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Postconfirmation Issues: The Effects of Confirmation and Post Confirmation Procedings

Frank R. Kennedy
University of Michigan, Phoenix

Gerald K. Smith
University of Michigan, Phoenix

POSTCONFIRMATION ISSUES: THE EFFECTS OF CONFIRMATION AND POSTCONFIRMATION PROCEEDINGS

FRANK R. KENNEDY*
GERALD K. SMITH**

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* Thomas M. Cooley Professor of Law Emeritus, University of Michigan Law School. Of Counsel, Sidley & Austin, Chicago, Illinois. A.B. 1935, Southwest Missouri State University; LL.B. 1939, Washington University; J.S.D. 1953, Yale University. Executive Director of the Commission on the Bankruptcy Laws of the United States, 1971-73. Professor Kennedy wishes to acknowledge research assistance provided by Diane Benedict, third-year student at the University of Michigan Law School.

** Partner, Lewis and Roca, Phoenix, Arizona. B.S. 1958, Kansas State University; LL.B. 1961, New York University. Deputy Director of the Commission on the Bankruptcy Laws of the United States, 1972-73. Lewis and Roca was counsel for the O'Neill Group in the *Continental Airlines* litigation discussed *infra* notes 419-429 and accompanying text. Mr. Smith has no client relationship in connection with this Article, but his participation in the litigation may have influenced his views, and he brings this to the attention of the reader.

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Confirmation is not the end of a reorganization case. It is ordinarily the most significant single event in the case, the climax of efforts that may have lasted years. But as our Article demonstrates, confirmation does not resolve all controversies between the debtor and the creditors and does not terminate all litigation in a case. Part I of the Article considers the jurisdictional implications of confirmation. Part II discusses the role of confirmation as res judicata and discharge of debt. Part III considers the implementation of the plan of reorganization, postconfirmation modification of the plan, revocation of the plan, postconfirmation conversion of a case, postconfirmation dismissal, and the effects and implications of the postconfirmation filing of a second case.

I. POSTCONFIRMATION JURISDICTION OF THE BANKRUPTCY COURT

A. An Overview of Bankruptcy Court Jurisdiction

The jurisdiction of the courts administering the bankruptcy laws of the United States[1] is shrouded by the mists of ambiguity and uncertainty,[2]

1. The bankruptcy jurisdiction of federal district courts is currently found in 28 U.S.C. § 1334 (1988 & Supp. IV 1992). The jurisdiction of the bankruptcy court under the Bankruptcy Reform Act of 1978 was contained in 28 U.S.C. § 1471 (1982) (repealed 1984). Such jurisdiction, like the present jurisdictional grant to the district court, was extensive. The present grant has been described as "the broadest possible jurisdiction." Robert A. Greenfield, *The National Bankruptcy Conference's Position on the Court System Under the Bankruptcy Amendments and Federal Judgeship Act of 1984, and Suggestions for Rules Promulgation*, 23 HARV. J. ON LEGIS. 359, 362 (1986). The

compounded by a bastardized status designed to avoid the creation of hundreds of additional Article III federal judges.[3] The basic jurisdictional

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Reform Act differed significantly from the current legislation, however, as to its treatment of the bankruptcy court. Section 1471(c) provided that the bankruptcy court was to "exercise all of the jurisdiction conferred by this section on the district courts." 28 U.S.C. § 1471(c) (1982) (repealed 1984). In contrast, 28 U.S.C. § 157(a) allows each district to refer cases and proceedings to the bankruptcy judges for the district. If referral takes place, § 157 goes on to regulate and restrict the jurisdictional reference in a patchwork of complex subsections, which are extraordinarily expensive and wasteful of judicial resources. The jerry-built structure includes § 157(c)(1), which restores the special reference procedure of § 117 of Chapter X of the Bankruptcy Act of 1898.

2. As Professor Countryman observed:

> In the arcane world of federal bankruptcy law, nothing is more arcane than the jurisdiction of the bankruptcy court. That was true under the old Bankruptcy Act of 1898, as frequently amended, and was even more true when that Act was replaced by the new Bankruptcy Code of 1978, effective October 1, 1979. The situation became still worse in 1982, when the Supreme Court found at least some part of the 1978 effort unconstitutional. The Ninety-eighth Congress responded to the Court's ruling by amending the Code in 1984. The best that can be said of the 1984 amendments to the new Code is that a hitherto unacceptable situation has now been rendered intolerable by a process that reflects no credit on any branch of the federal government.

Vern Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process,* 22 HARV. J. ON LEGIS. 1, 1 (1985) (footnotes omitted).

3. Professor Countryman addressed the reasons for some of the opposition of the federal judges to Article III status of bankruptcy judges.

> District Judge Wesley Brown, chairman of the ad hoc committee, also appeared in House hearings and revealed the ad hoc committee's own draft of a statute for the bankruptcy court system. This draft was a virtual copy of the Senate bill, except that the bankruptcy judges were again designated "referees in bankruptcy." The ad hoc committee focused its objections to the House bill on the creation of "specialized" judges and on the additional expense involved, ignoring the facts that the specialized judges and most of the expense would be present whether or not the bankruptcy judges were Article III judges. Former District Judge Simon Rifkind opposed the increase in the number of Article III judges, however, on the ground that it "would dilute the significance, and prestige, of district judgeships." Similarly, Attorney General Griffin Bell, himself a former circuit judge, opposed a system of Article III bankruptcy courts on the ground that such action "would almost certainly operate to diminish the prestige and influence of our district courts." Judge Weinfeld had volunteered to "meet head on" the "suggestion that the opposition of the judges is sort of an ego trip on the part of the judges; that they're holding on to their power—a jealousy of their power." But when the Rifkind and Bell statements were read to him, Weinfeld said, "I don't disagree with those statements at all."

Id. at 9 (footnotes omitted). The lobbying efforts of the federal judges in the 1970s and

provisions were contained in section 2a of the Bankruptcy Act of 1898.[4] To the extent not inconsistent with the particular reorganization or arrangement chapter, these jurisdictional provisions applied to reorganizations and arrangements as well.[5]

One of the important recommendations of the Commission on the Bankruptcy Laws of the United States was that bankruptcy judges be granted "jurisdiction to determine most controversies arising from cases commenced under the Act."[6] This proposal was implemented in the Commission's

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again in the 1980s is discussed in some detail by Professor Countryman. *Id.* at 7-12, 29-33. Professor Countryman also questioned the legality and propriety of lobbying efforts of members of the judiciary.

> A few days after the House action, Chief Justice Warren Burger reportedly called Senator Strom Thurmond (R-S.C.), ranking minority member of the Senate Judiciary Committee, and Senator Malcolm Wallop (R-Wyo.), a minority sponsor of the bill, to delay a vote in the Senate because of his dissatisfaction with the new bankruptcy court provisions. The Chief Justice was particularly unhappy with those provisions calling for presidential appointment, making the bankruptcy courts "adjuncts" of the circuit courts of appeals rather than the lower-level district courts, and adding bankruptcy judges to the Judicial Conference. The Supreme Court's public information officer reportedly confirmed the Chief Justice's call to Thurmond. He explained this "unusual action" by saying that the Chief Justice was acting in his role as Chairman of the Judicial Conference, "which by law is authorized to tell Congress what it thinks of bills affecting the court system."
>
> That is a rather free-handed interpretation of the statute creating the Judicial Conference, which provides that "[t]he Chief Justice shall submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation." It is particularly unusual when read in connection with a section of the federal Criminal Code forbidding the use of any federally appropriated funds, unless expressly authorized by Congress, to pay for any "telephone, letter . . . or other device" intended to influence the vote of any member of Congress, unless on the request of such member.

Id. at 10-11 (footnotes omitted).

4. 11 U.S.C. § 11(a) (1976) (repealed 1978). For a succinct description of the jurisdiction of the bankruptcy courts under the Bankruptcy Act of 1898, see Countryman, *supra* note 2. Jurisdictional provisions were also contained in Bankruptcy Act §§ 60(b), 67a(4), 67e, and 70e(3), 11 U.S.C. §§ 96(b), 107(a)(4), 107(e), and 110(e)(8) (1976) (repealed 1978).

5. Bankruptcy Act §§ 102, 302, 402, 11 U.S.C. §§ 502, 702, 802 (1976) (repealed 1978). In addition, Bankruptcy Act §§ 111, 311, and 411, 11 U.S.C. § 511, 711, and 811 (1976) (repealed 1978), granted the bankruptcy courts exclusive jurisdiction over the debtor and the debtor's property.

6. REPORT OF THE COMM'N ON THE BANKRUPTCY LAWS OF THE U.S., H.R. DOC. NO. 137, 93d Cong., 1st Sess., pt. I, at 85 (1973) (footnotes omitted) [hereinafter REPORT I]:

> The Commission proposes the establishment of bankruptcy courts vested

Proposed Bankruptcy Act of 1973.[7] Section 2-201(b)(6) of the proposed act gave bankruptcy courts jurisdiction over matters of significance in the administration of reorganization cases.[8] The Commission's recommendation became law with the enactment of the Bankruptcy Reform Act of 1978.[9]

Somewhat less than four years after the October 1, 1979 effective date of the Reform Act,[10] the Supreme Court in *Northern Pipeline*[11] held unconstitutional the grant to a non-Article III court of jurisdiction over a prepetition action for breach of contract. Since the broad grant of jurisdiction was part of a "comprehensive restructuring of the bankruptcy laws,"[12] the Court struck down the entire jurisdictional framework, although delaying the effective date of its ruling.[13] Congress eventually enacted a new

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> with jurisdiction to determine most controversies arising from cases commenced under the Act. At the same time these courts would be relieved of most of the administrative duties heretofore performed by the courts of bankruptcy. Jurisdiction of railroad reorganizations would remain, however, with the United States district courts. This redistribution of jurisdiction and duties should substantially reduce the number of courts needed to discharge the judicial duties of the Act. As a result, the lines defining judicial districts and circuits would be inappropriate and would not apply to the bankruptcy courts. Nevertheless, the bankruptcy courts would be an integral part of the federal judicial establishment. The judges would be appointed by the President with the advice and consent of the Senate for terms of fifteen years. The judgments and orders of the bankruptcy courts would be final, but subject to review on appeal to the United States district courts. Further review by the appellate courts would be largely governed by provisions in Title 28 of the United States Code. The procedures of the bankruptcy courts would be governed by rules of practice and procedure made pursuant to section 2075 of Title 28 of the United States Code, the enabling act which authorizes the Supreme Court to prescribe procedure and practice under the Bankruptcy Act.

See also id. at 5-7. Article III status was carefully considered, but the Commission ultimately decided to recommend what was politically doable—Article I status. The Commission had given serious consideration to additional district judges to handle bankruptcy litigation. Thus, if the Commission had known that the Article I structure it recommended was unconstitutional, the Commission likely would have recommended that the District Courts handle bankruptcy litigation.

7. *See* REPORT OF THE COMM'N ON THE BANKRUPTCY LAWS OF THE U.S., H.R. DOC. NO. 137, 93d Cong., 1st Sess., pt. II, § 2-201, at 30-31 (1973) [hereinafter REPORT II].

8. *Id.*

9. Pub. L. No. 95-598, 92 Stat. 2549. On November 6, 1978, President Carter signed into law the Bankruptcy Reform Act of 1978. 14 WKLY. COMP. PRES. DOC., Nov. 10, 1978, at 2005.

10. Bankruptcy Reform Act of 1978, § 402(a), 92 Stat. at 2682.

11. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

12. *Id.* at 87 n.40.

13. For a discussion of the stay and its one continuance to December 24, 1982, and

jurisdictional framework in an attempt to cure the constitutional defect laid bare in *Northern Pipeline*, but the pervasive grant of jurisdiction to the *district court* remained intact.[14]

B. Postconfirmation Jurisdiction over Reorganization Cases Under the Bankruptcy Act

Chapter X, the general corporate reorganization chapter of the Bankruptcy Act, is the predecessor of Chapter 11 of the Bankruptcy Code.[15] For that reason, discussion of jurisdiction under the Act will focus

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the ensuing legislative and judicial scrambles, see Countryman, *supra* note 2, at 18-33.

14. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333. Professor Countryman described the effect of the 1984 amendments as follows:

> The entire bankruptcy jurisdiction is again conferred on the district courts by language identical to that employed in section 1471(a) and (b) of the Judicial Code of 1978, but there is no provision similar to old section 1471(c) directing the bankruptcy court to exercise "all" of that jurisdiction. Instead, new section 157 of the Judicial Code authorizes each district court to provide that "any or all cases" or "proceedings" within that jurisdiction shall be referred to the bankruptcy judges.

Countryman, *supra* note 2, at 34-35.

15. *See* H.R. REP. NO. 595, 96th Cong., 1st Sess. 221 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6181:

> The Bankruptcy Act contains four chapters for the reorganization of businesses. Chapter VIII (Section 77) is for railroad reorganizations; chapter X for other corporate reorganizations, provides a complete financial restructuring of a corporation; chapter XI provides for arrangements and compositions for corporations, partnerships, and individuals; and chapter XII contains the procedures for arrangements for noncorporate entities involved in real estate. The line between the latter three chapters, unclear when drawn in 1938, had blurred further over the past 40 years. In 1938, the business reorganization concept was not nearly as well developed as it is today, and the chapters reflect a certain lack of sophistication in handling the myriad problems of modern corporate finance.

The Commission recommended a comprehensive chapter for the rehabilitation of distressed businesses, available to all persons except insurance and banking corporations, savings and loan associations, railroads covered by Chapter IX, and municipalities covered by Chapter VIII. REPORT I, *supra* note 6, at 237. As suggested in the Commission Report, Chapter X was the model for the Commission's proposed reorganization chapter, and that chapter strongly influenced the structure of Chapter 11 of the Bankruptcy Code. *Cf. id.*, at 257 ("[T]he flexibility of present Chapter XI is retained to the extent compatible with the interests of creditors, but the protective features of present Chapter X are generally made applicable, with the exception of the 'absolute priority rule,' which is substantially modified."). This is evident from the postconfirmation provisions of Chapter 11, which closely parallel those of Chapter X.

on Chapter X reorganizations. Although surely not a matter of subject matter jurisdiction, Chapter X expressly allowed the modification of a confirmed plan.[16] This power ended with the substantial consummation of the plan.[17] On the consummation of the plan, the judge was directed to enter a final decree which, among other things, closed the estate.[18] The concept of a "closing of the case" in and of itself implicitly recognized the

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Compare infra notes 16-20 and accompanying text *with infra* notes 31-33 and accompanying text.

16. Section 222 of Chapter X of the Bankruptcy Act of 1898 (as amended October 1, 1973) provided:

> A plan may be . . . modified, with the approval of the judge, . . . after its confirmation if, in the opinion of the judge, the . . . modification does not materially and adversely affect the interests of creditors or stockholders. If the judge finds that the proposed . . . modification . . . does materially and adversely affect the interests of creditors or stockholders, he shall fix a hearing for the consideration, and a subsequent time for the acceptance or rejection, of such . . . modification. The requirements in regard to notice of hearing, to submission to the Securities and Exchange Commission, to acceptance, to filing and hearing of objections to confirmation and to the confirmation, as prescribed in subchapter VII of this chapter in regard to the plan proposed to be . . . modified, shall be complied with.

11 U.S.C. § 622 (1976) (repealed 1978).

17. Section 229c of Chapter X of the Bankruptcy Act of 1898 (as amended October 1, 1973) provided that once "a plan has been substantially consummated . . . , the plan may not thereafter be . . . modified if the proposed . . . modification materially and adversely affects the participation provided for any class of creditors or stockholders by the plan." 11 U.S.C. § 629(c) (1976) (repealed 1978). Substantial consummation was defined as

> (1) transfer, sale or other disposition of all or substantially all of the property dealt with by the plan pursuant to the provisions of the plan;
>
> (2) assumption of operation of the business and management of all or substantially all of the property dealt with by the plan by the debtor or by the corporation used for the purpose of carrying out the plan; and
>
> (3) commencement of the distribution to creditors and stockholders, affected by the plan, of the cash and securities specified in the plan as provided for in section 224 of this Act.

Bankruptcy Act § 229a, 11 U.S.C. § 629(a) (1976) (repealed 1978).

18. Bankruptcy Act § 228, 11 U.S.C. § 628 (1976) (repealed 1978):

> Upon the consummation of the plan, the judge shall enter a final decree—
>
> (1) discharging the debtor from all its debts and liabilities and terminating all rights and interests of stockholders of the debtor, except as provided in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of property;
>
> (2) discharging the trustee, if any;
>
> (3) making such provisions by way of injunction or otherwise as may be equitable; and
>
> (4) closing the estate.

ongoing jurisdiction of the court; however, another provision of Chapter X made it express:

> The court may direct the debtor, its trustees, any mortgagees, indenture trustees, and other necessary parties to execute and deliver or to join in the execution and delivery of such instruments as may be requisite to effect a retention or transfer of property dealt with by a plan which has been confirmed, and to perform such other acts, including the satisfaction of liens, as the court may deem necessary for the consummation of the plan.[19]

Thus, Chapter X contemplated that the court retain jurisdiction and therefore have oversight of the performance of the plan until the entry of a final decree.[20]

Chapter XI used a different approach to postconfirmation jurisdiction.[21] After confirmation the court had jurisdiction to allow or disallow claims,[22] and to allow modification of a confirmed plan if an application to modify was filed within six months after confirmation and fraud "was practiced in the procuring of such arrangement."[23] If the court concluded that the confirmation should be set aside, the court could consider alterations or modifications of the arrangement for the purpose of correcting the fraud; but it could not materially modify or alter the arrangement adversely to the interests of any party who did not participate in the fraud and who did not consent or to the prejudice of any innocent person, who, for value, subsequent to the confirmation, acquired rights in reliance upon it.[24]

However, an arrangement could provide for a further retention of jurisdiction.[25] In that event, Chapter XI allowed the modification of

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19. Bankruptcy Act § 227, 11 U.S.C. § 627 (1976) (repealed 1978); *see also* Bankr. R. 10-309(a).

20. Chapter XII was similar to Chapter X. In real property arrangements under Chapter XII, modification of the arrangement was allowed "either before or after its confirmation." Bankruptcy Act § 469, 11 U.S.C. § 869 (1976) (repealed 1978). Chapter XII also allowed an arrangement procured by fraud to be set aside on application filed within six months of confirmation. Bankruptcy Act § 511, 11 U.S.C. § 911 (1976) (repealed 1978). Upon consummation, the court was to enter a final decree. Bankruptcy Act § 477, 11 U.S.C. § 877 (1976) (repealed 1978). The court was expressly authorized to enter orders necessary to effectuate consummation.

21. *See* Paul F. Festerson, *Retained Jurisdiction in Chapter XI of the Bankruptcy Act: Why Not? Or, How to Have Your Cake and Eat it, Too*, 7 CREIGHTON L. REV. 492 (1974).

22. Bankruptcy Act § 369, 11 U.S.C. § 769 (1976) (repealed 1978).

23. Bankruptcy Act § 386, 11 U.S.C. § 786 (1976) (repealed 1978); *see* Bankr. R. 11-41.

24. Bankruptcy Act § 386(3), 11 U.S.C. § 786(3) (1976) (repealed 1978).

25. Bankruptcy Act § 368, 11 U.S.C. § 768 (1976) (repealed 1978). As Festerson

observed:

> After confirmation of a plan, those things which do occur take place because the court "retains jurisdiction." The phrase appears repeatedly in the Act. It is nowhere defined and only slightly understood. The object is to set sail upon this uncharted sea, and to inquire what promise it may hold for the salvation of the struggling enterprise.

Festerson, *supra* note 21, at 493.

Curiously, the drafters of the Chandler Act Amendments provided for dismissal of the case upon confirmation, except as otherwise provided in sections 369 and 370. Bankruptcy Act § 367(4), 11 U.S.C. § 767(4) (1976) (repealed 1978). Section 369 dealt with final allowance or disallowance of claims, and section 370 provided for distribution subsequent to confirmation.

This dismissal was not, however, the end of the case. In Mr. Festerson's words, "The players do not leave the field." Festerson, *supra*, at 494. Section 357(7) and (8) and section 368 allowed the court to retain jurisdiction. Not until consummation, was there to be an end to the proceeding with the entry of a final decree under section 372.

Mr. Festerson also points out that section 2 of the Bankruptcy Act "provides quite simply that the court may 'reopen estates for cause shown.'" *Id.* at 501. And "there is no basis to question the applicability to proceedings in Chapter XI of the provisions for reopening the estate." *Id.*

The problem with the approach of Chapter XI was that the postconfirmation "powers" were left to the draftsmen, some of which were unartful. *Id.* at 502. Mr. Festerson goes on to point out that under the Act,

> [w]ithin certain broad limits, the debtor is free to invent his own world and in negotiation with his creditors to determine outside the courtroom what duties will remain for the court once the confirmation is had. The prime corollary of the thesis is that the plan need be drafted with great particularity. It needs to state exactly what it is that the court will have a voice in, exactly what benefits will survive the confirmation and what burdens will expire with it, or vice versa. As all good lawyers know, the name of the game is to take every legitimate advantage of the rules; to seek, as the advantage may appear, the best of the world within and without the courtroom.

Id. at 510.

Mr. Festerson discusses the type of problem that may result from the debtor's and its counsel's being able to provide for ongoing jurisdiction. In Jones v. Waynesburg Bank (*In re* Ohio Builders & Milling, Inc.), 128 F.2d 165 (6th Cir. 1942), the plan provided that the court would retain jurisdiction over the assets. After confirmation the debtor secured a loan with the assets, without obtaining court approval. This was held invalid since "no encumbrance could be put upon the assets of the debtor without the court's approval." *Id.* at 166.

In Seedman v. Friedman, 132 F.2d 290 (2d Cir. 1942), the court avoided a similar unjust result. Seedman contracted for bulk purchase of the debtor's merchandise and fixtures pursuant to express provisions in the plan. The plan was thereafter set aside. The trustee then sold the assets to a third party, and Seedman filed a priority claim to recover for damages for breach of the contract. The court concluded that authorization of the sale was not essential and that

> [t]he court properly retained jurisdiction under it only insofar as necessary to

payment provisions of a confirmed arrangement prior to full payment of the deferred consideration or, if the deferred consideration was represented by negotiable promissory notes, before delivery of the notes to the creditors, if the court retained jurisdiction. Furthermore, upon default or termination of an arrangement on "the happening of a condition specified in the arrangement," the court had the power to dismiss the Chapter XI case, adjudge the debtor a bankrupt, and direct that bankruptcy proceed.[26]

C. Postconfirmation Jurisdiction over Chapter 11 Reorganizations Under the Bankruptcy Code[27]

As was the case with former Chapter X, Chapter 11 does not expressly address postconfirmation jurisdiction. Chapter 11, as did Chapter X, limits postconfirmation modification of a confirmed plan, but contrary to former

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> carry out its provisions and the terms of the arrangement. . . . The court, however, was without authority to exercise a continuous and active control over the conduct of the debtor's business. . . .
>
> . . . .
>
> But even if this interpretation is incorrect, retention of jurisdiction, at least under the circumstances of this case, should still be operative only to ensure compliance with the terms of the arrangement and the statutory provisions, not to pass on all details of the debtor's business.

Id. at 294-95. Mr. Festerson points out that the judge in *Seedman* had no authority "except the conclusions of Collier on Bankruptcy, which itself had no authority but the veneration customarily accorded it." Festerson, *supra*, at 514. The important point is that "Judge Clark's words and the authority of Collier and *Seedman* have spawned a theory which has come to be widely recited and little questioned." *Id.*

As Mr. Festerson makes clear, especially in his discussion of *In re* California Eastern Airways, Inc., 97 F. Supp. 847 (D. Del. 1951) and North American Car Corp. v. Peerless Weighing & Vending Machine Corp., 143 F.2d 938 (2d Cir. 1944) (§ 77(b) core proceeding), the difficulty was that allowing the debtor to prescribe the extent of retained jurisdiction led to broad and general retention of jurisdiction, which created problems and led to the court's reaction against this. For example, in *North American Car Corp.*, the Second Circuit stated:

> It should be the objective of courts to cast off as quickly as possible all leading strings which may limit and hamper [the debtor's] activities and throw doubt upon its responsibility. It is not consonant with the purposes of the Act, or feasible as a judicial function, for the courts to assume to supervise a business somewhat indefinitely.

143 F.2d at 939.

26. Bankruptcy Act § 377, 11 U.S.C. § 777 (1976) (repealed 1978).

27. This Article does not discuss postconfirmation jurisdiction of adjustment of debt cases under Chapters 12 and 13. The principles discussed herein apply, however, with the qualification that 11 U.S.C. §§ 1208, 1231, and 1329 vary these principles somewhat.

Chapter X, Chapter 11 restricts the ability of parties in interest to seek, and the court to revoke, an order of confirmation. Chapter 11, like former Chapter X, expressly grants the court power to effectuate a confirmed plan; exactly what this means has been left to the courts. Not surprisingly, there has been a divergence of opinion among the courts. The courts have also disagreed about the need for, and effect of, plan provisions retaining jurisdiction over a great variety of matters.

The Bankruptcy Code simplifies matters considerably by eliminating different procedures for the rehabilitation of business debtors.[28] Under 28 U.S.C. § 1334(a) and (b), the district courts are granted original and exclusive jurisdiction of cases under title 11 and nonexclusive jurisdiction over civil proceedings "arising under title 11 or arising in or related to cases under title 11."[29] And under 28 U.S.C. § 1334(d) the district court in which the title 11 case is commenced or is pending has "exclusive jurisdiction of all of the property of the debtor in existence at commencement of the case and of property of the estate."[30]

Chapter 11 provides for the modification of a confirmed plan before substantial consummation.[31] As in the case of Chapter X of the Bankruptcy Act, Chapter 11 of the Code impliedly recognizes the ongoing jurisdiction of the court to effectuate the plan since a case continues after confirmation, but the court can close a case after it has been "fully administered."[32] This

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28. Chapter 11 was not intended just for business debtors. Toibb v. Radloff, 111 S. Ct. 2197 (1991).

29. 28 U.S.C. § 1334(b) (1988).

30. *Id.* § 1334(d).

31. 11 U.S.C. § 1127(b) (1988). Substantial consummation is defined under § 1101(2) as:

> (A) transfer of all or substantially all of the property proposed by the plan to be transferred;
>
> (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and
>
> (C) commencement of distribution under the plan.

Id. § 1101(2). Borrowing from Chapters XI and XII, Chapter 11 also expressly provides for revocation of an order of confirmation for fraud on application within 180 days after entry of an order. *Id.* § 1144. However, this is in reality a *limitation* on the court's power.

32. 11 U.S.C. § 350(a) ("After an estate is fully administered and the court has discharged the trustee, the court shall close the case."); *see also* FED. R. BANKR. P. 3022 ("[A]fter an estate is fully administered in a chapter 11 reorganization case, the court, on its own motion or on a motion of a party in interest, shall enter a final decree closing the case.") Section 2a(8) of the Bankruptcy Act gave the court jurisdiction to close cases. 11 U.S.C. § 11(a)(8) (1976) (repealed 1978); *see also* Bankr. R. 514. Under the Bankruptcy Code, "[a] case may be reopened in the court in which such case was

is made express by section 1142, which authorizes orders necessary to the implementation of the plan.[33] The reorganization court also has broad powers under section 105 of the Bankruptcy Code, applicable generally to cases under the Code, "to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]."[34]

The broad jurisdiction of the court under 28 U.S.C. § 1334(a) and (b)[35] otherwise continues,[36] as did the jurisdiction of the Chapter X court

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closed to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(b). There is no Bankruptcy Rule for reopening Chapter 11 cases, although FED. R. BANKR. P. 5010 covers the reopening of cases under Chapters 7, 12 and 13. Section 2a(8) of the Bankruptcy Act of 1898 also gave the court jurisdiction to reopen cases. 11 U.S.C. § 11(a)(8) (1976) (repealed 1978); *see also* Bankr. R. 515 (generally applicable to Chapters X, XI, and XII cases by way of Bankr. R. 10-501, 11-60 and 12-59).

33. Section 1142 provides that:

> (a) Notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court.
>
> (b) The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan.

11 U.S.C. § 1142 (1988).

34. *Id.* § 105. This section is derived from the All Writs Statute, 28 U.S.C. § 1651 (1988).

35. Section 1334 gives jurisdiction to the district courts, and the bankruptcy courts get it only by reference pursuant to 28 U.S.C. § 157(a). Congress intended that bankruptcy courts have pervasive jurisdiction. It carried out this intent by granting jurisdiction over proceedings arising under or in title 11 or related to a case under title 11. A proceeding arises under title 11 if the cause of action is created by the Bankruptcy Code or concerns the administration of the estate. National City Bank v. Coopers & Lybrand, 802 F.2d 990, 994 (8th Cir. 1986); *see also* H.R. REP. NO. 595, *supra* note 15, at 445-46, *reprinted in* 1978 U.S.C.C.A.N. at 6400-01 ("[A]ny action by the trustee under an avoiding power would be a proceeding arising under title 11, because the trustee would be claiming based on a right given by one of the sections in Subchapter III of Chapter 5 of Title 11"); 2 COLLIER ON BANKRUPTCY ¶ 3.01(c)(iii) (Lawrence P. King ed., 15th ed. 1992). An example is an adversary proceeding to recover a postpetition transfer under § 549 of the Bankruptcy Code. Such a proceeding is grounded solely on the Bankruptcy Code. Any invocation of the avoidance powers generally arises under title 11.

Whether a proceeding "arises in" a title 11 case is uncertain. 2 COLLIER ON BANKRUPTCY, *supra*, ¶ 3.01(c)(v) (listing counterclaims, turnover orders, and lien determinations). Some cases suggest that a proceeding "arises in" a title 11 case if the proceeding involves an administrative matter that would not exist outside the context of

under the Bankruptcy Act.[37] Thus, since the confirmation of a plan in a

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the bankruptcy case. Wood v. Wood (*In re* Wood), 825 F.2d 90, 97 (5th Cir. 1987). An example is a contested fee application.

With respect to "related to" jurisdiction, the widely accepted test formulated by the Third Circuit in Pacor, Inc. v. Higgins (*In re* Pacor, Inc.), 743 F.2d 984 (3d Cir. 1984), is whether the action "could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate." *Id.* at 994. This formulation is probably as close to the mark as any definition, and the authorities seem to adopt the view that if the action could conceivably have any effect on the estate, it will be within the scope of the related to jurisdiction. Cases applying the test include: Gardner v. United States (*In re* Gardner), 913 F.2d 1515, 1518 (10th Cir. 1990); Elscint, Inc. v. First Wis. Fin. Corp. (*In re* Xonics), 813 F.2d 127, 131 (7th Cir. 1987); Dogpatch Properties, Inc. v. Dogpatch U.S.A., Inc.(*In re* Dogpatch U.S.A., Inc.), 810 F.2d 782, 786 (8th Cir. 1987); *National City Bank*, 802 F.2d at 994; Bobroff v. Continental Bank (*In re* Bobroff), 766 F.2d 797, 802 (3d Cir. 1985). Since this formulation leaves out proceedings determining discharge, dischargeability, and reaffirmation, presumably those are examples of proceedings arising in a case under title 11.

36. *See, e.g.*, Fidelity & Deposit Co. v. Morris (*In re* Morris), 950 F.2d 1531 (11th Cir. 1992); Smith v. Commercial Banking corp. (*In re* Smith), 866 F.2d 576 (3d Cir. 1989); *see also* Spacek v. Thomen (*In re* Universal Farming Indus.), 873 F.2d 1334 (9th Cir. 1989) (dismissal of case does not require dismissal of ancillary matters); Winston & Strawn v. Kelly (*In re* Churchfield Management & Inv. Corp.), 122 B.R. 76 (Bankr. N.D. Ill. 1990) (continued jurisdiction over actions to recover preferential and fraudulent transfers, because they were matters "arising under" title 11); Stardust Inn, Inc. v. Doshi (*In re* Stardust Inn, Inc.), 70 B.R. 888 (Bankr. E.D. Pa. 1987) (noting four factors to be considered: judicial economy, fairness, convenience to parties, and degree of difficulty of state-law issues).

> The Eleventh Circuit in *Morris* expressly rejected the notion that this "retained" jurisdiction operated like pendant jurisdiction (i.e., that the court would have to expressly retain jurisdiction over a given action or it would be dismissed when the case itself was dismissed). Instead, the court noted that an adversary proceeding and the bankruptcy case itself are two distinct proceedings, so that dismissal of one does not automatically result in dismissal of the other.

LEIF M. CLARK & BRET A. MAIDMAN, POSTDISMISSAL, POSTCLOSING AND POSTCONFIRMATION JURISDICTION: WHEN IS THE BANKRUPTCY CASE REALLY OVER? 6 (Am. Bankr. Inst. 1992 Annual Spring Meeting Educational Materials, LRP Publications 1992) (citation omitted). The exclusive jurisdiction provisions of § 1334(a) and (d) seem to require that the case be pending, but the original, nonexclusive jurisdiction over specified civil proceedings under § 1334(b) does not seem to be so limited.

37. The basic jurisdiction of the Chapter X court was found in 11 U.S.C. § 2 (1976) (repealed 1978). The constraints of 11 U.S.C. § 23 did not apply in Chapter X cases. 11 U.S.C. § 102 (1976) (repealed 1978). *See generally* 6 COLLIER ON BANKRUPTCY ¶ 3.18, at 539-48 (James W. Moore ed., 14th ed. 1977) (discussing jurisdiction of federal district court); 6A COLLIER ON BANKRUPTCY, *supra*, ¶ 11.13[3], at 276-83, ¶ 11.20, at 308-16 (same).

Chapter 11 case does not terminate a case, there should be no change in the basic jurisdiction of the court under 28 U.S.C. § 1334(a) and (b).[38] Confirmation does, however, result in a loss of *exclusive* jurisdiction grounded on 28 U.S.C. § 1334(d), which grants exclusive jurisdiction over property of the debtor and property of the estate. This is so at least as to "property of the estate" since there is no longer any property of the estate after confirmation, absent a plan provision delaying the revesting of title in the debtor or its transfer pursuant to the plan.[39] Thus, Chapter 11 postconfirmation jurisdiction does not depend on whether the confirmed plan or the order of confirmation provides for a retention of jurisdiction. It is like Chapter X in that regard. Congress declined to follow the Chapter XI model, which grounded the court's postconfirmation jurisdiction in large part on whether the plan provided for a retained jurisdiction. Nonetheless, some bankruptcy judges have viewed postconfirmation jurisdiction under Chapter 11 as dependent on a retention of jurisdiction in the plan.[40]

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38. Arguably, termination occurs when the case is closed, and at that point jurisdiction ceases. However, 28 U.S.C. § 1334(a) gives no guidance in this regard. It may, however, be a reasonable implication of the provisions of 11 U.S.C. § 350 for closing and reopening cases. But there is at least a continuing jurisdiction for purposes of § 350; or, better stated, a motion under § 350 is within the bankruptcy court's jurisdiction under 28 U.S.C. § 1334(a) and (b).

This does not mean that there is jurisdiction over all disputes involving the reorganized debtor, its owners, or creditors. The dispute must involve (1) an action arising under Chapter 11, (2) administration of the estate, or (3) alteration of the debtor's right, liabilities, options, or freedom of action. There would not be jurisdiction over, for example, an action by a creditor against the reorganized debtor to recover a note executed pursuant to the plan. In Zahn Associates v. Leeds Building Products, Inc. (*In re* Leeds Building Products, Inc.), 160 B.R. 689 (Bankr. N.D. Ga. 1993), the district court held that the bankruptcy court had no jurisdiction over a postconfirmation adversary proceeding to recover on a note executed by the debtor pursuant to the plan. Neither implementation nor interpretation of the plan was involved.

39. *See generally* Rodney K. Hopkinson, *The Status of Attorney Fees During the Post-Confirmation/Pre-Conversion Period,* 22 IDAHO L. REV. 381 (1986).

40. For example, Bankruptcy Judge Schwartzberg dismissed an adversary proceeding postconfirmation in the absence of a plan provision retaining jurisdiction over such claims. Neptune World Wide Moving, Inc. v. Schneider Moving & Storage Co. (*In re* Neptune World Wide Moving, Inc.), 111 B.R. 457, 462-64 (Bankr. S.D.N.Y. 1990); *see also In re* Jr. Food Mart of Ark., Inc., 161 B.R. 462 (Bankr. E.D. Ark. 1993) (holding that bankruptcy court lacked postconfirmation jurisdiction to approve substitution on debtor's board of directors, there being no relevant reservation of authority in confirmation order). In *Neptune* the court had confirmed a reorganization plan that provided a 23% dividend to unsecured creditors. The disclosure statement indicated that the debtor would not assert actions for preferences or fraudulent transfers. After confirmation of the plan, however, the debtor initiated an adversary proceeding, asserting affirmative claims based on improper usage of the debtor's bills of lading or damages for

alteration of the debtor's bills of lading. In determining that there was no jurisdiction Judge Schwartzberg concluded that:

> 11 U.S.C. § 1141(b) permits a debtor to insert language in the plan and order confirming the plan which authorizes the bankruptcy court to retain a limited jurisdiction over specified property of the estate which did not vest in the newly confirmed debtor. This provision reads as follows: (b) "*Except as otherwise provided in the plan* or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor (Emphasis added)." Therefore, in accordance with 11 U.S.C. § 1141(b), a Chapter 11 plan and order confirming the plan may specifically provide for retention of jurisdiction by the bankruptcy court over actions pending at the time of confirmation and actions commenced after the time of confirmation, and over any assets recovered as a result of these actions. Additionally, 11 U.S.C. § 1142 confers limited post-confirmation jurisdiction upon the bankruptcy court for the purpose of implementing the plan.

111 B.R. at 462 (citations omitted). Since the retention of jurisdiction provision of the debtor's confirmed plan did not authorize postconfirmation adversary proceedings, Judge Schwartzberg found that there was no postconfirmation jurisdiction.

In Hospital & Property Damage Claimants v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 7 F.3d 32, 34-35 (2d Cir. 1993), the Court of Appeals for the Second Circuit cited Judge Schwartzberg's opinion in *Neptune* with apparent approval. The court of appeals held that the bankruptcy court lacked jurisdiction to consider postconfirmation objections by the debtor to the hospitals' property damage claims. The court of appeals emphasized the plan's explicit exception of such objections from the bankruptcy court's jurisdiction and said that concerns regarding such claims were properly addressed by the claims resolution facility established pursuant to the plan. An alternative basis for the decision was the fact that the debtor's motion to disallow the claims was barred by a time limitation imposed by the bankruptcy court's confirmation order.

In contrast, probably because § 1142 of the Bankruptcy Code expressly provides for implementing orders and is not conditioned on the retention of jurisdiction by the plans, bankruptcy judges have not been hesitant to find jurisdiction to interpret, implement, and otherwise effectuate a plan, even though there was no express retention of jurisdiction in that regard. *E.g.*, Pennsylvania Cos. v. Stone (*In re* Greenlee Energy Holdings of Pa., Inc.), 110 B.R. 173 (Bankr. E.D. Pa. 1990); *In re* Micro-Acoustics Corp., 49 B.R. 630 (Bankr. S.D.N.Y. 1985).

In *Stone*, prior to the filing of a Chapter 11 case, the debtor's stockholders were involved in litigation about the ownership of the debtor's stock. The disputes continued after the Chapter 11 case was filed, but a plan of reorganization was confirmed. In fact, the debtor's shareholders supported the plan. Fifteen months after confirmation, one group of stockholders filed an adversary proceeding against another stockholder, seeking to determine plaintiffs' interests in the debtor. Bankruptcy Judge Scholl dismissed the adversary proceeding for lack of subject matter jurisdiction, concluding that "this court's limited post-confirmation jurisdiction to oversee the implementation of a plan permits us only to clarify patent ambiguities in a confirmed plan or interpret matters concerning the plan's operations which impact upon its effectuation." *Stone*, 110 B.R. at 174. But the matter of stockholder ownership was, in the opinion of Judge Scholl, an issue that did "not involve the Debtor or its estate but merely . . . the interrelationship of non-debtor

individuals." *Id.* at 174-75. In an opinion that contained no analysis of the jurisdictional provisions of the Bankruptcy Code, but rather numerous quotes from cases (both pre- and post-Code), Judge Scholl concluded that:

> post-confirmation jurisdiction is limited by Bankruptcy Code § 1142(b) to only those matters the resolution of which are "necessary for the consummation of the plan." In light of the provisions of § 1142(b), we conclude that we retain post-confirmation jurisdiction for the limited purpose of resolving disputes arising from the presence of patent ambiguities in the Plan or disputes which affect the operation of the Plan as between the interested parties.

Id. at 184. *But cf.* TMS Assocs. v. Kroh Bros. Dev. Co. (*In re* Kroh Bros. Dev. Co.), 100 B.R. 480 (W.D. Mo. 1989). In *Kroh Brothers*, the court held that postconfirmation jurisdiction extends to the conclusion of pending administrative matters. The court relied on Bankruptcy Rule 3020(d) which provides: "Notwithstanding the entry of the order of confirmation, the court may enter all orders necessary to administer the estate." FED. R. BANKR. P. 3020(d), *quoted in Kroh Bros.*, 100 B.R. at 486. The court also referred to the Advisory Committee Note that "Subdivision (d) clarifies the authority of the court to *conclude matters pending before it prior to confirmation* and to continue to administer the estate as necessary, *e.g.*, resolving objections to claims." *Kroh Bros.*, 100 B.R. at 486. Furthermore, the court referred to the discussion in 8 COLLIER ON BANKRUPTCY, *supra* note 35, ¶¶ 3020.06, 3020-7 to -8, to the effect that this power to conclude administrative matters is parallel to the power under section 1142(b). The court added that "a substantial number of courts have determined post-confirmation jurisdiction exists under the Bankruptcy Code with respect to the resolution of many different issues." *Kroh Bros.*, 100 B.R. at 486. In support, the court referred to avoidance actions under §§ 547, 548, and 549 of the Bankruptcy Code. *Id.* By way of dictum, the court stated that a retention of jurisdiction provision was necessary. *Id.*

In Unified Data Systems, Inc. v. Almarc Corp. (*In re* Almarc Corp.), 94 B.R. 361 (Bankr. E.D. Pa. 1988), the court had confirmed a Chapter 11 plan that provided for retention of jurisdiction "to adjudicate all controversies concerning the classification or allowance of any claim" and to "adjudicate all claims or controversies arising out of any purchases, sales or contracts made or undertaken by the debtor during the pendency of these proceedings." *Id.* at 363. Postconfirmation, the other party to a postfiling contract with the debtor filed an adversary proceeding seeking to recover damages for breach of contract from the reorganized debtor. The court dismissed for lack of subject matter jurisdiction concluding that the plan could not confer jurisdiction and that there was no jurisdiction since there was no showing that the dispute would have any effect on the debtor's ability to consummate its confirmed plan. This was dictum because the court also concluded that a contractual provision selecting a different forum was binding. The concept that the retention of jurisdiction provision is not controlling seems sound, as does the conclusion that there was no jurisdiction, because the complaint concerned a postconfirmation breach of contract. However, Judge Fox, as have other bankruptcy judges, had difficulty articulating the basis for the lack of jurisdiction.

> A leading commentator suggests that "so long as a chapter 11 case is 'open', there does not appear to be any limit on the court's jurisdiction under 28 U.S.C. § 1334(b) . . . ." Section 1334(b), though, always requires that the outcome of the dispute conceivably effect the administration of the bankruptcy case. The effect that a proceeding may have upon the administration of an

Even though jurisdiction under 28 U.S.C. § 1334 and Chapter 11 of the Bankruptcy Code is not expressly affected by confirmation of a plan, judges are hesitant to so conclude. This resistance is probably a carryover from the limited postconfirmation jurisdiction of Chapter XI cases under the Bankruptcy Act and the clever wording in one decision under the Bankruptcy Act that deplored the tendency of district courts to keep reorganized concerns "in perpetual tutelage" by orders retaining jurisdiction to supervise the debtor's conduct.[41] However, long ago, in *Local Loan Co. v. Hunt*,[42] the United States Supreme Court recognized that a bankruptcy court has ongoing jurisdiction to effectuate its orders.[43]

> estate may be dependent upon factors such as the bankruptcy chapter under which the case has been filed, the size of the estate, the nature of the claims against the estate and whether confirmation has occurred.

Id. at 365 (citations omitted). The idea that the proceeding must affect the administration of the estate is not a sufficient rationale for jurisdiction. It is too narrow in scope and overlooks completely actions to recover assets for the reorganized debtor or to resolve issues that may impact on the viability of the debtor.

41. Claybrook Drilling Co. v. Divanco, Inc., 336 F.2d 697, 700-01 (10th Cir. 1964). For a similar decision under the Bankruptcy Code, see Pettibone Corp. v. Easley, 935 F.2d 120 (7th Cir. 1991) (Easterbrook, C.J.).

42. 292 U.S. 234 (1934).

43. Local Loan Co. v. Hunt involved a modest loan of $300. The debtor assigned his future wages as security for the loan. After the debtor obtained a discharge in bankruptcy, the creditor sought to enforce the assignment by suing the employer in a Chicago municipal court. The debtor returned to the bankruptcy court and sought an injunction to prevent the creditor from further prosecuting the action or attempting to enforce the wage assignment. The bankruptcy court granted the debtor's request. The matter then proceeded through the district court and court of appeals to the Supreme Court. One of the challenges to the bankruptcy court's injunction was a lack of jurisdiction. The Supreme Court found that the case initiated before the bankruptcy court was

> in substance and effect a supplemental and ancillary bill in equity, in aid of and to effectuate the adjudication and order made by the same court. That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well settled.

Id. at 239.

The Court through Justice Sutherland went on to discuss abstention. Although the Court had jurisdiction,

> the Court was [not] bound to exercise its authority. And it probably would not and should not have done so except under unusual circumstances such as here exist. So far as appears, the municipal court was competent to deal with the case. It is true that respondent was not a party to that litigation; but undoubtedly it was open to him to intervene and submit to that court the question as to the effect upon the subject-matter of the action of the bankrupt-

In *Pettibone Corp. v. Easley*[44] several personal injury cases that were pending against the debtor were stayed by the automatic stay of section 362(a) of the Bankruptcy Code. After the bankruptcy case was filed, several additional personal injury suits were initiated in violation of the stay. Neither the new cases nor the old cases proceeded prior to confirmation. The underlying claims were not affected by the reorganization. Plaintiffs who had filed in violation of the stay had 30 days after termination of the automatic stay, which occurred on confirmation, within which to file and be assured that the filings would be timely under section 108(c)(2) of the Bankruptcy Code. Three of the plaintiffs did not do so; thus, the reorganized debtor asked the bankruptcy court to enjoin the prosecution of their suits.

The first sentence of Judge Easterbrook's opinion was dispositive: "Only a belief that bankruptcy is forever could produce a case such as this."[45] However, he went on to conclude that, although there might be "related to" jurisdiction, there was no jurisdiction under *Marathon* and 28 U.S.C. § 157(b)(5). In his view, Article III judges had to decide tort claims founded on state law;[46] and this meant the whole case, including any defenses. The bankruptcy court was not empowered to decide whether the filing was void and, if so, whether the three cases were barred by the statute of limitations. That was up to the judges trying the cases. And that was true even though the personal injury proceeding may have been related to the bankruptcy case in the sense that, if insurance coverage were exhausted, a verdict in favor of one or more of the plaintiffs would affect the amount of the distribution to other creditors. Judge Easterbrook also concluded that section 1142(b) of the Bankruptcy Code did not grant jurisdiction over the dispute. According to Judge Easterbrook, that section empowers "the bankruptcy court to 'direct the debtor and any other necessary party . . . to perform any other act . . . that is necessary for the consummation of the plan.' Enjoining a tort suit expressly authorized by the plan is hardly 'necessary for the consummation of the plan,' however."[47]

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cy decrees.

Id. at 241. Nevertheless, other considerations aside, it is clear that the legal remedy thus afforded would have been inadequate to meet the requirements of justice. As the Court determined, "the sole question at issue is one which the highest court of the state of Illinois had already resolved against [the debtor's] contention." *Id.*

44. 935 F.2d 120 (7th Cir. 1991).

45. *Id.* at 121.

46. Judge Easterbrook inexplicably ignored the fact that state court judges are not Article III judges and that federal magistrates, who are also not Article III judges, try personal injury cases. In addition, removal need not occur until the time of trial under § 157(i)(5). Moreover, tort claims have been tried by bankruptcy courts under both the Bankruptcy Act and Code. *See* Reading Co. v. Brown, 391 U.S. 471 (1968).

47. *Pettibone*, 935 F.2d at 123.

In his article discussing postconfirmation jurisdiction, Mr. Ronald Goss observes that "the longstanding doctrine of postconfirmation jurisdiction holds that this jurisdiction is much narrower than that which was exercised before confirmation. The common rationale for this doctrine is that the debtor's 'tutelage' status should end at confirmation."[48] Mr. Goss recognized that there are authorities to the contrary, including the leading treatise.[49] Mr. Goss's article contained a lengthy discussion of retention of jurisdiction. This discussion is valuable in the sense that it discusses current practice in Chapter 11 cases, but current practice does not justify his conclusion that a retention of jurisdiction provision is necessary. Furthermore, in his discussion of the statutory basis for postconfirmation jurisdiction, Mr. Goss failed to recognize that Chapter X was the model for Chapter 11.[50] Although much of his discussion centered on Chapter XI, which

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> Once the bankruptcy court confirms a plan of reorganization, the debtor may go about its business without further supervision or approval. The firm also is without the *protection* of the bankruptcy court. It may not come running to the bankruptcy judge every time something unpleasant happens. Formerly a ward of the court, the debtor is emancipated by the plan of reorganization. A firm that has emerged from bankruptcy is just like any other defendant in a tort case: it must protect its interest in the way provided by the applicable non-bankruptcy law, here by pleading the statute of limitations in the pending cases.

Id. at 122 (citations omitted).

48. Ronald W. Goss, *Defining the Scope of Retained Jurisdiction in Chapter 11 Plans,* 18 J. CONTEMP. L. 1, 3 (1992). Mr. Goss concluded that Congress did not intend that postconfirmation jurisdiction be as broad as preconfirmation jurisdiction, and "a review of the case law suggests that postconfirmation jurisdiction is subject to statutory and judicial limitations." *Id.* However, the basic statutory grant of jurisdiction does not contain any such limitation.

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.
> . . . .
> (d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the property of the estate.

28 U.S.C. § 1334(a), (b), (d) (1988).

49. 5 COLLIER ON BANKRUPTCY, *supra* note 35, ¶ 1142.01[1], at 1142-3 ("[S]o long as a Chapter 11 case is 'open,' there does not appear to be any limit on the court's jurisdiction under 28 U.S.C. § 1334(b) with respect to civil proceedings arising under title 11 or arising in or related to cases under title 11.").

50. *See supra* note 15.

utilized the concept of "retained jurisdiction," Mr. Goss acknowledged that "in Chapter 11 of the current Bankruptcy Code there are no statutory provisions expressly dealing with retained jurisdiction."[51] Mr. Goss's discussion of postconfirmation jurisdiction centered around limiting provisions of Chapter 11, including sections 1127 and 1142. Only at the end of his lengthy discussion does he acknowledge the importance of 28 U.S.C. § 1334(b) and that this section does not contain any express limitations on postconfirmation jurisdiction. This fact compelled him to construct a limitation, adapting the "related to" jurisdiction definition of *Pacor, Inc. v. Higgins (In re Pacor, Inc.).*[52] His construct limited postconfirmation "related to" jurisdiction to "matters affecting the implementation and execution of the plan."[53] Under this approach, the court would probably lose jurisdiction of many pending and future adversary proceedings on entry of the order of confirmation. As a matter of legislative policy this may or may not make sense, but it is certainly for the legislature, not the courts, to

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51. Goss, *supra* note 48, at 22.

52. 743 F.2d 984, 994 (3d Cir. 1984), *discussed supra* note 35.

53. Goss, *supra* note 48, at 27. Mr. Goss stated several other formulations of postconfirmation jurisdiction.

> According to the conventional formulation of the retained jurisdiction doctrine, the bankruptcy court's jurisdiction continues during postconfirmation "to protect its [confirmation] decree, to prevent interference with the execution of the plan and to aid otherwise in its operation." . . .
>
> Case law recognizes that postconfirmation jurisdiction generally is limited to rights arising under the plan, and "matters concerning interpretation and administration of the [p]lan." In *Shores v. Hendy Realization Co.,* the Ninth Circuit characterized the bankruptcy court as the court "best equipped as well as the one properly entitled" to adjudicate such disputes.
>
> . . . .
>
> The unifying principle underlying the various judicial views of postconfirmation jurisdiction is that a "reservation of jurisdiction beyond what is requisite to effectuate a plan of reorganization is beyond the power of the reorganization court."

Id. at 28-29 (footnotes omitted).

Gross continues:

> Despite the sometimes extravagant rhetoric that runs through these decisions, a judicial doctrine clearly emerges. According to this doctrine, postconfirmation jurisdiction generally is limited to matters pending at the time of confirmation and matters for which jurisdiction is expressly and necessarily retained in the plan. . . .
>
> Jurisdiction turns on whether resolution of the particular controversy is necessary to the consummation of the plan. . . . However, a bankruptcy court may exercise jurisdiction to fulfill the purposes of the plan even when a plan fails to provide for retained jurisdiction.

Id. at 32 (footnotes omitted).

engraft such a limitation on 28 U.S.C. § 1334(b). Mr. Goss concluded, based on cases decided predominately under Chapter XI of the Bankruptcy Act, that "jurisdiction turns on whether resolution of the particular controversy is necessary to the consummation of the plan."[54] Mr. Goss went on to state that "[b]y limiting its jurisdiction to matters of 'unfinished business,' judicial supervision of the debtor will normally end at confirmation."[55]

Mr. Goss grounded his conclusion on two incorrect premises. The first is that the law under the prior Bankruptcy Act limited postconfirmation jurisdiction to "matters concerning interpretation and administration of the plan;" and that this rule should be deemed to have continued under the Supreme Court's standard of interpretation that pre-Code law will be deemed to have continued absent congressional intent to the contrary.[56] Additionally, Mr. Goss relied on what he identified as the "unifying principle" that "reservation of jurisdiction beyond what is requisite to effectuate a plan of reorganization is beyond the power of the reorganization court."[57]

The cases that Goss relied on for this "unifying principle," with the exception of a single bankruptcy court decision, were decisions under section 77B of the Bankruptcy Act. One of the section 77B decisions held that there was no jurisdiction to approve new leases by the reorganized debtor some six years after confirmation.[58] The other held that the court did not have jurisdiction to approve an extension of a voting trust created by the confirmed plan.[59] The order confirming the plan reserved jurisdiction to "'enter such further orders as may hereafter be deemed necessary or proper in connection with the carrying out of the terms and provisions of the said plan.'"[60] The court correctly concluded that the requested modification was not necessary to carry out the terms of the plan.[61]

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54. *Id.*

55. *Id.*

56. Mr. Goss relied on the Supreme Court's decision in Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494 (1986). To the extent *Midlantic* applies (and it is doubtful that it does in light of the Supreme Court's recent textualism approach to interpretation, *see generally* Jerry L. Mashaw, *Textualism, Constitutionalism and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827 (1991), because the jurisdictional provisions are unambiguous), the decision is not relevant since the model for Chapter 11 was Chapter X, not Chapter XI.

57. Goss, *supra* note 48, at 29.

58. Reese v. Beacon Hotel Corp., 149 F.2d 610, 611 (2d Cir. 1945) ("[R]eservation of jurisdiction beyond what is necessary to effectuate a plan of reorganization is beyond the power of the reorganization court.")

59. Blair v. Finan (*In re* Elless Co.), 174 F.2d 925, 927 (6th Cir.), *cert. denied*, 388 U.S. 824 (1949).

60. *Id.* at 927 (quoting order of confirmation).

61. *Id.* at 929-30. In Bakers Share Corp. v. Lincoln Terrace, Inc., 130 F.2d 157 (2d

In the bankruptcy court decision discussed by Goss, the court held that it could award postconfirmation attorneys' fees and that such fees would be an administrative expense claim with priority in the superseding Chapter 7 case.[62] By way of dictum, the court stated, "A reservation of jurisdiction beyond what is necessary to effectuate the plan of reorganization is beyond the power of the bankruptcy court."[63] Thus, the three cases are not very solid authority for the so-called "unifying principle."

Although Mr. Goss discussed abstention in some detail, he failed to recognize that this may be the solution to any problem—real or imagined—resulting from the pervasive jurisdiction of the bankruptcy court. Concern about continued supervision or keeping a debtor in "perpetual tutelage" can be solved by the court's abstaining under 28 U.S.C. § 1334(c)(2), without distorting statutory language and congressional intent. The power to abstain allows the court to avoid resolving controversies "that could be heard elsewhere [and that] would burden the bankruptcy courts."[64] Mr. Goss's conclusion that "discretionary abstention and notions of comity are inadequate to deal with fundamental questions of subject matter jurisdiction"[65] is difficult to fathom. Nonetheless, it seems better to give the court discretion to abstain as to some or all of the myriad disputes that can arise postconfirmation rather than to develop strained interpretations of jurisdiction which reach that result but arrive there in a straight jacket.[66]

Cir. 1942), Judge Learned Hand was faced with a similar issue under § 77B. Finding that the plan provided alternatives dependent on the interpretation of a state statute, Judge Hand concluded that the bankruptcy court had jurisdiction to interpret the statute. He carefully distinguished this situation from continuing administration over the successor under the plan:

> [T]he phrase in subdivision h of Sec. 77B, "under and subject to the supervision and control of the judge," did not invest the judge with a general protectorate over "corporations organized * * * for the purpose of carrying out the plan." Our theory was that such a reservation gives him jurisdiction only to decide whether the parties to the "plan" carry out its provisions according to their true intent. Concededly, he would have no power to adjudge the rights and liabilities of the corporation arising from transactions with third persons; equally he has none to adjudge even the mutual rights and liabilities of the parties themselves, so far as those depend, not upon the contents of the "plan," but upon subsequent transactions between themselves, or upon modifications imposed by later changes in the law.

Id. at 159.

62. *In re* Tri-L Corp., 65 B.R. 774, 778 (Bankr. D. Utah 1986).

63. *Id.* The court cited one of the two cases relied on by Mr. Goss, Reese v. Beacon Hotel Corp., 149 F.2d 610 (2d Cir. 1945), as authority for its dictum.

64. Goss, *supra* note 48, at 29.

65. *Id.* at 38.

66. *Cf. In re* Chicago, Milwaukee, St. P. & Pac. R.R., 6 F.3d 1184, 1189, 1194 (7th

That seemed to be the view of Mr. Justice Sutherland in *Local Loan Co. v. Hunt*.[67]

And it was clearly the view of the Fifth Circuit in *Wood v. Wood (In re Wood)*,[68] which contains an excellent analysis of the scope of jurisdiction under the 1978 Reform Act, as amended in 1982. Especially interesting is the Fifth Circuit's observation that concerns about an overbroad interpretation of 28 U.S.C. § 1334 bringing into federal court matters best left to state courts is properly dealt with not by restrictive interpretation of the statutory grant of jurisdiction, but by utilizing the discretion to abstain.[69]

That is not to say a statutory change would not be useful. The National Bankruptcy Conference has recommended statutory changes as to postconfirmation jurisdiction, and the recommendation should be given thoughtful consideration.

> The bankruptcy court should be divested of general administrative jurisdiction over the affairs of a reorganized debtor, unless the plan specifically provides otherwise, as of the effective date of the plan. To promote certainty in this area, the Code should also be amended to

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Cir. 1993) (reversing reorganization court's exercise of discretionary abstention pursuant to 28 U.S.C. § 1334(c)(1) after consideration of relevant factors; declaring that test "developed in the context of a proceeding under the Bankruptcy Reform Act of 1978" is nevertheless appropriate for application in a Bankruptcy Act case involving a § 77 debtor; stating that abstention is "but a narrow exception to the exercise of federal jurisdiction").

67. *See supra* notes 42-43 and accompanying text.

68. 825 F.2d 90 (5th Cir. 1987).

69. *Id.* at 93. The *Wood* decision also contained an interesting analysis of the phrase "arising under title 11, or arising in or related to cases under title 11" as utilized in the jurisdictional grant and in the definition of core proceedings that can be finally adjudicated by bankruptcy judges under 28 U.S.C. § 157(b). As to the former, Judge Wisdom wisely observed that the phrase was expressive of the broad grant of jurisdiction, *Wood*, 825 F.2d at 92; while as to the latter it gave precision to the definition of core proceedings by taking it in segments, *id.* at 96-97; *cf.* Goodman v. Philip R. Curtis Enters. (*In re* Goodman), 809 F.2d 228 (4th Cir. 1987), which concerned an order of the bankruptcy court postconfirmation compelling the former Chapter 11 debtor to settle a personal injury claim, even though the claim was not dealt with as a source of funding for the plan obligations. The Fourth Circuit reversed, remanding to the district court for remand to the bankruptcy court to consider the possibility of modification of the plan. The opinion of Judge Phillips analyzed the dispute, not as a matter of subject matter jurisdiction, but as a matter of "procedural regularity." "We therefore believe that the proper way to analyze the authority of the courts to enter those orders is to consider their procedural regularity as orders effecting a § 1127 modification, rather than as possible excesses of any retained post-confirmation jurisdiction." *Id.* at 233.

> require that each plan contain an "effective date" upon which revestment and discharge actually occur; after this date the debtor is empowered to conduct its business without further court supervision, unless that authority is expressly limited in the plan. The foregoing is not intended to change the fact that courts will continue to retain sufficient jurisdiction to carry out their post-confirmation functions under sections 350, 1127, 1112(b), and 1144.[70]

The recommendation of the National Bankruptcy Conference is a good starting point. However, it does not address jurisdiction of adversary proceedings and contested matters pending at the date of confirmation or filed thereafter. It also allows parties in interest to determine jurisdiction. Nevertheless, the recommendation does make it clear that "perpetual tutelage" ends and the reorganized debtor can conduct business without further court supervision, although it leaves open the possibility of a reservation of administrative jurisdiction. Furthermore, it does not spell out what type of jurisdiction remains; it provides only that there is a general divestment of general administrative jurisdiction. Surely it is not inappropriate to allow the bankruptcy court to determine rejection or assumption of executory contracts or to resolve administrative expense claims arising prior to confirmation.

To the extent postconfirmation jurisdiction is to be clarified, it should be by way of amendment to 28 U.S.C. § 1334. For example, the section could be amended to provide that jurisdiction over the reorganized debtor as to the conduct of its business ceases on confirmation, but jurisdiction to resolve pending and subsequently filed adversary proceedings and contested matters continues, subject to the ability of the court to abstain under subparagraph (c).

II. THE EFFECTS OF CONFIRMATION

A. The Res Judicata Effect of Confirmation

Section 1141 declares in four subsections the effects of confirmation of a Chapter 11 plan. Subsection (a) provides that a confirmed plan binds the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner of the debtor.[71] Whether a creditor, equity security holder, or partner is impaired by the plan or has accepted the plan does not affect the plan's finality as a conclusive determination of rights. Subsection (b)

70. National Bankruptcy Conference Code Review Project, *in* ALI/ABA, BANKRUPTCY REFORM CIRCA 1993, at 266 (1993) [hereinafter NBC Draft].

71. 11 U.S.C. § 1141(a) (1988).

recognizes that the confirmation vests all the property of the estate in the debtor except as the plan or order of confirmation otherwise provides.[72] As a result of confirmation, according to subsection (c), the property dealt with by the plan is free and clear of the claims and interest of creditors, equity security holders, and partners, to the extent not otherwise provided in the plan.[73] Subsection (d) sets forth the role of confirmation in discharging

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72. *Id.* § 1141(b); *see* Volvo White Truck Corp. v. Chambersburg Beverage, Inc. (*In re* White Motor Credit Corp.), 75 B.R. 944 (Bankr. N.D. Ohio (1987) (holding that purchaser of debtor's assets was not liable to holders of preconfirmation tort, indemnity, and contribution claims against debtor that were discharged by confirmation of debtor's plan pursuant to § 1141(b) and (c); also holding that bankruptcy law pre-empts state law imposing successor liabiiity on purchaser of assets).

73. 11 U.S.C. § 1141(c). Although § 1141(c) is derived from similarly worded provisions in the Bankruptcy Act, its meaning and implications are unclear and are subject to diverse interpretations. Thus, it has been held that § 1141(c) does not extinguish prepetition liens, notwithstanding its discharge of underlying claims. Relihan v. Exchange Bank, 69 B.R. 122 (S.D. Ga. 1985) (holding that secured creditor did not lose its prepetition lien by its failure to file a proof of claim; recognizing continuing enforceability of lien notwithstanding discharge of claim); *In re* Electronics & Metals Indus,. 153 B.R. 36 (Bankr. W.D. Tex. 1992) (holding that creditor's prepetition lien, for which no claim was filed and which was not provided for in debtor's plan, survived confirmation, rendering plan infeasible; fact that creditor's claim was scheduled as "disputed" held not to affect result, although debtor's objection to creditor's claim would have changed the result according to Sun Fin. Co. v. Howard (*In re* Howard), 972 F.2d 639, 640-41 (5th Cir. 1992)); *In re* Snedaker, 39 B.R. 41, 42 (Bankr. S.D. Fla. 1984) (holding that prepetition garnishment lien was unaffected by confirmation order that did not refer to the lien); *cf.* Simmons v. Savell (*In re* Simmons), 765 F.2d 547, 554-57 (5th Cir. 1985) (creditor's claim filed and allowed as secured claim in Chapter 13 case when no preconfirmation objection was filed, although plan treated claim as unsecured and creditor did not object to the plan; § 1327(b) read to restore property to debtor subject to encumbrances not avoided during the case). In his treatise, Richard Broude concludes that property not dealt with in a Chapter 11 plan is "subject to the same encumbrances or other interests that existed at the time the petition was filed." RICHARD F. BROUDE, REORGANIZATIONS UNDER CHAPTER 11 OF THE BANKRUPTCY CODE 14-9 (1992) (citing *Snedaker*, 39 B.R. 41).

On the other hand, there is substantial authority for the view that § 1141(c) strips the debtor's property of prepetition liens. *See, e.g.,* Minstar, Inc. v. Plastech Research, Inc. (*In re* Arctic Enters.), 68 B.R. 71 (D. Minn. 1986) (holding that successor in interest of debtor purchased debtor's property free of security interest extinguished by confirmation of debtor's plan); Pennsylvania Iron & Coal Co. v. Good (*In re* Pennsylvania Iron & Coal Co.), 56 B.R. 492, 495-96 (Bankr. S.D. Ohio 1985) (confirmation deemed to have stripped debtor's property of lien rights not granted in confirmed plan); Board of County Comm'rs v. Coleman Am. Properties, Inc. (*In re* American Properties, Inc.), 30 B.R. 239, 246 (Bankr. D. Kan. 1983) ("After confirmation of a chapter 11 plan, a creditor's lien rights are only those granted in the confirmed plan."); 1 DAVID G. EPSTEIN ET AL., BANKRUPTCY 151 (1993) ("In a reorganization case, any of the preexisting liens that still survive will eventually die upon confirmation."); 5 COLLIER

debt.[74] Exceptions in subsections (a) and (c) recognize that subsection (d) carves out protections for holders of nondischargeable claims against individual debtors and of claims against corporations and partnerships that are liquidated.

The purposes and policies of Chapter 11 are implemented by the body of case law that accords effect to confirmation as res judicata[75] and limits

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ON BANKRUPTCY, *supra* note 35, at 1141-11, 1141-12; David A. Lander & David A. Warfield, *A Review and Analysis of Selected Post-Confirmation Activities in Chapter 11 Reorganizations*, 62 AM. BANKR. L.J. 203, 205 (1988) ("If the plan makes no provision for any, . . . lien, then the lien is cancelled. If the debt underlying any lien is discharged or cancelled, then that lien is automatically cancelled."); *cf.* Brady v. Andrew (*In re* Commercial W. Fin. Corp.), 761 F.2d 1329, 1334-38 (9th Cir. 1985) (confirmation order purporting to invalidate security interests of investors in debtor reversed for failure to accord investors procedural rights provided in Bankruptcy Rules). In his treatise, Richard Broude appropriately emphasized the importance of specificity in an order of confirmation respecting its effect on security interests, lest a court read § 1141(c) to strip the property of liens not dealt with by the plan. BROUDE, *supra*, at 14-8 to -9.

74. 11 U.S.C. § 1141(d).

75. Pickens v. Lockheed Corp., 990 F.2d 1488 (5th Cir.) (debtors precluded by res judicata from seeking to set aside part or all of provisions of confirmed plan of reorganization; debtor enjoined from taking any action or filing any pleadings relating to any issue connected with the case; and courts in the Fifth Circuit prohibited from accepting any pleading or document proffered by or for debtors without prior approval of court of appeals), *petition for cert. filed*, 62 U.S.L.W. 3350 (1993); Findley v. Blinken (*In re* Joint E. & S. Dist. Asbestos Litig.), 982 F.2d 721, 747-49 (2d Cir. 1992) (holding that settlement which divided health claimants, who were on equal footing under plan, into two groups with differing rights as to amounts recoverable and as to timing and rate of payment and with right to jury trial drastically curtailed, was impermissible modification of confirmed plan; rejecting argument that changes affected only plan-related documents rather than plan; C.J. Feinberg dissenting in part on the ground that lower courts' adjustment of payment mechanism constituted necessary and permissible response to conditions that made adherence to original arrangement impracticable), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993), *discussed infra* text accompanying notes 353-373; Eubanks v. FDIC, 977 F.2d 166 (5th Cir. 1992), (dismissing, on ground that confirmation constituted res judicata, postconfirmation action filed by debtors in state court against banks alleging violation of blue sky laws, breach of fiduciary duties, fraud, and breach of loan contract); Ocasek v. Manville Corp. Asbestos Disease Compensation Fund, 956 F.2d 152, 154-55 (2d Cir. 1992) (holding that provision of confirmed plan prohibiting payment of interest on claims not settled prepetition barred postjudgment interest on postpetition, preconfirmation judgment); Still v. Rossville Bank (*In re* Chattanooga Wholesale Antiques, Inc.), 930 F.2d 458, 463 (6th Cir. 1991) (Chapter 7 trustee denied recovery of postconfirmation payments pursuant to a confirmed plan notwithstanding its argument that such payments were inequitable because plan erroneously treated recipient as a secured creditor); United States v. Carolina Parachute Corp., 907 F.2d 1469, 1470, 1473-74 (4th Cir. 1990) (holding that order confirming government contractor's plan was *res judicata* and binding on Government which,

although on notice of the confirmation hearing, made no objection to the plan and did not appeal from the order of confirmation); Paul v. Monts, 906 F.2d 1468 (10th Cir.1990) (although debtor and creditors were bound by confirmed plan, whether third party investor was bound depended on factual determination as to whether he agreed to terms of proposed purchase of debtor's stock); Wallis v. Justice Oaks II, Ltd. (*In re* Justice Oaks II, Ltd.), 898 F.2d 1544, 1551 (11th Cir.) (although guarantors of debtor did not have allowable claim for reimbursement under § 502(e)(1), they were bound by confirmation order entered in compliance with requirements of due process; guarantors' assertion of equitable lien and objections to plan provisions for secured creditors dismissed), *cert. denied*, 498 U.S. 959 (1990); *In re* Chicago, Milwaukee, St. Paul & Pac. R.R., 891 F.2d 159 (7th Cir. 1989) (where plan confirmed in railroad reorganization case under § 77 of the Bankruptcy Act specifically provided for no interest to accrue on "liquidation date," order bound debtor and all creditors and precluded grant of interest for period of delay between date of order for sale and actual delivery of payments to employees); Thompson v. Kentucky Lumber Co. (*In re* Kentucky Lumber Co.), 860 F.2d 674, 679 (6th Cir. 1988) (denying claim of unsecured creditors for interest for period of postconfirmation delay in payment, in view of provision for no interest in confirmed plan overwhelmingly accepted by creditors); Heins v. Ruti-Sweetwater, Inc. (*In re* Ruti-Sweetwater, Inc.), 836 F.2d 1263 (10th Cir. 1988) (rejecting postconfirmation objections by nonvoting class of creditors to provisions of plan that removed their lien; holding that Code deemed nonvoting, nonobjecting class to have accepted plan); Heritage Hotel Ltd. Partnership I v. Valley Bank (*In re* Heritage Hotel Ltd. Partnership I), 160 B.R. 374 (Bankr. 9th Cir. 1993) (holding that res judicata applies to Chapter 11 confirmation order and precludes filing of lender-liability actions by debtor predicated on prepetition relationship with a lender; concluding that failure of debtor to mention known potential claims in disclosure statement or plan and indication in plan of intention to pay lender in full estopped debtor from prosecuting the postconfirmation suit); *In re* Northampton Corp., 59 B.R. 963, 966 (E.D. Pa. 1984) (confirmed plan imposing $2 million obligation on debtor held to be binding and not subject to modification in second Chapter 11 case); Garsal Realty, Inc. v. Troy Sav. Bank (*In re* Garsal Realty, Inc.), 39 B.R. 991, 993-93 (N.D.N.Y. 1984) (postconfirmation motion to extend deadline established by plan for exercise of option denied as collateral attack on plan; debtor's characterization of motion as one "in aid of administration" rejected), *aff'd mem.*, 755 F.2d 913 (2d Cir. 1985); Public Serv. Co. v. Richards (*In re* Public Serv. Co.), 148 B.R. 702 (Bankr. D.N.H. 1992) (confirmation order approving debtor-public utility's Chapter 11 plan held to be *res judicata*, barring prosecution of threatened lawsuit by shareholders asserting that plan solicitation violated federal securities laws; postconfirmation suit based on "secret fraud" regarding matter not addressed during course of case acknowledged not to be barred by confirmation, but opportunity afforded shareholders preconfirmation to raise issues in threatened litigation said to preclude further suit in this case); *In re* Southern Energy, Ltd., 98 B.R. 42, 44 (Bankr. N.D. Fla. 1989) (holding lessor of nonresidential property to debtor bound by confirmation of plan that "communicated the intention of assuming the lease, subject to the Court retaining jurisdiction to consider rejection at a later date"); *In re* Fischer, 91 B.R. 55, 56 n.1 (Bankr. D. Minn. 1988) (confirmation of plan that provided for no distribution to creditor and for discharge of its claim held to entitle debtor to determination barring collateral attack by creditor seeking to enforce judgment lien against debtor's

property); City Nat'l Bank v. General Coffee Corp. (*In re* General Coffee Corp.), 85 B.R. 905, 907 (Bankr. S.D. Fla. 1988) (confirmation order held to constitute res judicata); *In re* Newport Offshore, Ltd., 78 B.R. 383, 386 (Bankr. D.R.I. 1987) (same); *In re* Earley, 74 B.R. 560, 561 (Bankr. C.D. Ill. 1987) (rejecting postconfirmation objection to claim treated as secured in confirmation order); Virgin Islands Bureau of Internal Revenue v. St. Croix Hotel Corp., 60 B.R. 412 (D.V.I. 1986) (holding governmental unit bound by confirmed plan's provisions respecting debtor's liability for prepetition taxes); *In re* St. Louis Freight Lines, 45 B.R. 546, 552-53 (Bankr. E.D. Mich. 1984) (holding that confirmation order excluding penalties assessed on postpetition, preconfirmation taxes and approving application of debtor's payments to taxes was binding on IRS, even though exclusion may have been erroneous); Astroglass Boat Co. v. Eldridge (*In re* Astroglass Boat Co.), 32 B.R. 538 (Bankr. M.D. Tenn. 1983) (denying creditor's postconfirmation motion seeking allowance of claim, because it was barred by confirmation and because of failure to satisfy requirements of FED. R. CIV. P. 60). *But cf.* United States v. Gurwitch (*In re* Gurwitch), 794 F.2d 584 (11th Cir. 1986) (holding that tax liabilities which were nondischargeable under § 523(a)(1)(A) were enforceable against individual debtor notwithstanding confirmation of plan allowing 100% payment of tax claims).

In the course of determining the feasibility of a plan the court may consider the availability of net loss carry-forwards and other tax impacts. Moreover, in light of the prohibition in § 1129(d) on confirmation of a plan if its principal purpose is to avoid either the taxes or the application of § 5 of the Securities Act of 1933, it is arguable that every confirmation order contains an implied finding that the plan's principal purpose does not contravene the statutory prohibition. *See* Allis-Chalmers Corp. v. Goldberg (*In re* Hartman Material Handling Sys., Inc.), 141 B.R. 802, 809 (Bankr. S.D.N.Y. 1992). Query, whether explicit or implicit findings in the order of confirmation respecting the principal purpose of a plan or the availability of tax benefits are binding on a governmental unit in a postconfirmation proceeding by the unit? *See* Robin E. Phelan et al., *Litigating with the IRS in Bankruptcy Court, in* SECOND ANNUAL BANKRUPTCY TAXATION: ISSUES FOR THE 90S (1992). The court in the *Hartman Systems* case rejected the debtor's arguments that the confirmation of its plan constituted *res judicata* or collateral estoppel barring the IRS from seeking disallowance of the use of net operating losses. The court emphasized that a preconfirmation finding could not finally determine tax issues that do not arise until after confirmation. 141 B.R. at 811-13.

The effect of confirmation as *res judicata* has been held not to be affected by the subsequent dismissal of the case on account of material default by the debtor with respect to the plan. United States v. Standard State Bank, 91 B.R. 874 (W.D. Mo. 1988), *aff'd*, 905 F.2d 185 (8th Cir. 1990). Numerous cases have reached the same conclusion respecting the effect of a postconfirmation conversion. *See, e.g.*, Bank of La. v. Pavlovich (*In re* Pavlovich), 952 F.2d 114, 117 (5th Cir. 1992); Still v. Rossville Bank (*In re* Chattanooga Wholesale Antiques, Inc.), 930 F.2d 458, 463 (6th Cir. 1991); Paul v. Monts, 906 F.2d 1468, 1471 (10th Cir. 1990); *In re* Blanton Smith Corp., 81 B.R. 440 (M.D. Tenn. 1987); Sanders v. GIAC Leasing Corp. (*In re* Sanders), 81 B.R. 496 (Bankr. W.D. Ark. 1987); *In re* Kaleidoscope of High Point, Inc., 56 B.R. 562, 565-66 (Bankr. M.D.N.C. 1986). The *Blanton* case was approved, and the *Sanders* case was disapproved, in Reef Petroleum Corp. v. United States (*In re* Reef Petroleum Corp.), 99 B.R. 355 (Bankr. W.D. Mich. 1989), where the court opined that "once a case is

review by application of a doctrine of mootness.[76]

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converted to Chapter 7, each case must be decided on its own facts." *Id.* at 360; *see also* American Bank & Trust Co. v. United States *ex rel.* IRS (*In re* Barton Indus.), 159 B.R. 954 (Bankr. W.D. Okla. 1993) (holding that collateral attack by IRS on provision for priority of security interest of bank in accounts receivable of debtor was precluded by res judicata; and holding that debtor's default in performing its obligations under plan did not nullify or alter rights and remedies under the plan).

In Bank of Louisiana v. Pavlovich (*In re* Pavlovich), 952 F.2d 114, a creditor had made loans (1) prepetition, (2) contemporaneously and in connection with the confirmation, and (3) postconfirmation. Two years after the confirmation, and after the debtor ceased making payments required by the plan, the case was converted, and the creditor objected to a discharge of the debtor in the Chapter 7 case. The bankruptcy and district courts read §§ 348(d) and 1141(d)(1) to give the debtor a discharge from liability on all three classes of claims, but the court of appeals reversed with respect to the dischargeability of claims arising from postconfirmation advances of new value to the debtor. *Id.* at 119. This case is discussed in Barry L. Zaretsky, *Effect of Chapter 11 Plan Confirmation*, 209 N.Y. L.J. 3 (1993).

In Blumenthal v. Clark (*In re* Hiller), 143 B.R. 263 (Bankr. D. Colo. 1992), a provision of a confirmed plan authorized the debtor to collect a judgment against his partner. But the court, citing *Pavlovich*, held that the postconfirmation, postconversion settlement by the debtor with his partner for less than the amount of the judgment was subject to attack by the Chapter 7 trustee on behalf of the creditors.

76. If an appellant from an order of confirmation does not obtain a stay of execution, the appeal is typically dismissed for mootness, since the consummation of the plan is likely to have progressed beyond the point where effective relief can be granted. *See, e.g.*, Smith v. United States (*In re* Holywell Corp.), 911 F.2d 1539, 1543 (11th Cir. 1990) (dismissing appeal for mootness and rejecting arguments that bankruptcy court lacked jurisdiction to confirm plan and that creditor had acted fraudulently in obtaining approval of plan), *rev'd on other grounds*, 112 S. Ct. 1021 (1992); Rochman v. Northeast Utils. Serv. Group (*In re* Public Serv. Co.), 963 F.2d 469 (1st Cir.) (dismissing, as moot, appeal from confirmation of public utility's proposed Chapter 11 plan where, in absence of stay, performance under plan had proceeded to point beyond any practicable annulment), *cert. denied*, 113 S. Ct. 304 (1992); First Union Real Estate Equity & Mortgage Invs. (*In re* Club Assocs.), 956 F.2d 1065 (11th Cir. 1992) (affirming dismissal of appeal from confirmation order as moot and for reasons of equity, where plan had been substantially consummated and several investors not parties to the case had committed new funds with expectation of preferred return on their investment, and their interests could not be protected in the event of reversal of the confirmation order; while failure to seek timely stay of confirmation order was said not to preclude review, it was proper consideration in determining whether equitable grounds warranted dismissal of appeal); Halliburton Serv. Co. v. Crystal Oil Co. (*In re* Crystal Oil Co.), 854 F.2d 79 (5th Cir. 1988) (dismissing creditor's appeal of Chapter 11 plan confirmation where creditor had not obtained stay of bankruptcy court's order pending appeal, comprehensive change of circumstances had occurred, and creditor's requested relief could jeopardize plan); Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 841 F.2d 92 (4th Cir. 1988) (creditor's appeal from order of confirmation in absence of stay held to be moot in view of fact that plan had been

implemented and reversal would create unmanageable and inequitable situation); Miami Ctr. Ltd. Partnership v. Bank of New York, 838 F.2d 1547 (11th Cir.) (vacating affirmance by district court of bankruptcy court's consolidation and confirmation order and remanding case with instructions to dismiss appeal as moot; vacating previous order of court of appeals in 826 F.2d 1010 (11th Cir. 1987); district court's conclusion that it could grant effective relief by setting aside sale to a bona fide purchaser approved in a confirmed reorganization plan and restoring the property to the debtor said to stand the law of mootness on its head), *cert. denied*, 488 U.S. 823 (1988); Tompkins v. Frey (*In re* Bel Air Assocs.), 706 F.2d 301, 304-06 (10th Cir. 1983) (dismissing, for mootness under former Bankr. R. 805, appeal without obtaining stay from order of confirmation authorizing sale, in view of sale to bona fide purchaser; upholding sale notwithstanding fact that purchaser was mortgagee who also bid in claims of creditor of debtor and that general partner of debtor limited partnership controlled the mortgagee); Metro Property Management Co. v. Information Dialogues, Inc. (*In re* Information Dialogues, Inc.), 662 F.2d 475 (8th Cir. 1981) (dismissing, as moot, appeal of creditor from confirmation where no stay had been requested and debtor had implemented substantial elements of its plan); Trone v. Roberts Farms, Inc. (*In re* Roberts Farms, Inc.), 652 F.2d 793, 797 (9th Cir. 1981) (appeals from disallowance of claims, approval of settlement, and confirmation of plan dismissed for mootness in view of failure of appellants to obtain stay; because of intricacy and interrelationship of many transactions, "to deny mootness and reverse would 'knock the props out from under the authorization for every transaction that has taken place' and 'create an unmanageable, uncontrollable situation for the Bankruptcy Court'"); BROUDE, *supra* note 73, § 14.01[1] (noting that stays pending appeal are seldom granted, that appeals typically take a long time, that plan proponents frequently accelerate performance pending appeals to enhance the likelihood that the appeal will be rendered moot, and that the numerous rulings denying review of order approving sales are typically followed in appeals from confirmation orders); *cf.* Munson v. Antisdel (*In re* Munson Geothermal Inc.), 982 F.2d 360, 361 (9th Cir. 1992) (dismissing appeal from order of confirmation because it was rendered moot by subsequent confirmation of modified plan; imposing sanctions on appellant and his counsel for filing of frivolous appeal); Holywell Corp. v. Bank of New York, 901 F.2d 931, 933-34 (11th Cir. 1990) (dismissing as moot appeal from bankruptcy court decision determining amount, validity, and extent of bank's lien; rejecting debtor's challenge to bankruptcy court's acceptance of bank's unilateral determination of contract rate of interest as excessive, because it struck at a crucial element of the confirmed reorganization plan, and amendment of plan would be unjust and indeed impossible), *cert. denied*, 498 U.S. 1041 (1991) (petition challenged denial of right of appeal to Article III court to recover amount wrongfully paid to satisfy claim that was unenforceable under agreement pursuant to which debt arose, when all interested parties remained before the court, and no intervening event had changed the situation). *But cf. In re* Andreuccetti, 975 F.2d 413, 418-20 (7th Cir. 1992) (appeal from order of confirmation held not moot where portion of plan had not been completed, parties most affected remained before the court, and settlement agreement allowed reinstatement of settled claims in the event of reversal; debtors' appeal from confirmation nevertheless dismissed insofar as predicated on challenge to limitation of rights of administrative expenses claimants since appellants had no claims affected by the limitation); *In re* AOV Indus., 792 F.2d 1140, 1148-49 (D.C. Cir.) (confirmation order reversed insofar as it required one unsecured creditor

B. The Order of Confirmation as a Discharge of Debt

Section 1141(d) of the Bankruptcy Code provides for a broad, but not absolute or unqualified discharge from the debtor's indebtedness.[77] The

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to release its claims against a third party before sharing in fund to be created by the third party and insofar as fees had been awarded to one law firm), *vacated in part*, 797 F.2d 1004 (D.C.Cir. 1986); Brite v. Sun Country Dev., Inc. (*In re* Sun Country Dev., Inc.), 764 F.2d 406, 407 n.1 (5th Cir. 1985) (appeal from confirmation entertained because effective relief was still available notwithstanding substantial consummation of plan); Jorgensen v. Federal Land Bank (*In re* Jorgensen), 66 B.R. 104 (Bankr. 9th Cir. 1986) (although no stay pending appeal had been obtained and creditors' plan of liquidation had not been substantially consummated because the debtor had completed only four months of selling timber under an 18-month plan, debtors' appeal was not rendered moot; bankruptcy court's appointment of arbitrator in confirmation order for resolution of disputes stricken as unauthorized under FED. R. BANKR. P. 9019(c); confirmation order affirmed as modified); Chang v. Servico, Inc. (*In re* Servico, Inc.), 161 B.R. 297 (S.D. Fla. 1993) (holding that appeal challenging confirmation order became moot by virtue of substantial consummation of plan, no stay having been sought; substantially all of hotel properties to be transferred under the plan had been transferred, new board of directors had assumed responsibility for debtor's business, distribution to creditors was nearly complete, and millions of shares of stock of debtors had been traded on American Stock Exchange); New York City Dep't of Fin. v. 1515 Broadway Assocs. (*In re* 1515 Broadway Assocs.), 153 B.R. 400, 404-07 (S.D.N.Y. 1993), (rejecting city's argument that Chapter 11 plan's transformation of a former general partner in Chapter 11 debtor, a general partnership, into a limited partnership was not mooted by confirmation, because reorganization of the limited partnership was found to be at the core of a reorganization of the partnership; but holding that city's effort to tax a future foreclosure provided for under the plan and the liability of any of the parties under the plan to pay the state's gains tax presented issues not mooted by confirmation).

77. 11 U.S.C. § 1141(d) (1988); Holstein v. Brill, 987 F.2d 1268, 1270 (7th Cir. 1993). "Chapter 11 of the Bankruptcy Code does not contemplate the filing of objections to discharge as might be done in a Chapter 7 case." C.I.T. Fin. Servs. v. Novelty & Toy Co. (*In re* Novelty & Toy Co.), 22 B.R. 77, 77 (Bankr. M.D. Ala. 1982). Confirmation of a debtor's plan constitutes a discharge of its debts, and a postconfirmation objection comes too late. *Cf.* Unarco Bloomington Factory Workers v. UNR Indus., 124 B.R. 268, 276 (N.D. Ill. 1990) (holding that preconfirmation claims of former employees for occupational disease and tort resulting from exposure to asbestos were discharged by confirmation under § 1141(a), and actions on the claims were prohibited by § 524(a)(2)).

Although confirmation discharges the debtor's preconfirmation liabilities under a contract, it does not terminate the agreement, and postconfirmation costs incurred within the contemplation of the agreement remain collectible. Shure v. Vermont (*In re* Sure-Snap Corp.), 983 F.2d 1015, 1018 (11th Cir. 1993) (holding debtor liable for attorneys' fees incurred by creditor in defending against postconfirmation appeal by debtor); Danzig Claimants v. Grynberg (*In re* Grynberg), 113 B.R. 709 (Bankr. D. Colo.) (judgment creditor awarded postpetition appellate attorney's fees where Chapter 11 debtor appealed a prepetition judgment), *aff'd*, 143 B.R. 574 (D. Colo. 1990), *aff'd*, 966 F.2d 570 (10th Cir. 1992).

subsection's discharge extends generally to all preconfirmation debt and to certain debts whether they arise before or after confirmation.[78] An introductory phrase of subsection (d) recognizes that the plan or the court's order of confirmation may except indebtedness from the operation of the confirmation as a discharge.[79] The second paragraph of subsection (d) saves from discharge debts of an individual debtor that are nondischargeable under section 523 of the Code.[80] The third paragraph of the subsection

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78. Confirmation of a Chapter 11 plan was held not to preclude setoff by a creditor of a quantum meruit claim for advertising provided to the debtor, although the claim was not referred to in the plan. Carolco Television Inc. v. National Broadcasting Co. (*In re* De Laurentis Entertainment Group Inc.), 963 F.2d 1269 (9th Cir.), *cert. denied,* 113 S. Ct. 330 (1992), commented on in Brett Ludwig, Comment, In re De Laurentis Entertainment Group: *Sacrificing Confirmed Chapter Plan to Delinquently Asserted Setoff Rights*, 77 MINN. L. REV. 871 (1993).

79. *See, e.g.,* Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n, 997 F.2d 581, 589 (9th Cir. 1993), where debtor's plan did not grant a discharge, but contemplated that a discharge would occur in the future. In the recent case of Mancuso v. Sullivan (*In re* Sullivan), 153 B.R. 746 (Bankr. N.D. Tex. 1993), the court recognized that a provision in a confirmed plan that precluded a discharge of the debtor if he did not prevail in § 727 proceedings was binding on the debtor. *See also* Mancuso v. Sullivan (*In re* Sullivan), 153 B.R. 751 (Bankr. N.D. Tex. 1993) (holding that the Chapter 11 trustee had no authority under the Code or the Chapter 11 plan to institute proceedings objecting to the debtor's discharge).

80. Atassi v. McLaren (*In re* McLaren), 990 F.2d 850, 853-54 (6th Cir. 1993) (upholding bankruptcy court's ruling in core proceeding that individual Chapter 11 debtor's debt was not dischargeable under § 523(a)(2)(A)); Grynberg v. United States (*In re* Grynberg), 986 F.2d 367 (10th Cir.) (gift taxes on transfers occurring within three years prior to filing of Chapter 11 petition by individual debtor held to be nondischargeable and collectible postconfirmation notwithstanding failure to file claims for the taxes prior to bar date), *cert. denied,* 114 S. Ct. 57 (1993). *Grynberg* is discussed in Zaretsky, *supra* note 75.

In Star Bank, N.A. v. Reveal (*In re* Reveal), 148 B.R. 288 (Bankr. S.D. Ohio 1992), the court rejected a creditor's request for a determination that its claim for punitive damages arising out of the debtor's false statement of his financial condition was nondischargeable under § 523(a)(2) and deferred the creditor's request for denial of discharge as premature in light of the fact that a plan of reorganization had not yet been filed.

The court in Climax Molybdenum Co. v. Specialized Installers, Inc. (*In re* Specialized Installers, Inc.), 12 B.R. 546 (Bankr. D. Colo. 1981), ruled that a creditor's claim against an individual debtor for breach of fiduciary duty was nondischargeable under § 523(a)(4), but qualified the ruling by adding that it was "subject to the other provisions of Chapter 11 in the event the debtor achieves confirmation of a nonliquidating plan and continues in business." *Id.* at 554-55. How could confirmation of a nonliquidating plan affect dischargeability?

In Savoy Records, Inc. v. Trafalgar Assocs. (*In re* Trafalgar Assocs.), 53 B.R. 693, 696 (Bankr. S.D.N.Y. 1985), a case involving a limited partnership, the court

withholds, or possibly withdraws, the effect of confirmation as a discharge in a case where the plan is a liquidation plan, the debtor does not engage in business after the plan's consummation, and the debtor could not be discharged in a Chapter 7 case because, for example, it is not an individual. This third paragraph raises numerous questions,[81] but these have not proved to be significant in practice.[82] The fourth paragraph authorizes a

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confusingly denied a request for a determination of nondischargeability of a claim for fraud or defalcation on the ground that the request was premature. The court added that a declaration of nondischargeability could not be made because no plan had been filed.

In *In re* Namer, 141 B.R. 603, 608 (Bankr. E.D. La. 1992), *appeal dismissed sub nom. In re* National Business Consultants, Nos. 92-1552, 92-1553, 1992 WL 164528 (E.D. La. June 17, 1992), the court declared that an individual Chapter 11 debtor was not entitled to a discharge from a debt to the FTC for money obtained by false representations; however, the court dismissed the debtor's Chapter 11 petition, along with that of his wholly owned corporation, for lack of good faith.

81. The third paragraph prescribes the requirements for an attack on the effectiveness of confirmation as a discharge to be successful. The second requirement, namely, that the debtor does not engage in business after consummation of the plan, is especially troublesome in that it does not indicate answers to such questions as the following: (1) What is the effect of continuation of business for a limited period of time after consummation of the plan? (2) Is it possible for the effect of confirmation as a discharge to be revoked or terminated by virtue of the debtor's cessation of business after a postconsummation interval? (3) If the debtor changes the location and nature of his or her business activities postconsummation, does the debtor escape the consequence of the denial of discharge prescribed by § 1141(d)(3), or must he continue some or all of the former business in order to obtain the benefit of discharge? (4) Does the bankruptcy court have jurisdiction over a proceeding to determine whether discharge of a preconfirmation debt was precluded by § 1141(d)(3)(B)? In any event, the third paragraph appears to give a debtor who is subject to loss of the benefit of a discharge by virtue of its provisions an incentive to engage in business in order to preserve the benefits of discharge of his preconfirmation debts.

82. Research has revealed no cases in which any of the issues listed *supra* in note 81 were raised or considered by the court. In five cases the court deferred ruling on a creditor's request for relief predicated on § 1141(d)(3) by saying that the request was premature until the nature of the plan had been determined. Star Bank, N.A. v. Reveal (*In re* Reveal), 148 B.R. 288 (Bankr. S.D. Ohio 1992); Park View Fed. Sav. & Loan Ass'n v. Rich-Morrow Realty Co. (*In re* Rich-Morrow Realty Co.), 100 B.R. 893, 895 (Bankr. N.D. Ohio 1989); Reynolds v. Miller (*In re* Miller), 80 B.R. 270, 271 (Bankr. W.D.N.Y. 1987); Savoy Records, Inc. v. Trafalgar Assocs. (*In re* Trafalgar Assocs.), 53 B.R. 693, 697 (Bankr. S.D.N.Y. 1985); United Bank v. Pfliger (*In re* Pfliger), 57 B.R. 467, 468 (Bankr. D.N.D. 1985).

In the following cases, a Chapter 11 debtor was held not to be discharged from preconfirmation debts under § 1141(d): Norwest Bank Neb., N.A. v. Tveten, 848 F.2d 871, 874 (8th Cir. 1988) (denying individual debtor discharge because the court found that he transferred his property with intent to defraud creditors within contemplation of § 727(a)(2)); citing § 1141(d)(3)(C) as statutory support for decision); *In re* Namer, 141 B.R. 603, 608 (Bankr. E.D. La.) (denying discharges to individual debtor and his wholly

debtor to execute an enforceable waiver of discharge after the entry of the order for relief. Finally, section 1144(2) authorizes revocation of the discharge order under restricted circumstances.[83]

Notwithstanding the breadth of the language of section 1141(d)[84] and

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owned corporation and dismissing Chapter 11 petitions on motion of FTC as filed in bad faith; citing "§ 1141(3)(c)" as authority for denying discharge of debt of corporate debtor due to the FTC), *appeal dismissed sub nom. In re* National Business Consultants, Inc., Nos. 92-1522, 92-1523, 1992 WL 164528 (E.D. La. June 17, 1992); Teamsters' Pension Trust Fund v. Malone Realty Co., 82 B.R. 346, 349-50 (E.D. Pa. 1988) (holding that confirmation of plan of liquidating partnership constituted denial of discharge under § 1141); *In re* Wood Family Interests, Ltd., 135 B.R. 407 (Bankr. D. Colo. 1989) (denying confirmation of plan and discharge to partnership that proposed liquidating plan and indicated intent not to continue in business); Reynolds v. Miller (*In re* Miller), 97 B.R. 760, 762 (Bankr. W.D.N.Y. 1989) (denying discharge to individual debtor who proposed liquidating plan, desisted from engaging in business after consummation of his plan, concealed assets, and failed to keep financial records from which alleged loss of his assets could be determined). The courts in *Tveten* and *Namer* referred only to subparagraph (C) of § 1141 (d)(3), thereby ignoring the statutory implication that the requirements of subparagraphs (A) and (B) must also be met in order to warrant denial of the benefits of the discharge of all preconfirmation debts.

In Borsdorf v. Fairchild Aircraft Corp. (*In re* Fairchild Aircraft Corp.), 128 B.R. 976 (Bankr. W.D. Tex. 1991), the court refused to allow a claimant to file a wrongful death claim after the claims bar date. The court acknowledged that because the debtor was being liquidated, the result of its ruling was to leave the claimant with a claim only against a corporate shell without assets. The court stated that the congressional purpose of § 1141(d)(3) was "to discourage trading in corporate shells." *Id.* at 981-82.

83. *See infra* part III.C.

84. Section 1141(d) reads as follows:

> (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 of a plan does not discharge 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

the policy of the Bankruptcy Code evidenced in its legislative history to accord a fresh start to a reorganized debtor,[85] judicial decisions have

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this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

11 U.S.C. § 1141(d) (1988).

85. *See infra* note 230. It is sometimes loosely and inaccurately stated that the fresh start policy does not apply to corporations. *See, e.g.*, Official Comm. of Unsecured Creditors v. PSS S.S. Co. (*In re* Prudential Lines), 928 F.2d 565, 573 (2d Cir.), *cert. denied*, 112 S. Ct. 82 (1991); Pettibone Corp. v. Payne (*In re* Pettibone Corp.), 151 B.R. 166, 174-75 (Bankr. N.D. Ill. 1992); THOMAS JACKSON, LOGIC AND LIMITS OF BANKRUPTCY 225 (1986); Ellen A. Sward, *Resolving Conflicts Between Bankruptcy Law and the State Police Power*, 1987 WIS. L. REV. 403, 408, Philippe J. Kahn, Note, *Bankruptcy Versus Environmental Protection: Discharging Future CERCLA Liability in Chapter 11*, 14 CARDOZO L. REV. 1999, 2034-37 (1993); Gary M. Roberts, Note, *Bankruptcy and the Union's Bargain: Equitable Treatment of Collective Bargaining Agreements*, 39 STAN. L. REV. 1015, 1025 n.67 (1987). The statement is a misleading way of summarizing the effect of § 1141(d)(3) and the limitation of discharge under § 727 to individual debtors. *See* Susan Block-Lieb, *Fishing in Muddy Waters: Clarifying the Common Pool Analogy as Applied to the Standard for Commencement of a Bankruptcy Case*, 42 AM. U. L. REV. 337, 428-29 (1993); Shawn F. Sullivan, *Discharge of CERCLA Liability in Bankruptcy: The Necessity for a Uniform Position*, 17 HARV. ENVTL. L. REV. 445, 454 n.41, 458 n.57 (1993).

The author of the Note in the Cardozo Law Review cited *supra* purported to find support for putting aside the fresh start objective in the context of corporate reorganizations in the absence from the House and Senate Reports on the Bankruptcy Code of mention of fresh start as a purpose in bankruptcy reorganization. Kahn, *supra*, at 2037. The fresh start policy is not a statutory concept, but has animated congressional formulation and judicial construction of provisions of the bankruptcy law relating to discharge, exemptions, property of the estate, and discrimination against debtors. *See* Frank R. Kennedy, *Reflections on the Bankruptcy Laws of the United States: The Debtor's Fresh Start*, 76 W. VA. L. REV. 427, 445-51 (1974). Discharge of a debtor was originally introduced into the English Bankruptcy Acts as an inducement to debtors to make full disclosure and delivery of their assets and to comply with the provisions of the law and orders of the court. 4 & 5 Anne c. 17 (1706). *See* United States v. Kras, 409 U.S. 434, 447 (1973) (quoting and citing JAMES A. MACLACHLAN, BANKRUPTCY 20-21, 88 (1956). As Professor MacLachlan pointed out in his treatise,

> The later development of the discharge represents an independent and though not unrelated public policy in favor of extricating an insolvent debtor from what would otherwise be a financial impasse. A business man may sometimes get new credit after a failure, if it is of such a nature as not to discredit his ability or character, but not if his prospective earnings are to be consumed in trying to meet old debts.

Id. at 88.

The considerations underlying the grant of a discharge to an individual apply to a corporation or partnership seeking reorganization, as the Commission on Bankruptcy Laws and Congress recognized in formulating the provisions of the bankruptcy reform

engrafted significant limitations on the effect of a discharge in a reorganization case. The first limitation rests on the constitutional ground that a creditor's claim cannot be discharged without affording the claimant due process of law. What constitutes due process, however, turns out to be a concept of varying content. Statutory provisions and rules prescribing procedures to be followed in the course of a case in dealing with claims and sales, as well as plan confirmation, have been deemed to express constitutional requirements embodied in the due process clause. And the case law construing these provisions elaborates these limitations on the availability of a discharge. The scope of confirmation as a discharge may be affected by not only the characteristics of the debtor and the creditor, but also the relationship between the debtor and the creditor. The interpretation of the word "claim," which has generated a diversity of views, has proved to have crucial significance in demarking the scope of the discharge. The courts' views of the operation of confirmation as res judicata and collateral estoppel have significant impacts on the outcome of postconfirmation efforts to collect preconfirmation debts. Finally, the courts' analyses of the role of subject matter jurisdiction in determining the effect of confirmation is of crucial importance.

1. The Requisites of Due Process

As noted in the preceding paragraph, confirmation may be denied effect as a discharge of a claim against the debtor because the claimant was not afforded the protection of due process. The seminal case establishing the right of a claimant to due process before his claim is barred is *Mullane v. Central Hanover Bank & Trust Co.*[86] In *Mullane* a trustee of a common trust fund, seeking a settlement of its first account, had given notice of the application to its many beneficiaries by local newspaper publication in compliance with requirements of an applicable New York statute. In reversing unanimous decisions of three New York courts,[87] the Supreme Court determined that notice by publication was incompatible with the requirements of the Fourteenth Amendment with respect to beneficiaries whose names and places of residence were known and who could have been

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legislation of the 1970s. *See* REPORT I, *supra* note 6, at 175; H.R. REP. NO. 595, *supra* note 15, at 129, *reprinted in* 1978 U.S.C.C.A.N. at 6069; CMC Heartland Partners v. Union Pac. R.R. (*In re* Chicago, Milwaukee, St. P. & Pac. R.R.), 3 F.3d 200, 201 (7th Cir. 1993); *see also infra* note 230.

86. 339 U.S. 306 (1950).

87. The surrogate court's holding that the notice required and given was sufficient was affirmed by the Appellate Division of the New York Supreme Court in *In re* Central Hanover Bank & Trust Co., 88 N.Y.S.2d 907 (App. Div. 1949), and by the New York Court of Appeals, 87 N.E.2d 73 (N.Y. 1949).

easily notified by mail.

In *Mullane* Justice Jackson articulated his classic formulation of the right to due process:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such a nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied.[88]

Justice Jackson's opinion was replete with the pragmatics of weighing costs and benefits in reaching a conclusion about the demands of due process. He acknowledged that personal service of every known beneficiary was not required since "notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all since any objections sustained would inure to the benefit of all."[89]

Three years later, in *City of New York v. New York, N.H. & H.R. Co.*,[90] the Supreme Court cited *Mullane* when it unanimously overturned lower court rulings that had discharged a reorganized railroad's property from New York City's tax liens. The Court concluded that the City was not afforded due process because the City did not receive reasonable notice of the reorganization court's order prescribing the time for filing claims.[91] Although the City knew of the pendency of the reorganization case, it did not file a claim. The City, "[s]omewhat as an afterthought," had contended in the district court that a ruling barring enforcement of its liens would constitute a deprivation without due process.[92] The district court responded that the City's "continued failure to assert its claims in any way while the proceedings were in progress cannot be attributed to lack of due pro-

88. 339 U.S. at 314-15 (citations omitted); *cf.* Southmark Corp. v. Cagan, 999 F.3d 216, 221 (7th Cir. 1993) (holding that failure of mortgagee as debtor-in-possession in Chapter 11 case to give adequate notice to receiver appointed in securities fraud class action to safeguard partnership assets allowed receiver to press claims on behalf of defrauded investors in partnership assets notwithstanding confirmation of plan that did not include investor's claims).

89. *Id.* at 319.

90. 344 U.S. 293 (1953).

91. *Id.* at 296 (citing *Mullane*, 399 U.S. 306).

92. *In re* New York, N.H. & H.R. Co., 105 F. Supp. 413, 420 (D. Conn. 1951), *aff'd*, 197 F.2d 428 (2d Cir. 1952), *rev'd*, 344 U.S. 293 (1953).

cess."[93]

Circuit Judges Swan and Augustus Hand affirmed the opinion of the district court,[94] but Circuit Judge Frank wrote an extended dissent, invoking *Mullane* at several points but not mentioning due process except in his quotations from *Mullane*.[95] Judge Frank's extended analysis adhered to the approach taken in *Mullane* of weighing the benefits and costs of conditioning discharge on compliance with requirements derived from various sources.[96]

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93. *Id.* at 420.

94. City of New York v. New York, N.H. & H.R. Co. (*In re* New York, N.H. & H.R. Co.), 197 F.2d 428 (2d Cir. 1952), *rev'd*, 344 U.S. 293 (1953).

95. *Id.* at 428-35 (Frank, J., dissenting).

96. *Id.* at 430. Judge Frank's opinion elaborated the following considerations in justification of his position:

(1) The railroad's explanation for failing to schedule the City as a creditor (because the debtor disputed the validity of the City's claimed lien) justified a suspicion that the railroad's real reason was a hope that the City would neglect to file its claim before the entry of an order expunging it. *Id.* at 429.

(2) The district judge had improperly ordered notice by mail only to "appearing" creditors rather than "known" creditors, thereby ignoring the statutory scheme that contemplated giving notice by mail to the known creditors who had not appeared. *Id.* at 430.

(3) Notice by publication to nonappearing creditors who were known to the debtor was definitively discredited by the Court in *Mullane*, where such notice was referred to as a "gesture," a "feint," a "fiction," and lacking any "tenable ground" when names and addresses of known creditors are available to the debtor. *Id.* at 430-31.

(4) The district court's predicating of the loss of the City's right as a creditor on its neglect to follow up constructive notice of the existence of the reorganization imposed an insupportable burden on the City to scrutinize all published notices of bankruptcy proceedings and one wholly disproportionate to the burden imposed by the Bankruptcy Act on the debtor. The district judge, having neglected to perform its statutory duty in respect to the listing of creditors and ordering the giving of notice, sought to excuse that neglect by fictionally imputing constructive notice of the bar order to the creditor. *Id.* at 431.

(5) As numerous cases have recognized, a creditor who is reasonably familiar with the applicable statute would be justified in assuming that the court would order specific notice to be given of the time for filing claims. *Id.* at 432.

(6) To impose constructive notice of a bar order by judicial construction on the basis of a creditor's knowledge of the pendency of a reorganization case without regard to how the knowledge was obtained constituted a departure from case law that typically requires the party subject to the notice to be guilty of gross negligence or fraud. *Id.* at 433.

(7) While § 17a(3) of the Bankruptcy Act rendered a creditor's knowledge of the pendency of a bankruptcy case equivalent to constructive notice of a duty to file the creditor's claim and any available objections to discharge, the absence of a comparable provision in § 77 negated any inference that mere knowledge of a pending reorganization

Justice Black for the Supreme Court relied on *Mullane* for its disapproval of notice by publication as "a poor and sometimes hopeless substitute for actual service of notice"; however, he acknowledged that "when the names, interests and addresses of persons are unknown, plain necessity may cause a resort to publication."[97] Justice Black agreed with Circuit Judge Frank in criticizing both the district judge's failure to require all known creditors to be listed and the lower courts' imposing a duty on the City of New York to act to protect its rights because of its knowledge of the pendency of the reorganization case. Justices Frankfurter and Jackson doubted that the City was a creditor of the debtor railroad under section 77(b) in view of the nonrecourse character of its lien, but opined without explanation that the notice given in the case was inadequate support for the order destroying the lien.[98]

Both *Mullane* and *New York, N.H. & N.R. Co.*, which reversed lower courts' rulings that had rejected challenges to court orders grounded on defective notice, left in considerable doubt the implications of these decisions.[99] This doubt has given rise to uncertainty and failure of reorganized debtors to realize the intended benefits of the comprehensive discharge

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case would impose on the creditor any duty to act to protect its rights before receiving notice. *Id.*

(8) Since the point had never been settled, it was at least arguable that the holder of a lien need not file a claim in a reorganization case in order to preserve the right to enforce the lien after confirmation. *Id.*

(9) The provisions of the plan were confusing with respect to the effect of confirmation on the enforceability of a lien and the necessity of a timely filing of the underlying claim in order to preserve the right to enforce the lien. *Id.* at 434.

With respect to the necessity of filing a claim to preserve a lien, *cf.* Dewsnup v. Timm, 112 S. Ct. 773 (1992).

97. *New York, N.H. & N.R. Co.*, 344 U.S. at 296.

98. 344 U.S. at 297 (Frankfurter & Jackson, J.J.).

99. The Supreme Court last had occasion to consider the requisites of due process in claims proceedings in Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988). In *Pope* the Court reversed Oklahoma state-court rulings that barred a claim against a decedent's estate filed more than two months after the publication of notice of the commencement of probate proceedings. Citing *Mullane* and *New York, N.H. & H.R. Co.*, the *Pope* Court stated that probate and bankruptcy proceedings are analogous settings for deciding the issue presented. The Court held that due process requires "actual notice" to the appellant if he was known or "reasonably ascertainable." *Id.* at 490-91. Moreover, the Court explained that "actual notice" means "'[n]otice by mail or other means as certain to ensure actual notice.'" *Id.* at 491 (quoting Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983)). The Court had declared in 1961 that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961); *see also infra* text accompanying notes 215-222.

provided by section 1141(d) of the Bankruptcy Code.

In *In re Harbor Tank Storage Co.*[100] the Third Circuit Court of Appeals upheld the due process claim of a creditor who had not received formal notice of the bar date for filing claims, a summary of the debtor's plan of reorganization, or notice of hearings on confirmation of the plan. The court deemed immaterial the claimant's knowledge of the pendency of the debtor's reorganization case. Since the trustee knew of the existence of the creditor and its claim and the address of the creditor, the court declared that due process under the circumstances required more than notice by publication.[101]

Eighteen years later, in *In re Penn Central Transp. Co.*,[102] the same court refused a claimant's request for relief from a consummation order entered in a reorganization case, notwithstanding the claimant's argument that it had not received constitutionally adequate notice. The claimant had received notice by mail of procedures established for filing of claims, but the claimant had not availed itself of these procedures because, according to its allegations, the debtor had fraudulently concealed the existence of the claims. The court reviewed the evidence and found no concealment.[103]

In 1985 the Court of Appeals for the Seventh Circuit cited *New York, N.H. & H.R. Co.*, for the proposition that "known creditors are entitled to actual notice of the bar dates for filing claims."[104] The court nevertheless

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100. 385 F.2d 111 (3d Cir. 1967).

101. *Id.* at 115.

102. 771 F.2d 762 (3d Cir.), *cert. denied*, 474 U.S. 1033 (1985).

103. *Id.* at 771-72.

104. *In re* Chicago Pac. Corp., 773 F.2d 909, 916 (7th Cir. 1985). The Rock Island Railroad filed a reorganization petition in 1975 under § 77 of the Bankruptcy Act. The Organization of Minority Vendors had filed a class action against the railroad and its trustee in the federal district court in 1979, but the railroad was dropped as a defendant in 1980 when the complaint in the class action was amended. When the claimants sought to reinstate the railroad as a defendant in the class action in 1984, the trustee sought and obtained an injunction. The claimants thereupon filed a $60 million claim against the railroad ten days before the consummation date set by the court in the reorganization case. The district court held on the eve of its consummation order that the claim was untimely under both the applicable bankruptcy rule and the bar order previously entered in the case and that the trustee had reasonably believed that the claimants had abandoned their claim in 1979. On appeal the court of appeals approved the district court's conclusion that the claimants were not known creditors entitled to actual notice of the bar dates. The court of appeals considered whether the claims were for administrative expenses and thus not subject to the bar date because they related to alleged discrimination during the trustee's operation; however, the court held that the claimants were nevertheless barred by laches and estoppel. The court rejected the claimants' contention that they were entitled to pursue their class action, because the reorganization court clearly had the power to protect both the estate and the reorganization process against the

held, on a variety of grounds, that a class of minority vendors claiming discrimination by the debtor railroad was entitled only to constructive notice.[105]

Citing its 1952 decision, but without adverting to any constitutional requirement, the same court in 1992 acknowledged that "actual notice is necessary only as to known creditors, whereas constructive notice is sufficient for unknown creditors."[106] Again the court held, on a variety of grounds, that a claimant for reimbursement of environmental cleanup costs against a railroad reorganized under section 77 of the Bankruptcy Act was barred by constructive notice from pursuing its claim against the railroad, its trustee, and successors.[107]

In the 1980s, a series of courts of appeals decisions that denied a debtor's invoking confirmation as a discharge of a preconfirmation claim explicitly relied on the constitutional mandate of the Fifth Amendment for reasonable notice to the creditor whose claim was supposed to be discharged. The cases digested in the next few paragraphs illustrate how procedural rules have become elevated to constitutional mandates that override the congressional declaration of the effect intended to be given a discharge in a Chapter 11 case.

In *Reliable Electric Co. v. Olson Construction Co.*,[108] the creditor was well aware of the pendency of the debtor's Chapter 11 case, by virtue of telephonic notice from the creditor's attorney, over a year before order of confirmation was entered. In fact, the debtor had filed a state-court action against the creditor on the very contract that was the basis for the claim that the court of appeals ultimately held not to be discharged, and the creditor

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unraveling that would ensue from allowing the class action to proceed.

105. *Id.* at 917.

106. *In re* Chicago, Milwaukee, St. Paul & Pac. R.R., 974 F.2d 775, 788 (7th Cir. 1992) (citing *In re* Chicago Pac. Corp., 773 F.2d at 916-17). The Washington State Department of Transportation (WSDOT) incurred environmental cleanup costs on property it had purchased in 1984 from the trustee of the Chicago, Milwaukee, St. Paul & Pacific Railroad Co. In 1979 one of the railroad's trains carrying copper ore was derailed, and the resulting spill led to the contamination and need for cleanup. The district court found that WSDOT had sufficient information to give rise to a claim or contingent claim against the railroad before the entry of a consummation order in the railroad's reorganization in 1985; however the court declined to find that the railroad or its trustee had knowledge of the contamination or of WSDOT's status as a creditor so as to be entitled to actual notice from the railroad prior to the consummation. The district court concluded that actual notice given by the railroad's trustee to the Washington Department of Revenue constituted actual notice to other state agencies, including WSDOT, but the court of appeals refrained from resting its finding of notice on that rationale. This case is discussed further *infra* text accompanying notes 144 and 192.

107. 974 F.2d at 788.

108. 726 F.2d 620 (10th Cir. 1984).

had removed the action to the bankruptcy court in which the debtor's Chapter 11 case was pending. The order of confirmation in the Chapter 11 case was entered within three months after the removal of the state court action. Because the creditor received no formal notice of the confirmation hearing, the court declared the creditor to be deprived of a constitutionally guaranteed opportunity to dispute the discharge of his claim.[109]

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109. *Id.* at 623 Compare the following statement by the Court of Appeals for the Ninth Circuit in the preceding year:

> When the holder of a large, unsecured claim . . . receives any notice from the bankruptcy court that its debtor has initiated bankruptcy proceedings, it is under constructive or inquiry notice that its claim may be affected, and it ignores the proceedings to which the notice refers at its peril. "Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry may have led. When a person has sufficient information to lead him to a fact, he shall be deemed to be conversant of it."

Lawrence Tractor Co. v. Gregory (*In re* Gregory), 705 F.2d 1118, 1123 (9th Cir. 1983) (quoting D.C. Transit Sys., Inc. v. United States, 531 F. Supp. 808, 812 (D.D.C. 1982), *aff'd*, 790 F.2d 964 (D.C. Cir. 1986)). The Ninth Circuit's statement in *Gregory* is quoted and approved in Robbins v. Amoco Prod. Co., 952 F.2d 901, 908 (5th Cir. 1992). The correctness of *Reliable Elec.*'s analysis of the mandate of due process is further examined *infra* part II.B.4.

Kenneth Klee, one of the principal draftsmen of the Bankruptcy Code and a co-author of a critique of the *Reliable Electric* court's opinion, characterized the Tenth Circuit's decision denying the discharge in this case as "infamous." Kenneth N. Klee & Frank A. Merola, *Ignoring Congressional Intent: Eight Years of Judicial Legislation*, 62 AM. BANKR. L.J. 1, 22 (1988). Klee and Merola criticized the *Reliable Electric* case for its unreasonable expansion of the scope of due process on three grounds: (1) The court refused to recognize that a creditor's knowledge of the existence of its debtor's reorganization case constituted effective notice that provided an opportunity for the creditor to act to protect its claim in the case. *Id.* at 22-25; *cf.* Lawrence Tractor Co. v. Gregory (*In re* Gregory), 705 F.2d 1118, 1122-23 (9th Cir. 1983) (holding that creditor's claim against convicted embezzler in Chapter 13 case was discharged notwithstanding creditor's objection to sufficiency of notice of creditors' meeting to satisfy due process requirements for effectuating discharge). (2) The court elevated the notice of the confirmation hearing rather than notice of the bar date for filing claims to constitutional status. (3) Rather than extending the bar date for the complaining creditor to file its claim, the court simply held the creditor's claim to be nondischargeable. *Compare In re* Intaco P.R., Inc., 494 F.2d 94, 99 (1st Cir. 1974) (not requiring *acceptance* of a claim that the court authorized to be filed postconfirmation, but opining that the problems of administration engendered by its decision were "not beyond the ken of the court on remand"); *see also In re* Harbor Tank Storage Co., Inc., 385 F.2d 111, 115 (3d Cir. 1967); *In re* Moskowitz, 35 B.R. 750 (S.D.N.Y. 1983) (creditor allowed extension of time for filing proof of claim in view of fact that, although it knew of pendency of debtor's reorganization case, creditor had not received timely notice prescribed by rule; since no plan had been confirmed, opinion emphasized that dischargeability of claim not in issue).

In *Broomall Industries v. Data Design Logic Systems, Inc.*[110] the Court of Appeals for the Federal Circuit denied the benefit of discharge of a patent infringement claim to a debtor although the creditor arguably had actual notice of the pendency of the debtor's Chapter 11 case. The court cited and followed *New York, N.H. & H.R. Co.* and *Reliable Electric* in discounting the debtor's evidence and argument respecting the creditor's knowledge of the reorganization case and reversed the district court's summary judgment for the debtor based on that evidence.[111] The debtor had been informed of the claim three years before filing its petition, but had not scheduled the claim, apparently on the assumption that the claim had been abandoned. As a result, the claimant was never served with notice of any of the proceedings in the case.

Klee and Merola read the *Broomall* opinion as treating every entity that has threatened to litigate a claim as a known creditor entitled to notice of a reorganization case, so long as the statute of limitations has not run against the claim.[112] The opinion does not appear to go quite so far, however, since it merely reversed the district court's summary judgment based on that court's conclusion that the debtor was without notice of the creditor's claim. The opinion moreover recognized that the debtor might still assert the defenses of laches and estoppel in the trial of the case. The court noted that, in any event, there was no indication in the record that notice by publication had been given to unknown claimants as required by *Mullane*.[113]

As Klee and Merola observed, the implication of the *Broomall* opinion extends beyond that of *Mullane* in requiring the debtor to provide constructive notice by publication to unknown claimants, even though the debtor is unaware of the existence of such claimants. In view of the rising risk of liability for environmental damage of which a debtor or plan proponent has no inkling, every plan proponent may be well advised to publish notices of not only the initiation of a reorganization case, but also of bar dates and the confirmation hearing.[114] However, to read the Fifth Amendment as

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The court's opinion in *Reliable Electric* indeed appears to go so far as to suggest that the failure of a creditor to be "properly notified of all vital steps in the proceeding so they may have the opportunity to protect their interests" constitutes a constitutional defect invalidating the discharge. *Reliable Elec.*, 726 F.2d at 623.

110. 786 F.2d 401 (Fed. Cir. 1986).

111. *Id.* at 495-506.

112. Klee & Merola, *supra* note 109, at 26.

113. *Broomall*, 786 F.2d at 404.

114. *See* MARTIN J. BIENENSTOCK, BANKRUPTCY REORGANIZATION, 693-94 (1987). Commenting on *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, abstracted *supra* note 106, Randolph Haines suggested the following practice pointer derived from this decision:

[D]ebtors that own or have owned real property should always give actual

imposing an obligation to give such notice in all or even most reorganization cases may impose a questionable burden on a debtor seeking reorganization. The court in *Broomall* observed that "Fifth Amendment due process consideration take precedence over the discharge provisions of section 1141 of the Bankruptcy Code, in cases where the debtor has knowledge of claims and fails to inform claimants of the pendency of the proceeding."[115]

In *Spring Valley Farms, Inc. v. Crow* (*In re Spring Valley Farms, Inc.*),[116] the court denied a Chapter 11 debtor the benefit of discharge from nuisance and trespass claims of property owners who had knowledge of the Chapter 11 case but received no official notice of the bar date for filing claims set by the bankruptcy court. The court relied on Bankruptcy Rule 2002(a)(8), which prescribes a 20-day notice requirement for the filing of proofs of claim, and referred to the "[c]onsiderable support" for the claimants' assertion that due process required compliance with the rule.[117]

> notice to the state environmental agency and the EPA, and also attempt to provide constructive notice through newspaper publication. The *Milwaukee Road* case suggests that such constructive notice will be sufficient to discharge environmental claims if (1) the identity of the potential claimant is unknown to the debtor, and (2) the potential claimant has reason to know of the existence of the pollution and potential liability of the debtor for it.

Randolph J. Haines, *Seventh Circuit Requires Knowledge for an Environmental Claim to Arise*, NORTON BANKR. L. ADVISER, Oct. 1992, at 10.

For a case going far to suggest the publication of notice of the filing and perhaps other events in every Chapter 11 case, see Orcon, Inc. v. Nevada Emergency Servs., Inc. (*In re* Nevada Emergency Servs., Inc.), 39 B.R. 859 (Bankr. D. Nev. 1984). The claimant had filed a postconfirmation tort and contract action against the reorganized debtor, and the court held that it was precluded by the requirements of due process from dismissing the action. The plaintiff alleged that it did not know of the pendency of the defendant's Chapter 11 case at the time of the confirmation of its plan, and the court assumed that the debtor did not know of the existence of the plaintiff's claims. The court appeared to regard the case law to require publication of notice in order to bind any unknown claimant to the terms of the confirmation of a plan. The court acknowledged that the plaintiff should be characterized as a "claimant" rather than as a "creditor." *See also* Southmark Corp. v. Cagan, 999 F.2d 216, 221 (7th Cir. 1993) (holding that failure of a mortgagee as debtor-in-possession in Chapter 11 case to give adequate notice to receiver appointed in securities fraud class action to safeguard partnership assets allowed receiver to press claims on behalf of defrauded investors in partnership assets notwithstanding confirmation of plan that did not include investor's claims); McGlinn v. Sullivan Ford Sales, Inc. (*In re* Sullivan Ford Sales, Inc.), 25 B.R. 400 (Bankr. D. Me. 1982) (holding that tort claimant was not barred by confirmation from suing debtor for damages where claimant had no knowledge and did not receive official notice either of filing of debtor's Chapter 11 case or of subsequent steps in case in time to file preconfirmation proof of claim).

115. *Broomall*, 786 F.2d at 403.

116. 863 F.2d 832 (11th Cir. 1989).

117. *Id.* at 834. The court acknowledged, in a footnote, that actual knowledge by the

2. *The Scope of Debt Subject to Discharge*
a. Liability for Environmental Cleanup

Section 1141(d) of the Bankruptcy Code declares that the confirmation of a plan discharges the debtor from any debt that arose before the date of the confirmation. A "debt" is a liability on a claim.[118] These simple, straightforward statements implicate two troublesome issues: (1) What is a claim? and (2) When does the claim arise? A "claim" is broadly defined to mean a "right to payment," whether fixed or contingent.[119]

Two years after adoption of the Bankruptcy Code, Congress enacted the Comprehensive Environmental Response Compensation and Liability Act (CERCLA),[120] which imposes liability on persons responsible for contaminating sites with toxic wastes. CERCLA places responsibility for cleanup of a site contaminated by toxic waste on (1) a current "owner" or "operator" of the site, (2) a person who "owned" or "operated" the site at the time of the contamination, (3) a person who arranged for the disposal of the waste, and (4) a person who transported the waste to the site.[121] A "responsible party" (RP) or "potentially responsible party" (PRP) may be held liable to whoever performs the cleanup or is ordered or authorized to do so.[122] Does the liability thus imposed give rise to a claim under the Code, and if so, is it discharged by confirmation of a plan under the Code?

The judicial treatment of environmental claims under the Bankruptcy Code has been troubled by a difference of opinion as to whether such a claim is governed by nonbankruptcy law or bankruptcy law. Confusion was engendered by the opinion of the Court of Appeals for the Third Circuit in *Avellino & Bienes v. M. Frenville Co. (In re M. Frenville Co.)*,[123] now a generally discredited precedent,[124] which held that a claim under the

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claimants of the bar date itself rather than merely a general knowledge of the initiation of bankruptcy proceedings might have changed the result. *Id.* at 835 n.2. The court cited *In re* Intaco P.R., Inc., 494 F.2d 94, 99-100 n.11 (1st Cir. 1974), where a similar concession was made.

118. 11 U.S.C. § 101(12) (1988).

119. *Id.* § 101(5)(A).

120. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675 (1988 & Supp. III 1991)).

121. CERCLA § 107(a)(1)-(4), 42 U.S.C. § 9607(a)(1)-(4) (1988).

122. CERCLA § 107(a), 42 U.S.C. § 9607(a).

123. 744 F.2d 332 (3d Cir.), *cert. denied*, 469 U.S. 1160 (1985).

124. *See* California Dep't of Health Servs. v. Jensen (*In re* Jensen), 995 F.2d 925, 930 (9th Cir. 1993) (citing Arlene Elgart Mirsky et al., *The Interface Between Bankruptcy and Environmental Law*, 46 BUS. LAW. 623, 650 (1991)); BIENENSTOCK, *supra* note 114, at 101-03 & n.14; Ralph Mabey & Annette W. Jarvis, In re Frenville, *A Critique by the National Bankruptcy Conference's Committee on Claims and Distribution*, 42 BUS. LAW.

Bankruptcy Code is to be assimilated to a cause of action under nonbankruptcy law.[125] The result of that unfortunate coupling was that the inclusion of "unmatured" and "contingent" claims within the definition of "claim" by section 101(5)[126] of the Bankruptcy Code was effectively negated.[127] Since CERCLA does not recognize a "cause of action" or

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697 (1987); Charles E. Elmer, Comment, In re Chateaugay Corp.: *To What Extent are Contingent Claims and Injunctive Remedies Under CERCLA Dischargeable in Bankruptcy?*, 16 AM. J. TRIAL ADVOC. 255, 281-83 (1992) (listing fifteen cases critical of *Frenville*); *see also In re* Chicago, Milwaukee, St. P. & Pac. R.R. Co., 6 F.3d 1184, 1193 (7th Cir. 1993) (citing *In re Jensen* and quoting Mirsky et al., *supra*).

125. The court in *Frenville* held that an implied right to indemnification or contribution from the debtor for damages imposed on an accounting firm, but alleged to have been caused by prepetition acts of the debtor, was nevertheless a postpetition claim because it was not recognized as the basis for a lawsuit under state law prior to the institution of a postpetition suit against the firm.

In Kilbarr Corp. v. General Servs. Admin. (*In re* Remington Rand Corp.), 836 F.2d 825 (3d Cir. 1988), the Third Circuit undertook to bridge the gap between its view of a "claim" under the Bankruptcy Code and the prevailing view of the term. *Kilbarr* presented the issue of whether the government should be permitted to file a contract claim four years after confirmation of a debtor's plan. The government's justification for the delay was that under the Contract Dispute Act of 1978, 41 U.S.C. § 605(a), the government had no right to payment until completion of a postaward audit, which had occurred postconfirmation, and that the debtor had not notified the government of the bar date for filing claims. The bankruptcy and district courts had sustained the government's position, thus permitting the government to file a late claim. On appeal the court of appeals reversed the lower courts' ruling which failed to recognize that the government had a right to payment by virtue of a contingent and unliquidated claim that was discovered five months before confirmation. The court acknowledged that *Frenville* had "determined that state law governed the right to payment inquiry," but that "in some cases, overriding policy would require us to consult federal law." *Kilbarr Corp.*, 836 F.2d at 830. The court rejected the government's reliance on the provisions of the Contract Dispute Act for determining when its claim arose, but did not explain how it reached the conclusion that the claim arose before confirmation. The conclusion should have been tantamount to a decision sustaining the debtor's right to a discharge but for the conceded failure of the debtor to provide the government with proper notice of the bar date until several months after confirmation. The court of appeals vacated the bankruptcy court's order permitting the government to file its claim, with directions to the bankruptcy court to determine "whether the government [had] any legal justification for requesting the late filing of the late proof of claim." *Id.* at 833.

126. The definition of "claim" was moved from paragraph (4) to paragraph (5) of § 101 when the definition of "Federal depositary institutions regulatory agency" was inserted as § 101(3) in 1990. Pub. L. No. 101-311, § 101, 104 Stat. 267, 268 (1990).

127. Elmer, *supra* note 124, at 305 ("[T]his view removes contingent claims from the Code's definition of 'claim,' much as the former Bankruptcy Act's requirement of provability and allowability did."). For an argument against the allowance of claims before they have accrued under non-bankruptcy law, see Gregory A. Bibler, *The Status of Unaccrued Tort Claims in Chapter 11 Bankruptcy Proceedings*, 61 AM. BANKR. L.J.

"right to payment" unless and until "necessary costs of response" have been incurred,[128] a debtor's violation of environmental laws, without more, would not, according to this analysis, give rise to a claim allowable or dischargeable under the Bankruptcy Code.

In 1980, the year of CERCLA's enactment, Carter Day Industries filed a petition for relief under Chapter 11, and October 29, 1982 was fixed as the bar date for filing claims against the estate. In 1981 a Carter Day subsidiary, which operated two landfills, filed a Chapter 7 petition. The New Jersey Department of Environmental Protection filed claims to cover closure costs against both Carter Day and its subsidiary in their respective cases. The claim against Carter Day was disallowed, apparently because the subsidiary, rather than Carter Day, was liable. A plan of reorganization was confirmed in Carter Day's case in December of 1983. EPA filed no claims against Carter Day, but filed a claim against the subsidiary in its Chapter 7 case in 1986. The claim against the subsidiary was allowed in the amount of $50,000, but the subsidiary's estate had no assets. Carter Day then filed a declaratory judgment proceeding in its case seeking a determination that any EPA claim relating to the sites occupied by its subsidiary had been discharged by the confirmation order of 1983.

The district court held that the issue was not ripe,[129] and the Court of Appeals for the Second Circuit affirmed after noting a conflict between the policies reflected in the Bankruptcy Code and CERCLA.[130] The court of appeals accepted the EPA's argument that, because the agency had not yet decided whether it would act against Carter Day, the court's discretionary jurisdiction should not be exercised. The court added invidious comments

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145 (1987).

128. CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B); AL Tech Specialty Steel Corp. v. Allegheny Int'l, Inc. (*In re* Allegheny Int'l, Inc.), 126 B.R. 919, 925 (W.D. Pa. 1991) (stating that claim of purchaser of steel plants from debtor's predecessor for response costs incurred and to be incurred was dischargeable only with respect to facilities where actual response costs were incurred prepetition; remanding case to determine extent costs were actually incurred at several sites); United States v. Price, 577 F. Supp. 1103, 1110 (D.N.J. 1983) (holding that EPA does not to have a cause of action under § 107(a) of CERCLA until it spends money on cleanup).

129. Carter Day Indus. v. United States EPA (*In re* Combustion Equip. Assocs.), 73 B.R. 85 (S.D.N.Y. 1987), *aff'd*, 838 F.2d 35 (2d Cir. 1988).

130. 838 F.2d 35 (2d Cir. 1988). In addition to contrasting the policies of the Bankruptcy Code and CERCLA, the court noted that the two statutes differed in their "timing" inasmuch as Congress delayed litigation about cleanup costs until after the cleanup, whereas the Bankruptcy Code often accelerates litigation by allowing estimation of contingent liabilities. *Id.* at 37. By avoiding or postponing the litigation of the dischargeability of the liability for cleanup costs, the court implemented CERCLA's policy to the detriment of the debtor, who was left with a potential liability impending indefinitely notwithstanding the confirmation five years earlier.

regarding Carter Day's failure to schedule any claim by EPA or to litigate the claim prior to confirmation.[131] The court also expressed sympathy for the burden that would have been imposed on the EPA had it been required to litigate Carter Day's complaint and similar complaints involving immature claims.[132] Aside from its recitation of the conflict in the policies of the Bankruptcy Code and CERCLA, the court expressed no concern respecting the impact on Carter Day of the declination to determine the issue of dischargeability of EPA's claim for cleanup costs. The opinion did, however, confront and discuss tentatively how EPA's claim could be held not to be ripe at the time of its decision and yet have been ripe during the pendency of the reorganization case five years earlier. Without disposing finally of the question, the court observed that "[o]ne answer is that the bankruptcy court's power to estimate contingent liabilities, 11 U.S.C. § 502(c), substitutes for ripeness," and that "the fact that some claims could be estimated does not mean that those claims could be ripe for resolution after confirmation."[133] The opinion hardly provided a road map for potentially responsible parties, potential claimants, or bankruptcy courts for dealing with the dischargeability of liabilities for future response costs under environmental legislation.

In *United States v. Union Scrap Iron & Metal*,[134] Taracorp, a debtor who owned smelting facilities in Illinois, had been discharged in a Chapter 11 case in 1985. EPA sued Taracorp in 1990 for recovery of CERCLA response costs relating to a Minnesota site to which the debtor had delivered battery casings in the 1980s. The debtor sought dismissal on the ground that its CERCLA liability was discharged by the confirmation order entered in 1985. District Judge Murphy denied the requested relief on the ground that since no response costs had been incurred by EPA at the time of the confirmation, the mere release of hazardous substances by Taracorp was insufficient to create a legal obligation constituting a claim that could be discharged. The court explicitly predicated its conclusion on the proposition that the relevant substantive law was CERCLA and that to establish a legal obligation under CERCLA "the United States must have incurred necessary

131. *Id.* at 39:

> . . . Carter Day's concern over its fresh start seems somewhat disingenuous since it did not include its potential CERCLA liability in the required bankruptcy schedule of liabilities and since it evidently did not attempt to litigate that liability in the bankruptcy court before confirmation of the plan of reorganization, even though the PRP letters were received prior to confirmation.

132. *Id.* at 40.

133. *Id.*

134. 123 B.R. 831 (D. Minn. 1990).

costs in responding to the release at the facility."[135] In rejecting Taracorp's argument that its contingent liability gave rise to a contingent claim, however, the court referred to the lack of knowledge by EPA or Taracorp that a CERCLA claim could or would arise years later. In support of its position Taracorp cited the recent district court decision, *United States v. Chateaugay Corp. (In re Chateaugay Corp.)*,[136] which recognized that release of hazardous substances may give rise to dischargeable contingent claims in advance of the actual incurring of the costs. The *Union* court answered that the context of *Chateaugay* was quite different because the claim there arose during "ongoing bankruptcy proceedings"; but the court implied that if EPA had been shown to have had knowledge of its potential CERCLA claims in time to file timely claims in the reorganization case, the result might have been different.[137]

The Court of Appeals for the Second Circuit affirmed the district court in *In re Chateaugay Corp.*[138] In a seminal opinion Circuit Judge Newman undertook to articulate and explain some of the implications of the relevant statutory provisions of CERCLA and the Bankruptcy Code. Before LTV filed a Chapter 11 petition under the Bankruptcy Code, EPA had identified LTV as a PRP at fourteen sites and had expended $32 million dollars in a partial cleanup. After LTV filed its Chapter 11 petition, EPA filed a claim for reimbursement of the response costs. The EPA sought a declaratory judgment with respect to the dischargeability of the claims for prepetition response costs that had not yet been incurred. The district court and the court of appeals held that the claims were dischargeable to the extent they were based on a prepetition release or threatened release of hazardous substances, regardless of when the costs were incurred and when they were discovered or discoverable.[139]

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135. *Id.* at 835.

136. 112 B.R. 513 (S.D.N.Y. 1990), *aff'd*, 944 F.2d 997 (2d Cir. 1991).

137. *Union Scrap Iron & Metal*, 123 B.R. at 836.

138. 944 F.2d 997 (2d Cir. 1991).

139. 112 B.R. at 521-22; 944 F.2d at 1005. *Chateaugay* was followed in *In re* Cottonwood Canyon Land Co., 146 B.R. 992, 998 (Bankr. D. Colo. 1992). The opinion of the court of appeals in *Chateaugay* has been the subject of extensive comment. *See, e.g.*, Kathryn R. Heidt, *Environmental Obligations in Bankruptcy: A Fundamental Framework*, 44 FLA. L. REV. 154, 171, 191-97, 204 (1992); Nancy H. Kratzke, *Dischargeability Issues and Superfund Claims: The Conflict Between Environmental and Bankruptcy Policies*, 17 COLUM. J. ENVTL. L. 381, 392-94 (1992); James K. McBain, *Environmental Impediments to Bankruptcy Reorganizations*, 68 IND. L.J. 233, 238-40 (1992); Marion M. Walsh, *The Dischargeability of Post-Confirmation CERCLA Liability in Bankruptcy:* In re Chateaugay and Beyond, 1 N.Y.U. ENVTL. L.J. 95 (1992); Elmer, *supra* note 124; John P. Berkery, Comment, *The Dischargeability of CERCLA Cleanup Costs Incurred After Bankruptcy*, 9 BANKR. DEV. J. 417 (1992); Lowell E. Blackham,

Note, *The Unstoppable Force Hits the Immovable Wall: Should Environmental Cleanup Liability Be Discharged in Bankruptcy?*, 25 CREIGHTON L. REV. 1357, 1382-85 (1992); Jill Thompson Losch, Comment, *Bankruptcy v. Environmental Obligations: Clash of the Titans*, 52 LA. L. REV. 137, 171 (1991); Christina L. Diaz, Recent Decisions Note, *Environmental Law—Bankrupt Polluters Cannot Avoid Environmental Responsibilities*—In re Chateaugay Corp., 65 TEMP. L. REV. 1053 (1992); Patrick D. Shaw, Comment, *See No Evil, Speak No Evil: Discharging CERCLA Claims in Bankruptcy Without Notice*, 6 TUL. ENVTL. L.J. 127 (1992); Michael I. Shaftel, Note, *CERCLA Injunctive Orders in Chapter 11 Bankruptcy: Fresh Start or Free Ride for the Reorganized Debtor?*, 17 VT. L. REV. 281 (1992).

Professor Heidt criticized the *Chateaugay* opinion for adding a requirement to the definition of "claim," namely, that there be no ongoing pollution, and for confusing the definition of "claim" with the timing of the claim insofar as the *Chateaugay* court held that cleanup obligations are not "claims" and therefore not dischargeable if cleanup will end or ameliorate current pollution. *See* 44 FLA. L. REV. at 171, 191-96. She also criticized the result of the court's decision to encourage the EPA to delay cleanup in order to avoid transforming an obligation into a dischargeable claim. *See id.* at 196-97.

After reviewing the extensive case law embraced by the title of her article, Professor Kratzke recommended the addition of an exception for "environmental claims" to § 523's list of nondischargeable claims, evidencing no awareness of the policy of § 1141 of the Bankruptcy Code and of the inapplicability of § 523 to corporate and partnership debtors.

Mr. McBain criticized the nexus between a release and the contemplation of contingencies required by *Chateaugay* and *Chateaugay*'s creation of an incentive for the EPA to couple a nonclaim injunction with its cleanup orders, thereby jeopardizing the feasibility of a reorganization plan.

> Ms. Walsh criticized *Chateaugay* for its susceptibility to conflicting interpretations: (1) that before a contingent claim can be discharged, it must result from prepetition conduct fairly giving rise to the claim in light of a regulatory relationship between the debtor and the EPA and (2) that EPA's cost recovery claims arise in bankruptcy merely upon the actual or threatened release of a hazardous substance.

1 N.Y.U. ENVTL. L.J. at 126. The article concluded with an argument for adoption by the courts of "the 'fairly contemplated' contractual standard employed in *Union Scrap* in conjunction with the factors enumerated in *In re Gypsum,*" discussed *infra* text accompanying notes 149-156.

The commentator in the American Journal of Trial Advocacy acknowledged that the *Chateaugay* opinion followed congressional intent in the Bankruptcy Code, but expressed concern at the "alarming prospect of businesses discharging millions of dollars in unknown, contingent environmental liabilities in Chapter 11 reorganizations." 16 AM. J. TRIAL ADVOC. at 304. The commentator concluded that the court's narrow view of injunctive claims, discussed *infra* text accompanying notes 163-172, which permits imposition of liability for "on-going pollution," resulted in a "practicable balance between the policies and objectives of the Bankruptcy Code and CERCLA." 16 AM. J. TRIAL ADVOC. at 304.

The commentator in the Bankruptcy Developments Law Journal approved *Chateaugay*'s determination that EPA's claim arose with the prepetition release of

Two months after the decision in *Chateaugay*, Judge Murphy was again presented with the question whether confirmation of a reorganization discharged a debtor's liability for potential response costs incurred or about to be incurred four years after the confirmation.[140] The court no longer treated the issue as one controlled by CERCLA, but rejected the debtor's argument that its contingent liability was discharged because the EPA had no knowledge of the debtor's potential liability in time to file a claim before confirmation. Before confirmation, both the EPA and a state environmental agency were informed of the pendency of the debtor's reorganization case and that the debtor was a potentially responsible party in respect to environmental violations; however, the court concluded that the information was insufficient to enable governmental agencies to file timely claims in the debtor's reorganization case.[141] The court acknowledged that the debtor was unaware of its potential liability before confirmation. The agency's lack of sufficient knowledge of its potential claim was deemed to excuse it from filing a timely claim, but the debtor's lack of knowledge of its potential liability afforded it no excuse for failing to notify the agency. The court

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hazardous waste, but criticized as a "dangerous and unjust precedent" its ruling that such a claim was dischargeable with respect to sites where the debtor had not adequately informed the EPA by its schedules of the amount, type, and location of hazardous waste materials that might be attributed to the debtor. 9 BANKR. DEV. J. at 445, 450-51.

The Creighton Law Review and Vermont Law Review commentators argued for congressional legislation declaring environmental-cleanup liability nondischargeable and for judicial recognition of paramountcy of environmental protection laws over bankruptcy laws.

The Louisiana Law Review commentator attributed to the district court's ruling in *Chateaugay*, 112 B.R. at 513, the establishment of "a clear cut rule: unless a prepetition event . . . occurs *prior* to the filing of the petition, any subsequent liability under CERCLA would not be dischargeable in bankruptcy." The validity of that proposition is examined *infra* part II.B.7. The comment concluded with an argument for deeming environmental obligations to be nondischargeable.

The Temple Law Review commentator approved the *Chateaugay* opinion's limiting the protection available to a polluter in bankruptcy from liability for environmental violations, but criticized (1) the court's failure to establish clear guidelines for determining the relationship between a creditor and the debtor to bring a contingent claim within the bankruptcy proceeding; (2) the court's failure to provide guidance for determining whether equitable remedies are dischargeable in bankruptcy; and (3) the court's failure to consider whether compliance with certain injunctions might be too onerous to permit some debtors to survive bankruptcy.

The commentator in Tulane Environmental Law Journal criticized *Chateaugay* and *Jensen* for promoting "evasive and treacherous" corporate behavior by permitting PRPs to obtain discharge from liability for CERCLA cleanup costs without providing notice. 6 TUL. ENVTL. L.J. at 156.

140. Sylvester Bros. Dev. Co. v. Burlington N. R.R., 133 B.R. 648 (D. Minn. 1991).

141. *Id.* at 653.

justified its ruling as supported by the federal and state environmental legislation, but made no reference to the fresh start policy of the bankruptcy laws.

In two railroad reorganization cases under section 77 of the Bankruptcy Act, the Court of Appeals for the Seventh Circuit unequivocally adopted a position in accord with *Chateaugay*.[142] The first decision, *In re CMC Heartland Partners*, declared enforcement of any liability of the owner or its predecessor for response costs incurred pursuant to CERCLA section 107(a)(2) during the pendency of reorganization proceedings to be barred by the confirmation order and injunction entered at the end of the reorganization case. EPA knew of the potential liability for the dumping that preceded the entry of the bar date for filing of claims in the reorganization case, but did not file a claim. The opinion of the court evinced a sensibility of the discharge policy of bankruptcy laws often missing in cases dealing with claims arising under environmental laws.[143]

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142. *In re* CMC Heartland Partners, 966 F.2d 1143 (7th Cir. 1992); *In re* Chicago, Milwaukee, St. Paul & Pac. R.R., 974 F.2d 775 (7th Cir. 1992).

143. *See* 966 F.2d at 1146:

> A fundamental idea of bankruptcy is that bygones should not prevent the best current deployment of assets. Sunk costs and their associated promises to creditors create problems of allocation when the firm cannot pay its debts as they come due. But assets that cannot generate enough revenue to pay all claims may still produce net profits from current operations. So bankruptcy cleaves the firm in two. Existing claims must be satisfied exclusively from existing assets, while the "new" firm, created as of the date the petition is filed, carries on to the extent current revenues allow. Old debts will drag down current operations unless they are pooled and paid (or written) off together, so old claims may not be asserted against current operations. The idea of CERCLA is that sunk wastes differ from sunk costs. Seepage reduces current welfare as stale debts and like bygones do not, and it may be cheaper to purge or encapsulate the wastes than to let sleeping dogs lie.

(citations omitted); *see also* California Dep't of Health Servs. v. Jensen (*In re* Jensen), 995 F.2d 925, 929-30 (9th Cir. 1993), *commented on by* Karen Donovan, *Debtors Can Walk Away: Middle Course Taken on Cleanups*, NAT'L L.J. . June 28, 1993, at 3, 31; Myron A. Eng, Note, In re Jensen: *Determining When A Bankruptcy Claim Arises in the Context of Environmental Liability*, 23 GOLDEN GATE U. L. REV. 259 (1993) *cf.* Carter Day Indus. v. United States EPA (*In re* Combustion Equip. Assocs.), 838 F.2d 35 (2d Cir. 1988), *discussed supra* text accompanying note 131; *In re* National Gypsum Co., 139 B.R. 397 (N.D. Tex. 1992), *discussed infra* text accompanying note 148; Sylvester Bros. Dev. Co. v. Burlington N. R.R., 133 B.R. 648 (D. Minn. 1991), *discussed supra* text accompanying note 140; United States v. Union Scrap Iron & Metal, 123 B.R. 831 (D. Minn. 1990), *discussed supra* text accompanying note 134.

A substantial body of law review literature discusses the intersection of bankruptcy and environmental law. Student notes and comments typically criticize decisions that appear to resolve conflicts by relieving debtors from liability for environmental damage

The Seventh Circuit adhered to its view of the dischargeability of claims for contingent response costs in *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*[144] Before holding that the preconfirmation purchaser of property from the railroad had a CERCLA claim that should have been filed before the close of its debtor's bankruptcy case, the court determined that the claimant had tied the "bankrupt debtor to a known release of a hazardous substance which the potential claimant [knew would] . . . lead to CERCLA response costs."[145] The potential claimant thus had a contingent claim. The court emphasized that the cases requiring response costs to be actually incurred before claims could therefore be filed and discharged would encourage delay in administration of bankruptcy cases, postpone access to fresh start, and frustrate the public interest in speedy cleanup of hazardous sites.[146] The court distinguished rulings in cases denying discharge of claims based on CERCLA when the consummation order was adopted before the enactment of the statute creating the liability.[147]

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and argue for legislative change strengthening the enforceability of remedies and sanctions under environmental laws. *See, e.g.*, Kratzke, *supra* note 139; Elmer, *supra* note 124; Berkery, *supra* note 139; Kahn, *supra* note 85; Blackham, *supra* note 139; Losch, *supra* note 139; Kevin J. Saville, Note, *Discharging CERCLA Liability in Bankruptcy: When Does a Claim Arise?* 76 MINN. L. REV. 327 (1991); J. Ricky Arriola, Note, *The Life & Times of a CERCLA Claim in Bankruptcy: An Examination of Hazardous Waste Liability in Bankruptcy Proceedings,* 67 ST. JOHN'S L. REV. 55 (1993); Shaw, *supra* note 139; Shaftel, *supra* note 139.

A higher level of deference to bankruptcy objectives is reflected in the following discussions: John R. Allison & John A. Rizzardi, *Effects of Bankruptcy on Environmental Liabilities,* 28 TORT. & INS. L.J. 636 (1993); Joel M. Gross & Suzanne Lacampagne, *Bankruptcy Estimation of CERCLA Claims: The Process and the Alternatives,* 12 VA. ENVTL. L.J. 235 (1993); Heidt, *supra* note 139; McBain, *supra* note 139; Roy B. True, *Dischargeability of CERCLA Liability in Bankruptcy,* 61 U.M.K.C. L. REV. 329 (1992); Sullivan, *supra* note 85; Walsh, *supra* note 139; Diaz, *supra* note 139; Robert R. Graves, Comment, *The Interaction of the Bankruptcy Code and Environmental Laws: The Grit, the Grind, and the Grease,* 29 WILLAMETTE L. REV. 297 (1993).

144. 974 F.2d 775 (7th Cir. 1992), *discussed supra* text accompanying note 106 and *infra* note 192.

145. *Id.* at 786.

146. *Id.* The court's criticisms were directed at *Union Scrap Iron & Metal, discussed supra* text accompanying notes 134-137, and *Sylvester Bros., discussed supra* text accompanying notes 140-141.

147. The court distinguished *In re* Penn Central Transp. Co., 944 F.2d 164 (3d Cir. 1991), *cert. denied,* 112 S. Ct. 1262 (1992), and United States v. Serafini, 135 B.R. 219 (M.D. Pa. 1991), on the ground stated in the text. 974 F.2d at 784-85. CERCLA had been held constitutionally applicable to acts committed before its enactment. United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 732-37 (8th Cir. 1986), *cert. denied,* 484 U.S. 848 (1987). *See generally Developments—Toxic Waste*

Recent judicial opinions, building on the structure erected by the *Chateaugay* case, have added another requirement or standard to the concept of an allowable claim or contingent claim for future response and natural resource damage costs—namely, that the claim be based on conduct *fairly within the contemplation of the parties at the time of the debtor's bankruptcy*.[148] The opinions listed illustrative factors as relevant in determining whether fair contemplation can occur in a particular case. In *In re National Gypsum Co.* the court identified the following factors: "knowledge by the parties of a site in which a PRP [potentially responsible party] may be liable, NPL [National Priorities Listing] list, notification by EPA of PRP liability, commencement of investigation and cleanup activities, and incurrence of response costs."[149] In *AM International, Inc. v. Datacard Corp.*, a postconfirmation purchaser of contaminated property once owned by a Chapter 11 debtor asserted claims against the debtor. The court identified the following factors: the purchaser's awareness, before its purchase, of the debtor's releases of hazardous materials at the site; the role of the purchaser's awareness of environmental risks in the purchase price for the property; the purchaser's contemplation of suit against the debtor when incurring response costs three years after confirmation of the debtor's reorganization; and the contemplation of environmental risks by the original purchaser of the debtor's property at the time of the purchase over two years prior to the filing of the debtor's Chapter 11 petition.[150]

Litigation, 99 HARV. L. REV. 1458, 1555-65 (1986). Although Kaiser Steel Corporation was reorganized and presumably discharged of preconfirmation liabilities in 1988, United Mine Workers Association has recently advised the company of its position that the discharge did not extinguish the company's liability for premiums levied under the Coal Industry Retiree Benefit Act of 1992 enacted after consummation of the Kaiser Steel Company's reorganization.

148. California Dep't of Health Servs. v. Jensen (*In re* Jensen), 995 F.2d 925, 929-30 (9th Cir. 1993) (holding that individual Chapter 7 debtors were discharged from liability for environmental cleanup costs, even though the debtors were not notified of the state's contingent claim until after the case was closed); *In re* National Gypsum Co., 139 B.R. 397 (N.D. Tex. 1992); AM Int'l, Inc. v. Datacard Corp., 146 B.R. 391 (N.D. Ill. 1992).

149. 139 B.R. at 408. In his opinion in *In re* National Gypsum Co. Judge Sanders characterized *Chateaugay* as a landmark case in "reading together the statutory framework of CERCLA and the Code" by using "the bankruptcy concept of contingent claims to bring future CERCLA response and damage costs within the ambit of present discharge proceedings under the Code." *Id.* at 405-06. Judge Sanders nevertheless declared that he was unwilling to favor the Bankruptcy Code's objective of a "fresh start" to the extent exhibited in *Chateaugay*. He questioned the implication in *Chateaugay* that liability for all costs relating to prepetition conduct be discharged irrespective of whether these costs were fairly within the contemplation of the parties prepetition.

150. 146 B.R. at 409.

The issue of dischargeability in *National Gypsum* arose on challenges to proofs of claims filed or to be filed on behalf of the United States under CERCLA in a pending Chapter 11 case. The court's opinion settled the allowability and dischargeability of claims for future costs to be incurred at seven listed sites and extended the bar date for the filing of claims relating to thirteen unlisted sites in view of the unique and extraordinary circumstances deemed to excuse delay in filing.[151] The issue in *AM International*, however, arose eight years after confirmation of the debtor's reorganization plan. Indeed, there was no evidence of knowledge of the release of hazardous material prior to the filing of the debtor's Chapter 11 petition. The opinion of the magistrate judge in *AM International* embraced the rationale of Judge Sanders' opinion in *National Gypsum* as fully applicable to the different facts in the case before him.[152] However, the district court, while apparently adopting the magistrate judge's recommendation for a factual determination with respect to the claimants' knowledge of the risk of incidence of response costs, explicitly declined to adopt the "'fair contemplation' test per se."[153] The factors recited in the magistrate judge's opinion were nevertheless deemed to be relevant to the inquiry framed by the Seventh Circuit opinion in the *Chicago, Milwaukee, St. Paul & Pacific Railroad* case for determining when a claim or contingent claim for response costs arises.[154]

The imposition of a "fair contemplation" gloss on the recognition of a "claim or contingent claim" for CERCLA response costs subjects both claimants and debtors to enormous uncertainty. Furthermore, this gloss subjects the administration of Chapter 11 cases involving premises susceptible to potential claims for environmental damage to an escalation of litigation, unpredictability, expense, and delay.[155] Determining the "fair contemplation" in cases where the case is closed requires the court to permit discovery of former states of mind. The testimony of disinterested witnesses will be rare. The "fair contemplation" requirement also allows the court leeway for weighing the policy considerations involved in determining the dischargeability issue in Chapter 11 cases and subjects the availability of the fresh start in such cases to judgments that depend on the judges' policy preferences.

It is to be noted that District Judge Sanders in *National Gypsum*

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151. 139 B.R. at 401-09.

152. 146 B.R. at 401, 406-10.

153. *Id.* at 394.

154. *Id.*

155. *See* Jeffrey J. Harmon, et al., *Surviving a Collision at the Intersection of CERCLA and the Code*, 20 N. KY. L. REV. 47, 70-72 (1992); McBain, *supra* note 139, at 238 n.37.

disagreed with the opinion of Circuit Judge Newman as to whether "the placing of hazardous substances in sealed containers pre-petition, followed by release of the substances into the environment years after confirmation" is a claim.[156] Similarly, as noted above,[157] District Judge Norgle in *AM International* was unwilling to adopt the "'fair contemplation' test per se."[158]

b. Mandatory Injunction as a Claim; Claims that Run with the Land

The Bankruptcy Code defines a "claim" to include a "right to an equitable remedy for breach of performance if the breach gives rise to a right to payment."[159] The question arose in *United States v. Whizco, Inc.*[160] whether the government's right to a mandatory injunction under the Surface Mining Control and Reclamation Act[161] gave rise to a dischargeable claim. That Act, unlike CERCLA, gives the government no cost recovery alternative, but only a right to a mandatory injunction requiring restoration of a mine surface area to its natural condition. Nevertheless, the court in *Whizco* held that the government's right under the Surface Mining Act constituted a dischargeable claim since the injunction required the debtor to spend money to correct a condition created prepetition.[162]

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156. 139 B.R. at 407 n.24.

157. *See supra* note 153 and accompanying text.

158. 146 B.R. at 394.

159. 11 U.S.C. § 101(5)(B) (1988).

160. 841 F.2d 147 (6th Cir. 1988).

161. 30 U.S.C. §§ 1201-1328 (1988 & Supp. IV 1992).

162. *Whizco*, 841 F.2d at 149-51. Like Ohio *ex rel.* Brown v. Kovacs (*In re* Kovacs), 717 F.2d 984 (6th Cir. 1983), *aff'd*, 469 U.S. 274 (1985), *Whizco* was a Chapter 7 case, and the court of appeals relied on and quoted its opinion in *Kovacs*. The *Whizco* court insisted, however, that its holding was very narrow and did not discharge the debtor of any obligation to comply with a governmental order that could be performed without spending money. *Whizco*, 841 F.2d at 150-51. For discussion of *Whizco*, see Allison & Rizzardi, *supra* note 143, at 644 (noting that *Chateaugay* is *contra* to *Whizco*); Heidt, *supra* note 139, at 190-91 (stating that *Whizco* went too far by transforming an equitable remedy into a "claim," but not far enough to give a debtor a fresh start); Linda Johannsen, Note, United States v. Whizco, Inc.: *A Further Refinement of the Conflict Between Bankruptcy Discharges and Environmental Cleanup Obligations*, 20 ENVTL. L. 207 (1990).

Whizco was criticized in United States v. Hubler, 117 B.R. 160, 165, 167 (W.D. Pa. 1990), *aff'd per curiam*, 928 F.2d 1131 (3d Cir. 1991), as contrary to the rationales of Ohio v. Kovacs, 469 U.S. 274 (1985), and Penn Terra Ltd. v. Department of Environmental Resources, 733 F.2d 267 (3d Cir. 1984). The *Hubler* court construed these precedents to authorize discharge only where the government has the option of

In the *Chateaugay* case[163] the district court considered which environmental claims based on injunctions were dischargeable. The district court declared

> that claims for injunctive relief based on a pre-petition release or threatened release would be dischargeable if the injunctive relief was an option EPA was electing to use in lieu of incurring response costs itself and thereafter seeking reimbursement; on the other hand, . . . "where there is no right to such payment for cleanup or other remedial costs, claims for injunctive relief do not fall within the Bankruptcy [Code] and are not dischargeable."[164]

The court of appeals found the district court's analysis flawed and offered the following explanation:

> Since there is no option to accept payment in lieu of continued pollution, any order that to any extent ends or ameliorates continued pollution is not an order for breach of an obligation that gives rise to a right of payment and is for that reason not a "claim." But an order to clean up a site, to the extent that it imposes obligations distinct from any obligation to stop or ameliorate ongoing pollution, is a "claim" if the creditor obtaining the order had the option, which CERCLA confers, to do the cleanup work itself and sue for response costs, thereby converting the injunction into a monetary obligation.[165]

The court added "that most environmental injunctions will fall on the non-claim side of the line." On that understanding, the court affirmed the district court's ruling concerning injunctions.[166] The court made no reference to

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converting an affirmative injunction into a right to monetary compensation. Although the debtor partners in *Hubler* were discharged from pecuniary liability for violation of the Surface Mining Control and Reclamation Act, the partnership and the partners were enjoined to comply with abatement obligations specified in a cessation order issued by the Office of Surface Mining, U.S. Dep't of Agriculture. The debtor partners did not contest the government's disclaimer of authority to accept monetary payment in lieu of performance.

163. United States v. LTV Corp. (*In re* Chateaugay Corp.), 944 F.2d 997 (2d Cir. 1991).

164. *Id.* at 1000 (quoting *In re* Chateaugay, 112 B.R. 513, 523 (S.D.N.Y. 1990)).

165. *Id.* at 1008. Michael Shaftel, in his note in the Vermont Law Review, epitomized the *Chateaugay* opinion's treatment of injunctions by reading it to render affirmative injunctions dischargeable and negative injunctions nondischargeable. Shaftel, *supra* note 139, at 315.

166. *Chateaugay*, 944 F.2d at 1008. In reversing a bankruptcy court order that held a Chapter 11 debtor's obligation under state law to clean up environmental contamination

Whizco or to the rationale that a mandatory injunction should be treated as a dischargeable claim whenever it imposes an obligation on the debtor to spend money to remedy conditions that were created prepetition.

In *In re CMC Heartland Partners*[167] the Court of Appeals for the Seventh Circuit adhered to the distinction drawn in *Chateaugay* when it upheld EPA's order, entered pursuant to section 106(a) of CERCLA, that directed the owner of the premises to abate "an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility."[168] The court described the effect of section 106 of CERCLA as creating a claim that runs with the land.[169] An order of abatement under section 106 may issue against an owner-operator notwithstanding the entry by the court of a confirmation order that discharged liability for a preconfirmation act constituting a release or threatened release of a contaminant.[170]

The opinion of the court of appeals in *Chateaugay* has been appropriately criticized for its refusal to recognize that a claim exists if pollution continues after the cleanup. "It creates an incentive for the EPA to avoid cleaning up sites,"[171] and to frame enforcement orders as nonclaim injunctions to continue after confirmation so long as the debtor operates and without reference to the future existence of the waste.[172]

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to be discharged by confirmation of a Chapter 11 plan, the district court in Torwico Electronics, Inc. v. New Jersey, 153 B.R. 24, 26 (D.N.J. 1992), *aff'd*, 8 F.3d 146 (3d Cir. 1993), quoted the following conclusion from *Chateaugay*, 944 F.2d at 1008: "[A] cleanup order that accomplishes the dual objective of removing accumulated wastes and stopping or ameliorating on-going pollution emanating from such wastes is not a dischargeable claim." When the debtor in *Torwico* asserted that it was no longer in possession of the land from which wastes were seeping and migrating, the court responded that since the debtor's wastes were presenting a continuing environmental hazard, the debtor's cleanup obligation ran "with the waste." *Torwico*, 8 F.3d at 151. The court added that the fact that the state may have had a alternative means at its disposal to end the ongoing threat did not convert its statutory authority to a "right to payment" constituting a dischargeable claim. *Id.* at 151 n.6.

167. 966 F.2d 1143 (7th Cir. 1992).

168. *Id.* at 1147.

169. *Id.* at 1146; *cf.* David Gray Carlson, *Successor Liability in Bankruptcy: Some Unifying Themes of Intertemporal Creditor Priorities Created by Running Covenants, Products Liability, and Toxic-Waste-Cleanup*, 50 LAW & CONTEMP. PROBS. 119 (1887).

170. A debtor who retains possession of contaminated property may have a continuing obligation to comply with an injunction requiring remedial action. Allison & Rizzardi, *supra* note 143, at 645; True, *supra* note 143, at 334. *But cf. infra* text accompanying note 265.

171. Heidt, *supra* note 139, at 196.

172. McBain, *supra* note 139, at 238 n.37.

3. *When Does a Claim Arise? The Asbestos Cases*

The issue, when does a claim arise, has become critical in a series of cases involving harms inflicted by exposure to asbestos. The issue has been troublesome in these cases because the exposure may precede manifestation of resulting injury many years later. In *Schweitzer v. Consolidated Rail Corp.*,[173] former railroad workers, representatives, and survivors brought tort actions against railroads pursuant to the Federal Employers' Liability Act.[174] The railroads became Conrail pursuant to reorganization under section 77 of the Bankruptcy Act. Conrail argued that the plaintiffs' claims were discharged by the confirmation orders in the cases of its predecessors. However, the court denied relief on the ground that the plaintiffs who did not suffer manifestations of injury from asbestos exposure until after consummation of the reorganization had no claims that were dischargeable in the reorganization case. Although acknowledging that the holder of a contingent claim could be a "creditor" under the Bankruptcy Act, the court distinguished cases recognizing such a claim by noting that those cases had required the existence of a relationship between the claimant and the debtor. The *Schweitzer* found no such relationship between the debtor and the claimants.

As the Court of Appeals for the Second Circuit acknowledged in *Chateaugay*, a considerable body of case law has declined to recognize a "claim" in advance of some manifestation of injury.[175] The court in *Chateaugay* nevertheless affirmed the district court's ruling that prepetition claims arose when releases or threatened releases of hazardous substances occurred.[176] The court discussed the necessity of a relationship between the claimant and the debtor vaguely and tentatively, concluding that the relationship between the EPA, as claimant, and the debtor, LTV, was "far

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173. 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985).

174. 45 U.S.C. §§ 51-60 (1988).

175. 944 F.2d at 1004 (citing *Schweitzer*, 758 F.2d at 944; *In re* Forty-Eight Insulations, Inc., 58 B.R. 476, 477 (Bankr. N.D. Ill. 1986); Gladding Corp. v. Forrer (*In re* Gladding Corp.), 20 B.R. 566, 567-68 (Bankr. D. Mass. 1982). For an argument that this body of case law is supported by constitutional, jurisdictional, and policy considerations, see Bibler, *supra* note 127. For an argument that the *Gladding* case and restrictive readings of the definition of "claim" and of § 1141(d)(1) are at odds with congressional policy, see Harvey J. Kesner, *Future Asbestos Related Litigants as Holders of Statutory Claims Under Chapter 11 of the Bankruptcy Code and Their Place in the* Johns Manville *Reorganization (Second Installment)*, 62 AM. BANKR. L.J. 159 (1988).

The dilemma facing "environmental creditors" in deciding when or whether to file a claim is discussed in Arlene Elgart Mirsky et al., *The Interface Between Bankruptcy and Environmental Laws*, 46 BUS. LAW. 623, 670-71 (1991).

176. 944 F.2d at 1005.

closer than that existing between future tort claimants totally unaware of injury and a tort-feasor."[177]

On remand in *Schweitzer*, the District Court for the Eastern District of Pennsylvania held that the claims of employees for injuries not manifested at the time of confirmation could be maintained against the reorganized debtor notwithstanding the transfer to a purchaser of the rail properties that had inflicted the injuries.[178] The court explained that the original tortfeasor remained liable as a defendant, and the purchaser was intended by Congress to be relieved of such liability in order to be able to meet regional transportation service needs.[179]

However, when former employees of the Erie Lackawanna Railway sued their former employer for asbestos-related injuries manifested after consummation of its reorganization under section 77 of the Bankruptcy Act, as supplemented by the Regional Rail Reorganization Act, the Court of Appeals for the Sixth Circuit denied recovery, although the injuries were due to preconfirmation exposure.[180] The court's rationale was that, because the debtor was liquidated rather than reorganized, its unsecured creditors received only stock in a new entity not operating a railroad; thus, it would be "palpably unjust" to impose on the new enterprise a massive liability for asbestos-related injuries of former employees.[181]

Two subsequent decisions followed the *Erie Lackawanna* decision in upholding recoveries by former employees for asbestos-related injuries discovered or reasonably discoverable only postconfirmation.[182]

As the court's opinion in *Chateaugay* recognized,[183] the *Manville* and *Robins* cases caused a significant reorientation, outside the Third Circuit, of the judicial approach to the issue of when a claim arises. Johns-Manville filed for relief under Chapter 11 because the corporation's potential liability

177. *Id.*

178. Schweitzer v. Consolidated Rail Corp., 65 B.R. 794 (E.D. Pa. 1986).

179. *Id.* at 798-802.

180. Erie Lackawanna Ry. v. Henning (*In re* Erie Lackawanna Ry.), 803 F.2d 881, 884-85 (6th Cir. 1986), *cert. denied*, 481 U.S. 1070 (1987).

181. *Id.* at 884-85. The court suggested that the plaintiffs might still sue the manufacturers and installers of the asbestos to which the former employees of the Erie Lackawanna Ry. Co. had been exposed. *Id.* at 885.

182. Zulkowski v. Consolidated Rail Corp., 852 F.2d 73, 77-78 (3d Cir.) (Becker, C.J., concurring but objecting to the majority's effort to rationalize *Erie Lackawanna Ry.*), *cert. denied*, 488 U.S. 994 (1988); Roach v. Edge (*In re* Edge), 60 B.R. 690 (Bankr. M.D. Tenn. 1986).

183. *Chateaugay*, 944 F.2d at 1004 (citing *In re* Johns-Manville Corp., 57 B.R. 680, 686-88 (Bankr. S.D.N.Y. 1986), with a "*cf.*" reference to Grady v. A.H. Robins Co., 839 F.2d 198, 203 (4th Cir.), *cert. dismissed*, 487 U.S. 260 (1988), and *In re* Edge, 60 B.R. 690 (Bankr. M.D. Tenn. 1986)).

for future injuries resulting from past exposure to asbestos would have rendered the corporation insolvent. If the claims for such future injuries could not be dealt with by a reorganization plan, the foreseeable consequence was repeated litigation and resort to relief under the Bankruptcy Code until exhaustion of the assets of the debtor and liquidation of the enterprise. A similar prospect faced the A.H. Robins Co. as a result of pending and anticipated lawsuits on behalf of women injured by use of the debtor's Dalkon shield.

In both *Manville* and *Robins*, the debtors proposed plans to deal with claims of persons for injuries not yet manifested, by providing trust funds out of which payments could be made to claimants who suffered postconfirmation injuries attributable to prepetition exposure. If persons who had suffered no preconfirmation manifestation of injury had been denied any right to payment out of funds set aside for the purpose pursuant to a plan, the foreseeable result would have been distributions only to those who were able to prove the existence and extent of their injuries as of the date of the confirmation. The courts finessed the question whether persons who had suffered no preconfirmation injuries had allowable claims, by approving the establishment of trusts to which those suffering post confirmation injuries might have recourse. In the meanwhile, the debtors and the trustees of the trusts were protected by injunctions against challenges by claimants with allowable claims.[184]

In the recent case of *Waterman Steamship Corp. v. Aguiar*[185] the court rejected the debtor's argument that asbestosis claims of former employees were discharged by a confirmation order entered in its reorganization case. Nevertheless, the court explicitly accepted the position adopted in the *Manville* case that "a claim arises at the moment when acts giving rise to the alleged liability are performed"—*i.e.*, when the asbestosis claimants

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184. The Court of Appeals for the Ninth Circuit in a recent unanimous opinion joined the chorus of criticism of the cases that hold that a CERCLA claim does not arise until response costs have been incurred. California Dep't of Health Servs. v. Jensen (*In re* Jensen), 995 F.2d 925, 928 (1993). The court noted that the courts have employed varying approaches in determining when such a claim arises. The court observed that neither *Frenville,* cited *supra* notes 123-125, nor *Union Scrap*, cited *supra* note 134, "has had substantial impact." 995 F.2d at 928. After pointing out that the bankruptcy appellate panel in the decision below had utilized the approach of *In re Chateaugay Corp.*, cited *supra* note 138, by deeming the claim to have arisen at the time of the debtor's conduct relating to the contamination, the court of appeals acknowledged that the approach was not immune from criticism. In particular the court noted that the approach permitted discharge before the creditor knew or should have known of its rights. The court nevertheless affirmed the decision of the bankruptcy appellate panel on the basis of a finding that the claimant had imputed knowledge of the debtor's potential liability for cleanup costs. *See infra* text accompanying notes 190-191.

185. 141 B.R. 552 (Bankr. S.D.N.Y. 1992), *vacated*, 157 B.R. 220 (S.D.N.Y. 1993).

came into contact with the asbestos.[186]

4. The Discharge of Claims of Knowledgeable Creditors

As pointed out earlier in this Article,[187] a claimant's knowledge of the existence of its claim for environmental damage and response costs has been given uneven and confusing treatment in judicial opinions. A claimant's knowledge is ordinarily not an issue in a case where confirmation has not occurred and the court is concerned with the scope of the claim and when it arose.

In the Chapter 7 case of *Jensen v. California Department of Health Services (In re Jensen)*,[188] the bankruptcy appellate panel made no reference to the California department's knowledge of the existence of hazardous waste on the property owned and occupied by the Jensens. The court held that the department's claim for the cost of cleanup that occurred five years after the filing of the bankruptcy petition was discharged.

On appeal, however, the Court of Appeals for the Ninth Circuit, deferring to the opinion of Judge Sanders in *National Gypsum*,[189] looked for "indicia of fair contemplation."[190] The court found such an indicium by imputing to the department the knowledge of another state agency of the Jensens' potential liability for releasing a tank of fungicide. This knowledge was deemed sufficient "to give rise to a contingent claim for cleanup costs before the Jensens filed their bankruptcy petition . . . . The claim filed by California DHS against the Jensens therefore was discharged in the Jensens' bankruptcy."[191]

In *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*[192] the court held that the claimant had sufficient information about contamination resulting from a derailment to give rise to a claim or contingent claim before the entry of a consummation order in the railroad debtor's reorganization. The court reached this conclusion even though it found that the railroad did not know of the contamination so as to be under a duty to give to the

186. *Id.* at 556. Thus, in UNARCO Bloomington Factory Workers v. UNR Industries, 124 B.R. 276 (N.D. Ill. 1990), the court held that preconfirmation claims based on allegations of occupational disease and tort were discharged by confirmation of the plan and that actions on such claims against the reorganized debtor were therefore prohibited by § 524(a)(2).

187. *See supra* part II.B.2.

188. 127 B.R. 27 (Bankr. 9th Cir. 1991), *aff'd*, 995 F.2d 925 (9th Cir. 1993).

189. *In re* National Gypsum Co., 139 B.R. 397, 408 (N.D. Tex. 1992), *cited supra* note 148.

190. *Jensen*, 995 F.2d at 930.

191. *Id.* at 931.

192. 974 F.2d 775, 778-89 (7th Cir. 1992).

claimant notice of claim filing bar dates.[193]

In *In re Chateaugay Corp.*[194] the court held that preconfirmation releases of hazardous substances by the debtor generated claims notwithstanding the fact that the EPA did not "know the full extent of the hazardous waste removal costs that it may one day incur and seek to impose upon LTV, and it [did] not yet even know the location of all the sites at which such wastes may yet be found."[195] The court was satisfied, however, that the location of the sites, the determination of their coverage by CERCLA, and the incurring of response costs were "all steps that may fairly be viewed, in the regulatory context, as rendering the EPA's claim 'contingent.'"[196]

Several cases not involving exposure to toxic substances have presented the question whether confirmation discharges a claim when neither the debtor nor the creditor knows of the existence of the claim until after confirmation. For example, in *In re Penn Central Transportation Co.*[197] the claimant sought relief from the injunction imposed at the conclusion of Penn Central's reorganization in order to pursue antitrust actions against the reorganized company. The claimant argued that the consummation of the reorganization should not bar its pursuit of the antitrust action against the railroad because it was not advised of the effect the reorganization would have. The claimant acknowledged that the trustees were likewise uninformed of the facts alleged to be the basis for the cause of action. The Court of Appeals for the Third Circuit denied relief, explaining that the trustees of the railroad were not required by due process or the reorganization statute to provide information to potential claimants as to the character of their claims.[198]

Several subsequent cases have cited the *Penn Central* decision, along with other cases,[199] as authority for the proposition "'that all claims are

193. *See also* CMC Heartland Partners v. Union Pac. R.R. (*In re* Chicago, Milwaukee, St. Paul & Pac. R.R.), 3 F.3d 200, 206-07 (7th Cir. 1993) (denying claim of Union Pacific Railroad against successor trustee of the Milwaukee Road, reorganized under § 77 of the Bankruptcy Act, for indemnification under CERCLA, because the claimant railroad had constructive knowledge of its potential liability during the pendency of the Milwaukee Road's reorganization case but failed to file a claim; Union Pacific's claim under Washington state law remanded for further proceedings).

194. 944 F.2d 997 (9th Cir. 1991).

195. *Id.* at 1005.

196. *Id.*

197. 771 F.2d 7622 (3d Cir.), *cert. denied*, 474 U.S. 1033 (1985).

198. *Id.* at 768.

199. F & M Marquette Nat'l Bank v. Emmer Bros. Co. (*In re* Emmer Bros. Co.), 52 B.R. 385, 394 (D. Minn. 1985); Bowen v. Residential Fin. Corp. (*In re* Bowen), 89 B.R. 800, 804 (Bankr. D. Minn. 1988). *But cf.* Orcon, Inc. v. Nevada Emergency

discharged by confirmation, even if the claim is not discovered until some later date.'"[200] The declaration for general dischargeability of undiscovered claims has been qualified, however, by an implied recognition that a debtor's fraudulent concealment of the existence of facts supporting a claim would warrant a different ruling, but that the burden to show such concealment would be on the claimant.[201]

Knowledge by a creditor that its debtor has filed a petition, or has had a petition filed against it, under the Bankruptcy Code may also be a factor in determining the effect of confirmation in a Chapter 11 case. For most of this century a discharge entered under section 14 of the Bankruptcy Act or section 727 of the Bankruptcy Code has been effective against a creditor who knew of the pendency of the case in time to file a timely proof of claim.[202] The provision in section 944(c)(2) of the Code for a discharge

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Servs., Inc. (*In re* Nevada Emergency Servs., Inc.), 39 B.R. 859 (Bankr. D. Nev. 1984) (holding that absent a showing by the debtor that plaintiffs had a reasonable opportunity for their claims to be heard, court could not, consistent with due process, conclude that claims were barred by operation of order confirming debtor's reorganization plan), *abstracted supra* note 114.

200. *Bowen*, 89 B.R. at 805 (quoting *Emmer Bros.*, 52 B.R. at 394).

201. *Id.* at 806.

202. "The statutory language [of § 523(a)(3)(B)] clearly contemplates that mere knowledge of a pending bankruptcy proceeding is sufficient to bar the claim of a creditor who took no action, whether or not that creditor received official notice from the court of various pertinent dates." Byrd v. Alton (*In re* Alton), 837 F.2d 457, 460 (11th Cir. 1988) (denying creditor extension of time for filing dischargeability complaint since creditor had received actual notice of debtor's Chapter 11 case from debtor's counsel within time to file timely complaint); *see also* Briley v. Hidalgo, 981 F.2d 246, 249 (5th Cir. 1993) (holding that default judgment against guarantors was discharged under § 523(a)(3) by virtue of creditor's knowledge of guarantors' bankruptcy although judgment was never scheduled; rejecting argument that actual notice must be proven by clear and convincing evidence); Zidell, Inc. v. Forsch (*In re* Coastal Alaska Lines), 920 F.2d 1428, 1431 (9th Cir. 1990) (holding that unscheduled creditor's due process rights were not violated by bankruptcy court's refusal to extend filing time for proof of claim in Chapter 7 case, notwithstanding lack of notice of claims bar date, when creditor knew of pendency of case by virtue of having received copy of notice of first creditors' meeting); Yukon Self Storage Fund v. Green (*In re* Green), 876 F.2d 854, 856-57 (10th Cir. 1989) (dismissing creditor's complaint to determine dischargeability as untimely; holding that failure to receive formal notice of bar date did not excuse delay in light of § 523(a)(3)(A) and evidence that creditor learned of pendency of debtor's bankruptcy in time to file timely complaint); Neeley v. Murchison, 815 F.2d 345, 347 (5th Cir. 1987) (holding that creditor's objection to dischargeability was time-barred notwithstanding clerk's failure to provide timely notice of applicable time limit, where creditor had received timely notice of pendency of debtor's case); 1A COLLIER ON BANKRUPTCY, *supra* note 37, ¶ 17.21[5]; 2 COLLIER ON BANKRUPTCY, *supra* note 35, ¶ 523.13[c].

The court in *In re* Green undertook to differentiate the creditor's rights under

of a Chapter 9 debtor from all of its debts on confirmation except those "owed to an entity that, before confirmation of the plan, has had neither notice nor actual knowledge of the case"[203] was recently upheld against attack based on due process grounds.[204] It would thus appear that there is no constitutional requirement that notice conforming to a procedural rule or a statute be delivered to a knowledgeable creditor before the creditor's claim can be discharged.[205]

Chapters 11 and 7 by gratuitously suggesting that "11 U.S.C. § 1141(c) and (d), which would appear to allow the discharge of the debt of a creditor without actual notice failed to meet due process muster," whereas § 523(a)(3), by preserving the effect of a discharge in a Chapter 7 case only when the creditor received actual timely notice (or knowledge), satisfied due process requirements. 876 F.2d at 856-57; *see also In re* Turning Point Lounge, Ltd., 111 B.R. 44, 48 n.3 (Bankr. W.D.N.Y. 1990). Although *Green* upheld the constitutionality of § 523(a)(3) and purported to find § 1141(d) unconstitutional on due process grounds, both sections were regarded as unconstitutional in Nicholas A. Franke, *The Code and the Constitution: Fifth Amendment Limits on the Debtor's Discharge in Bankruptcy*, 17 PEPP. L. REV. 853, 863 (1990), *quoted infra* text accompanying notes 206-208.

203. 11 U.S.C. § 944(c)(2) (1988).

204. Nebraska Sec. Bank v. Sanitary & Improvement Dist. No. 7, 119 B.R. 193, 195 (D. Neb. 1990). Mr. Franke erroneously stated that "Section 523(a)(3) is the only section of the Bankruptcy Code that conditions a debtor's discharge on any type of notice to or knowledge by a creditor." Franke, *supra* note 202, at 858 n.30; *see also id.* at 862 n.54, 864. Mr. Franke's article did not refer to § 944(c)(2), but did cite the district court's decision that upheld its constitutionality. *Id.* at 863 n.59.

205. Cases barring a creditor with knowledge of the pendency of its debtor's Chapter 11 case in time to file a timely proof of claim include the following: *In re* Production Plating, Inc., 90 B.R. 277, 280-84 (Bankr. E.D. Mich. 1988) (holding that confirmation discharged claim for intentional tort when the claimant knew of the filing of the debtor's petition but the debtor was unaware of the existence of the claim); Siouxland Beef Processing Co. v. Knight (*In re* Siouxland Beef Processing Co.), 55 B.R. 95, 100 (Bankr. N.D. Iowa 1985) (holding that claim by debtor's employee, who had actual knowledge of debtor's Chapter 11 filing long before confirmation of debtor's plan but who failed to file timely claim, was discharged by confirmation); *see also* Jones v. Arross, 9 F.3d 79, 82 n.5 (10th Cir. 1993) (acknowledging that claim of unscheduled creditor who did not file timely claim would be dischargeable if she "had timely notice or timely actual knowledge of the case"); Neeley v. Murchison, 815 F.2d 345, 347 (5th Cir. 1987) (holding that creditor's objection to discharge of claim for fraud against individual Chapter 11 debtor was time-barred in view of creditor's knowledge of pendency of Chapter 11 case in ample time to file objection); *cf.* Hassett v. Weissman (*In re* O.P.M. Leasing Servs., Inc.), 48 B.R. 824, 831 (S.D.N.Y. 1985) (barring creditor's late filing of claim where its allegations of ignorance of pendency of debtor's Chapter 11 case strained credulity and trustee had no knowledge of creditor's claim or its name and address); *In re* Larsen, 80 B.R. 784, 787 (Bankr. E.D. Va. 1987) (barring late filing of claim where creditor knew of pendency of case but debtor had no knowledge of claim's existence); *In re* Missionary Baptists Found. of Am., Inc., 41 B.R.

In a recent article, Mr. Nicholas A. Franke nevertheless made the following elaborate argument: (1)

> Because section 523(a)(3) requires notice to creditors before discharging their claims only when the debtor is an individual, and because no corollary provision exists when the debtor is not an individual, the Bankruptcy Code apparently takes the position that claims can be discharged without notice to the claimholder when the debtor is not an individual;[206]

(2) "*New York Railroad* and its progeny make this constitutionally impermissible";[207] (3) "Therefore, the 'actual knowledge' exception found in section 523(a)(3) violates the due process requirements of the fifth amendment when applied in a Chapter 11 case in which the debtor knows of the existence of a creditor and that creditor's claim."[208]

Although we, *i.e.*, the authors of this Article, concur in approving the amendments to sections 1141, 1142, and 523 proposed in the National Bankruptcy Conference's Code Review Project Working Draft,[209] which would clarify the relationship of notice requirements to discharge under the Bankruptcy Code, we question Mr. Franke's analysis of the implications of the *New York Railroad* case. Section 523(a)(3)'s precursor in the Bankruptcy Act, *viz.*, section 17a(3), also excepted from discharge the claim of a creditor having "notice or actual knowledge of the proceedings in bankruptcy";[210] however, the Supreme Court did not, in *New York v. New York, N.H. & H.R. Co.*[211] or elsewhere, suggest that the precursors of section 1141(d) of the Bankruptcy Code, *viz.*, sections 77(f), 95(b), 228, 371, 476, 660, and 661 of the Bankruptcy Act, carried any implication that no notice need be given to creditors or that these sections contravened the Constitution by failing to specify a need for timely notice of some kind. The Supreme Court did not predicate its ruling in the *New York Railroad* case on the Fifth Amendment or even mention it.[212] If the *New York Railroad* decision is

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467, 472 (Bankr. N.D. Tex. 1984) (disallowing claim, as untimely filed, where fiscal intermediary of Health Care Financing Administration had actual knowledge of pendency of debtor's Chapter 11 petition ten weeks prior to bar date for filing claims).

206. Franke, *supra* note 202, at 864.

207. *Id.* at 863-64.

208. *Id.* at 863.

209. These proposals are summarized *infra* the text accompanying notes 245-266.

210. Bankruptcy Act § 17a(3), 11 U.S.C. § 35(a)(3) (1976) (repealed 1978).

211. 344 U.S. 293 (1953). The *New York Railroad* case is discussed *supra* text accompanying notes 90-98.

212. *See* Grossie v. Sam (*In re* Sam), 894 F.2d 778, 781 (5th Cir. 1990). Two opinions of the Supreme Court involving due process in nonbankruptcy contexts,

allowed to rest on the rationale stated in Justice Black's opinion, the reason the confirmation did not effectuate a discharge was that the court did not comply with the statutory command for notice prescribed by the Bankruptcy Act.[213]

Judge Frank, in his dissenting opinion in *New York Railroad*, likewise emphasized the district court's noncompliance with the statute, but identified eight other factors that also appeared to warrant a ruling for the city.[214] As pointed out earlier in the discussion of *New York Railroad*, Judge Frank had adhered to the approach taken by the Supreme Court in *Mullane* in weighing competing considerations in determining when the requisites of due process have been met.[215]

In questioning the constitutionality of sections 523(a)(3) and 1141(d), Mr. Franke argued that *New York Railroad* mandates a *per se* rule of compliance with formal notice.[216] Although the mode of giving "formal notice" would have to be prescribed by statute or rule, Mr. Franke argued that Congress would be precluded from specifying actual knowledge or actual notice in lieu of some kind of "formal notice."[217] Such an approach is antithetical to the Supreme Court's articulation in numerous cases of the demands of procedural due process[218] and would overrule a substantial

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however, assumed without careful analysis that *New York v. New York, N.H. & H.R. Co.* was based on a constitutional mandate. *See* Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478, 487-89 (1988); Mennonite Board of Missions v. Adams, 462 U.S. 791, 797-800 (1983).

213. *See New York, N.H. & H.R.*, 344 U.S. at 296. The case does not appear to have involved a collateral attack on the district court's order that was reversed.

214. *See supra* note 96.

215. *See supra* text accompanying note 96.

216. Franke, *supra* note 202, at 863-65.

217. "Creditors in all bankruptcy cases must be given official notice of the relevant debts in the case, as required by *New York Railroad* and its progeny." *Id.* at 864.

218. Justice O'Connor's dissenting opinion in Mennonite Board of Missions v. Adams, 462 U.S. 791, 800-09 (1983) (O'Connor, J., dissenting), is an extended exposition of the Supreme Court's previous, persistent, and long-continued refusal either to commit itself to any formula for balancing the governmental and private interests involved or to assume the responsibility for prescribing the form of notice the government should adopt in determining the requisites of due process. The majority in *Mennonite Board v. Adams* held that posting and publication of notice of a tax sale of real property that complied with an Indiana statute did not meet requirements of the Fourteenth Amendment's Due Process Clause when challenged by a mortgagee of the property that was sold. Justices Rehnquist and Powell concurred in Justice O'Connor's dissent, and Justice O'Connor wrote the nearly unanimous opinion of the Court in Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988). *See also* Drexel Burnham Lambert Group, Inc. v. Claimants Identified on Schedule I (*In re* Drexel Burnham Lambert Group, Inc.), 995 F.2d 1138, 1144 (2d Cir. 1993) ("What process is due under the Due Process Clause

body of case law.[219] A flurry of recent bankruptcy court decisions have disapproved rulings of courts of appeals that disallow claims that are not timely filed;[220] but these courts have recognized the appropriateness of subordinating such a claim to the claims timely filed.[221] Mr. Franke did not address whether a claim filed by a person without formal notice is constitutionally protected against subordination pursuant to section 510(c) or section 726(a)(3). However, a number of cases can be cited as coinciding with the views espoused by Mr. Franke in their preoccupation with formal notice.[222]

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when asked in the abstract is an imponderable question like 'What is Truth?' John 18:38. When focused on concrete circumstances or particular parties, it still admits of no easy answer . . . .").

219. Mr. Franke's article cites four cases that "discharged claims without notice to creditors notwithstanding the Supreme Court holding to the contrary." Franke, *supra* note 202, at 863 n.59; *see also* cases cited *supra* notes 202-205; *In re* Burke, 76 B.R. 62, 64 (Bankr. D. Vt. 1987) (disallowing late-filed claim notwithstanding lack of notice that claim had been scheduled as disputed and therefore subject to a timely-filing requirement; creditor's active participation in case emphasized in court's opinion).

220. *In re* McLaughlin, 157 B.R. 873 (Bankr. N.D. Iowa 1993); *In re* Babbin, 156 B.R. 838 (Bankr. D. Colo.), *rev'd in part*, 160 B.R. 848 (D. Colo. 1993); General Motors Acceptance Corp. v. Judkins (*In re* Judkins), 151 B.R. 553, 555 (Bankr. D. Colo. 1993); Lastra v. Blood Servs. Program of Am.Red Cross (*In re* Corporacion De Servicios Medico-Hospitalarios De Fajardo, Inc.), 149 B.R. 746 (Bankr. D.P.R. 1993); *In re* Rago, 149 B.R. 882 (Bankr. N.D. Ill. 1992) (disapproving three opinions of courts of appeals that held or assumed that late-filed claims are automatically disallowed).

221. *Judkins*, 151 B.R. at 555 (recognizing the court's power in a Chapter 13 case to approve differing treatment of timely and tardy claims provided by a plan); *Lastra*, 149 B.R. at 749-50 (discussing subordination under § 726(a)(3)); *Rago*, 149 B.R. at 888-90 (discussing subordination of late-filed claims under §§ 726(a)(3) and 510(c)); *In re* Hausladen, 146 B.R. 557 (Bankr. D. Minn. 1992).

222. In addition to New York v. New York, N.H. & H.R. Co., discussed *supra* text accompanying notes 90-98, and the court of appeals decisions discussed *supra* text accompanying notes 108-117, the following bankruptcy court decisions may be cited: *In re* Turning Point Lounge, Ltd., 111 B.R. 44 (Bankr. W.D.N.Y. 1990) (holding that preconfirmation judgment creditor who was not "properly notified" of the bar date for filing a proof of claim and of the hearing on confirmation was not barred from enforcing a postconfirmation default judgment obtained against the debtor; concluding that preconfirmation oral notice of the debtor's petition given the creditor by the debtor's principal was ineffective as notice); Acevedo v. Van Dorn Plastic Mach. Co., 68 B.R. 495 (Bankr. E.D.N.Y. 1986) (ruling that machine manufacturer's claim for indemnity and contribution against Chapter 11 debtor, whose employee was injured while working on machine and became plaintiff in products liability action against the manufacturer, was nondischargeable by virtue of the debtor's failure to give timely notification to the manufacturer of its claim; deeming § 1141(d) unconstitutional in its application to manufacturer's claim; stating that creditors who accepted the debtor's plan shared responsibility for not examining the debtor to insure that all claims were included in the

Mr. Franke opined in his Pepperdine Law Review article that "[n]otice is for the benefit of creditors, not debtors, and creditors are entitled to adequate notice irrespective of the type of debtor."[223] Accordingly, he argued that the discrimination between creditors of individuals and creditors of legal entities other than individuals implicit in the "actual knowledge" caveat in section 523(a)(3) and the omission of any such caveat in section 1141 must be eliminated to pass constitutional muster.[224] This argument ignores the significant difference between the effects of the discharge of an individual and the discharge of an entity other than an individual.

Because discharge of a liquidated corporation or partnership was perceived to serve no useful purpose and indeed encouraged trafficking in corporate shells and bankrupt partnerships, Congress eliminated any provision for discharge of such entities in Chapter 7 and severely restricted discharge of liquidated entities in Chapter 11 cases.[225] In enacting Chapter 11 of the Code, however, Congress recognized that a corporation or partnership could not survive reorganization without the protection of a pervasive discharge of preconfirmation debts.[226] The differences between the effects of liquidations and reorganizations on creditors of individual and nonindividual debtors could legitimately be taken into account by Congress in enacting bankruptcy legislation.

Mr. Franke appropriately recognized that a creditor with actual knowledge of a Chapter 7 case has no need for notice of the bar date for filing of a claim, whereas a creditor in a reorganization case must continually inquire about the relevant bar date.[227] Thus, in *Spring Valley Farms, Inc. v. Crow (In re Spring Valley Farms, Inc.)*,[228] when a reorganized debtor relied on the cases enforcing a discharge against creditors who did not file their claims notwithstanding their knowledge of the pendency of the bankruptcy case of their debtor, the court responded by pointing out that the provisions of the bankruptcy laws authorizing that result protected only individual debtors.[229] Congress nevertheless provided for a comprehensive

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plan); Orcon, Inc. v. Nevada Emergency Servs., Inc. (*In re* Nevada Emergency Servs., Inc.), 39 B.R. 859 (Bankr. D. Nev. 1984), *abstracted supra* note 114.

223. Franke, *supra* note 202, at 864 n.69.

224. *Id.*

225. *See* H.R. REP. NO. 595, *supra* note 15, at 385, *reprinted in* 1978 U.S.C.C.A.N. at 6341; S. REP. NO. 989, 95th Cong., 2d Sess. 98, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5884.

226. *See infra* note 230.

227. Franke, *supra* note 202, at 860 n.34.

228. 863 F.2d 832 (11th Cir. 1989).

229. *Id.* at 833-34; *see also In re* Turning Point Lounge, Ltd., 111 B.R. 44, 48 n.3 (Bankr. W.D.N.Y. 1990) (acknowledging that failure of a knowledgeable creditor of an individual Chapter 11 debtor to file a timely proof of claim may result in discharge by

discharge in section 1141(d) and evinced a recognition of the need for as broad a discharge of a reorganized corporation as the Constitution permits.[230] It is thus anomalous to find in several judicial opinions not only a disregard of the congressional policy of affording a comprehensive discharge to reorganized debtors but also a discovery of Due Process Clause protection of knowledgeable creditors against omission of any step in the procedures prescribed by the statute and the rules.[231]

In *Waterman Steamship Corp. v. Aguiar (In re Waterman Steamship Corp.)*[232] the debtor knew that there were future claimants, but did not know their identity. Over 100 claims for disease resulting from asbestos exposure had been filed in the case, and the debtor had published notices of claims-filing dates in two national publications and in two other publications where the debtor's operations were concentrated. It was important to the success of the reorganization and the fairness of the treatment of future

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confirmation of a plan, although a creditor of corporate Chapter 11 debtor who did not receive formal notice of the confirmation hearing was held not bound by the confirmation).

In dismissing the significance of the claimants' knowledge of the pendency of a reorganization case, courts frequently declare that awareness of a debtor's involvement in a reorganization case does not impose any duty on the claimant to take steps to protect its rights by intervening in any way in the case. New York v. New York, N.H. & H.R. Co., 344 U.S. 293, 297 (1953); *Spring Valley Farms*, 863 F.2d at 834 (citing *In re* Intaco P.R., Inc., 494 F.2d 94, 99 (1st Cir. 1974)); Reliable Elec. Co. v. Olson Constr. Co., 726 F.2d 620, 622 (10th Cir. 1984). These courts add that the claimant has a right to assume that the reorganization court will issue notices required by statute and rule in due course. *But cf.* Lawrence Tractor Co. v. Gregory (*In re* Gregory), 705 F.2d 1118, 1123 (9th Cir. 1983), *quoted supra* note 109; *see also* Robbins v. Amoco Prod. Co., 952 F.2d 901, 908 (5th Cir. 1992).

In *In re* CRC Wireline, Inc., 103 B.R. 804, 808 (Bankr. N.D. Tex. 1989), the court sought to confine the relevance of a claimant's knowledge of the pendency of its debtor's case to instances where the claimant was unknown; but as the court pointed out in Zidell, Inc. v. Forsch (*In re* Coastal Alaska Lines), 920 F.2d 1428, 1431 (9th Cir. 1990), the creditor in *Gregory* had already obtained a judgment against the debtor before the debtor filed his petition.

230. "By this broadest possible definition [in section 101(4), later renumbered 101(5)], and by the use of the term throughout the title 11, . . . the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court." H.R. REP. NO. 595, *supra* note 15, at 309, *reprinted in* 1978 U.S.C.C.A.N. at 6266; S. REP. NO. 989, *supra* note 225, at 22, *reprinted in* 1978 U.S.C.C.A.N. at 5808; *see also* 124 CONG. REC. 32405 (1978) (statement of Rep. Edwards); *id.* at 34005 (statement of Sen. DeConcini); *cf.* Ohio v. Kovacs, 469 U.S. 274, 279 (1985) (". . . Congress desired a broad definition of a 'claim.' . . .").

231. *See supra* notes 108-117, 143.

232. 141 B.R. 552 (Bankr. S.D.N.Y. 1992), *vacated*, 157 B.R. 220 (S.D.N.Y. 1993).

claimants who had been exposed during the debtor's prepetition and preconfirmation operations that these claims were dealt with in the reorganization plan. In light of the debtor's ownership and operation of sea vessels containing asbestos for 50 years and in light of the "highly publicized *Johns-Manville* bankruptcy" the court declared that the debtor knew there were many employees and former employees with contingent claims in the form of unmanifested asbestos-related diseases prior to confirmation who had not filed claims. Acknowledging the difficulties faced by the debtor, the court nevertheless declined to grant its request for declaratory relief discharging the claims of the nonfiling claimants. Although published notice to claimants has been deemed to satisfy due process when they cannot be identified,[233] the court in *Waterman Steamship* declared that published notice to the nonfiling claimants would not reasonably inform them of their claims.[234] The court suggested that the debtor could have appointed a representative to receive notice for, and to represent the interests of, the unidentifiable future claimants.[235] Thus, a novel procedural device, which has been developed in a series of judicial opinions within the last decade,[236] took on the aspect of a constitutional requirement of due process. Meanwhile, the confirmation in the *Waterman Steamship* case did

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233. *See supra* text accompanying notes 97 and 106, and compare the following statement of District Judge Keenan in Hassett v. Weissman (*In re* O.P.M. Leasing Corp.), 48 B.R. 824 (S.D.N.Y. 1985): "[N]otice by publication is an adequate form of notice to advise a party of the entry of a bar order." *Id.* at 831 (citing Novak v. Callahan (*In re* GAC Corp.), 681 F.2d 1295, 1300 (11th Cir. 1982); Reddington v. Borghi (*In re* Weis Sec., Inc.), 411 F. Supp. 194, 195 (S.D.N.Y. 1975); *In re* International Coins & Currency, Inc., 22 B.R. 123, 125 (Bankr. D. Vt. 1982)).

In Pettibone Corp. v. Payne (*In re* Pettibone Corp.), 151 B.R. 166, 170-73 (Bankr. N.D. Ill. 1993), the court appropriately held that notice by publication was inadequate with respect to a claimant who was injured nearly two years later when operating equipment manufactured by the debtor. The injury occurred preconfirmation, but the debtor denied knowledge of its occurrence until sued by the claimant in state court, and the claimant denied knowledge of the pendency of the debtor's Chapter 11 case until the debtor filed a complaint against the claimant in the bankruptcy court. The debtor's liability on an administrative claim of the injured plaintiff was said to depend on proof of a postpetition failure by the debtor to warn the claimant. *Id.* at 175-76.

234. *Waterman S.S.*, 141 B.R. at 559. The court referred to publication as an "emaciated form of minimal due process." *Id.* at 558.

235. *See infra* text accompanying note 256.

236. *See In re* Amatex Corp., 755 F.2d 1034, 1035, 1042-43 (3d Cir. 1985); *In re* UNR Indus., 725 F.2d 1111, 1119-20 (7th Cir. 1984); *In re* UNR Indus., 46 B.R. 671, 675 (Bankr. N.D. Ill. 1985); *In re* Johns-Manville Corp., 36 B.R. 743, 749 (Bankr. S.D.N.Y.), *appeal denied*, 39 B.R. 234, 235-36 (S.D.N.Y. 1984); Stacy L. Rahl, Note, *Modification of a Chapter 11 Plan in the Mass Tort Context*, 92 COLUM. L. REV. 192, 222-23 (1992).

not discharge the future claims of the debtor.

Ralph Mabey and Jamie Andra Gavrin, in an article published in this symposium,[237] declare that "*Mullane* usually mandates . . . the appointment of a future claims representative in order to provide future claims access to a court hearing."[238] They nevertheless acknowledge that "[u]nder *Mullane*, publication notice, though futile, may suffice because only the best notice and opportunity for hearing that can reasonably be given under the circumstances is required."[239] Although Mabey and Gavrin cite cases and commentary recognizing that the constitutional requirements of due process contemplate a balancing of multiple factors, including the risk of erroneous deprivation and the value of additional or substitute safeguards,[240] the authors emphasize that the appointment of a claims representative is constitutionally mandated when the discharge of future claims is involved.[241] *Mullane* did not involve the Fifth Amendment, but the authors make the reasonable assumption that the Due Process Clauses of Fifth and Fourteenth Amendments impose identical procedural requirements.[242] It is nevertheless arguable whether either amendment embraces the notion that a representative must always be appointed to represent the claims of unknown claimants.[243] Mabey and Gavrin are concerned only with the exceedingly complex and perplexing problem of future claims, an undefined category under the Bankruptcy Code, and their article is an eloquent and persuasive presentation of an argument in support of their ultimate conclusion: "The Fifth Amendment's procedural due process standards . . . do not preclude the discharge of future claims. Rather, they require only that a debtor make the best practicable effort to give notice to future claimants and afford them a meaningful opportunity to be heard."[244] The authors of this Article are concerned that the Fifth Amendment not be read to empower creditors to attack the effectiveness of the confirmation of a plan as a discharge of claims of unknown creditors by reciting procedural steps

237. Ralph R. Mabey & Jamie Andra Gavrin, *Constitutional Limitations on the Discharge of Future Claims in Bankruptcy*, 44 S.C. L. REV. 745 (1993).

238. *Id.* at 781.

239. *Id.* at 787 (citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317-18 (1950)). They cite seven cases sustaining the constitutional adequacy of notice by publication to creditors unknown to debtor. *Id.* at 788 n.190.

240. *Id.* at 781-83 & nn.152-157.

241. *Id.* at 779-84.

242. *Id.* at 779 n.142.

243. As pointed out *infra* text accompanying note 256, the National Bankruptcy Conference, after extended debate, limited its recommendation for enactment of a statutory requirement for appointment of a group representative to cases where all members of a group of potential claimants are not identifiable.

244. Mabey & Gavrin, *supra* note 237, at 784.

that conceivably could have been but were not taken after a careful evaluation of the costs, benefits, and risks involved.

5. *Proposals of National Bankruptcy Conference Working Groups on Discharge of Contingent and Environmental Claims*

The National Bankruptcy Conference has approved a series of proposed amendments that would deal with the dischargeability of contingent and environmental claims.[245] One proposal would amend sections 1141, 1142, and 523 to provide that, subject to exceptions for discharge of individual debtors, a claim should be discharged if its holder's name and address are known or are reasonably ascertainable and the holder has been served with notice of the case in time to file a timely proof of claim and to vote on a plan.[246] Discharge would be barred if the creditor's name and address are not known unless notice by publication is made and the court deems the notice reasonably calculated to make the creditor aware of the case in time to file a timely proof of claim and to vote on a plan.[247] The commentary accompanying the proposal acknowledged that "[t]his proposal would overrule the results of such cases as *Reliable Electric* and *Broomall.*"[248]

The Conference also proposed to amend the definition of "claim" in section 101(5) to provide that the occurrence of one or more material acts or failures to act at the time of or before the order for relief would create a claim.[249] If the conduct or event tending to cause harm has occurred or is occurring at or before the order for relief, a claim for resulting damage would be allowable and dischargeable although the damage has not yet befallen the claimant.[250] The scope and likelihood of the harm would be determined by estimation, and notice would be given to holders of potential future claims.[251] The comment accompanying the proposal acknowledged the implicit need for evidence of certainty of harm and the totality of the likely damage.[252]

A new subsection (k) was proposed to be added to section 502 to authorize the designation of "group claims."[253] The scope of this proposed

245. NBC Draft, *supra* note 70, at 1-42.
246. Proposal S, NBC Draft, *supra* note 70, at 270.
247. *Id.*
248. *Id.*
249. Proposal T.1, NBC Draft, *supra* note 70, at 273-74.
250. *Id.*
251. *Id.* at 274.
252. *Id.*
253. Proposal T.3, NBC Draft, *supra* note 70, at 274.

subsection has been the focus of extended debate. In a version tentatively approved at a meeting in January 1993, the new subsection would apply only when all members of a group of potential claimants are not identifiable. In such cases the court would be required to appoint a group representative.[254]

The NBC Draft proposed an amendment to section 363 to provide that a good-faith purchaser should take free and clear of successor liability.[255] The accompanying comment made clear an intent not to cut off a creditor's right to assert successor liability against a bona fide purchaser when the creditor did not receive the notice required to be provided by the proposed section 523(e) and did not have a group representative appointed for the creditor and persons similarly situated.[256]

The NBC Draft included a number of relevant proposals for the treatment of environmental claims.[257] Although the Draft was explicit that "environmental claims" should not be separately defined in the Bankruptcy Code but should be embraced within a comprehensive general definition of claims,[258] the Draft ventured the following rule prescribing when an environmental claim should be deemed to arise:

> A claim against a debtor for environmental harm should be regarded as arising when the debtor first acts, resulting in, fails to act, resulting in, or otherwise becomes legally responsible for the harm, irrespective of when the harm occurs, is manifested, is fully known or knowable, or is remediated.[259]

The Draft explained further: "Applying this rule means in most cases that a claim arises at the time when a hazardous substance is released into the environment."[260] The proposal thus embodied the position taken in *Jensen*[261] and *Chateaugay*.[262] If a debtor becomes legally responsible before a release, however, the claim may arise at the earlier time, as illustrated by the situation when leakage occurs on premises without any act

254. *Id.* The appointment of a group representative for a class of potential claimants was criticized in Bibler, *supra* note 127, at 171-73.

255. Proposal T.11, NBC Draft, *supra* note 70, at 279-80.

256. *Id.*

257. NBC Draft, *supra* note 70, at 1-42.

258. *Id.* at 4.

259. *Id.*

260. *Id.*

261. *Id.* at 5. *Jensen* is cited and discussed *supra* notes 188-191 and accompanying text.

262. NBC Draft, *supra* note 70, at 6. *Chateaugay* is cited *supra* note 138 and discussed in the accompanying text.

or failure on the part of the owner.[263] The fact that cleanup takes place after the date of relief under the Code would not be significant under the Draft proposal.[264]

The NBC Draft declared that

> [a]fter a claim for recovery of environmental cleanup costs incurred is discharged against a property owner in bankruptcy, the government should not be able to recover the same claim against a reorganized entity that continues to own the same cleaned up property postconfirmation. Also, the government should not be able to assert claims for recovery of environmental cleanup costs based on prepetition contamination against a purchaser who buys the cleaned up property from the debtor's estate free and clear of liens.[265]

Citing 28 U.S.C. § 959(b), the Draft finally concluded that a reorganized entity or a purchaser may be required to clean up postpetition any current contamination, even though due to prepetition acts.[266]

6. Discharge of Nondebtors

Section 524(e) of the Bankruptcy Code provides that, except for the operation of a provision that applies only to a community claim,[267] discharge of a debt does not affect the liability of any entity other than the debtor or of the property of any entity other than that of the debtor.[268] The

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263. NBC Draft, *supra* note 70, at 6.

264. *Id.*

265. *Id.* at 21. The Draft acknowledged that an amendment of the Bankruptcy Code or CERCLA may be needed to protect purchasers and to facilitate the sale of property owned by a debtor. *Id.*

266. *Id.* at 22. The Draft pointed out that Waterville Industries v. First Hartford Corp., 124 B.R. 411 (D. Me. 1991), would protect the purchaser on the ground that New York v. New York, N.H. & H.R. Co., 344 U.S. 293, 297 (1953), requires some notice to an "affected creditor" in order for the debtor to be relieved of liability. NBC Draft, *supra* note 70, at 22. In *Waterville Industries* a mortgagee had sold contaminated property to a purchaser who was without knowledge or notice of the contamination.

267. The exception carves out of the general negation of the discharge of the liability of entities other than the debtor, and of property other than that of the debtor, the special provisions for community claims in § 524(a)(3).

268. *See* Landsing Diversified Properties-II v. First Nat'l Bank & Trust Co. v. Abel (*In re* Western Real Estate Fund, Inc.), 922 F.2d 592, 595-97 (10th Cir. 1990) (holding that injunction purporting to protect party settling with debtor against future liability to former attorney for debtor conflicted with § 524(e)), *modified sub nom.* Abel v. West, 932 F.2d 898 (10th Cir. 1991) (approving temporary injunction against attorney for debtor "pending confirmation of a reorganization plan," but declaring permanent

provision is an adaptation of section 16 of the Bankruptcy Act, which declared that "[t]he liability of a person who is a co-debtor with or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt."[269] Numerous cases have declared the invalidity of provisions of proposed and confirmed plans that would discharge liabilities of purchasers of debtors' property,[270] officers of corporate debtors,[271] partners in debtor partnerships,[272] guarantors,[273]

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postconfirmation injunction inappropriate); Kathy B. Enters. v. United States, 779 F.2d 1413 (9th Cir. 1986) (holding that § 524(e) did not preclude collection by IRS of debtor's taxes out of proceeds of sale of fraudulently transferred property); *In re* Elsinore Shore Assocs., 91 B.R. 238, 250 (Bankr. D.N.J. 1988) (denying confirmation of Chapter 11 plan because it "improperly" called for release of third-party nondebtors); *In re* Texaco Inc., 84 B.R. 893, 900 (Bankr. S.D.N.Y.) ("The confirmation of a Chapter 11 plan of reorganization should not release the obligations of non-party entities to creditors of a debtor."), *appeal dismissed*, 92 B.R. 38 (S.D.N.Y. 1988); Peter M. Boyle, Note, *Non-Debtor Liability in Chapter 11: Validity of Third-Party Discharge in Bankruptcy*, 61 FORDHAM L. REV. 421 (1992); *see also* Moore, Owen, Thomas & Co. v. Coffey, 992 F.2d 1439 (6th Cir. 1993) (stating that because discharge of principal debtor in bankruptcy would not discharge liability by cramdown pursuant to § 1129(b), it would likewise not affect the guarantor's obligation; guarantor was nevertheless entitled to determination of reduction of liability by amount of setoffs asserted by creditor against debtor).

269. 11 U.S.C. § 34 (1976) (repealed 1978).

270. *In re* Sis Corp., 120 B.R. 93, 94 (Bankr. N.D. Ohio 1990) (holding that proposed inclusion in plan of injunction against assertion of claims against purchasers of property of the debtors was in conflict with §§ 1141(d)(3) and 352(c) and was "illusory at best").

271. Kinney v. IRS (*In re* Video Gaming, Inc.), 123 B.R. 889 (Bankr. D. Nev. 1991) (concluding that claim of IRS for 100% penalty taxes was not rendered dischargeable by confirmed plan); Inforex, Inc. v. Burridge (*In re* Inforex, Inc.), 26 B.R. 515 (Bankr. D. Mass. 1983) (holding that corporate debtor's officers and directors were not discharged from liability to stockholders under SEC Rule 10b-5 by confirmation of corporation's plan). *But cf. In re* Schepps Food Stores, Inc., 160 B.R. 792 (Bankr. S.D. Tex. 1993) (staying postconfirmation state court action brought by Chapter 11 debtor's shareholders against several of debtor's directors, as an improper interference with the bankruptcy court's order of confirmation; stating that complaint based on directors' alleged breach of fiduciary duty in purposefully diluting shareholders' voting power was properly presented only to bankruptcy court during course of the Chapter 11 case).

272. Cardinal Indus. v. Buckeye Fed. Sav. & Loan Ass'n (*In re* Cardinal Indus.), 102 B.R. 991, 1008 (Bankr. S.D. Ohio 1989) (disapproving settlement between debtors, including general partner of limited partnerships, and mortgagees of property owned by partnerships, since relief contemplated by settlement required court to protect interests of nonfiling subsidiaries of debtors and other entities and was beyond intent and spirit of Code).

273. Shure v. Vermont (*In re* Sure-Snap Corp.), 983 F.2d 1015, 1019 (11th Cir. 1993) (holding that confirmation did not discharge liability of nondebtor guarantor for

and other codebtors of the debtor.[274] Nevertheless, the Supreme Court, in *Stoll v. Gottlieb*,[275] and a number of lower courts[276] have ruled unequiv-

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attorney's fees incurred in defending postconfirmation appeal initiated by the debtor); *In re* Timber Tracts, Inc., 70 B.R. 773, 779 (Bankr. D. Mont. 1987) (stating that, in event of default, debtor's officers and stockholders would remain liable under plan as cosigners on debtor's note).

274. *In re* General Homes Corp., 134 B.R. 853, 861 (Bankr. S.D. Tex. 1991) (stating that release of any cause of action held by a third party against a third party, including insiders of the debtor, is unenforceable since "the cause of action is property of the estate"); *In re* Mandalay Shores Co-op. Housing Ass'n, 53 B.R. 609, 615 (Bankr. M.D. Fla. 1985) (denying confirmation in part because settlement incorporated in plan prohibited creditors from suing nondebtors).

Numerous cases have held that a discharge does not preclude an action against a debtor, and later its insurer, when the objective of the actions is to recover from the insurer. *See, e.g.,* Owaski v. Jet Fla. Sys., Inc. (*In re* Jet Fla. Sys., Inc.), 883 F.2d 970 (11th Cir. 1989).

275. 305 U.S. 165 (1938), *noted in* 39 COLUM. L. REV. 274 (1939); 6 U. CHI. L. REV. 293 (1939); 48 YALE L.J. 979 (1939). Stoll v. Gottlieb has not escaped scholarly criticism. *See, e.g.,* ZECHARIAH CHAFEE, JR., SOME PROBLEMS IN EQUITY 319-20 (1950).

276. Republic Supply Co. v. Shoaf, 815 F.2d 1046 (5th Cir. 1987); Sanders v. GIAC Leasing Corp. (*In re* Sanders), 81 B.R. 496 (Bankr. W.D. Ark. 1987) (determining that enforcement of guaranty of partnership debt was precluded by res judicata based on confirmation of Chapter 11 plan providing for release of nondebtor guarantors, even though the confirmed plan was never consummated and no payments were made to creditors under the plan); *In re* CCA Partnership, 70 B.R. 694 (Bankr. D. Del. 1986) (holding that general partners of Chapter 11 debtor partnership were released by order confirming plans); *In re* Safeguard Co., 35 B.R. 44, 47 (Bankr. W.D. Pa. 1983) (holding that confirmation discharged principals as well as debtor firm from liability predicated on dealings with debtor); Jerome J. Steiker Co. v. Eccleston Properties Ltd., 593 N.Y.S.2d 394 (Sup. Ct. 1992) (holding that action by mortgage broker against nondebtor guarantor and its president was barred by confirmation of Chapter 11 plan that provided for their discharge; *res judicata* effect of confirmation overrode postconfirmation objections raised by broker to enforcement of discharge); *see also* Levy v. Cohen, 561 P.2d 252 (Cal.), *cert. denied*, 434 U.S. 833 (1977). *But cf.* North Ala. Anesthesiology Group, P.C. v. Zickler (*In re* North Ala. Anesthesiology Group, P.C.), 154 B.R. 752 (N.D. Ala. 1993) (although bankruptcy court correctly held that unappealed confirmation order released nondebtor guarantors of Chapter 11 debtor's indebtedness, Alabama Supreme Court's subsequent decision permitting creditor's action against guarantors held to constitute res judicata; guarantors who failed to seek injunctive relief from bankruptcy court against state court action before Alabama Supreme Court's final decision held to be collaterally estopped against further action in bankruptcy court).

The ruling in Republic Supply Co. v. Shoaf was qualified in Sun Finance Co. v. Howard (*In re* Howard), 972 F.2d 639, 641 (5th Cir. 1992), by a holding that a confirmed Chapter 13 plan is res judicata only as to parties who participate in the confirmation process. In *In re* Electronics & Metals Industries, 153 B.R. 36, 38 (Bankr. W.D.Tex. 1992), the court held that a creditor's claim which was scheduled as

ocally that confirmation of a reorganization plan may discharge a guarantor or other nondebtor from liability on an obligation when the order so provides and is not timely contested by a party with standing.

Notwithstanding the clear and unequivocal rulings in *Stoll v. Gottlieb* and its progeny, the courts of appeals of the Seventh[277] and Ninth[278] Circuits, as well as a number of lesser courts,[279] have permitted collateral attack of provisions of confirmed plans purporting to discharge or otherwise preclude enforcement of claims against nondebtor parties. Despite the fact that subject matter jurisdiction of a federal court has been authoritatively held not to be subject to collateral attack,[280] the decisions refusing to enforce confirmation orders have relied on a rationale that declares the orders to be beyond the jurisdiction of the bankruptcy court[281] or to

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"disputed" by the debtor did not implicate the creditor in the process. Nevertheless, in *Howard* the court conceded that the filing of an objection to the claim would have changed the result and emphasized that *Shoaf*, unlike *Howard*, involved a secured creditor. As indicated *supra* note 73, there is considerable confusion respecting the effect of confirmation on secured claims.

277. Union Carbide Corp. v. Newboles, 686 F.2d 593, 595 (7th Cir. 1982).

278. American Hardwoods, Inc. v. Deutsche Credit Corp. (*In re* American Hardwoods, Inc.), 885 F.2d 621, 624-27 (9th Cir. 1989) (distinguishing *Robins* case, cited *infra* note 287, on the ground that it involved "unusual facts"); Underhill v. Royal, 769 F.2d 1426 (9th Cir. 1985); *see also* Seaport Automotive Warehouse, Inc. v. Rohnert Park Auto Parts, Inc. (*In re* Rohnert Park Auto Parts, Inc.), 113 B.R. 610, 617-19 (Bankr. 9th Cir. 1990) (stating that §§ 362 and 105 do not authorize disregard of § 524(e)).

279. Mellon Bank v. Siegel, 96 B.R. 505, 506 (E.D. Pa.), *appeal dismissed*, 974 F.2d 1385 (3d Cir. 1989); Hat-Hanseatische Anlage v. Sago Palms Joint Venture (*In re* Sago Palms Joint Venture), 39 B.R. 9 (Bankr. S.D. Fla. 1984).

280. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940), *noted in* 28 GEO. L.J. 1006 (1940); 53 HARV. L. REV. 652 (1940); 49 YALE L.J. 959 (1940); McCormick v. Sullivant, 10 Wheat. (23 U.S.) 192 (1825); 2 JAMES W. MOORE, FEDERAL PRACTICE ¶ 0.60[5] (2d ed. 1985); 13 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3522, at 80-81 (2d ed. 1984); Karen N. Moore, *Collateral Attack on Subject Matter Jurisdiction: A Critique of the Restatement (Second) of Judgments*, 66 CORNELL L. REV. 534, 560 (1981):

> The principles of law regarding subsequent challenges to subject matter jurisdiction can be summarized as follows: generally, in a contested action a court's subject matter jurisdiction is res judicata and cannot be challenged through collateral attack on the judgment, whether or not the issue of subject matter jurisdiction was actually litigated.

"It has long been recognized that a bankruptcy court's order confirming a plan of reorganization is given the same effect as a district court's judgment on the merits for claim preclusion purposes." Eubanks v. FDIC, 977 F.2d 166, 170 (5th Cir. 1992) (citing five cases).

281. *See* cases cited *supra* notes 277-280.

constitute a denial of due process.[282] Section 524(e) has thus inappropriately been given effect as a jurisdictional limitation on the bankruptcy court or a constitutional mandate without any effort to distinguish or explain *Stoll v. Gottlieb*.[283] As Professor James W. Moore observed in his seminal article, *Res Judicata and Collateral Estoppel in Bankruptcy*,[284] it is not significant that the party raised the jurisdictional issue in *Stoll v. Gottlieb*, nor that the parties failed to do so, as in *Chicot Drainage District v. Baxter State Bank*,[285] since "it is a 'well settled principle that *res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, but also as respecting other available matters which might have been presented to that end.'"[286]

In a number of cases the courts have granted a debtor's request for permanent injunction to prohibit the pursuit of claims by creditors and others against nondebtor parties to a settlement that is an integral part of the reorganization plan. Such an injunction was notably issued in the *A.H. Robins*[287] case and was sustained against attack as violative of section 524(e) of the Bankruptcy Code. The court acknowledged the hurdles presented by *Underhill v. Royal*[288] and *Union Carbide Corp. v. Newboles*,[289] but drew some comfort from the statement of the Fifth Circuit in *Republic Supply Co. v. Shoaf*[290] that "'the statute does not by its specific words preclude the discharge of a guaranty when it has been accepted and confirmed as an integral part of reorganization.'"[291] The

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282. *In re* Timber Tracts, Inc., 70 B.R. 773, 779 (Bankr. D. Mont.1987); *In re* Mandalay Shores Co-op. Housing Ass'n, 53 B.R. 609, 615 (Bankr. M.D. Fla. 1985).

283. *See* Frank R. Kennedy, *The Discharge of Partnerships and Partners Under the Bankruptcy Code*, 38 VAND. L. REV. 857, 884-89 (1985).

284. James W. Moore, *Res Judicata and Collateral Estoppel in Bankruptcy*, 68 YALE L.J. 1 (1958).

285. 308 U.S. 371, 378.

286. Moore, *supra* note 284, at 9. Bankruptcy Judge Nims recently sought to limit the force of Stoll v. Gottlieb as precedential authority for the proposition that an order of confirmation is res judicata by insisting that "it was the decision on the postconfirmation petition to vacate or modify, to the order of confirmation, that formed the basis of the decision in *Stoll v. Gottlieb*." Reef Petroleum Corp. v. United States (*In re* Reef Petroleum Corp.), 99 B.R. 355, 359 (Bankr. W.D. Mich. 1989). The court then refused to give effect to a plan provision that granted unsecured creditors a lien with priority over federal tax claims that arose out of the debtor's receipt of duplicate refund checks.

287. Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989). The injunction in this case barred suit by product liability claimants against the debtor's directors, its attorneys, and its insurers' attorneys.

288. 769 F.2d 1426 (9th Cir. 1985), *cited supra* note 278.

289. 686 F.2d 593 (7th Cir. 1982), *cited supra* note 277.

290. 815 F.2d 1046 (5th Cir. 1987), *cited supra* note 276.

291. *A.H. Robins*, 888 F.2d at 702 (quoting *Shoaf*, 815 F.2d at 1050). The *Robins*

bankruptcy court's power to enjoin claimants' actions against a liability insurer of the debtor was sustained in the *Manville* and *UNR* cases on several alternate grounds: (1) as an exercise of the court's jurisdiction over liability insurance policies of the debtor as property of the estate; (2) as an exercise of the statutory authority under section 363(f)(4) to approve disposition of property of the estate free of third-parties' interests; and (3) as an exercise of the authority granted by section 105(a) to issue necessary orders to carry out the provisions of Title 11.[292] A careful study of *Man-*

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court summarized the considerations supporting its affirmance of the issuance of the permanent injunction as follows:

> [W]here the Plan was overwhelmingly approved, where the Plan in conjunction with insurance policies provided as part of a plan of reorganization gives a second chance for even late claimants to recover where, nevertheless, some have chosen not to take part in the settlement in order to retain rights to sue certain other parties, and where the entire reorganization hinges on the debtor being free from indirect claims such as suits against parties who would have indemnity or contribution claims against the debtor, we do not construe § 524(e) so that it limits the equitable power of the bankruptcy court to enjoin the questioned suits.

Id. at 702. The opinion in the *Robins* case was commented on favorably in John E. Swallow, Note, *The Power of the Shield—Permanently Enjoining Litigation Against Entities Other than the Debtor—A Look at* In re A.H. Robins Co., 1990 B.Y.U. L. REV. 707. The *Robins* case *inter alia* was relied on in the extended and careful opinion in *In re* Heron, Burchette, Ruckert & Rothwell, 148 B.R. 660, 667, 685-89 (Bankr. D.D.C. 1992) (issuing permanent injunction to protect participating partners of debtor partnership against actions by creditors on partnership debts and by other partners seeking contribution; declaring injunction to be *sine qua non* of plan to provide maximum payout and fair distribution); *see also* Marley Orchards Income Fund I, Ltd. Partnership v. Walker (*In re* Marley Orchards Income Fund I, Ltd. Partnership), 120 B.R. 566 (Bankr. E.D. Wash. 1990) (granting preliminary injunction against suit by creditors of limited partnership against general partnership).

292. *See* MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89, 91-94 (2d Cir.), *cert. denied*, 488 U.S. 868 (1988); Unarco Bloomington Factory Workers v. UNR Indus., 124 B.R. 268, 279-82 (N.D. Ill. 1990) (sustaining bankruptcy court's authority to enjoin suits against products liability insurers who had settled with the debtor against contention that injunction was inconsistent with § 524(e)); distinguishing *Newboles*, 686 F.2d 593, on the ground that guarantors released had not given anything to the estate or the creditors, whereas preconfirmation settlement with insurers in *UNR* case provided cash proceeds within jurisdiction of bankruptcy court to protect, and injunction was deemed necessary to preserve settlement approved as part of the reorganization); *see also* Official Comm. of Unsecured Creditors v. PSS S.S. Co. (*In re* Prudential Lines), 928 F.2d 565, 572-74 (2d Cir.), *cert. denied*, 112 S. Ct. 82 (1991) (sustaining permanent injunction issued against assertion of claim by corporate parent to worthless stock deduction as appropriate exercise of equitable power vested in bankruptcy court by § 105 inasmuch as claim would have deprived its subsidiary, a Chapter 11 debtor, of its NOL carry forward, which constituted property of the debtor's estate, and would have impeded the

ville, Robins, and UNR concluded that these cases have to come to stand for the following proposition:

> [A] permanent injunction in favor of settling nondebtors is proper in connection with a plan of reorganization if (1) the injunction is indispensable to the debtor's reorganization by providing a settlement fund to satisfy creditor claims, without limiting creditors' rights to pursue noncontributing third parties (*e.g.*, insurers, partners); and (2) the contributions of settling parties bear a reasonable relation to their potential liability (in the case of insurers) or their net worth (in the case of general partners).[293]

Courts have sustained release of a nondebtor given on receipt of a distribution from a fund provided by the nondebtor when the release was consensual and not coercive.[294]

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reorganization process); *In re* Energy Co-op., 886 F.2d 921, 929 (7th Cir. 1989) (sustaining injunction prohibiting creditors and former creditors from asserting claims against member-owners of a co-operative as exercise of jurisdiction of property of the debtor's estate and authority of court under § 105(a) "to enjoin actions which threaten the integrity of the bankrupt's estate"); Griffin v. Bonapfel (*In re* All American of Ashburn, Inc.), 805 F.2d 1515, 1518 (11th Cir. 1986) (sustaining permanent injunction against shareholders of debtor corporation, precluding their pursuit of action against a second corporation, on the ground that the latter action was a derivative action belonging to the debtor corporation and had been compromised by the trustee).

293. Howard C. Buschman III & Sean P. Madden, *The Power and Propriety of Bankruptcy Court Intervention in Actions Between Nondebtors*, 47 BUS. LAW. 913, 942 (1992); *see also* Joel C. Shapiro, *Non-Debtor Third Parties and the Bankruptcy Code: Is Bankruptcy Protection Available Without Actually Filing?*, 95 COM. L.J. 345, 350-53 (1990); Barry L. Zaretsky, *Co-Debtor Stays in Chapter 11 Bankruptcy*, 73 CORNELL L. REV. 213, 251-60 (1988).

294. *In re* Specialty Equip. Cos., 3 F.3d 1043, 1047 (7th Cir. 1993) (stating that although § 524(e) provides that discharge does not affect liabilities of third parties, it does not proscribe grants of release by the court to third parties; since consensual releases under a plan bind only those voting for the plan, creditors rejecting or abstaining from voting for the plan were held entitled to pursue claim against third parties);In re AOV Indus., 792 F.2d 1140, 1150-54 (D.C. Cir.) (holding that § 524(e) does not forbid giving of release to a nondebtor-guarantor who provided a fund for distribution to creditors), *vacated in part*, 797 F.2d 1004 (D.C. Cir. 1986); *In re* Monroe Well Serv., Inc., 80 B.R. 324, 334-36 (Bankr. E.D. Pa. 1987) (holding that § 524(e) was not violated by releases given by unsecured creditors to funds for distribution to creditors executing releases); *cf. In re* Heron, Burchette, Ruckert & Rothwell, 148 B.R. 660, 671 (Bankr. D.D.C. 1992) (holding that plan which provided for priority of distribution to participating partners who released claims ahead of nonparticipating partners who did not release their claims was confirmable in view of fact that there would be no distribution to partners anyway and that all partners were required to agree to receive distributions pro rata); *In re* Elsinore Shore Assocs., 91 B.R. 238, 251 (Bankr. D.N.J. 1988) (holding

Many cases illustrate the courts' strict construction of the order of confirmation against the plan proponent.[295] Confirmation of a plan providing for a debtor's payment of priority tax claims pursuant to section 1129(a)(9) has generally been held not to bar a federal tax collector from pursuing principals of the debtor to enforce the statutory liability.[296] In any

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that release of nondebtors was not enforceable when release was not voluntary); *In re* Future Energy Corp., 83 B.R. 470, 485-86 (Bankr. S.D. Ohio 1988) (holding that plan provisions which released two nondebtors from claims of parties receiving distributions from funds to which the nondebtors had contributed violated § 524(e)).

Union Carbide Corp. v. Newboles, 686 F.2d 593 (7th Cir. 1982), *cited supra* notes 277 and 289 for its disregard of Stoll v. Gottlieb, 305 U.S. 165 (1938), involved a "settlement, satisfaction and discharge" against individual third-party guarantors in exchange for distributions of proceeds from the property of the debtor. The court in *In re* Specialty Equipment Companies, 3 F.3d at 1046, ventured as partial explanations for the divergent results of the cases that *Union Carbide* was construing § 16 of the Bankruptcy Act, "which is more explicit than section 524(e) of the current Bankruptcy Code," and that "[t]he *Union Carbide* court concluded in summary fashion that the purpose of Section 16 was to prevent a creditor from being forced to lose his claim against a third party involuntarily and without consideration."

Releases of nondebtors may generate troublesome issues of classification and discrimination. *See, e.g., In re* AOV Indus., 792 F.2d at 1151-54 (holding that § 1123(a)(4) was violated by provisions for the same pro rata distribution to creditors, some of whom were required to execute releases and some of whom had no right against the guarantor); *In re* Monroe Well Serv., Inc., 80 B.R. at 335-36 (reserving for future consideration issues of classification under § 1123(a)(4) and discriminatory treatment).

295. Thus, numerous cases have rejected efforts of codebtors to have confirmation orders construed to grant them discharge by implication. United States v. Stribling Flying Serv., Inc., 734 F.2d 221, 223-24 (5th Cir. 1984); United States *ex rel.* SBA v. Kurtz, 525 F. Supp. 734, 742 (E.D. Pa. 1981), *aff'd per curiam*, 688 F.2d 827 (3d Cir.) (Chapter XI case), *cert. denied*, 459 U.S. 991 (1982); Beconta, Inc. v. Schneider, 41 B.R. 878 (E.D. Mich. 1984); *cf.* Bridgman v. Curry, 398 N.W.2d 167 (Iowa 1986) (holding that bankruptcy court's order imposing waiver of vendor's claim against debtor did not bar enforcement of claims of vendor against assignees in joint venture who were not protected in debtor's plan).

296. *In re* Huckabee Auto Co., 46 B.R. 741 (N.D. Ga. 1985) (reversing bankruptcy court's order enjoining collection of priority taxes from debtor's principals during six-year period allowed corporate debtor for payment of taxes under § 1129(a)(9)) *aff'd*, 783 F.2d 1546, 1548-49 (11th Cir. 1986); East Wind Indus. v. United States (*In re* East Wind Indus.), 61 B.R. 408 (D.N.J. 1986); Steel Prods., Inc. v. United States (*In re* Steel Prods., Inc.), 53 B.R. 999 (W.D. Wash. 1985) (reversing bankruptcy court orders that enjoined IRS from collecting income and social security taxes during pendency of Chapter XI case); Dore & Assoc. Contracting, Inc. v. United States *ex rel.* IRS (*In re* Dore & Assoc. Contracting, Inc.), 45 B.R. 758 (Bankr. E.D. Mich. 1985) (denying injunction against IRS to former officers of corporate debtor); *In re* Toy & Sports Warehouse, Inc., 37 B.R. 141 (Bankr. S.D.N.Y. 1984) (holding that officers of corporate debtor remained liable for its priority tax obligations during six-year payout notwithstanding confirmation of plan for corporate reorganization). *But cf.* Driscoll's

event, there should be no doubt that a court must sustain a creditor's timely objection to a provision of an order of confirmation purporting to discharge a nondebtor.[297] A district court opinion that recognized a "retained jurisdiction" by the bankruptcy court to delete as unenforceable a provision barring enforcement of a claim against a codebtor is a variant of the cases treating section 524(e) as a jurisdictional limitation on the bankruptcy court's powers.[298]

The National Bankruptcy Conference's Code Review Project Draft of January 1, 1993 has proposed that if a full-payment plan is confirmed in a partnership case, partnership creditors should be enjoined from proceeding

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Towing Serv., Inc. v. United States (*In re* Driscoll's Towing Serv., Inc.), 43 B.R. 647, 650 (Bankr. S.D. Fla. 1984) (denying motion of IRS for dismissal of debtors' complaint seeking injunction against assessment of 100% penalties for debtor's corporate tax obligations pursuant to I.R.C. § 6672, in order to permit debtors to show whether assessment would interfere with orderly administration of debtors' estate), *vacated*, 51 B.R. 990 (S.D. Fla. 1985). *See generally* BROUDE, *supra* note 73, at 14-18 to -20; Mitchell E. Jones, *Enjoining the IRS from Assessing the 100% Penalty Pursuant to 26 U.S.C. Section 6672: The Continuing Saga*, 90 COM. L.J. 576 (1985); Stephen H. King, *The Disappearing 100% Tax Penalty*, 90 COM. L.J. 356 (1985); Zaretsky, *supra* note 293, at 260-74.

297. *See* Consolidated Motor Inns. v. BVA Credit Corp. (*In re* Consolidated Motor Inns), 632 F.2d 1178 (5th Cir. 1980), *vacated on petition for en banc reconsideration*, 666 F.2d 189 (5th Cir.), *cert. denied*, 457 U.S. 1140 (1982). This case made two trips to the court of appeals and a like number to the Supreme Court. The original order of confirmation of a Chapter XII plan under the Bankruptcy Act had discharged claims of 400 creditors of a debtor partnership against the partners and their spouses, and distribution checks required the payees to sign releases of the debtor, the partners, and their spouses. On appeal the district court reversed on the ground that the partners had no standing to receive a discharge in the partnership's case. A further appeal to the court of appeals was dismissed, and certiorari was denied in Consolidated Motor Inns v. Alias Enters., Ltd., 436 U.S. 935 (1978). On remand, the bankruptcy court voided the discharge of the partners, and the district court affirmed. On a second appeal to the court of appeals, the court reversed the district court's avoidance of the discharge of the partners as contrary to the policy of Chapter XII. 632 F.2d at 1183-84. A creditor who had not consented to the plan obtained an *en banc* reconsideration of this second ruling. By a final vote of 21 to 2, the court of appeals affirmed the district court judgment insofar as it held the confirmation inoperative to discharge claims of "nonassenting creditors" against the partners and their spouses. 666 F.2d at 191.

298. Bill Roderick Distrib., Inc. v. A.J. Mackay Co. (*In re* A.J. Mackay Co.), 50 B.R. 756, 759-60 (D. Utah 1985) (holding that provision of confirmation order barring enforcement of claims against codebtor of Chapter 11 debtor was unenforceable by postconfirmation stay order issued by bankruptcy court, although creditor had not objected to the provision at confirmation hearing; stating that res judicata was not contravened because bankruptcy court retained jurisdiction to delete provision beyond its jurisdiction to approve in the confirmation order).

against partners, so long as payments under the plan are met.[299] "A change could be made in section 1141" to reflect this proposal, and "it might also be necessary to amend section 524(e), although the injunction might already be understood to be consistent with the idea that the nondebtor's obligation cannot be discharged."[300] The proposal contemplated that if the plan provisions are not met, the partnership creditors should be free to proceed against the partners. The injunction would thus not be tantamount to a complete or permanent discharge. The Draft included the following additional observations regarding this proposal:

> [T]he Conference expects that plans will ordinarily have both limitations on partner transfers and other protections to assure partner compliance with the plan. In some cases, such protections may become requirements to find that the plan is feasible.
>
> The Conference believes that the normal rules governing bankruptcy settlements should be applicable, and that the courts have the power to release the general partner (as part of the plan or a separately approved compromise) from post confirmation claims of creditors of the partnership and contribution and indemnity claims of other (non-settling) general partners.[301]

7. Dischargeability of Administrative Claims

It is frequently assumed that, to be allowable or dischargeable, a claim or debt must have arisen or been in existence at, or even prior to, the filing of the petition by or against the debtor. However, it is clear that a claim and a debt may be postpetition. Section 1141(d) declares that confirmation discharges debts that arose before confirmation,[302] and section 305 and subdivisions (g), (h), and (i) of section 502 provide for the allowance of postpetition claims. Since section 1129(a)(9)(A) requires *claims* for

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299. NBC Draft, *supra* note 70, at 170.

300. *Id.*

301. *Id.*

302. 11 U.S.C. § 1141(d)(1)(A) (1988). In Fonda Group, Inc. v. Contemporary Packaging Corp. (*In re* Fonda Group, Inc.), 108 B.R. 962 (Bankr. D.N.J. 1989), the court noted that the original bankruptcy bills introduced in the 95th Congress and the accompanying House and Senate Reports referred to claims arising "'before the date of the order for relief,'" and that "[t]he legislative history provides no insight as to the change." *Id.* at 966 n.3. The section on discharge in the reorganization chapter of the Bankruptcy Reform Act of 1973 proposed by the Commission on Bankruptcy Laws simply provided that "[t]he confirmation of a plan shall . . . extinguish all claims against the debtor other than those excepted from discharge under section 4-506." REPORT I, *supra* note 6, at 255. Section 4-506 excepted from discharge certain claims against individual debtors, as does section 1141(d) of the enacted Bankruptcy Code.

administrative expenses to be paid in cash as a condition for confirmation unless the claimant agrees to different treatment, the question of the effect of confirmation on unpaid administrative expenses does not often arise. In any event, judicial dicta and commentary that appear to require claims to have arisen prepetition, rather than preconfirmation, in order to be discharged by the confirmation must be regarded as erroneous.

Even when an erstwhile Chapter 11 debtor cannot invoke confirmation of a plan as a discharge pursuant to section 1141, there are difficulties confronting an administrative expense claimant who seeks to collect the claim from the debtor after the close of the case. Neither the debtor nor its successor is an obligor with respect to administrative claims. While efforts to collect administrative expense claims from a debtor after the close of a case have no doubt typically come to naught,[303] there are surprisingly a number of cases where courts have allowed recovery of such claims from the debtor or an entity liable for the debtor's obligations.[304]

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303. *See, e.g.*, McNulta v. Lochridge, 141 U.S. 327, 332 (1891) (judgments against equity receiver payable only from the funds in his hands); *In re* Western Farmers Ass'n, 13 B.R. 132 (Bankr. W.D. Wash. 1981) (acknowledging that administrative expense claims are worthless if the estate would not be sufficient to pay them); *cf.* Bright v. Fred C. Sproul, Inc., 616 P.2d 189 (Colo. Ct. App. 1980) (dismissing, for lack of jurisdiction, action filed in state court by attorney to collect fee for services rendered to Chapter XI debtor-in-possession).

304. *In re* Alton, 81 B.R. 97 (Bankr. M.D. Fla. 1987) (holding that tax liability incurred by partnership during pendency of its Chapter 11 case was not chargeable as administrative expense of Chapter 11 estate of general partner; stating that claim of state for unemployment taxes was nevertheless allowable as a seventh priority pursuant to § 507(a)(7)(C), although claim apparently arose postpetition); *In re* Safren, 65 B.R. 566, 571-72 (Bankr. C.D. Cal. 1986) (holding that claim for brokerage services rendered a partnership as a debtor-in-possession survived dismissal of its Chapter 11 case and was assertable against estates of partners in consolidated Chapter 11 cases, but not as priority administrative expense claims); Birmingham Elec. Battery Co. v. Elmer's Auto Parts (*In re* Elmer's Auto Parts), 34 B.R. 63, 66 (Bankr. N.D. Ala. 1983) (declaring that holder of unpaid administrative expense claim arising during course of Chapter 11 case was "free to proceed against the Debtor despite the Debtor's discharge in bankruptcy in any Court having jurisdiction; provided further, that such leave to proceed is stayed so long as Debtor pays $25 per month until the debt is paid in full and Creditor is enjoined from attempting to collect . . . by either civil or criminal process"); *In re* Mann, 4 Bankr. Ct. Dec. (CRR) 514, 523 (Bankr. S.D. Tex. 1978) (although holding that administrative expense claimants were compensable only out of estate, allowing debtor's attorney to be compensated out of postpetition acquisitions of debtor for postpetition services in seeking discharge); Mt. Wheeler Power v. Gallagher, 653 P.2d 1212 (Nev. 1982) (holding that claim for administrative expenses incurred by partnership as Chapter XII debtor in receiving electrical services was collectible from partners after case was closed); *cf.* Texas & Pac. Ry. Co. v. Manton, 164 U.S. 636, 639-41 (1897) (holding debtor liable for tort inflicted during operations of railroad by equity receiver where debtor had

Section 348, which prescribes the effects of conversion of a case, generally provides that a preconversion claim shall be treated as a prepetition claim but excepts from that provision a claim specified in section 503(b).[305] Accordingly several cases have recognized continuing priority in a converted case for administrative claims that arose in the superseded Chapter 11 case.[306] The surviving priority has not been protected, however, against subordination to administrative claims arising in a superseding Chapter 7 case.[307]

In a recent case, *In re Benjamin Coal Co.*,[308] the Court of Appeals for the Third Circuit acknowledged the argument of a creditor for priority for a postpetition loan and for its continuity under section 348(d). However, the court rejected the argument on the ground that the confirmation of the plan had discharged the preconfirmation priority claim and that the new

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procured or at least acquiesced in termination of receivership without a sale of the assets, and restoration of the assets to the debtor was deemed to be subject to an assumption by the debtor of liability for valid, unpaid claims against the receiver); *In re* Cardinal Indus., 151 B.R. 833 (Bankr. S.D. Ohio 1992) (equipment lessor's claims against general partner, a Chapter 11 debtor, based on postpetition modification of leases with limited partnerships, denied classification as administrative expense since no direct and substantial benefit to partner's estate was shown; postpetition debt of partnership said, however, not to be precluded from constituting administrative claim against general partner as a matter of law).

305. 11 U.S.C. § 348. Section 348(d) provides:

> A claim against the estate or the debtor that arises after the order for relief but before conversion in a case that is converted under section 1112 . . . of this title, other than a claim specified in section 503(b) of this title, shall be treated for all purposes as if such claim has arisen immediately before the date of the filing of the petition.

306. *In re* Peter DelGrande Corp., 138 B.R. 458, 461-62 (Bankr. D.N.J. 1992) (holding that interest accruing on Chapter 11 debtor's postpetition tax liability retained status as administrative expense notwithstanding conversion be first priority); White Front Feed & Seed, v. State Nat'l Bank (*In re* Ramaker), 117 B.R. 959, 962 (Bankr. N.D. Iowa 1990) (holding that, despite failure of farm reorganization, expenses incurred in farm operation retained administrative expense priority after conversion); *In re* Iberis Int'l, Inc. 72 B.R. 624, 627 (Bankr. W.D. Wis. 1986); *In re* Kaleidoscope of High Point, Inc., 56 B.R. 562, 564 (Bankr. M.D.N.C. 1986).

307. *In re* Peter DelGrande Corp., 138 B.R. at 462 n.6; *White Front Feed & Seed*, 117 B.R. at 962; *In re* Kaleidoscope of High Point, Inc., 56 B.R. 562; *In re* Blanton-Smith Corp., 44 B.R. 73, 75 (Bankr. M.D. Tenn. 1984) (administrative expense claimant who waived right to full payment out of Chapter 11 debtor's estate in exchange for perfected security interest in recoveries for preferential transfers nevertheless subordinated to administrative claims for expenses incurred postconversion in Chapter 7 case), *rev'd*, 81 B.R. 440 (M.D. Tenn. 1987). *Blanton-Smith* is criticized by BROUDE, *supra* note 73, at 14-6.

308. 978 F.2d 823, 827 (3d Cir. 1992).

claim created by the plan was merely a contractual nonpriority claim.[309] Since the claimant in the *Benjamin* case had "failed timely to file his 'new' contractual claim in [the debtor's] Chapter 7 case," the court disallowed the claim.[310]

An issue similar to that discussed in the previous paragraph arises when a Chapter 11 debtor fails to perform an obligation assumed in a confirmed plan and then files a second Chapter 11 petition. Section 348(d) does not apply, and the courts have generally rejected creditors' arguments for survival of the priority of an administrative expense claim against the estate of the Chapter 11 debtor in the second Chapter 11 case. The most noteworthy case of this genre is *In re Jartran, Inc.*,[311] where the Seventh Circuit recognized the propriety of the filing of a second Chapter 11 petition when the debtor was seeking liquidation rather than reorganization. The bankruptcy court,[312] district court,[313] and court of appeals[314] rejected efforts of creditors to assert priority for administrative expenses deemed to have been incurred during the first Chapter 11 case.[315]

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309. The *Benjamin* case was followed in Prudential Ins. Co. of Am. v. Erie Hilton Joint Venture (*In re* Erie Hilton Joint Venture), 157 B.R. 244 (Bankr. W.D. Pa. 1993) (holding that, after confirmation of Chapter 11 plan and conversion of case to one under Chapter 7, creditor's sole remedy for nonpayment of administrative expense as provided in Chapter 11 plan was the filing of a proof of claim in the Chapter 7 case; stating that creditor did not retain right to administrative claim after confirmation but only to contractual right to full payment of claim in accordance with the plan).

310. *Benjamin Coal*, 978 F.2d at 828; *see also infra* note 314 (noting the similar fate of the administrative expense claim in the *Jartran* case).

311. 886 F.2d 859 (7th Cir. 1989), *aff'g* 87 B.R. 525 (N.D. Ill. 1988), *aff'g* 71 B.R. 938, 944-45 (Bankr. N.D. Ill. 1987). The *Jartran* case is further discussed *infra* text accompanying notes 411-418.

312. 71 B.R. at 945 (denying creditor's claim to administrative claim priority for $1,500,000 incurred in marshaling and repossessing leased equipment, because the expense was incurred for the claimant's benefit).

313. 87 B.R. at 528 (affirming bankruptcy court's denial of administrative expense priority for rejection of executory contract during pendency of Chapter 11).

314. 886 F.2d at 870-71 (denying continuity of administrative expense priority from *Jartran I* to *Jartran II*, denying priority to claim for rejection of executory contract during *Jartran I*, and denying priority to claim for postconfirmation expenses because expenses conferred no benefit on estate).

315. *See also In re* Jartran, Inc., 76 B.R. 123, 125-26 (Bankr. N.D. Ill. 1987) (holding that truck lessor's administrative expense claim arising in first Chapter 11 case was discharged by confirmation of plan, stating that unpaid liability under first case plan became unsecured claim in superseding second case, and denying lessor's request for extension of time for filing unsecured claim). *Jartran* was followed in United States v. Shepherd Oil, Inc. (*In re* Shepherd Oil, Inc.), 118 B.R. 741, 747 (Bankr. D. Ariz. 1990) ("The priority that a creditor may have in the initial Chapter 11 proceedings does not necessarily carry over in the subsequently filed Chapter 11 proceedings if the debtor has

The Seventh Circuit distinguished *Jartran* in a subsequent case that sustained a claim to a continuing priority for trust fund taxes after confirmation of a plan in its first Chapter 11 case and the filing of a second case by the same debtor.[316] The Third Circuit in *Benjamin Coal* appropriately questioned the Seventh Circuit's disregard of the mandate of section 1141(d) discharging all preconfirmation claims, including tax claims.[317]

8. Dischargeability of Liability to Disgorge a Voidable Preference

Whether the right of a debtor-in-possession or trustee to recover a voidable preference from a preconfirmation creditor was a dischargeable claim has been considered in at least two cases. In *Fonda Group, Inc. v. Contemporary Packaging Corp. (In re Fonda Group, Inc.)*,[318] the court found no reason to exclude such a right from the scope of a "claim" that must be filed within the time prescribed by the court in the transferee creditor's case. Fonda filed an adversary proceeding, in the court where its Chapter 11 case was pending, to avoid a preference allegedly received by Contemporary. The proceeding was filed eight months after confirmation of a plan of reorganization had been entered in Contemporary's Chapter 11 case. Contemporary argued that the confirmation in its case constituted a discharge of any obligation to return the preference. Citing *In re Remington Rand Corp.*[319] for the proposition that a claim arises under the Bankruptcy Code only when the claimant knows of its existence, the court ruled that Contemporary would "have to establish at trial not only Fonda's knowledge of Contemporary's Chapter 11 case but also knowledge of the bar dates within which Fonda had to file or otherwise give notice of its claim."[320] After citing *New York v. New York, N.H. & H.R. Co.*[321] and its progeny,[322] the court added cryptically, "The applicability of those cases may be limited by reason of the fact that Fonda was not a 'creditor.'"[323]

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engaged in serial filings of Chapter 11 petitions.") (citing *Jartran*, 886 F.2d 859).

316. *In re* Official Comm. of Unsecured Creditors of White Farm Equip. Co., 943 F.2d 752 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1292 (1992).

317. *In re* Benjamin Coal Co., 978 F.2d 823, 828 (3d Cir. 1992) (pointing out that the Senate version of § 1141(d)(2) had saved certain taxes from discharge, but that the Senate acceded to the House's objections to the "undesirable uncertainty surrounding [corporate or partnership] reorganizations" that would result from retaining an exception of taxes from discharge).

318. 108 B.R. 962, 966, 970-71 (Bankr. D.N.J. 1989).

319. 836 F.2d 825 (3d Cir. 1988), *discussed supra* note 125.

320. 108 B.R. at 966.

321. 344 U.S. 293 (1953).

322. *See supra* text accompanying notes 99-115.

323. 108 B.R. at 966. The court's rejection of Contemporary's defenses of equitable

In *Ossen v. First Software Corp. (In re Northeastern Software)*[324] the court likewise assumed that the rules governing the filing of claims were applicable to a transferor's avoidance proceeding. Accordingly, the court denied the transferee's motion for summary judgment. The transferee's position was predicated on the transferor's failure to file a proof of claim and on the transferee's lack of knowledge that the transferor had a "preference claim." The transferee was a Chapter 11 debtor whose plan had been confirmed in February 1987, nearly four months after the transferor had filed its Chapter 11 petition, but a month before the transferor filed an adversary proceeding in its own Chapter 11 case to recover $648,649.42 in preferential payments. The court cited cases that differed about what constitutes adequate notice when a debtor does not know about a creditor's claim and the creditor has knowledge of the debtor's bankruptcy case. However, the court explained that it did not have to resolve the conflict among the cases because a dispute existed about whether the transferee knew of the transferor's claim. Inferentially such knowledge would have imposed a duty on the transferee to give notice to the transferor of the bar date for filing claims and perhaps other relevant dates in the transferor's Chapter 11 case. To convert a transferor of a preference into a creditor because of the possibility of a future avoidance proceeding is a distortion of the ordinary meaning of the term as used in the Bankruptcy Code and the Rules of Bankruptcy Procedure.[325]

The implication of the courts' treatment of the right to avoid a preference as a claim that must be filed within the time limitations, and subject to the other requirements that apply to a claim as the term is used in subchapter I of Chapter 5 of the Bankruptcy Code and in Part III of the Rules of Bankruptcy Procedure, is at best questionable. Indeed, it is contrary to the understanding underlying the provisions of the Code and Rules that apply to claims to construe them as applicable to avoidance proceedings under Subchapter III of Chapter 5 of the Code and the Rules

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and judicial estoppel and res judicata was not exceptionable. Contemporary contended that when Fonda requested orders reducing and expunging claims, including that of Contemporary, it should have joined its claim against Contemporary based on voidable preferences. But the court answered that Bankruptcy Rule 7018 does not mandate joinder of claims and that Rule 7013 does not compel the filing of a counterclaim. The court further suggested that § 546(a)(1) may contain a subtle accommodation of a debtor's inclination to leave a preference intact. *Id.* at 969-70.

324. 111 B.R. 387 (Bankr. D. Conn. 1990).

325. Thus, in Koch Refining Co. v. Farmers Union Central Exchange, Inc., 831 F.2d 1339, 1351-52 (7th Cir. 1987), *cert. denied*, 485 U.S. 906 (1988), the court held that potential defendants in preference actions brought by the trustee could not be considered "creditors" for the purpose of enabling the trustee to sue under § 544(b) to avoid a transfer voidable by creditors under nonbankruptcy law.

governing adversary proceedings under Part VII. Insofar as *Fonda Group* or *Northeastern Software* hold or suggest that any entity which has received a preconfirmation transfer remains vulnerable to postconfirmation avoidance of the transfer unless it can establish its ignorance of the transferor's case or, alternatively, monitors the transferor's case and makes certain that the transferee receives formal notice of all the steps in the transferor's case, these cases can hardly be taken seriously. The court in *Fonda Group* avoided a determination about whether the transferor could file a claim and limited its authority to a determination of whether the transferor had a preference claim, leaving to the court where Contemporary's case was pending, to determine how the claim should be treated.[326] The court in *Northeastern Software* simply denied the transferee's motion for summary judgment because of its failure to carry the burden of showing its lack of knowledge of the transferor's claim.[327]

9. Nondischargeability of Postconfirmation Claims

Confirmation of a Chapter 11 plan does not discharge a postconfirmation claim.[328]

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326. 108 B.R. at 970-71.

327. 111 B.R. at 390-91.

328. Shure v. Vermont (*In re* Sure-Snap Corp.), 983 F.2d 1015, 1018-19 (11th Cir. 1993) (holding that confirmation did not discharge liability of debtor for attorney's fees incurred in defending postconfirmation appeal initiated by the debtor); Bank of La. v. Pavlovich (*In re* Pavlovich), 952 F.2d 114 (5th Cir. 1992) (holding that, although creditor was bound by confirmation order insofar as it discharged debtor's liability for preconfirmation debts and acts, creditor whose claims arose from and after confirmation as not barred from asserting such claims), *discussed in* Zaretsky, *supra* note 75, at 3; *In re* Central R.R., 950 F.2d 887 (3d Cir. 1991) (holding that claim of former employee against successor-in-interest to railroad reorganized under § 77 of the Bankruptcy Act accrued under both bankruptcy and nonbankruptcy law when claimant discovered or reasonable persons would have discovered injury resulting from exposure to toxic substances while working for railroad; denying successor's request for injunctive relief against prosecution of lawsuits under Federal Employers' Liability Act, notwithstanding provision of § 77 rendering property dealt with by reorganization plan free and clear of claims of creditors), *cert. denied*, 112 S. Ct. 1586 (1992); Zulkowski v. Consolidated Rail Corp., 852 F.2d 73, 77-78 (3d Cir.), *cert. denied*, 488 U.S. 994 (1988), *cited supra* note 182; Farber v. Wards Co., 825 F.2d 684, 691-92 (2d Cir. 1987) (rejecting debtor's argument that landlord's claim for damages for breach of lease in failing to remove fixtures on termination of lease should be dismissed as barred by discharge or allowed as prepetition claim entitled to distribution as an unsecured claim); Schweitzer v. Consolidated Rail Corp., 758 F.2d 936, 943-44 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985), *cited and discussed supra* text accompanying notes 173-179; Continental Country Club, Inc. v. Burr (*In re* Continental Country Club, Inc.), 114 B.R. 763, 767-68 (Bankr. M.D. Fla. 1990) (holding that claim of former employee of reorganized debtor for

III. POSTCONFIRMATION PROCEEDINGS

A. Implementation of Plan

The Bankruptcy Code contemplates that the court will, to the extent necessary, enter orders to effectuate or implement the plan. Section 1142(a) of the Bankruptcy Code directs the debtor and any entity organized to carry out a plan to comply with "any orders of the court."[329] Section 1142(b) expressly authorizes the court to

> direct the debtor and any other necessary party to execute or deliver or to join the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan.[330]

Generally speaking, the provisions of a confirmed plan are intended to preempt otherwise applicable law. Congress attempted to express this intent by providing in Bankruptcy Code section 1142(a) that "[n]otwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court."[331] The Bankruptcy Commission's

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termination wages under employment contract was not discharged by confirmation of plan since claim arose postconfirmation); Pennsylvania Iron & Coal Co. v. Good (*In re* Pennsylvania Iron & Coal Co.), 56 B.R. 492 (Bankr. S.D. Ohio 1985) (holding debtor liable for reasonable value of postconfirmation storage notwithstanding rejection by plan of contract of bailment of debtor's truck to defendant). But in *In re* Pettibone Corp., 151 B.R. 178 (Bankr. N.D. Ill. 1992), the court held that a confirmed plan barred the allowance of postconfirmation interest to products liability claimants, even though there was adequate insurance to cover the interest.

In *In re* Piper Aircraft Corp., 162 B.R. 619 (Bankr. S.D. Fla. 1994), the bankruptcy court disallowed a claim for $10,000,000 filed by a legal representative on behalf of persons asserting liability by the debtor based on postconfirmation events. The court emphasized that it was not determining whether any or all holders of future claims against the debtor based on postconfirmation events may have a future nonbankruptcy remedy.

329. 11 U.S.C. § 1142(a) (1988). *See* Lewis U. Davis, Jr. et al., *Corporate Reorganizations in the 1990s: Guiding Directors of Troubled Corporations Through Uncertain Territory*, 47 BUS. LAW. 1, 30-31 (1991).

330. 11 U.S.C. § 1142(b). *See* Lander & Warfield, *supra* note 73, at 205-06.

331. 11 U.S.C. § 1142(a); *see* Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n, 997 F.2d 581, 587 n.11 (9th Cir. 1993) ("Regardless of any plan provision, a bankruptcy court has statutory jurisdiction under 11 U.S.C. § 1142(b) to ensure that any act necessary for the consummation of the plan is carried out and it has continuing responsibilities to satisfy itself that the plan is being properly implemented."); Findley

proposed Bankruptcy Act of 1973 was more specific; section 7-312(a) stated that

> the debtor and any corporation organized for the purpose of carrying out the plan shall have full power and authority to take all action necessary to carry out the plan and the orders of the court, notwithstanding any law or court decision or regulation of any regulatory agency of any state or subdivision thereof to the contrary, except that if the debtor is a public utility, the debtor or any successor corporation shall obtain the consent of any regulatory agency having jurisdiction over the debtor as to any rate change.[332]

The Bankruptcy Code expressly deals only with jurisdiction over public utility rates. Section 1129(a)(6) of the Bankruptcy Code preserves the authority of the applicable rate-setting body by providing that the court may confirm the plan if "[a]ny governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval."[333] In an attempt to state more clearly the preemption intended, Congress amended section 1123(a) in 1984.[334] This section, which contains the requirements of a plan of reorganization, was amended in its prefatory phrase by adding "[n]otwithstanding any otherwise applicable bankruptcy law."[335] This amendment still left in doubt the preemptive effect as to provisions not found in section 1123, such as the power of local governing bodies over utilities in addition to their power over rates covered by section 1129(a)(6).[336]

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v. Blinken (*In re* Joint E. & S. Dist. Asbestos Litig.), 982 F.2d 721, 750 (2d Cir. 1992) (rejecting objections to postconfirmation appointment of experts to advise on estimating future claims), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993); Chase Manhattan Bank, N.A. v. Sultan Corp. (*In re* Sultan Corp.), 81 B.R. 599, 602 (Bankr. 9th Cir. 1987) (approving postconfirmation award of attorney's fees for legal services rendered by debtor's attorney); *In re* Auto W., Inc., 43 B.R. 761 (D. Utah 1984) (approving postconfirmation employment of counsel to represent debtor in state court litigation); *In re* Tri-L Corp., 65 B.R. 774, 779 (Bankr. D. Utah 1986) (allowing administrative claim for postconfirmation legal services performed in aid of consummation of Chapter 11 plan and pursuant to plan's directives); *see also* 11 U.S.C. § 1123(a), *discussed infra* notes 334-336 and accompanying text. *See generally* BROUDE, *supra* note 73, §§ 9.01, 14.02[1].

332. REPORT II, *supra* note 7, at 255-56.

333. 11 U.S.C. § 1129(a)(6).

334. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, sec. 449, § 507(a), 98 Stat. 333, 374.

335. 11 U.S.C. § 1123(a).

336. Section 7-310(d) of the proposed Bankruptcy Act of 1973, which contained the prerequisites of confirmation, provided in subparagraph 2(F) that a regulatory

A rather plain vanilla example of the exercise of postconfirmation implementation authority is *Texas Extrusion Corp. v. Lockheed Corp. (In re Texas Extrusion Corp.)*.[337] In that case, the court directed counsel for the debtors to execute documents. An unusual example of an implementation order was an order of a bankruptcy court appointing a trustee postconfirmation, despite the objection of the United States trustee that the plan must provide its own liquidating agent.[338]

In addition to Bankruptcy Code section 1142 and the inherent power of a court to enforce its own decrees, section 105 of the Bankruptcy Code is another source of power for the court to enter orders implementing plans. Additional support is found in Bankruptcy Rule 7070, which incorporates Rule 70 of the Federal Rules of Civil Procedure. Although this rule applies only in adversary proceedings, the court is empowered under Bankruptcy Rule 9014 to make it applicable to contested matters. Thus, the power of the court to direct a party to perform some act required under the plan is express under Bankruptcy Rule 7070. Moreover, this power can be exercised either in an adversary proceeding initiated to compel performance or by way of a motion to compel performance pursuant to Bankruptcy Rule 9013, unless Rule 7001(7), which defines an adversary proceeding to include one to obtain an injunction or other equitable relief, compels the filing of an adversary proceeding.[339]

B. Modification of Plan

The Bankruptcy Act and the Bankruptcy Rules applicable to reorganization cases allowed the modification of plans postconfirmation. If the modification materially and adversely affected the interests of creditors or

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commission must approve a rate change. REPORT II, *supra* note 7, at 253. This approach was followed in the Bankruptcy Code, and § 1129(a)(6) at best gives only a negative inference that regulatory commissions are preempted as to other matters, *e.g.*, the capital structure of the reorganized utility, and perhaps as to rate changes during the pendency of a Chapter 11 case. The Bankruptcy Code failed to include a provision like that of § 7-312(a) of the Proposed Bankruptcy Act of 1973. *See supra* text accompanying note 332.

337. 844 F.2d 1142, 1153-54 (5th Cir.) (relying on FED. R. BANKR. P. 7070, which applies FED. R. CIV. PROC. 70 to adversary proceedings), *cert. denied*, 488 U.S. 926 (1988).

338. *In re* Nigg, 63 B.R. 630 (Bankr. D.S.D. 1986). *Contra In re* U.S. Truck Co., 47 B.R. 932 (E.D. Mich. 1985), *aff'd*, 800 F.2d 581 (6th Cir. 1986).

339. In Harlow v. Palouse Producers Inc. (*In re* Harlow Properties, Inc.), 56 B.R. 794, 797-98 (Bankr. 9th Cir. 1985), an adversary proceeding was used to compel a recalcitrant debtor to transfer property pursuant to the provisions of a confirmed plan. The Ninth Circuit Bankruptcy Appellate Panel reversed the bankruptcy court's order compelling the transfer due to a failure to serve the complaint on the debtor's principals.

stockholders in a Chapter X case, a hearing was necessary. Neither section 222 of the Bankruptcy Act nor former Rule 10-306 specified a standard for approval of a modification of a Chapter X plan by the court. Section 222 did not limit standing to propose a modification. Section 229c did, however, preclude material and adverse modification of a Chapter X plan after substantial consummation.[340]

The provisions of Chapter XI differed. Only the debtor could propose a Chapter XI plan or its modification.[341] Postconfirmation modification was dependent on an express reservation of jurisdiction to do so; however, even this power over the time of payment of deferred installments or a reduction in the amount of the payments was precluded if the payments had been fully made or were represented by negotiable promissory notes that had been delivered to creditors.[342]

Postconfirmation modification under Chapter XII of confirmed real property arrangements was permitted by section 469 of the Bankruptcy Act. This section required that the court authorize the modification, but no standard was provided. Unlike Chapters X and XI, Chapter XII included no provision for an express end to the modification power.

The proposed Bankruptcy Act of 1973 utilized a different approach to modification. Reorganizations that were routed on four tracks under Chapters VIII, X, XI, and XII of the Bankruptcy Act were channeled onto a single track in Chapter 11. Professor Lawrence P. King was the initial draftsman. He was also the Reporter for the Chapter X, XI, and XII Rules and used an early draft of the Chapter X Rules as the basis for the first draft of the consolidated chapter. Thus, Chapter VII of the Proposed Bankruptcy Act of 1973 took on the appearance of Chapter X in large part. Section 7-305 thereof allowed a material and adverse modification up to the point of substantial consummation. This approach was followed in Bankruptcy Code section 1127(b), which allows the proponent of a plan or the reorganized debtor to modify a confirmed plan prior to substantial consummation.[343]

There has been some litigation about the meaning of substantial consummation, a defined term under Chapter 11.[344] For example, in *In re*

340. *See* Bankruptcy Act § 229c, 11 U.S.C. § 629(c) (1976) (repealed 1978).

341. Bankruptcy Act §§ 306, 363, and 387(1), 11 U.S.C. §§ 706, 763, and 787(1) (1976) (repealed 1978); *see also* Bankr. R. 11-36(a), 11-39, and 11-40.

342. If fraud was "practiced" in procuring confirmation, modification was also permitted. Bankruptcy Act § 386, 11 U.S.C. § 786 (1976) (repealed 1978).

343. 11 U.S.C. § 1127(b) (1988). Surprisingly, there has been litigation about whether one other than the proponent or reorganized debtor may propose a material and adverse modification. *See* Solon Automated Servs., Inc. v. Georgetown of Kettering, Ltd. (*In re* Georgetown of Kettering, Ltd.), 22 B.R. 312 (Bankr. S.D. Ohio 1982) (precluding proposed modification by other than reorganized debtor or plan proponent).

344. 11 U.S.C. § 1101(2).

Heatron,[345] the bankruptcy court concluded that completion of 53% of the payments required under the plan did not constitute substantial consummation.[346] Although the debtor satisfied the third prong of the definition—"commencement of distribution under the plan"[347]—it did not satisfy the first prong—"transfer of all or substantially all of the property proposed by the plan to be transferred."[348] The court thus equated payments to transfers of property. The *Heatron* case has been criticized for eviscerating the third prong of the definition.[349]

Not surprisingly there has been litigation as to the meaning of "transfer" as used in this definition. In *Federal Land Bank of Louisville v. Gene Dunavent & Son Dairy (In re Gene Dunavent & Son Dairy)*,[350] the court held that delivery into escrow pending the outcome of an appeal did not constitute a transfer within the meaning of the definition of substantial consummation. On the other hand, in *Hyman v. University Cafeteria, Inc. (In re University Cafeteria, Inc.)*,[351] the court held that the sale of a majority of the debtor's assets was sufficient to constitute substantial consummation.

Courts have attempted to circumvent the limits on modification. For example, in the *Manville* reorganization the first attempt was successful.[352] There, the trustees of the trust created under the plan made a motion to suspend operation of the claims resolution facility when there would no longer be funds available to make payments. The court upheld this action as a variation with respect to timing and intensity of claim processing, rather than a modification prohibited by section 1127(b).

The second effort, however, was unsuccessful, but only at the appellate level.[353] This effort involved much more pervasive changes. Again, propo-

345. 34 B.R. 526 (Bankr. W.D. Mo. 1983).

346. *Id.* at 529; *see also* Jorgenson v. Federal Land Bank (*In re* Jorgenson), 66 B.R. 104 (Bankr. 9th Cir. 1986). *Contra In re* Hayball Trucking, Inc., 67 B.R. 681 (Bankr. E.D. Mich. 1986). *See generally* Lander & Warfield, *supra* note 73; Renata D. Kendrick, Note, *Postconfirmation Modification of the Plan of Reorganization: Section 1127(b)*, 5 BANKR. DEV. J. 211 (1987).

347. 11 U.S.C. § 1101(2)(C).

348. *Id.* § 1101(2)(A).

349. BROUDE, *supra* note 73, at 14-27. The National Bankruptcy Conference has proposed an amendment to § 1101(2) to make it clear that the "transfer of property" test of subparagraph (H) does not include distribution to creditors as covered by subparagraph (C). NBC Draft, *supra* note 70, at 90.

350. 75 B.R. 328, 331-33 (Bankr. M.D. Tenn. 1987).

351. 47 B.R. 404 (Bankr. W.D. Va. 1985).

352. State Gov't Creditors' Comm. for Property & Damage Claims v. McKay (*In re* Johns-Manville Corp.), 920 F.2d 121 (2d Cir. 1990).

353. Findley v. Blinken (*In re* Joint E. & S. Dist. Asbestos Litig.), 982 F.2d 721 (2d

nents of the changes argued that they were not modifications. The Second Circuit did not agree, concluding that they were modifications precluded by section 1127(b). Nonetheless, the Second Circuit left open the possibility of substantial changes under the guise of a settlement of a "mandatory non-opt-out class action" under Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure. The Second Circuit recognized that the class action rule does not have the protections afforded by the Bankruptcy Code and that a substantial question exists as to whether a class action "may be used against an insolvent entity to adjust the claims of creditors *vis-a-vis* each other, without observing the protections that would be available under bankruptcy law."[354] However, the Second Circuit felt bound by its decision in *SEC v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.)*,[355] in which it approved an adjustment of creditors' rights against an insolvent entity. Since the change was successful only because "the rights of the plaintiff class [were] revised *vis-a-vis* each other and consent to the resulting settlement [was] given by representatives who purport to represent the undifferentiated class of plaintiffs as a whole, rather than the interests of each of the subclasses whose rights are being altered,"[356] the court remanded the case for further proceedings not inconsistent with the opinion.

The confirmed plan in the *Manville* case established a trust for the purpose of satisfying "asbestos claims." The trust was funded with substantial assets,[357] but "[d]espite this funding, it soon became apparent that the liquidation of the claims of thousands of asbestos victims was substantially depleting the Trust's cash. . . . By the spring of 1990, 'the Trust was effectively out of money to pay its current and short term obligations.'"[358]

At the instigation of District Judge Weinstein a non-opt-out class action under Rule 23(b)(1)(B) was filed, accompanied by a proposed and agreed settlement of the class action.[359]

> On the day the complaint was filed, District Judge Weinstein and Bankruptcy Judge Lifland (hereafter "the Trial Courts") jointly entered orders to show cause why orders should not be entered (a) conditionally certifying the class, (b) appointing a legal representative for beneficiaries

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Cir. 1992), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993).

354. *Id.* at 736.

355. 960 F.2d 285 (2d Cir. 1992), *cert. dismissed*, 113 S. Ct. 1070 (1993), *and cited in Findley*, 982 F.2d at 737-39.

356. *Findley*, 982 F.2d at 739.

357. *See id.* at 725.

358. *Id.* at 726.

359. *Id.* at 727.

> of the Trust who have not yet asserted asbestos claims, and (c) staying all proceedings against the Trust pending determination of the class action. A hearing was scheduled for November 23, four days after the complaint was filed (and the day after Thanksgiving). On November 23, after hearing oral argument, the Trial Courts entered orders (1) conditionally certifying the class and appointing representative counsel, (2) setting fairness hearings in four cities and approving a form of notice, (3) staying payments by the Trust, (4) staying proceedings against the Trust, (5) making exceptions to the order staying proceedings, and (6) appointing counsel as representatives for defendants, other than the Trust, in pending asbestos litigation.
>
> Copies of the foregoing orders were mailed to counsel for each known claimant and each co-defendant and to approximately 1,500 pro se claimants. Copies were also distributed to all courts in which the Trust was a party to litigation, and to various other interested persons. Notice of the proposed settlement was published in 11 major newspapers. Hearings on the fairness of the proposed settlement were conducted in four cities. The hearings, conducted over eight days, received evidence from proponents of the settlement and objectors. Thirty-seven witnesses and attorneys were heard.
>
> On February 3, 1991, the Trial Courts issued an Order and Partial Judgment, certifying a mandatory non-opt-out class under Rule 23(b)(1)(B). At that time a motion by a member of the class to opt out was denied.[360]

The settlement established a distribution mechanism that divided the claims into two levels and discriminated as to the treatment of the two levels.[361] Several challenges to the ruling were made on appeal. The ones relied on by the Second Circuit in vacating the judgment were (1) inappropriate subclasses[362] and (2) impermissible modification of a confirmed plan.[363]

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360. *Id.* at 728-29 (citations omitted).

361. *Id.* at 729.

362. The court stated:

> We are therefore willing to permit the use of such a class action in the pending case, so long as there exists, as occurred in Drexel, appropriate designation of subclasses to provide assurance that the consent of groups of claimants who are being treated differently by the settlement is being given by those who fairly and adequately represent only the members of each group. The inevitable tension between the limited protections of Rule 23 and the more complete protections of the Bankruptcy Code is strained by any use of a mandatory non-opt-out class to settle claims against an insolvent entity that is subject to bankruptcy jurisdiction. But that tension reaches the breaking point when, instead of the traditional limited fund settlement that achieves a pro rata reduction of the claims of all members of the plaintiff class, the rights of the plaintiff class are revised vis-a-vis each other and consent to the

The Second Circuit panel that decided the appeal[364] was very wary of the use of Rule 23(b)(1)(B) as a means of settling creditors' claims against an insolvent entity.[365] The protections afforded creditors under Rule 23(b)(1)(B) are considerably weaker than those offered under the Bankruptcy

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resulting settlement is given by representatives who purport to represent the undifferentiated class of plaintiffs as a whole, rather than the interests of each of the subclasses whose rights are being altered.

Id. at 739.

363. The court also stated:

> Though the Trial Courts relied primarily on the exercise of diversity jurisdiction and the application of Rule 23(b)(1)(B) as authority to approve the Settlement restructuring the Trust, they also invoked their bankruptcy jurisdiction to some unspecified extent. We therefore proceed to inquire whether approval of the Settlement is valid in the exercise of the Trial Courts' bankruptcy jurisdiction. The objecting health claimants contend that the modification of their rights as Class-4 creditors is not authorized by the Plan or its attached documents and, in any event, violates section 1127 of the Code. We consider first the amending authority within the Plan.

Id. at 745-46.

364. Circuit Judges Feinberg, Newman, and Winter.

365. *See Findley*, 982 F.2d at 735-36:

> The Trial Courts concluded that the insolvency of the Manville Trust rendered it a "limited fund." Plainly, insolvency does not present the classic instance of a "limited fund," such as would be involved if a group of claimants asserted claims of an aggregate amount that would deplete a fixed sum of money. Whether, and for what purposes, (b)(1)(B) may be used with respect to an insolvent entity are perplexing issues that we would have expected to have received more extended consideration than is apparent in the cases thus far decided.
>
> With respect to aggregate claims in excess of a fixed sum of money, a (b)(1)(B) class action is appropriate to avoid an unfair preference for the early claimants at the expense of later claimants. With respect to an insolvent entity, however, bankruptcy law is normally the source of protection to assure a fair and orderly distribution of assets insufficient to meet claims. Insolvency exerts powerful pressures upon contending creditors to compromise their positions so that a fair distribution of assets is achieved—through a reorganization that contemplates the continuation of the debtor where feasible, and otherwise through liquidation. To lessen the risk that these pressures will lead to unfair compromises, bankruptcy law provides numerous safeguards not contained in class action procedures. For example, for a plan of reorganization to be approved, the plan must be put to a vote of all members of impaired classes of creditors, 11 U.S.C. § 1126, the vote is taken only after a solicitation based on a detailed description of the plan, *id.* § 1125, the plan can be "crammed down" over the objection of a dissenting class of creditors only if strict fairness standards are met, *id.* § 1129(b)(1), and the plan may not be imposed against the wishes of an impaired class that would fare better under liquidation, *id.* § 1129(a)(7).

Code.[366] The panel observed that, but for another Second Circuit panel's recent decision in *In re Drexel Burnham Lambert Group, Inc.*,[367] "which approved a more adventuresome use of a class action settlement to make a non-uniform adjustment of creditors' rights against an insolvent entity,"[368] it would probably not allow the use of mandatory non-opt-out (b)(1)(B) class action. However, as the panel acknowledged, *Drexel* was different in that it involved a "limited fund," and its use was essential to confirmation of a plan of reorganization.

On the question of whether the settlement improperly modified a confirmed, substantially consummated plan, the answer was that the Plan

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366. *See id.* at 736:

> These differences raise a substantial question whether a class action may be used to adjust claims against an insolvent entity that is eligible for bankruptcy protection. And, even if, in the context of insolvency, a "limited fund" class action may be used for its traditional purpose of effecting a pro rata reduction of all claims, an even more substantial question is raised as to whether a class action may be used against an insolvent entity to adjust the claims of creditors vis-a-vis each other, without observing the protections that would be available under bankruptcy law.

(citing *Dickinson v. Burnham,* 197 F.2d 973 (2d Cir. 1952), *cert. denied,* 344 U.S. 875 (1952)).

Interestingly, two of the major cases permitting this use of the Rule have been decided by Judge Weinstein. County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407 (E.D.N.Y. 1989), *aff'd,* 907 F.2d 1295 (2d Cir. 1990); *In re* "Agent Orange" Product Liability Litig., 100 F.R.D. 718 (E.D.N.Y. 1983), *aff'd,* 818 F.2d 145 (2d Cir. 1987), *cert. denied,* 484 U.S. 1004 (1988); *see also* SEC v. Drexel Burnham Lambert Group, Inc. (*In re* Drexel Burnham Lambert Group, Inc.), 960 F.2d 285 (2d Cir. 1992), *cert. dismissed,* 113 S. Ct. 1070 (1993); Abed v. A.H. Robins Co. (*In re* Northern Dist. of Cal., Dalkon Shield IUD Products Liability Litig.), 693 F.2d 847, 851 (9th Cir. 1982), *cert. denied,* 459 U.S. 1171 (1983); Green v. Occidental Petroleum Corp., 541 F.2d 1335 (9th Cir. 1976); Coburn v. 4-R Corp., 77 F.R.D. 43 (E.D. Ky. 1977).

In Keene Corp. v. Fiorelli (*In re* Joint E.& S. Dist. Asbestos Litig.), ___ F.3d ___, 1993 WL 497538 (2d Cir. Dec. 1, 1993), the Court of Appeals for the Second Circuit reaffirmed its reservations about the availability of a class action for dealing with mass tort claims in lieu of resort to the bankruptcy laws. The Keene Corporation, alleging an insufficiency of assets to permit a case-by-case adjudication of all asbestos claims filed against it, filed a mandatory, non-opt-out, limited, final class action under FED. R. CIV. P. 23(b)(1)(B). The court of appeals held the complaint insufficient to state a case or controversy adjudicable by a district court under Article III of the Constitution. Accordingly, the court dismissed the action as an attempt to evade "the *exclusive* legal system established by Congress for debtors to seek relief." *Id.* at *13. For comment on this case, see Charles F. Vihon, *Is Title 11 Totally Preemptive?*, NORTON BANKR. L. ADVISER, Jan. 1994, at 4-6.

367. 960 F.2d 285 (2d Cir. 1992), *cert. denied,* 113 S. Ct. 1070 (1993).

368. *Findley*, 982 F.2d at 737.

documents provided for modification. The panel found, however, that the Plan documents did not do so and, therefore, did not discuss whether this would have been permitted. If permissible, then any plan could waive the limitation of section 1127(b) in that manner.

The panel easily disposed of the argument (and holding below) that the modification was permissible since it was a modification of a Plan document, not of the Plan.[369] As to argument that the modification was a minor change of procedure, the court disagreed, but in any event found no such distinction drawn in section 1127(b).

The court recognized that even though the time to modify had passed, when a case has not been terminated, the court has ongoing jurisdiction. "The Bankruptcy Court has continuing responsibilities to satisfy itself that the Plan is being properly implemented."[370] Unfortunately, the court stated that

> [t]he Plan expressly provides that the Court shall retain jurisdiction for various purposes, including "to determine any and all disputes arising under the Plan, the Trust Agreement . . . and the Settlement Agreements," "to enforce and administer the provisions of the Plan," and "to enter such orders as may be necessary or appropriate . . . to facilitate implementation of the Plan."[371]

The implication is that the plan or order of confirmation controls jurisdiction—a suggestion disagreed with previously in this Article.[372]

The efforts of Judge Weinstein to solve a difficult problem were courageous and imaginative. There does not appear to be any good reason why the non-opt-out procedure cannot work. Judge Weinstein's effort failed

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369. *See id.* at 748:

> The Trial Courts additionally sought to avoid the restrictions of section 1127(b) by contending that the settlement effects no change in the Plan, but only in Plan-related documents. As the Trial Courts' Opinion states, "We have found no case that has applied section 1127(b) to bar variations in a plan-related document." That argument will not suffice. It could be said with equal conviction that no case has ever approved variations in a plan-related document, without regard to section 1127(b), where the effect is to alter substantial rights of creditors. The question remains whether a change that would contravene section 1127(b) if made in the provisions of a plan can be accomplished by modifying the provisions of a plan-related document. The answer must be no.

(citation omitted).

370. *Id.* at 750 (citing *In re* Dilberts' Quality Supermarkets, Inc., 368 F.2d 911, 924 (2d Cir. 1966); *In re* Johns-Manville Corp., 97 B.R. 174, 180 (Bankr. S.D.N.Y. 1989)).

371. *Id.*

372. *See supra* notes 32 and 40 and accompanying text.

only because of improper classification. Given a proper classification it may work, although the Supreme Court might deny the use of Rule 23(b)(1)(B) or hold that it is actually a modification impermissible under section 1127(b). The possible alternatives then would be those pointed out by the majority of the panel:

> We need not consider at this time whether any of the changes in claim adjudication and payment can yet be made by the settlement of a proper class action or by procedures other than the settlement of a class action, such as a Chapter 11 proceeding for the Trust itself (if it qualifies as a business trust, *see* 11 U.S.C. § 101(8)(A)(v)), a "re-open[ing of] all aspects of the Plan" (as suggested by the appellants, Joint Brief for Appellants at 50), a consensual modification of the Plan, or, more likely, a second Chapter 11 proceeding for the debtor.[373]

Like Chapters X, XI, and XII of the Bankruptcy Act, the Bankruptcy Code does not set forth a standard as to when modification is permissible. However, section 1127(b) requires that the plan as modified satisfy requirements of sections 1122 and 1123. Furthermore, the modification is effective only if the court, after notice and hearing, confirms the modified plan under section 1129. Thus, it would appear that the standard for modification is compliance with sections 1122, 1123, and 1129. Nonetheless, at least one bankruptcy judge has required more, such as "unforeseen and uncontrollable intervening circumstances."[374]

Bankruptcy Rule 3019 addresses only modification of an accepted plan before confirmation. It provides that the court can allow the modification if it determines that the modification "does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification."[375] If the court so finds, the modification is "deemed accepted by all creditors and equity security holders who have previously accepted the plan."[376] That procedure seems inconsistent with Bankruptcy Code section 1127(c), which requires that the proponent of a modification comply with section 1125. If so, it is unenforceable since the Bankruptcy Rules cannot vary the provisions of the Bankruptcy Code.[377] The alternative presents difficulties, however, since the

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373. *Findley*, 982 F.2d at 750-51 (citing *In re* Jartran, Inc., 71 B.R. 938 (Bankr. N.D. Ill. 1987), *aff'd*, 87 B.R. 825 (N.D. Ill. 1988), *aff'd*, 886 F.2d 859 (7th Cir. 1989)).

374. *In re* Ernst, 45 B.R. 700, 703-04 (Bankr. D. Minn. 1985); *cf.* Federal Land Bank v. Gene Dunovant & Son Dairy (*In re* Gene Dunovant & Son Dairy), 75 B.R. 328, 333-34 (M.D. Tenn. 1987).

375. FED. R. BANKR. P. 3019.

376. *Id.*

377. 28 U.S.C. § 2075 (1988). Prior to enactment of the Bankruptcy Reform Act of

confirmation process would start anew; that is, the acceptances and rejections previously solicited would be ignored, and an amended disclosure statement and modified plan would have to be filed, the amended disclosure statement approved, and a new vote taken.

As to postconfirmation modification, there is no applicable Bankruptcy Rule. The Code comprehensively regulates this area; any modification must satisfy the requirements of sections 1122, 1123, and 1129, and the proponent of the modification must jump through the section 1125 hoops as well. This conclusion seems perfectly clear; nonetheless, some bankruptcy judges ignore the statute and rule provisions by requiring reballoting only if there is a material, adverse affect.[378] The statute provides some flexibility, however, in that under section 1127(b), the holder of a claim or interest must change its previous acceptance or rejection, or it will be deemed to have accepted or rejected in accordance with its prior vote.

Modification of a plan should be distinguished from modification of an order of confirmation. Bankruptcy Rules 9023 and 9024 make applicable the post-judgment motion practice of Rules 59 and 60 of the Federal Rules of Civil Procedure. These rules apply to confirmation orders since they are applicable generally in cases under the Bankruptcy Code.

A request for a new trial, alteration, or amendment of an order of confirmation must be served within ten days after the entry of the order under Federal Rule 59, which is applicable without relevant modification by way of Bankruptcy Rule 9023. Thereafter, relief is available under Federal Rule 60. Bankruptcy Rule 9024, however, expressly limits the relief under Federal Rule 60 as to complaints seeking revocation of an order of confirmation for fraud to those filed within the 180 days allowed by Bankruptcy Code section 1144, not the one year allowed for motions based on fraud under Federal Rule 60(b). Federal Rule 60 allows a motion based on mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, or any other reason justifying relief from the operation of the order, in addition to fraud, misrepresentation, or other misconduct of an adverse party. Accordingly, it is arguable that an order of confirmation could be set aside on grounds other than fraud within the Rule 60(b) time limit of a reasonable time not to exceed a year where the motion is grounded on, *e.g.*, mistake or newly discovered evidence.

The relevant exception, Bankruptcy Rule 9024(3), shortens the time

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1978, 28 U.S.C. § 2075 provided that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C. § 2075 (1976), *amended by* Pub. L. No. 95-598, § 247, 92 Stat. 2549, 2672 (1978). According to the Advisory Committee Note to Rule 1001 of the Bankruptcy Rules, "The effect of the amendment is to require that procedural rules . . . be consistent with the bankruptcy statute, both title 11 and 28 U.S.C."

378. Davis et al., *supra* note 329, at 30-31.

within which to file a complaint to revoke an order of confirmation for fraud to 180 days consistent with section 1144 of the Bankruptcy Code. It is uncertain whether an order of confirmation can be set aside after ten days but within 180 days where relief is sought under Federal Rule 60(b) on a basis other than fraud. Section 1144, read literally, precludes revocation other than for fraud.

It is hard to determine from Bankruptcy Rule 9024 what was intended; it appears to conflict with section 1144. Likewise, Bankruptcy Rule 9023 arguably conflicts with section 1144. *In re Birdneck Apartment Associates, II, L.P.*[379] involved an intentional omission of notice to counsel for a secured creditor of a hearing on confirmation of a plan that would adversely affect the creditor's secured claim. The plan was confirmed, and after hearing of this, counsel for the secured creditor filed a motion to vacate the order of confirmation under Federal Rules 60(b)(3) and (6), as made applicable by Bankruptcy Rule 9024. Without discussion of 11 U.S.C. § 1144, the court vacated the order of conformation under Federal Rule 60(b)(6).

C. Revocation of Order of Confirmation of Plan

Fraud as used in section 1144 is undefined, but it probably should be the "but for" cause of the order of confirmation, since section 1144 states that the order must be procured by fraud before it can be revoked by the court. One bankruptcy judge faced with a revocation complaint concluded that section 1144 required "that a showing be made that the court relied thereon and that a creditor or other party was damaged thereby."[380]

Those who rely in good faith on the order of confirmation are to be protected under section 1144(1). The order of revocation must "contain such provisions as are necessary to protect any entity acquiring rights in good faith reliance on the order of confirmation."[381] Examples of fraud in the cases include misrepresentations to the court as to the value of property as well as a materially defective disclosure.[382] One court distinguished between fraudulent intent and an intent to defraud, although the distinction

379. 152 B.R. 65 (Bankr. E.D. Va. 1993).

380. United States v. Kostoglou (*In re* Kostoglou), 73 B.R. 596, 599 (Bankr. N.D. Ohio 1987); *see also* Official Comm. of Unsecured Creditors v. Michelson (*In re* Michelson), 141 B.R. 715 (Bankr. E.D. Cal. 1992).

The requirement of court reliance raises interesting problems, *e.g.*, the applicability of FED. R. EVID. 605.

381. 11 U.S.C. § 1144(1) (1988).

382. Bankers Trust Co. v. Rhoades, 108 B.R. 423 (S.D.N.Y. 1989); Bill Roderick Distrib., Inc. v. A.J. Mackay Co. (*In re* A.J. Mackay Co.), 50 B.R. 756, 760 (D. Utah 1985).

is not self-evident.[383]

Even the procedural aspects of revocation are uncertain. Authorities differ as to whether a complaint under the adversary rules or a motion under the contested proceeding rules is the appropriate procedural vehicle. Certainly a complaint is appropriate under Bankruptcy Rule 7001(5), but that may not mean that a motion under Bankruptcy Rule 9024 is inappropriate. Indeed, such a motion would seem to be most appropriate because a proceeding is pending, and requiring a new proceeding to be initiated would be anomalous.

D. Conversion of Case

A Chapter 11 case may be converted under section 1112(b) for a variety of reasons. Conversion can occur after confirmation of a plan, since section 1112(b) allows the court to convert to Chapter 7 for cause, including "inability to effectuate substantial consummation of a confirmed plan,"[384] "material default by the debtor with respect to a confirmed plan,"[385] and "termination of a plan by reason of the occurrence of a condition specified in the plan."[386] A debtor probably cannot convert a Chapter 11 case to a Chapter 7 case after confirmation, except pursuant to section 1112(b), since section 1112(a) allows only a debtor-in-possession to do so. Although it is not certain, it is doubtful that a debtor remains a debtor-in-possession postconfirmation since the debtor as such is revested with the property of the estate under section 1141(b) and there is no longer any property of the estate to manage or possess.[387]

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383. *See Kostoglou*, 73 B.R. 596.

384. 11 U.S.C. § 1112(b)(7).

385. *Id.* § 1112(b)(8).

386. *Id.* § 1112(b)(9).

387. Several courts have held that the estate created on the filing of a Chapter 11 case terminates on confirmation of a plan. *E.g., In re* Westholt Mfg., Inc., 20 B.R. 368 (Bankr. D. Kan. 1982), *aff'd sub nom.* United States v. Redmond, 36 B.R. 932 (D. Kan. 1984); Abbott v. Blackwelder Furniture Co., 33 B.R. 399 (W.D.N.C. 1983); *cf. In re* Tri-L Corp., 65 B.R. 774 (Bankr. D. Utah 1986).

The rule was to the contrary under Chapter X of the Bankruptcy Act. Section 228 of the Bankruptcy Act provided that:

> Upon the consummation of the plan, the judge shall enter a final decree—
>
> (1) discharging the debtor from all its debts and liabilities and terminating all rights and interests of stockholders of the debtor, except as provided in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of property;
>
> (2) discharging the trustee if any;
>
> (3) making such provisions by way of injunction or otherwise as may be equitable; and

(4) closing the estate.

Bankruptcy Act § 228, 11 U.S.C. § 628 (1976) (repealed 1978). *See* Meyer v. Kenmore Granville Hotel Co., 297 U.S. 160 (1936). This is an important issue. Arguably administrative expenses can be created only so long as there is an estate. *See generally* 6A COLLIER ON BANKRUPTCY, *supra* note 37, ¶ 11.15, at 290. This is of critical importance where a plan is confirmed and later there is an order of conversion to liquidation. Former Bankruptcy Rule 10-215(c)(5) expressly recognized that on conversion to liquidation the court had the power to allow reasonable compensation for services rendered and reimbursement of expenses incurred in the Chapter X case. Bankr. R. 10-215(c)(5); *see also* Bankr. R. 10-308 (providing that a case could be converted to a liquidation case after confirmation if the confirmed plan was not consummated and conversion was in the best interest of the estate and otherwise appropriate under the Act).

In the *Westholt* case, involving the priority of postconfirmation, preconversion, federal taxes, a bankruptcy judge held that the rule was changed under Chapter 11 and that the estate was terminated on confirmation and there was no estate as to which there could be administrative expenses after confirmation. *Westholt Mfg.*, 20 B.R. at 371-72. The court relied on 11 U.S.C. § 1141(d), which provides for the discharge of the debtor on confirmation of a plan. The court also relied on section 348(d), which is clearly authority to the contrary, since it provides that "the claim arising after the petition and before conversion, other than a claim specified in section 503(b) of this title, shall be treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition." 11 U.S.C. § 348(d) (1988). As suggested by one student commentator, the *Westholt* court simply rewrote section 348(d) as a result of its interpretation to read "'[a] claim . . . that arises after the order for relief *but not after confirmation* . . ." is treated as though it arose before the filing of the petition. Hopkinson, *supra* note 39.

The district court, in affirming the bankruptcy judge, did not rely on section 1141(d) but rather on section 1141(b) and (c). *Redmond*, 36 B.R. at 934.

The *Westholt* case has been followed in several recent decisions. *In re* Ernst, 45 B.R. 700 (Bankr. D. Minn. 1985); *In re* Air Ctr., Inc., 48 B.R. 693 (Bankr. W.D. Okl. 1985); Abbott v. Blackwelder Furniture Co., 33 B.R. 399 (W.D.N.C. 1983). In the *Abbott* case, the court struggled with § 326(a), which provides that "after an estate is fully administered and the court has discharged the trustee, the court shall close the case." 11 U.S.C. § 326(a); *see also* FED. R. BANKR. P. 5009. Bankruptcy Rule 3022 provides for a final decree after an estate is fully administered, and such decree closes the estate. As pointed out by the student commentator, the *Abbott* court concluded that:

> a *case* terminates when closed pursuant to section 350, but an *estate* terminates upon confirmation.
>
> The Code . . . does not make the artificial distinction between the closing of the "estate" and a "case" that the *Abbott* court made. Throughout the Code and Bankruptcy Rules there are references to the existence of a post-confirmation estate. Section 1112 allows for *post-confirmation conversion* when it is in "the best interest of creditors and the *estate*." Sections 348 and 726 acknowledge that claims against the estate may arise after confirmation. Also, Bankruptcy Rule 3020(d) specifically provides that "[n]otwithstanding the entry of an order of confirmation, the court may enter all orders necessary to administer the estate." Section 350(a) and Rule 3022 provide for the

Once a case is converted from Chapter 11 to Chapter 7, section 348 of the Bankruptcy Code provides that the date of the initial petition, rather than that of the order of conversion, is, generally speaking, to be considered the date of the filing of the petition, the commencement of the case, or the order for relief in the Chapter 7 case as well. There are exceptions under section 348 to the provision that the order of conversion is the order for relief under Chapter 7. An example of an exception is section 342, which requires notice of an order for relief and written notice to an individual of each chapter providing relief for an individual. Obviously, the operative date should be the filing of the initial petition. However, there is a special rule that administrative claims in the superseded Chapter 11 will continue their status as administrative claims;[388] on the other hand, postpetition claims that are not administrative claims will be treated as unsecured claims that arose prior to the filing of the original petition.

There is uncertainty with respect to avoidance powers. Section 348 does not deal with the avoidance power sections. However, if the original petition date controls, all transfers during Chapter 11 and subsequent to confirmation will be postpetition transfers. But section 549(a) concerns only property of the estate. Thus, after confirmation of a plan, section 549 should not come into play, since there is no longer an estate and property of the estate has vested in the debtor. Transfers after the filing of a Chapter 11 petition and before conversion would appear to be subject to section 549, but nonetheless saved from avoidance under section 549(a)(2)(B), since deemed to be authorized under section 1108 of Chapter 11. Sections 547 and 548, as well as section 544, do not apply to transfers occurring after the filing of the Chapter 11 case, since these sections affect transfers occurring at or before the filing of the petition.

There is, however, a glitch in the statutory framework. Property acquired by a Chapter 11 debtor after the filing of the petition and prior to confirmation should be property of the estate (except to the extent it consists of postpetition earnings of an individual debtor). However, a literal application of section 348(a) would lead to a contrary result—the return of such property to the debtor on conversion.

An interesting issue may arise in a confirmed Chapter 11 case, which is later converted to a Chapter 7 case, if a previously and properly perfected security interest becomes unperfected postconfirmation for failure to renew.

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closing of the *case* when the *estate* is fully administered indicating that the estate terminates when the case does. Thus, even though the Code clearly envisions a post-confirmation estate, and grants the courts authority to issue orders regarding that estate, the *Abbott* court held that no such estate exists after confirmation.

Hopkinson, *supra* note 39, at 390.

388. *See supra* text accompanying notes 302-307.

The security interest cannot be set aside by the Chapter 7 trustee, however, since the trustee acquired the position of a lien creditor or purchaser as of the original petition date, not the conversion date.

A perplexing issue unresolved by the statute is what to do with claims impaired under the plan of reorganization. Section 348 is silent on this point, although it provides that the original petition date is the effective date of the Chapter 7 case. Furthermore, under section 348(d), any claim, other than an administrative expense claim, against the estate or the debtor (but not the reorganized debtor) that arises after the initial petition is treated as a pre-Chapter 7 unsecured claim. Are the claims in the Chapter 7 case modified by the plan, or do the claims remain as they existed prior to the filing of the Chapter 11 case?

E. Dismissal of Case

A Chapter 11 case can be dismissed for a variety of reasons. Surprisingly enough, dismissal can occur after confirmation of a plan, since section 1122(b) allows the court to dismiss a Chapter 11 case for cause, including "inability to effectuate substantial confirmation of a confirmed plan"[389] or "material default by the debtor with respect to a confirmed plan."[390] Once a case is dismissed, section 349 does several things, absent a court order, for cause, to the contrary.[391] Section 349(b) attempts to undo the impact of the Chapter 11 case by reinstating proceedings, transfers, and liens. Section 349(b)(2) seeks to vacate orders affecting property interests of third parties. The impact of dismissal is to revest property of the estate as it existed before the initiation of the Chapter 11 case. Section 349(a) also makes it clear that the dismissal does not prejudice the debtor in respect to a subsequent petition.[392]

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389. 11 U.S.C. § 1112(b)(7) (1988).

390. *Id.* § 1112(b)(8).

391. *Id.* § 349(b):

> Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title--
>
> (1) reinstates--
>
> (A) any proceeding or custodianship superseded under section 543 of this title;
>
> (B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and
>
> (C) any lien voided under section 506(d) of this title;
>
> (2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and
>
> (3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

392. 11 U.S.C. § 349(a):

It is difficult to find a reported decision of a postconfirmation dismissal of a Chapter 11 case. The rarity (or paucity) of such dismissals is probably due, at least in part, to the fact that confirmed plans often provide a remedy other than dismissal. Furthermore, conversion, rather than dismissal, is generally a better procedure from the viewpoint of creditors.

One court of appeal decision, *Howe v. Vaughan (In re Howe),*[393] involved a motion to dismiss a Chapter 11 case after a plan had been confirmed. In 1982, the Howes initiated a voluntary Chapter 11 case, and a plan of reorganization was confirmed in January of 1983. Some five years later, the Howes filed a state-court suit alleging lender liability claims against Premier Bank and Benjamin Vaughan. Prior to the confirmation of the Chapter 11 case, the Howes had contested Premier's claims and had sought to reject a management contract of Mr. Vaughan. These matters were resolved in the plan. The lender liability claims were not scheduled as an asset of the estate, and they were not disclosed in the disclosure statement. In late 1988, the Howes defaulted on their monthly payment to Premier and filed a Chapter 12 case. Premier requested that the deed held in escrow pursuant to the Chapter 11 confirmed plan be released to it, and the Howes then moved to dismiss the Chapter 11 case. The request to dismiss was denied and the request of Premier for release of the deed was granted.[394]

The court held that the debtors' request that the Chapter 11 case be dismissed and that they be allowed to proceed under Chapter 12 constituted a *de facto* conversion to Chapter 12, which was precluded under the provisions of Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986.[395] Since a Chapter 12 was not permissible, the court dealt with the issue of dismissal for material default under 1112(b)(8) of the Bankruptcy Code. In that regard, the Fifth Circuit agreed with the bankruptcy court that the plan provided an alternative remedy upon nonpayment, "which sheltered the Chapter 11 proceedings from dismissal for material default of the plan."[396] Therefore, the Fifth Circuit declined to dismiss the Chapter 11 case.[397]

> Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(f) of this title.

393. 913 F.2d 1138 (5th Cir. 1990).

394. *Id.* at 1140-41.

395. Pub. L. No. 99-554, sec. 205, § 1208(e), 100 Stat. 3088, 3109 (1986).

396. *Howe*, 913 F.2d at 1149.

397. *Id.* In *In re* Kelley, 53 B.R. 961 (Bankr. W.D. Ky. 1985), the court also refused to dismiss a confirmed Chapter 11 plan which provided that:

"Should the Debtor fail to make any payment shown on the preceding

F. Successive Cases

The Bankruptcy Code precludes modification of a confirmed plan after substantial consummation. In most situations, substantial consummation will occur within a relatively short time of confirmation, since, by definition, it occurs on:

> (A) transfer of all or substantially all of the property proposed by the plan to be transferred;
>
> (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with the by plan; and
>
> (C) commencement of distribution under the plan.[398]

Although the bankruptcy court is not authorized to confirm a plan that is not feasible,[399] in fact, plans are confirmed that are not feasible or that fail because of unanticipated events occurring after confirmation. What then is to be done with the reorganized debtor or the successor to the debtor under such a plan? Is relief available under the Bankruptcy Code? If so, is it limited to liquidation under Chapter 7? If relief is available, how are the claims provided for under the confirmed plan to be dealt with in a new plan

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> schedule, Mammoth Cave may forthwith retake possession of all of its collateral, without further orders or proceeding. Should Mammoth Cave Production Credit Association retake possession of its collateral, the Debtor shall have no further obligation to Mammoth Cave Production Credit Association hereunder."

Id. at 962 (quoting plan). The court observed that:

> A reorganization plan which expressly provides for certain remedies upon default may close the door to the traditional creditor's remedy of dismissal of a Chapter 11 case for a default of that same type. That lesson of logic is learned from the case at hand.
>
> . . . .
>
> The creation of an alternative remedy gives the debtor, in effect, an option: Either make the payments when due or hand over the property. With such a provision the debtor gained no additional advantage, and the creditor made no further sacrifice, than would have occurred in a straight liquidation proceeding. In fact, given the judicial history of farm reorganizations in this district, this "walk-away" provision is a fair restatement of the laws of probability.

Id.

398. 11 U.S.C. § 1101(2) (1988).

399. *Id.* § 1129(a)(11) ("Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.").

or the superseding Chapter 7? These issues and others have been vigorously litigated in recent years. Although these issues are not necessarily settled, because the Supreme Court has not spoken on any of these issues, they appear to be well on their way to satisfactory resolution by the lower courts.

There is a general impression, at least among those not well versed in bankruptcy law, that there is a temporal limit as to relief—*i.e.*, that a bankruptcy petition may be filed only once every six years. The confusion stems from the provision of section 727(a)(8) (and its predecessor, Bankruptcy Act section 14c(5)) that a discharge shall not be granted to an individual who was granted a discharge in a case commenced within six years of the date of the filing of the petition.[400] This rule does not apply to Chapter 11 debtors who engage in business after consummation of the plan or whose assets are not substantially liquidated.[401] Furthermore, the rule does not preclude the filing of a petition under Chapter 11, but only a discharge in certain situations. Congress has not dealt with repetitive filings, except to a limited extent in section 109(g) of the Bankruptcy Code, which is aimed at a specific type of abuse in consumer cases.[402] On the other hand, some bankruptcy courts have dealt with repetitive filings by dismissing the second case as a "bad faith" filing. There are at least two other impediments to a successive case: (1) the prohibition by section 1127(b) of the modification of a prior confirmed plan after substantial consummation, and (2) lack of jurisdiction by the court in which the subsequent petition is filed if the prior case is pending.

Two bankruptcy judges have held that successive Chapter 11 cases are impermissible.[403] These two decisions stand for what has been referred to

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400. *Id.* § 727(a)(8). This rule is ameliorated somewhat in Chapter 12 and 13 cases. Section 727(a)(9) provides that a discharge can be granted within six years if payments under the plan totaled 100% of allowed unsecured claims in such case, or 70% of such claims and the plan was proposed in good faith and was the debtor's best effort.

401. *Id.* § 1141(d)(3). *See supra* text accompanying note 84.

402. Section 109(g) precludes the filing of a bankruptcy case by an individual or a family farmer who was a debtor in a case pending within the proceeding 180 days if that case was dismissed for wilful failure to obey orders of the court, or to appear before the court, or if the debtor obtained a voluntary dismissal following the filing of a request for relief from the automatic stay. This is the only express limitation on repetitive cases found in the Bankruptcy Code. The implication is obvious: Congress knew how to preclude successive cases if it so chose, but it has not chosen to do so except in section 109(g). As observed by the Seventh Circuit, "Congress could easily have included repeat corporate debtors in [section 109(g)]; its failure to do so indicates that corporate debtors are exempt from even the minimal constraints on serial filings imposed on other kinds of debtors." Fruehauf Corp. v. Jartran, Inc. (*In re* Jartran, Inc.), 886 F.2d 859, 870 (7th Cir. 1989).

403. In *In re* Northampton Corp., 37 B.R. 110 (Bankr. E.D. Pa.), a debtor filed a successive Chapter 11 petition. The purpose was to restructure a secured obligation

as the *per se* rule precluding a successive Chapter 11 case. Other courts have dismissed successive Chapter 11 cases on the basis of a lack of good faith,[404] while others have permitted successive cases because changed circumstances rebutted allegations of bad faith.[405] Although an improvement over the *per se* rule, the "good faith" decisions plunge the courts and litigants into the difficult task of determining the subjective intent of the petitioner. As Judge (now Professor) Ayer has cogently pointed out, the lack of good faith or the presence of bad faith as a test does not serve any useful function; it is "merely a pejorative phrase, functioning at such a high level of abstraction that one can scarcely discern what might be underneath

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provided for in the plan confirmed in the prior Chapter 11 case. The bankruptcy court held that this was an impermissible attempt to modify the prior order of confirmation and converted the second case to one under Chapter 7.

Shortly after the *Northampton* decision, another bankruptcy judge was faced with a successive filing, again seeking to modify the obligations of a prior confirmed Chapter 11 plan. The court dismissed the case as not having been filed in good faith because the court deemed the successive case to be a "veiled attempt" to modify the obligations of the plan confirmed in the prior case. *In re* AT of Me., Inc., 56 B.R. 55 (Bankr. D. Me. 1985); *see also In re* Caperoads Plaza Ltd. Partnership, 154 B.R. 614 (Bankr. D. Mass. 1993) (dismissing successive Chapter 11 case due to pendency of previously filed case filed by same debtor). *See generally* Jonathan Moss, Note, *"Consecutive" Chapter 11 Filings: Use or Abuse?*, 19 FORDHAM URB. L.J. 111 (1991).

404. Elmwood Dev. Co. v. General Elec. Pension Trust (*In re* Elmwood Dev. Co.), 964 F.2d 508 (5th Cir. 1992) (holding that second Chapter 11 petition was filed in bad faith when factors relied on as changed circumstances warranting another chance at reorganization with a different plan were foreseeable and indeed expected); Integon Life Ins. Corp. v. Marbleton-Booper Assocs. (*In re* Marbleton-Booper Assocs.), 127 B.R. 941 (Bankr. N.D. Ga. 1991) (dismissing second Chapter 11 petition as filed in bad faith where debtor could have anticipated circumstances, including managerial employee's drug use, leading to default under confirmed plan).

405. CFC 78 Partnership B v. Casa Loma Assocs. (*In re* Casa Loma Assocs.), 122 B.R. 814 (Bankr. N.D. Ga. 1991) (denying motion to dismiss second Chapter 11 petition filed by debtor; concluding that filing of second plan was not prohibited by Code when unanticipated change of circumstances prevented completion of first plan; acknowledging that mere change in market conditions did not constitute sufficient justification for filing of second petition); *In re* Garsal Realty, Inc., 98 B.R. 140, 148-52 (Bankr. N.D.N.Y. 1989) (although substantial consummation was not deemed synonymous with order closing Chapter 11 case, subsequently filed Chapter 11 petition was not viewed as effort to modify confirmed plan in derogation of section 1127(b) where debt of Chapter 11 debtor doubled, levels of tenant vacancy dropped due to drop of interest rates that encouraged purchase of homes, and closing of nearby company caused loss of tenants accounted for change of circumstances that warranted second filing; dismissal of second petition under section 1112(b)(1) and (2) held to be premature); Moss, *supra* note 403, at 144 ("Recognizing the inconsistencies between the good faith interpretations, recent decisions support a consecutive Chapter 11 standard that includes a changed circumstances component as a separate test from the more general good faith considerations.").

it."[406] From the point of view of counsel for the successive Chapter 11 debtor, Judge Ayer's admonition that a legal concept "has meaning only if it has some expository convenience—if it can help counsel and litigants to understand just what they should and should not do in any given case"[407] is especially sound. Judge Ayer concluded that "'good faith' [or its counterpart, bad faith] is utterly unable to do this sort of job."[408] This was precisely the reason the Commission on the Bankruptcy Laws recommended abandoning good faith as a condition of filing a reorganization case.[409]

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406. *In re* Victory Constr. Co., 42 B.R. 145, 149 (Bankr. C.D. Cal. 1984).

407. *Id.* at 148-49.

408. *Id.* at 149.

409. *See generally* Gerald K. Smith & Randolph J. Haines, *Chapter 11—Reorganization*, 1988 ANN. SURV. BANKR. L., 495, 498-509 (1989).

> The historical development suggests that the explicit statutory test of § 1112(b)(2) may be the only good faith element that remains viable and useful in the Bankruptcy Code. This conclusion is firmly supported by the minutes of the original draftsmen of the Code, the Commission on the Bankruptcy Law of the United States.
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> At the Commission's meeting of February 22-24, 1973, the Commission had under consideration a draft prepared by Commission Consultant Professor Lawrence P. King consolidating Chapters X, XI and XII, and an analysis and recommendations regarding that draft prepared by Deputy Director Gerald K. Smith. Minutes of that meeting reflect a considered decision by the Commission to delete the good faith requirement and to substitute specific grounds for dismissal or lifting of the automatic stay:
>
> In returning to the discussion of the reorganization Chapters, Chairman Marsh moved to Mr. Smith's recommendation that the good-faith test of a Chapter X petition be abolished. Mr. Smith explained that these requirements lead to fruitless litigation, i.e., they encourage and require secured creditors unnecessarily to litigate the issue of good faith at an earlier stage in order to lift the stay against exercise of their repossession or foreclosure remedies. While he recognized that they should have the opportunity to challenge the stay, he viewed their challenge at the approval [of the petition] stage as usually premature, if based on a lack of good faith in the sense that there was no possibility of a feasible plan. The issue should come up later, after the functionaries have a chance to investigate . . . .
>
> Mr. Smith stated that his recommendation also contemplated eliminating as a ground for dismissal the adequacy of relief under nonbankruptcy law, which is currently part of the "good faith" test. He believed that any debtor, regardless of any state court proceeding, should be able to choose relief under the Bankruptcy Act . . . .
>
> It was generally agreed that the good-faith test should be replaced with specific grounds for dismissing or adjudicating a Chapter case, either on a creditor's application or on the court's own initiative. The grounds should apply in all Chapter cases . . . .
>
> These recommendations, as adopted by the Commission, were followed

That is not to say that there cannot be an abuse of the bankruptcy process inherent in the filing of any Chapter 11 case, whether initial or successive. The Commission on the Bankruptcy Laws, and Congress, in enacting Section 1112(b) of the Bankruptcy Code, expressly recognized this possibility by allowing conversion or dismissal for cause. But the mere filing of a successive Chapter 11 case is not cause. Contrary rulings of bankruptcy

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in both the Commission draft and in the Bankruptcy Code as ultimately approved by Congress. The Commission draft deleted the answer and approval of a voluntary petition, noting that "no one can contest a voluntary petition." The Commission draft provided that the only limitation on a debtor's choice of chapter relief was that only wage-earners could elect wage earner relief; otherwise, "the court shall direct the relief requested." The Commission draft provided for a method by which creditors could obtain relief from the automatic stay short of dismissal of the case, and in reorganizations, provided specific grounds for dismissal or conversion to liquidation:

On the complaint of any party in interest, the court may order that a case be (1) converted to one for liquidation, . . . or (3) dismissed at any time prior to substantial consummation of a confirmed plan if

(A) if its unreasonable to expect that a plan can be effectuated;

(B) there has been unreasonable delay by the debtor that is prejudicial to creditors;

(C) no plan is proposed, approved, accepted, or confirmed, within the times fixed or extended by the administrator;

(D) confirmation is set aside for fraud and a modified plan is not confirmed; or

(E) a confirmed plan is not substantially consummated.

The Commission Note to this provision stated that it was "derived from § 146(3) and (4) of the present Act," but that the former "procedure was complex and the appropriate tests have been shifted to this section."

Obviously all of the provisions of the Commission draft, incorporating the recommendations adopted at the February 1973 meeting, have nearly exact counterparts in the ultimate Code. The Code therefore embodies the Commission's conscious intent to (1) eliminate any good faith or other limitation on the right of any individual, partnership or corporation to elect Chapter 11 relief, (2) provide grounds on which creditors may obtain relief from the stay short of obtaining dismissal, and (3) provide specific grounds for dismissal or conversion of a Chapter 11 case instead of the Chapter X good faith requirements, of which only inability to effectuate a plan retained significance.

The history indicates that, except for the unusual case that could truly be said to have been beyond the contemplation of the Commission, dismissal should be limited to the express grounds set forth in § 1112(b) rather than any broader analysis of good faith. Since the new debtor syndrome and individuals seeking business reorganizations had already generated a significant body of case law but were not adopted as grounds for dismissal by the Commission, these should not be grounds for finding a lack of good faith under the Code.

Id. at 503-06 (footnotes omitted).

courts are not only wrong as a matter of interpretation of the Bankruptcy Code, they are wrong as a matter of policy. The argument in support of a successive case has been ably stated by Mr. Gerald Munitz, counsel for Jartran in its two Chapter 11 cases.

> No case, whether a serial chapter 11 or an original filing, should be permitted to abuse the bankruptcy process. The answer to a "serial" chapter 11 case is not to prohibit or automatically convert or dismiss it, but to judge it on the merits. Moreover, the availability of serial chapter 11 filings for good-faith debtors is consistent with Congress' intent to provide corporate debtors with a rational and flexible method to continue in business while ensuring that similarly situated creditors are treated equitably.
>
> . . . .
>
> If the serial filed case proceeds, all of the chapter 11 safeguards will pertain to its administration. For instance, any party in interest can move for the appointment of a trustee under section 1104, move to convert or dismiss on other grounds under section 1112, file a competing plan of reorganization under section 1121, participate in the disclosure process governed by section 1125, vote against the plan as provided in section 1126, object to confirmation under section 1128, and, by the rejection of an impaired class, require invocation of the absolute priority rule of section 1129(b). The ultimate safeguard is a denial of a discharge if the plan, although confirmable, fails to meet the requirements of section 1141(d)(3). Thus the argument that a *per se* prohibition of serial chapter 11 filings is needed to avoid abuse of the bankruptcy process is without merit since protection against abuse is already provided by existing Code provisions.[410]

The Seventh Circuit is the only court of appeals that has addressed the successive case issue. In *Fruehauf Corp. v. Jartran, Inc. (In re Jartran, Inc.)*,[411] the Seventh Circuit phrased the issue as "whether a debtor whose original plan of reorganization has failed may file a new liquidating Chapter 11 rather than converting to Chapter 7 for liquidation."[412] The Seventh Circuit held that the bankruptcy court did not abuse its discretion when it found that the successive case was filed in good faith and refused to dismiss or convert the case.[413] Unfortunately, the *Jartran* court discussed the issue in the context of "good faith" and "bad faith," perhaps because skillful

410. Gerald Munitz, *Serial Chapter 11 Filings and Related Issues* 7-9 (paper prepared for 1990 Iowa 20th Annual Advanced Bankruptcy Procedure Seminar) (footnotes omitted).

411. 886 F.2d 859 (7th Cir. 1989).

412. *Id.* at 866.

413. *Id.* at 868.

counsel so argued the case.[414]

It appears that the *Northampton* and *AT of Maine* cases are aberrational insofar as they stand for the proposition that a successive case is impermissible *per se* or that a successive case must be dismissed as filed in bad faith. The courts, at least in the reported decisions, are permitting successive filings.[415]

According to Mr. Munitz, the decision to file *Jartran II* was influenced by the ability to reject the Fruehauf leases that had been assumed in *Jartran I*. The result would be "to relegate Fruehauf's significant rejection claim to general unsecured status," whereas if *Jartran I* had been converted to a Chapter 7 case, it "would have permitted Fruehauf to assert administrative expense status for its claim."[416] Thus, the filing of a new Chapter 11 case was of considerable importance to unsecured creditors, and the directors of the debtor had a fiduciary duty to creditors on the insolvency of Jartran.[417] It is, therefore, rather odd that such a filing would be attacked as being filed "bad faith."

The cases that have permitted a successive Chapter 11 case are, with limited exception, liquidating Chapter 11 cases. Thus, these issues do not involve the difficult question of whether claims and interests dealt with

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414. *Id.* at 867. The Seventh Circuit attempted to distinguish the bankruptcy court decisions in *AT of Maine* and *Northampton* by stating that "[t]he courts in *AT of Maine* and *Northampton* certainly could have concluded that in light of the Code's policy against modification of substantially consummated plans, a serial Chapter 11 filing designed to evade an existing plan was in bad faith." *Id.* As pointed out by Mr. Munitz in his paper,

> To the extent that *Northampton* and *AT of Maine* stand for the proposition that serial chapter 11 filings are *per se* prohibited, those decisions are wrongly decided and cannot be reconciled either with *Jartran* or with one of the primary goals of bankruptcy law—to rehabilitate worthy debtors. There is not only a distinction but a significant difference between, on the one hand, the prohibition of plan modification once that plan is substantially consummated and, on the other hand, the commencement of an entirely new chapter 11 case which affects all of a debtor's obligations, including those remaining under a prior plan.

Munitz, *supra* note 410, at 15.

415. W.A. Krueger Co. v. Sportpages Corp. (*In re* Sportpages Corp.), 101 B.R. 528, 530 (N.D. Ill. 1989) (second petition sought a liquidation rather than a reorganization of modification of the provisions of the plan in the initial case); *In re* White Farm Equip. Co., 103 B.R. 177 (Bankr. N.D. Ill. 1989) (involuntary Chapter 7 case filed postconfirmation converted into voluntary Chapter 11 liquidation case), *rev'd*, 111 B.R. 158 (N.D. Ill. 1990), *rev'd*, 943 F.2d 752 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1292 (1992); and *In re* GHR Cos., 50 B.R. 925 (Bankr. D. Mass. 1985).

416. Munitz, *supra* note 410, at 10.

417. *E.g.*, Gregory V. Varallo & Jesse A. Finkelstein, *Fiduciary Obligations of Directors of the Financially Troubled Company*, 48 BUS. LAW. 239, 243-45 (1992).

under the initial Chapter 11 case plan can be altered under a plan in a successive Chapter 11 case. Section 1127(b) of the Bankruptcy Code provides that a plan can be modified before substantial consummation, and this possibility leads to the conclusion by implication that a plan cannot be modified after substantial consummation. Furthermore, at least in *Jartran II*, Mr. Munitz very skillfully met all conceivable tests of good faith. The bankruptcy court found good faith on the facts of the case, which included Jartran's inability to continue operations and the fact that conversion to liquidation would have led to a variety of problems.[418]

A notorious example of a successive Chapter 11 case is the second *Continental Airlines* Chapter 11 case filed in the Bankruptcy Court for the District of Delaware.[419] The first *Continental Airlines* Chapter 11 case was filed in the Southern District of Texas,[420] and matters remained to be resolved by the bankruptcy court handling the First Continental Case. Nonetheless, Bankruptcy Judge Balick, who was assigned the Second Continental Case, held that she had jurisdiction and enjoined further proceedings in the *First Continental Case*.[421]

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418. *See* Munitz, *supra* note 410, at 12-13:

> [T]he bankruptcy court was concerned with the "mindboggling" administrative problems that would arise as a result of conversion. Six years had passed since the commencement of *Jartran I* and 18 months had elapsed since confirmation of the *Jartran I* plan. Under section 348 of the Code, conversion of a case relates back to the date of the original filing. Because of this, the bankruptcy court envisioned problems with the exercise of the Code's avoidance powers and with having holders of claims first arising *after* the confirmation of the plan, being told they were creditors in a case commenced in 1981. A related problem was the need to separate pre-conversion claims that would qualify under section 348(d) as "a claim specified in section 503(b)"—an administrative expense—from pre-conversion claims that would be treated as if they had arisen immediately before the date of the filing of the petition—a general unsecured claim.

419. Actually there were a number of affiliated cases including that of Continental Airlines. *In re* Continental Airlines, Nos. 90-932 to 90-984 (Bankr. D. Del. 1990) [hereinafter *Second Continental Case*].

420. As in the *Second Continental Case*, there were several cases filed, including that of Continental Airlines, Inc. and several affiliates. *In re* Continental Airlines, No. 83-04019-H2-5 (Bankr. S.D. Tex. 1986) [hereinafter *First Continental Case*].

421. Bankruptcy Judge Balick issued an order on extremely limited notice, restraining the O'Neill Group from

> making or pursuing any application, attending any hearing, acting to obtain the scheduling of any hearing, or taking, initiating or permitting any other steps whatever in or before the United States Bankruptcy Court for the Southern District of Texas . . . in support of or related to any proceeding that seeks any relief against Continental Airlines, Inc. or against any other debtor in these cases, or that seeks to transfer any of these cases to that court.

Continental Airlines v. O'Neill, No. 91-34 (Bankr. D. Del. Mar. 14, 1991) (Temporary Restraining Order and Order to Show Cause). The order was sought to prevent a hearing on March 18, 1991 before the Houston Bankruptcy Court. Despite the strictures of FED. R. CIV. P. 65(b), the order had no termination date, although a hearing on the issuance of a preliminary injunction was set before Judge Balick nearly a month and a half later. The comments of the District Judge led to the restraining order's being vacated on motion of Continental Airlines on March 17, 1991. The motion to vacate stated that it was made at the request of defense counsel "to permit proceedings about settlement proposals the parties are working on to finalize." Prior to the commencement of settlement discussions, the O'Neill Group and another creditor in the *First Continental Case*, American General Corporation, filed motions to transfer venue of the *Second Continental Case* to Houston. These motions were filed with the Houston Bankruptcy Court, rather than the Delaware Bankruptcy Court, on the basis of Bankruptcy Rule 1014(b), which provides,

> If petitions commencing cases under the [Bankruptcy] Code are filed in different districts by or against (1) the same debtor, . . . or (4) a debtor and an affiliate, on motion filed in the district in which the petition filed first is pending and after hearing on notice to the petitioners . . . and other entities as directed by the court, the court may determine, in the interest of justice or for the convenience of the parties, the district or districts in which the case or cases should proceed.

FED. R. BANKR. P. 1014(b). According to the Affidavit of counsel for the O'Neill Group filed in support of the Motion for Leave to Appeal from the restraining order, Judge Balick did not allow the O'Neill Group to be heard. The affidavit stated as follows:

> . . . I received a telephone call on March 13 at 2:17 p.m. from Dan Casey, a Continental vice president, and Paul Welsh, an attorney representing Continental in its Delaware bankruptcy case. . . . They . . . informed me that they had, ex parte, arranged with the Delaware Bankruptcy Judge Balick to hear their injunction motion (which was not yet filed) at 11:00 a.m. Delaware time the next day, March 14 (which would be 9:00 a.m. Phoenix time). . . . Messrs. Casey and Welsh did not inform me in that telephone call any basis for the injunctive relief they would seek. We did discuss whether I would be allowed to appear by telephone if the hearing occurred, and Mr. Welsh informed me that Judge Balick had permitted such appearances before, and that he would make such a request on my behalf at the hearing . . . .
>
> I waited by my telephone [the next day] for approximately the next hour and ten minutes, in the hope that I would receive a telephone call from the Delaware Bankruptcy Court. Finally, at approximately 10:00 a.m. Phoenix time, I received a telephone call from Mr. Welsh, who was apparently back in his office. He stated that the hearing had been held, and that he had requested that I be allowed to appear by telephone, which the judge denied. He informed me that the judge stated that she found telephone conferences to be unsatisfactory, and in addition indicated that it would violate a local rule requiring association with Delaware counsel. Mr. Welsh also informed me that Judge Balick had granted the temporary restraining order as requested, and a further hearing was set for April 26. I inquired what Mr. Welsh or Judge Balick intended to do when the TRO expired by its own terms in ten days pursuant to F.R.C.P. Rule 65(b), to which he responded that rule did not

Prior to filing its motion to transfer venue, the O'Neill Group, as appellants in an appeal from a ruling in the *First Continental Case*, responded to a letter from the Fifth Circuit requesting input as to whether the automatic stay arising on the filing of the *Second Continental Case* precluded further proceedings. The O'Neill Group took the position that it did not for the following reasons: (1) the automatic stay applies only to legal proceedings initiated against the debtor in bankruptcy, not proceedings initiated by a debtor in bankruptcy; since the appeal arose from legal proceedings initiated by Continental in the *First Continental Case*, it was not subject to the automatic stay; (2) the court having jurisdiction of the *First Continental Case* had exclusive jurisdiction, and an automatic stay emanating from a bankruptcy case filed in another bankruptcy court could not divest the court of jurisdiction nor stay its proceedings; and (3) the

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apply because this was not a temporary restraining order without notice.

In *In re* Mahurkar Double Lumen Hemodialysis Catheter Patient Litig., 140 B.R. 969 (N.D. Ill. 1992), Judge Balick did the same thing to the federal district court for the Northern District of Illinois. Unfortunately for her, Circuit Judge Frank Easterbrook was sitting by designation. Needless to say, Judge Easterbrook did not take kindly to this treatment and had the following to say:

> In other words, the bankruptcy judge in Delaware not only asserted exclusive jurisdiction to determine the meaning of § 362 but also instructed counsel to remain silent during the hearing scheduled in this court. (Perhaps even showing up would be a prohibited "act" to "continue" the proceeding.) In forbidding Mahurkar and Quinton from "conducting or participating in any type of discovery" in the entire "Patent Infringement Action," this TRO also apparently halts the litigation with IMPRA. It did not, however, issue in time to prevent Mahurkar from filing his reply brief.
>
> On learning of this preposterous order (I practically fell out of my chair, and I have a sturdy chair), I entered the following order of my own:
>
> Lest there be any misunderstanding about the telephonic instructions that have previously issued, I now issue my order in writing.
>
> Counsel for Kendall and Mahurkar are to be present in court tomorrow morning at 10:00 a.m. This is an order, not an invitation. Failure to appear will lead to sanctions.
>
> My instructions to appear and argue this case were issued last week. Any subsequent order from any other court is ineffectual. Kendall's ex parte application to the bankruptcy judge in Delaware appears to be an abuse of process. No bankruptcy court is authorized to instruct litigants in this court not to obey this court's orders. Any court has jurisdiction to determine its own jurisdiction, and this court unquestionably has the authority to determine what effect the bankruptcy stay has on the litigation. For the purpose of making that decision, the hearing will proceed as scheduled, and counsel for all parties are free to make whatever presentations they deem appropriate.

Id. at 972. Judge Easterbrook entered an order that those involved in this sorry episode were "permanently enjoined from enforcing or attempting to enforce the temporary restraining order issued by [Judge Balick]." *Id.* at 978.

automatic stay in any event did not preclude litigation in the bankruptcy court. The O'Neill Group also urged "two additional reasons why . . . [the Fifth Circuit] should not deem itself stayed by Continental's second bankruptcy case. First, the filing of such a second bankruptcy case while the first remains pending is not permissible. Second, a second filing cannot modify the debtor's obligations to pay claims under a prior confirmed plan of reorganization."[422] The authorities relied upon for the two additional reasons included the Supreme Court's decision in *Freshman v. Atkins*[423] and the *Colony Square* case.[424]

Continental, in reply, argued that the decision of the Eleventh Circuit in the *Colony Square* case and the Supreme Court's decision in *Freshman v. Atkins* were inapposite. As to *Colony Square*, the reply stated that

> the *Colony Square* cases turned on a jurisdictional conflict between the provisions of the Bankruptcy Reform Act of 1978 and Chapter XII of the Bankruptcy Act of 1898 . . . . Because the Chapter XII bankruptcy court had retained jurisdiction over an unconsummated plan of reorganization, Section 403(a) was a direct bar to the application of the automatic stay of Section 362(a)(1).[425]

The reply therefore concluded that the *Colony Square* cases had nothing to do with the issue before the Fifth Circuit, since the special transitional rule was the basis for the result reached in the *Colony Square* decisions, and that transitional rule was not relevant to two cases under the Bankruptcy Code. As to *Freshman v. Atkins*, the reply argued that the Supreme Court merely held that "[d]enial of a discharge . . . or failure to apply for it within the statutory time, bars an application under a second proceeding for discharge for the same debts."[426] The O'Neill Group had cited *Freshman v. Atkins* for the proposition that "a second bankruptcy case may not be filed while the prior case remains pending." The reply also asserted that those

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422. Letter from Randolph J. Haines to Gilbert F. Ganucheau, Clerk of the United States Court of Appeals for the Fifth Circuit (Jan. 3, 1991).

423. 269 U.S. 121 (1925).

424. Colony Square Co. v. Prudential Life Ins. Co. (*In re* Colony Square Co.), 779 F.2d 653 (11th Cir.), *cert. denied*, 479 U.S. 824 (1986); *see also* Colony Square Co. v. Prudential Life Ins. Co. (*In re* Colony Square Co.), 788 F.2d 739 (11th Cir.), *cert. denied*, 479 U.S. 824 (1986); Prudential Ins. Co. v. Colony Square Co., 40 B.R. 603 (Bankr. N.D. Ga. 1984), *aff'd*, 62 B.R. 48 (N.D. Ga. 1985); Prudential Ins. Co. v. Colony Square Co., 29 B.R. 432 (W.D. Pa.), *appeal dismissed*, 725 F.2d 666 (3d Cir. 1983).

425. Reply of Appellee at 8, O'Neill v. Continental Airlines, (No. 89-2943) (footnotes omitted).

426. *Freshman*, 269 U.S. at 123.

bankruptcy courts that had applied a *per se* rule to bar the filing of a second bankruptcy petition during the pendency of the first "mistakenly derived the rule from *Freshman v. Atkins*."[427]

The brief of Continental in support of its motion for a restraining order made the following interesting observation as to the 1983 or First Continental case:

> . . . [A]ll that remains in Texas is a specifically reserved exclusive jurisdiction of the 1983 *Cases—not* the estates, and *not* the 1983 Debtors—to administer and execute the 1983 Case Plan . . . . That includes ordinary, non-exclusive jurisdiction over the 1983 Debtors, whose successors continue to be subject to suit in that Court, in personam, solely to the extent of the jurisdiction reserved in the 1983 Case Plan. But the reserved in personam jurisdiction over the post-confirmation debtor was not exclusive—the 1983 Case Plan permits people to sue the reorganized Continental and its successors in other courts, without court permission, on any post-confirmation matter, as various litigants have routinely done. Otherwise, it would be impossible to reconcile 28 U.S.C. § 1334(d) (providing for exclusive jurisdiction of estate) with 11 U.S.C. § 1141(b) (releasing estate upon confirmation).[428]

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427. Reply of Appellee, at 13-14, *O'Neill* (No. 89-2943).

428. Plaintiff's Opening Brief at 14, Continental Airlines v. O'Neill (*In re* Continental Airlines, Inc.), No. 90-932-984 (Bankr. D. Del. Mar. 14, 1991) (order granting temporary restraining order and preliminary injunction). The brief went on to argue that

> no jurisdiction inconsistent with a subsequent bankruptcy filing was retained. For example, *In re Jartran, Inc.*, 71 B.R. 938, 940 (Bankr. N.D. Ill. 1987), *aff'd*, 87 B.R. 525 (N.D. Ill. 1988), *aff'd*, 886 F.2d 859 (7th Cir. 1989), Jartran, Inc. filed for relief under Chapter 11. The Jartran I plan was confirmed in September 1984 but, as is common, the court retained certain post-confirmation jurisdiction (71 B.R. at 940):
>
> to hear and determine all claims against Jartran [I] and to enforce all causes of action which may exist in its favor, to enter such orders regarding the disbursement of funds under the Plan or the consummation thereof as may be necessary to protect the interests of Jartran [I] and its creditors.
>
> In March 1986, Jartran commenced a new Chapter 11 case, "creating a new debtor in possession, Jartran II" in a "separate" case "characterized by different objectives, assets and claims" (71 B.R. at 941).
>
> That was proper. As the Seventh Circuit later explained, *In re Jartran, Inc.*, 886 F.2d 859 (7th Cir. 1989), "serial Chapter 11 filings are permissible under the Code if filed in good faith" (886 F.2d at 866-67), and corporate debtors "are exempt from even the minimal constraints on serial filings imposed on other kinds of debtors," and "[o]nce a bankruptcy plan is effectuated, all indications from the Code would incline us to treat the reorganized entity as we would *any other* company," (886 F.2d at 870).

The Fifth Circuit Court of Appeals concluded that the stay in the *Second Continental Case* prevented the Fifth Circuit from resolving the pending appeal.

> Pending before us is an appeal from a summary judgment order of the United States District Court for the Southern District of Texas, Singleton, J., affirming the Bankruptcy Court's grant of Continental's Motion for Summary Judgment against the appellants, the O'Neill and Stephens Groups of 1,069 pilot-employees of Continental (hereafter "Pilots"). Specifically, the Pilots' claims involved in this appeal are for furlough pay arising out of the temporary shutdown of operations which occurred around the time of Continental's Chapter 11 bankruptcy filing on September 24, 1983.
>
> Since that time, on December 3, 1990, Continental has instituted an entirely new Chapter 11 proceeding in the United States Bankruptcy Court for the District of Delaware (Balick, J.). Continental urges that this 1990 bankruptcy proceeding automatically stays the present appeal. 11 U.S.C. § 362(a). . . .
>
> For reasons we will subsequently file, the Court concludes that the present appeal is automatically stayed by operation of 11 U.S.C. § 362(a), in light of the current bankruptcy proceedings. Nothing in this Order shall be construed as a determination of the validity or legality of the Delaware bankruptcy proceedings, and, on the contrary, the Court assumes without deciding that such proceeding is valid and subsisting.[429]

Although there has not yet been a significant number of successor Chapter 11 cases, there will be with the passage of more time. There are a number of issues that will have to be litigated in those cases, and it is desirable to provide, to the extent possible, legislative rather than judicial

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Accord In re Grimes, 117 B.R. 531, 536 (Bankr. 9th Cir. 1990) ("Thus a debtor who has been granted a discharge under one chapter under Title 11 may file a subsequent petition under another chapter even though the first case remains open, as long as the debtor meets the requirements for filing the second petition."); *In re Garsal Realty, Inc.*, 98 B.R. 140, 150 (Bankr. N.D.N.Y. 1989) ("There is no per se rule against successive [Chapter 11] filings and a bona fide change in circumstances may justify a debtor's multiple filings"). *See In re Martin-Trigona*, 35 B.R. 596, 600 (Bankr. S.D.N.Y. 1983) (Refusing to apply Rule 1014(b) as to prior non-duplicative bankruptcy proceeding). Thus, this Court properly acquired exclusive jurisdiction of the 1990 Debtors and their estates, and the pre-existing in personam jurisdiction of them that any other court, including the Houston Bankruptcy Court, might have is automatically stayed.

429. O'Neill v. Continental Airlines (*In re* Continental Airlines), 928 F.2d 127, 129-30 (5th Cir. 1991).

solutions to these issues. To that end, the National Bankruptcy Conference in its Code Review Project has recommended several amendments to Chapter 11.

> Serial bankruptcy filings should be allowed in three instances: (a) when changes in the debtor's capital structure since confirmation have been sufficient to eliminate the connection between case I and case II; (b) when the filing is consensual and all the affected classes of debt and equity have agreed upon an appropriate modification; and (c) when the debtor seeks to file a serial plan of liquidation.
>
> To address issues raised by a serial filing, priorities from case I should not carry over into case II unless they otherwise qualify for priority under applicable bankruptcy law; there should be no separate priority for debts created under the plan in case I. Additionally, the date of the second petition should be the relevant date for purposes of the avoiding powers in case II. All transactions created under the plan in case I are subject to these avoiding powers, but payments made reasonably contemporaneously with the confirmation of the plan in case I should be exempted from the definition of antecedent debt for avoidance purposes.[430]

These changes may be unduly restrictive. They do not cover all the situations where unanticipated events occurring after substantial consummation create a need for further relief under Chapter 11. Under the National Bankruptcy Conference proposal, unless the connection between case I and case II has been eliminated by changes in the debtor's capital structure, only liquidation under Chapter 11 would be permissible, unless all "affected classes of debt and equity have agreed upon an appropriate modification." That provision would, of course, give a veto power to substantial creditors, the very modification of whose rights may be required.[431]

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430. NBC Draft, *supra* note 70, at 94.

431. Another recommendation of the National Bankruptcy Conference overlaps the second basis for a serial plan "when the filing is consensual and all the affected classes of debt and equity have agreed upon an appropriate modification." That proposal provides:

> Consensual plans of reorganization should be allowed to include provisions for post-consummation modification if a default occurs under the plan after substantial consummation has occurred. In order to be so modified, the plan must include specific provisions authorizing such modification, be consensual and modifications can only be made according to these provisions. These enabling provisions in such a plan may either (a) specify that modification shall take place under court supervision pursuant to a retention of section 1127 jurisdiction by the court, or (b) provide mechanisms in the event of a default under the plan for consensual amendments of the various instruments

IV. CONCLUSION

Confirmation does not end the controversy and litigation in a Chapter 11 case, but confirmation effects a significant cleavage in the case. Section 1141 of the Code identifies most of the important effects of confirmation: the modification of the rights and relations of the debtor, the creditors, and other parties to conform to those specified in the plan; the vesting of the property of the estate in the debtor or other entity specified in the plan or confirmation order, "free and clear" of claims and interests not saved by the plan or confirmation order; and the discharge of all preconfirmation debts except for relatively minor qualifications.

Chapter 11 of the Bankruptcy Code contemplates the continuing jurisdiction of the bankruptcy court. Unlike former Chapter XI, Chapter 11 does not make jurisdiction dependent on the provisions of the plan. There are few differences between pre- and postconfirmation jurisdiction, although the power of the court is expressly limited as to plan modification and revocation of an order of confirmation. Nonetheless, a number of decisions have limited postconfirmation jurisdiction primarily as to postconfirmation adversary proceedings. Although some statutory clarification may be appropriate, courts can readily clarify matters themselves by finding jurisdiction and abstaining in appropriate situations from the exercise of such jurisdiction.

The provisions of the Code and its legislative history manifest a Congressional purpose to assure to a reorganized debtor the "broadest possible" freedom from the burden of preconfirmation indebtedness. The most significant limitation on the realization of that legislative purpose has been the application of vague and inconsistent judicial conceptions of due process. Particularly troublesome have been cases presenting conflicts between the language and policies of CERCLA and the Bankruptcy Code and cases involving claimants whose claims arose out of acts and events that occurred preconfirmation but caused no preconfirmation manifestation. The National Bankruptcy Conference has approved proposals to clarify the requisites of procedural due process applicable in the determination of the effect of confirmation on preconfirmation claimants.

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issued under the plan, without the need for court supervision under section 1127.

All post-consummation modifications requiring court supervision must be done in conformity with the Code's general requirement of good faith. Debts and liabilities incurred by a reorganized debtor after consummation may not be impaired by any modification of the confirmed plan of reorganization, since such debts and liabilities are not part of the obligations treated by this confirmed plan.

Id. at 93.

Although section 524(e) declares that the discharge of a debtor does not affect the liability of any entity other than the debtor, it is doubtful that the section overrules authoritative pre-Code precedents that sustained the discharge of a codebtor of a debtor's obligation when a court order explicitly providing such was not timely contested by a party with standing. The relevant case law under the Code is in conflict. The case law is also in conflict over the effect of a confirmation order on unpaid administrative expense claims that arose during the course of a reorganization case. The rationale for enforcing such a claim against a debtor seems especially doubtful when a trustee was appointed and served in the case. Two cases dealing with the effect of confirmation on a creditor's liability for disgorging a voidable preference are questionable for their treatment of the transferee as a creditor. The inapplicability of the confirmation order to postconfirmation claims has been uniformly recognized by the courts.

Once a plan has been confirmed, it can be set aside or altered only under prescribed circumstances. Revocation must be for fraud in the procurement of the confirmation order and modification by the proponent or reorganized debtor before substantial consummation, which generally occurs shortly after confirmation. There are, however, other remedies. The Chapter 11 case can be converted to a Chapter 7 case if there is a material default under the plan. A less effective remedy is dismissal for material default, a remedy that some courts have refused where the plan provided an alternative. But conversion and dismissal are blunt swords when often a sharp scalpel is needed. A successive Chapter 11 petition may be more effective. A good example is *Continental II*. And recently another means of modifying rights under a nonmodifiable plan was attempted, the non-opt-out class action under Federal Rule 23(b)(1)(B). It was not successful as employed, but the Second Circuit sanctioned its use.