debtor files a schedule of its executory contracts within 15 days of the order for relief. Bankruptcy Rule 1007(b)(1). Motions to assume or reject executory contracts are strategically urged (and delayed), sometimes up until confirmation of the plan. See Bankruptcy Code §365(d)(2) and (p)(3). However, certain executory contracts are on a "short track." The debtor, as Trustee, must begin performing unexpired leases of real or personal property within 60 days under Bankruptcy Code §365(d)(3) and (5). Leases of non-residential real property are rejected if not assumed within 120 days under Bankruptcy Code §365(d)(4).

Rule 1007. Lists, Schedules, ~~and~~ Statements, and Other Documents; Time Limits

(b)(1) **Except in a chapter 9 municipality case, the debtor, unless the court orders otherwise, shall file the following schedules, statements, and other documents, prepared as prescribed by the appropriate Official Forms, if any:**

(A) **schedules of assets and liabilities;;**

(B) **a schedule of current income and expenditures;;**

(C) **a schedule of executory contracts and unexpired leases; ~~and~~;**

(D) **a statement of financial affairs; ~~prepared as prescribed by the appropriate Official Forms~~;**

(E) copies of all payment advices or other evidence of payment, if any, with all but the last four digits of the debtor's social security number redacted, received by the debtor from an employer within 60 days before the filing of the petition; and

(F) a record of any interest that the debtor has in an account or program of the type specified in §521(c) of the Code.

§ 365. Executory contracts and unexpired leases.

(d)(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4) *(A)* ~~Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject~~ *Subject to subparagraph (B),* an unexpired lease of nonresidential real property under which the debtor is the lessee ~~within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is~~ *shall be* deemed rejected, and the trustee shall immediately surrender ~~such~~ *that* nonresidential real property to the lessor~~.~~, *if the trustee does not assume or reject the unexpired lease by the earlier of—*

(i) the date that is 120 days after the date of the order for relief; or
(ii) the date of the entry of an order confirming a plan.

(B) (i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.

(ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.

(5)~~(10)~~ The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(p)(3) In a case under chapter 11 in which the debtor is an individual and in a case under chapter 13, if the debtor is the lessee with respect to personal property and the lease is not assumed in the plan confirmed by the court, the lease is deemed rejected as of the conclusion of the hearing on confirmation. If the lease is rejected, the stay under section 362 and any stay under section 1301 is automatically terminated with respect to the property subject to the lease.

Generally, the obligations of a contract assumed in bankruptcy are evaluated under state law. *In re Eagle Bus Mfg., Inc.*, 148 Bankr. 481 (S.D. Tex. 1992). However, one very significant feature of Section 365 of the Bankruptcy Code is that it invalidates and renders ineffectual provisions in an executory contract that define bankruptcy itself as an event of default, purporting to trigger rights in the non-bankrupt party. Commercial creditors may have a hard time believing that these types of bankruptcy-default clauses, which are still very commonly used, do not mean what they say (at the Bankruptcy Courthouse).

§ 365. Executory contracts and unexpired leases.

(e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

XI. The Creditors' Committee

The Creditors' Committee is a much more significant factor in a Chapter 11 case than in a straight bankruptcy. Since in most cases, the Trustee is the Debtor-In-Possession, the Creditors' Committee is the "watchdog" insuring such debtor's adherence to Code standards. The Code directs the U.S. Trustee to appoint a Creditors' Committee as soon as practical. Generally, the seven largest unsecured creditors willing to serve will be appointed. The Committee performs a number of statutory functions: (1) consulting with the Trustee or Debtor-In-Possession concerning administration; (2) participating in the formulation of the plan or presenting a creditors' plan; (3) investigating the debtor's acts and financial condition; (4) requesting the appointment of an independent Trustee if the Debtor-In-Possession drops the ball; and (5) appearing generally as a party-in-interest, entitled to notice in certain key situations. In a small business Chapter 11, the Court may for cause order no Committee be appointed.

§ 1102. Creditors' and equity security holders' committees.

(a)(1) Except as provided in paragraph (3), as soon as practicable after the order for relief under chapter 11 of this title, the United States trustee shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or of equity security holders as the United States trustee deems appropriate.

(2) On request of a party in interest, the court may order the appointment of additional committees of creditors or of equity security holders if necessary to assure adequate representation of creditors or of equity security holders. The United States trustee shall appoint any such committee.

(3) On request of a party in interest in a case in which the debtor is a small business *debtor* and for cause, the court may order that a committee of creditors not be appointed.

(b)(1) **A committee of creditors appointed under subsection (a) of this section shall ordinarily consist of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on such committee, or of the members of a committee organized by creditors before the commencement of the case under this chapter, if such committee was fairly chosen and is representative of the different kinds of claims to be represented.**

(2) **A committee of equity security holders appointed under subsection (a)(2) of this section shall ordinarily consist of the persons, willing to serve, that hold the seven largest amounts of equity securities of the debtor of the kinds represented on such committee.**

The Committee holds an initial meeting at which it organizes, and, if desired, selects counsel, pursuant to Bankruptcy Code §1103(a). The Committee must obtain Court authorization to employ attorneys or accountants. See Bankruptcy Rule 2014(a). Under Bankruptcy Code §1102(a)(4), a motion to change the Committee membership may be made by any party-in-interest, and the Court may order such a change to insure adequate representation.

§ 1103. Powers and duties of committees.

(a) **At a scheduled meeting of a committee appointed under section 1102 of this title, at which a majority of the members of such committee are present, and with the court's approval, such committee may select and authorize the employment by such committee of one or more attorneys, accountants, or other agents, to represent or perform services for such committee.**

Rule 2014. Employment of Professional Persons

(a) ***Application for and Order of Employment.*** **An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to §327, §1103, or §1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the Unites States trustee.**

§ 1102. Creditors' and equity security holders' committees.

(a)*(4)* ***On request of a party in interest and after notice and a hearing, the court may order the United States trustee to change the membership of a committee appointed under this subsection, if the court determines that the change is necessary to ensure adequate representation of creditors or equity security holders. The court may order the United States trustee to increase the number of members of a committee to include a creditor that is a small business concern (as described in section 3(a)(1) of the Small Business Act), if the court determines that the creditor holds claims (of the kind represented by the committee) the aggregate amount of which, in comparison to the annual gross revenue of that creditor, is disproportionately large.***

So what does the Creditors' Committee do? It investigates the debtor, monitors the operation of the debtor's business, and provides creditors access to information. The Committee can strongly influence voting by recommendations on the plan or disclosure statement. If the plan or confirmation Order so provides, the Committee can continue in existence and monitor consummation (*i.e.* the debtor's performance) of the plan.

§ 1102. Creditors' and equity security holders' committees.

(b)*(3)* ***A committee appointed under subsection (a) shall—***

(A) ***provide access to information for creditors who—***

(i) ***hold claims of the kind represented by that committee; and***
(ii) ***are not appointed to the committee;***

(B) ***solicit and receive comments from the creditors described in subparagraph (a); and***

(C) ***be subject to a court order that compels any additional report or disclosure to be made to the creditors described in subparagraph (A).***

§ 1103. Powers and duties of committees.

(c) A committee appointed under section 1102 of this title may—

(3) participate in the formulation of a plan, advise those represented by such committee of such committee's determinations as to any plan formulated, and collect and file with the court acceptances or rejections of a plan;

XII. Fees of Attorneys, CPAs, and Other Professionals

Certain claims which arise in connection with the administration and/or preservation of the bankruptcy estate are given a priority under the Code which enables the Court to order immediate compensation out of the first funds available. This includes costs of maintaining, repairing, storing, and selling estate property. It also includes Trustee's fees and fees of attorneys, accountants, and other professionals. For example, compensation and reimbursement awarded officers of the estate are allowable as administrative expenses. Actual, necessary expenses, other than compensation of a professional person, incurred by a creditor that files an involuntary petition, by a creditor that recovers property for the benefit of the estate, or by a creditor that makes a "substantial contribution" to a reorganization, are all allowable administrative expenses. A CPA whose professional services are retained with Court approval to facilitate the ongoing efforts of a debtor or of a Trustee will be given administrative priority. See Bankruptcy Code Sections 327 and 328. Post-bankruptcy breaches of duty by the debtor also often give rise to an administrative claim priority. *In re The Circle K Corp.*, 137 Bankr. 346 (D. Ariz. 1992).

The debtor must obtain authority to employ attorneys, accountants, and other professionals. See Bankruptcy Rule 2014(a). An attorney, accountant, or other professional person may only be employed to perform professional services, not the administrative duties of a trustee. Likewise, the Creditors' Committee must first obtain Court authority to retain attorneys or accountants. The most common reason a Creditors' Committee seeks employment of an accountant is to assist in investigating and analyzing the debtor's financial condition and operations. The need for an accountant will be a function of the accuracy and sophistication of the debtor's financial records and on the debtor's willingness to share those records with and explain them to the Committee. Services of an accountant may also be appropriate if restructuring decisions during the life of the case will involve financial analysis of *pro forma* outcomes. Committees may likewise need the services of an accountant to investigate existence and desirability of bringing preference, fraudulent transfer, and other avoidance actions. Fees are only payable from the estate upon the Court's Order, and applications and orders for payment of interim fees are permitted at 120 day intervals, under

Bankruptcy Code §331. Even post-confirmation of a plan, professional fees should prudently be approved by the Court.

§ 327. **Employment of professional persons.**

(a) **Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.**

(b) **If the trustee is authorized to operate the business of the debtor under section 721, 1202, or 1108 of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional persons if necessary in the operation of such business.**

(c) **In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.**

(d) **The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.**

(e) **The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.**

(f) **The trustee may not employ a person that has served as an examiner in the case.**

§ 328. **Limitation on compensation of professional persons.**

(a) **The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, *on a fixed or percentage fee basis,* or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.**

(b) **If the court has authorized a trustee to serve as an attorney or accountant for the estate under section 327(d) of this title, the court may allow compensation for the trustee's services as such attorney or accountant only to the extent that the trustee performed services as attorney or accountant for the estate and not for performance of any of the trustee's duties that are generally performed by a trustee without the assistance of an attorney or accountant for the estate.**

(c) **Except as provided in section 327(c), 327(e), or 1107(b) of this title, the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 or 1103 of this title if, at any time during such professional person's employment under section 327 or 1103 of this title, such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.**

Rule 2014. **Employment of Professional Persons**

(a) ***Application for and Order of Employment.*** **An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to §327, §1103, or §1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the**

specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the Unites States trustee.

§ 331. Interim compensation.

A trustee, an examiner, a debtor's attorney, or any professional person employed under section 327 or 1103 of this title may apply to the court not more than once every 120 days after an order for relief in a case under this title, or more often if the court permits, for such compensation for services rendered before the date of such an application or reimbursement for expenses incurred before such date as is provided under section 330 of this title. After notice and a hearing, the court may allow and disburse to such applicant such compensation or reimbursement.

The factors to be considered by the Court in awarding professional fees are as follows:

§ 330. Compensation of officers.

(a)(3) ~~(A)~~ In determining the amount of reasonable compensation to be awarded *to an examiner, trustee under chapter 11, or professional person,* the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; ~~and~~

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) **~~(E)~~ whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.**

(4) (A) Except as provided in subparagraph (B), the court shall not allow compensation for—

(i) unnecessary duplication of services; or
(ii) services that were not—

(I) reasonably likely to benefit the debtor's estate; or
(II) necessary to the administration of the case.

(B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

XIII. Reporting

The Chapter 11 debtor does not conduct its business "under a bushel." Full disclosure is the rule. Thus, during the pendency of the Chapter 11 case, periodic reports are due from the debtor within times fixed by the U.S. Trustee or the Court under Rule 2015(a)(3). The debtor summarizes the operations of its business and its income tax withholding practices. See Bankruptcy Code §704(a)(8). After confirmation of a plan, a progress report is typically due within 30 days. And reports may continue if required by the plan or by the Court. See Bankruptcy Code §1106(a)(7).

Rule 2015. Duty to Keep Records, Make Reports, and Give Notice of Case

(a) Trustee or Debtor in Possession. **A trustee or debtor in possession shall**

(3) **file the reports and summaries required by §704(8) of the Code which shall include a statement, if payments are made to employees, of the amounts of deductions for all taxes required to be withheld or paid for and in behalf of employees and the place where these amounts are deposited;**

§ 704. Duties of trustee.

(a) **The trustee shall—**

(8) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires; ~~and~~

§ 1106. Duties of trustee and examiner.

(a) A trustee shall—

(7) after confirmation of a plan, file such reports as are necessary or as the court orders.~~;~~

XIV. Conclusion

A. Creditor Strategies

1. Be diligent, aggressive, and thorough in protecting your interest as a creditor in bankruptcy—but don't expect too much. The deck is stacked against you. When you occasionally get a creditor-oriented result from bankruptcy, this is a major victory.

2. Never assume your intuitions are correct. Bankruptcy is a creature of statute, counter-intuitive, and treacherous.

3. Be cautious about joining in an involuntary petition. You may be incurring a risk of liability for damages.

4. Never be cavalier about the automatic stay. If a debtor tells you he is in bankruptcy, check it out.

5. Always file a timely and accurate Proof of Claim.

6. File a Notice of Appearance and Request for Notices in cases that you want to follow closely, or subscribe to and check in on the PACER website, http://pacer.uspci.uscourts.gov.

7. Remember that Creditors' Meetings and Debtor Examinations are available as an opportunity to interrogate the debtor and know what is going on.

8. Consider membership on the Chapter 11 Creditors' Committee, if asked, and/or active participation in the plan confirmation process.

9. Consider whether your claim can be excepted from discharge.

10. Consider suggesting reaffirmation, if the debtor wants to do business with you post-bankruptcy.

11. Record all transfers promptly and diligently.

12. You may want to search the entire Bankruptcy Code at http://www.wellscuellar.com/WebResources.shtml, or you may want to stay up to date on bankruptcy caselaw as it is published by the Courts by accessing http://www.wellscuellar.com/DynamicContentPage.shtml#35, but **always** consult with competent creditor's rights counsel on any bankruptcy matter.

B. Disclaimer

The foregoing information is for educational purposes only and is not intended to exhaustively or conclusively cover Chapter 11. Bankruptcy law is subject to change and all of its nuances, details, and exceptions cannot be covered completely in a short outline. Most importantly, this outline is no substitute for legal advice.

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