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Representing a Creditor under Chapter X of the Bankruptcy Act

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COMMENT

REPRESENTING A CREDITOR UNDER CHAPTER X OF THE BANKRUPTCY ACT

by Steve Alan Ungerman

Chapter X of the Bankruptcy Act gives corporations in financial distress the opportunity to reorganize more expediently and with less injury to the debtor and its creditors than the older methods.[1] The reorganization is accomplished by a scaling or rearrangement of the corporation's obligations and the shareholders' interests.[2] Chapter X was enacted to encourage the freer use of reorganization procedures and to avoid unnecessary or premature liquidations.[3] Its purpose, however, is to prevent a sinking corporation from drowning,[4] not to "place crutches under corporate cripples."[5]

I. INTRODUCTION

A. *Reorganization (Chapter X) Versus Arrangement (Chapter XI)*

Chapter XI, providing for arrangements under the Bankruptcy Act, offers a competing means for rehabilitation. In fact, chapter X may not be used if it appears that adequate relief may be obtained under chapter XI.[6] Under chapter XI the plan may affect only the settlement, satisfaction or extension of time for payment of unsecured debts;[7] chapter X plans affect also the rights of the stockholders and secured creditors.[8] Chapter XI may be used by individuals and partnerships as well as corporations, while chapter X is available only for corporations.[9] Chapter XI is voluntary, whereas chapter X authorizes both voluntary and involuntary proceedings.[10]

In general, chapter XI lacks the elaborate provisions for judicial supervision that are found in chapter X. And chapter X reorganizations are more complicated and expensive, and the plans may be subject to scrutiny by the Securities and Exchange Commission, while chapter XI plans are free of Commission jurisdiction and are usually speedier.[11] Corporate management remains in control in a chapter XI procedure, while under chapter X, except in the small case, a disinterested trustee replaces management.[12] Chapter XI arrangements may become effective if approved by a majority in number and amount of the unsecured creditors, while chap-

[1] Bankruptcy Act §§ 101-276, 11 U.S.C. §§ 501-676 (1965), *formerly* 11 U.S.C. § 77B (1934). *See* Duparquet Huot & M. Co. v. Evans, 297 U.S. 216 (1937).

[2] City Bank Farmers Trust Co. v. Irving Trust Co., 299 U.S. 433 (1937).

[3] Claridge Apartments Co. v. Commissioner, 323 U.S. 141 (1944).

[4] *In re* Kelly-Springfield Tire Co., 10 F. Supp. 414 (D. Md. 1935).

[5] Price v. Spokane Silver & Lead Co., 97 F.2d 237 (8th Cir.), *cert. denied*, 305 U.S. 626 (1938).

[6] Bankruptcy Act §§ 130(7), 146(2), 11 U.S.C. §§ 530(7), 546(2) (1965).

[7] Bankruptcy Act § 306(1), 11 U.S.C. § 706(1) (1965).

[8] Bankruptcy Act § 216(1), 11 U.S.C. § 616(1) (1965).

[9] Bankruptcy Act §§ 126, 306(3), 11 U.S.C. §§ 526, 706(3) (1965).

[10] Bankruptcy Act § 126, 11 U.S.C. § 526 (1965).

[11] Bankruptcy Act §§ 264(a), 116, 11 U.S.C. §§ 664(a), 516 (1965); Securities Act of 1933, § 3(a)(10), 15 U.S.C. § 77(c) (1965).

[12] Bankruptcy Act § 156, 11 U.S.C. § 556 (1965).

ter X reorganizations must be approved by two-thirds of each class of creditors and the holders of a majority of each class of stock.[13] The plan in chapter X must pass the test of being fair, equitable, and feasible,[14] while the chapter XI plan may qualify if merely feasible.[15]

Pertinent questions in deciding which chapter to use are:

> (1) Who should control the administration of the debtor's estate and formulate plans for its rehabilitation?
>
> (2) Should the features of speed and economy give way to the considerations of thoroughness and disinterestedness?
>
> (3) Is there need for an independent study of the debtor's affairs by court or trustee? . . .
>
> (4) Does the situation call for something more than arrangement of only the rights of unsecured creditors of the debtor, without alteration of the relations of any other class of security holders?
>
> (5) Will effective relief probably entail rearranging the capital structure of the corporation or will it involve only a simple composition of debts with unsecured creditors? . . .
>
> (6) Is there a serious question of continuing the present management of the debtor?[16]

B. *Summary of a Chapter X Proceeding*

A chapter X proceeding is initiated by the filing of a voluntary or involuntary petition with the federal district clerk. Before the first hearing the debtor or any creditor may file an answer controverting the petition. At the first hearing the petition is either approved or dismissed by the judge. If the petition is approved, a trustee is usually appointed. Creditors present their claims to the court and are divided into classes. A plan is proposed by the trustee or by creditors, and a hearing is held to consider objections or amendments to the plan. When a plan meets all the specified requirements, it is approved by the judge and is distributed to the creditors and shareholders for their approval. If two-thirds of each class of creditors and a majority of each class of stockholders approve the plan, a hearing is held to consider confirmation by the court. If the judge grants confirmation, the plan is carried into effect.

In the following pages of this Comment the procedural and substantive law of chapter X will be examined. The purpose is to present a general survey of chapter X with emphasis on procedures available to creditors.

II. PLEADINGS

Petition. An involuntary petition may be filed by three or more creditors who have claims against a corporation or its property amounting in the aggregate to $5,000 or over, liquidated in amount and not contingent as

[13] Bankruptcy Act § 179, 11 U.S.C. § 579 (1965).
[14] Bankruptcy Act § 174, 11 U.S.C. § 574 (1965).
[15] Bankruptcy Act § 366(2), 11 U.S.C. § 766(2) (1965).
[16] *In re* Herold Radio & Electronics Corp., 191 F. Supp. 780, 786-87 (S.D.N.Y. 1961). For an analysis of the leading cases in this area, see Weintraub & Levin, *From United States Realty to American Trailer Rentals: The Availability of Debtor Relief for the Middle-Sized Corporation*, 34 FORDHAM L. REV. 419 (1966).

to liability, provided that no other petition is pending under chapter X.[17] The Act lists the provisions which an involuntary petition must contain.[18]

Answer. Prior to the first date set for the hearing on the petition,[19] an answer controverting the allegations of a petition by or against a debtor may be filed by any creditor.[20] Thus, creditors may resist a voluntary petition for the purpose of preventing an unnecessary reorganization or a useless attempt to reorganize.[21] By statute, the answer is limited to a denial of one or more of the essential allegations of the petition, or to the allegation of new matter that, in effect, operates as a denial.[22] In addition an answer may allege that the petition was not filed in good faith and the judge must affirmatively determine this issue before approving the petition.[23] A failure to so allege may preclude the creditors from subsequently raising the issue of good faith.[24] There is some question whether a creditor may contest allegations other than good faith which are required in an involuntary petition, if the debtor seeks approval of the petition. A literal reading of the statute, however, would seem to allow such a contest.[25]

III. Approval or Dismissal of Petition—Good Faith

The judge must dismiss the petition if it does not fulfill the requirements of chapter X or has not been filed in good faith.[26] In addition, if the petition is challenged by an answer, the judge must also determine if the material allegations of the petition are sustained by proof.[27] In order to comply with the requirements of chapter X, (1) the petition must contain the allegations required by the Act,[28] (2) the debtor must be a cor-

[17] Bankruptcy Act § 126, 11 U.S.C. § 526 (1965). *See* Bankruptcy Act §§ 127 (filing petition in pending bankruptcy), 128 (venue), 129 (subsidiary), 132 (filing fee), 133 (service), 11 U.S.C. §§ 527, 528, 529, 532, 533 (1965). Note that only those corporations classified as "moneyed, business, or commercial" under § 4b of the Bankruptcy Act are subject to an involuntary petition under § 126. Municipal, railroad, insurance, banking corporations, and building and loan associations are not amenable to a reorganization. *See* 6 A. Collier, Bankruptcy ¶¶ 4.05, 4.06 (14th ed. 1965) [hereinafter cited as Collier]; 11 H. Remington, Bankruptcy §§ 4416-28 (1961). Bankruptcy Act § 256, 11 U.S.C. § 656 (1965) permits the filing of a petition notwithstanding the pendency of a prior mortgage foreclosure, prior equity, or other proceeding in a federal or state court in which a receiver or trustee of all or any part of the debtor's property has either been appointed or application made therefor.

[18] Bankruptcy Act §§ 130, 131, 11 U.S.C. §§ 530, 531 (1965).

[19] Bankruptcy Act § 161, 11 U.S.C. § 561 (1965) provides that the judge shall fix a time of hearing, to be held not less than thirty days and not more than sixty days after the approval of the petition. The Act further provides that at least thirty days' notice shall be given by mail to the creditors.

[20] Bankruptcy Act § 137, 11 U.S.C. § 537 (1965).

[21] Moore v. Linahan, 117 F.2d 140 (2d Cir.), *cert. denied*, 314 U.S. 628 (1941).

[22] *In re* Cheney Bros., 12 F. Supp. 609 (D. Conn. 1935).

[23] Manati Sugar Co. v. Mock, 75 F.2d 284 (2d Cir. 1935).

[24] *See In re* General Stores Corp., 147 F. Supp. 350 (S.D.N.Y. 1957).

[25] Moore v. Linahan, 117 F.2d 140 (2d Cir.), *cert. denied*, 314 U.S. 628 (1941). *But see In re* Equity Co. of America, 115 F.2d 570 (7th Cir. 1940). *See also* 6 Collier ¶ 5.03.

[26] Bankruptcy Act §§ 141, 142, 11 U.S.C. §§ 541, 542 (1965).

[27] Bankruptcy Act §§ 143, 144, 11 U.S.C. §§ 543, 544 (1965).

[28] *See In re* Equity Co. of America, 115 F.2d 570 (7th Cir. 1940) (when a creditor's petition states substantive allegations warranting approval but is technically deficient, the defects may be cured by an answer admitting the allegations and consenting to an order of approval). *See also In re* West Va. Printing Co., 11 F. Supp. 211 (D.W. Va.), *modified, mem.*, 77 F.2d 1020 (4th Cir. 1935) (the answer of debtor admitting insolvency in a prior proceeding is admissible to prove the allegation of insolvency in a creditors' petition).

poration eligible for reorganization, (3) the petitioners in involuntary proceedings must be qualified, (4) the necessary jurisdictional facts as alleged in the petition must be found,[29] and (5) a case for relief afforded by chapter X must be presented as alleged in the petition.[30]

The requirement that the petition must be filed in good faith has generated extensive litigation. While good faith includes the general meaning of the term, the Act specifically states that good faith is lacking if[31] (1) the petition is filed by creditors who acquired their claims for the purpose of filing the petition,[32] or (2) adequate relief may in fact be obtained by the debtor under chapter XI,[33] or (3) it is unreasonable to expect that a plan can be effected,[34] or (4) a prior proceeding is pending where the interest of creditors may be properly served.[35] The burden of proving good faith is upon the petitioner,[36] and the existence of good faith is to be

[29] The requisite jurisdictional facts are (1) a debtor eligible for relief; (2) in the case of an involuntary petition, petitioners having claims in the necessary amount; (3) an allegation that the principal assets and the principal place of business have been for the preceding six months within the territorial limits of the court; or for a longer portion of the preceding six months than in any other jurisdiction, or if the corporation is in bankruptcy that the proceeding is pending in the court in which the petition is filed; (4) insolvency or inability to pay debts; and (5) in the case of an involuntary petition, grounds for filing. *In re* Guardian Investors Corp., 39 F. Supp. 803 (S.D.N.Y. 1941).

[30] For cases where need for relief was established, see SEC v. United States Realty & Improvement Co., 310 U.S. 434 (1940); Capitol Motor Courts v. Le Blanc Corp., 201 F.2d 356 (2d Cir.), *cert. denied*, 345 U.S. 957 (1953); Ogilvie v. Dexter Horton Estate, 86 F.2d 282 (9th Cir. 1936); *In re* Kelly-Springfield Co., 10 F. Supp. 414 (D. Md. 1935). For cases where need for relief was not established, see Marine Harbor Properties, Inc. v. Manufacturers Trust Co., 317 U.S. 78 (1942); *In re* Sheridan View Bldg. Corp., 149 F.2d 532 (7th Cir. 1945); *In re* Suburban Properties, 110 F.2d 438 (7th Cir. 1940); Manati Sugar Co. v. Mack, 75 F.2d 284 (2d Cir. 1935).

[31] Bankruptcy Act § 146, 11 U.S.C. § 546 (1965).

[32] *See* Milwaukee Postal Bldg. Corp. v. McCann, 95 F.2d 948 (8th Cir. 1938).

[33] *See* Bankruptcy Act § 147, 11 U.S.C. § 547 (1965) providing for transfer to chapter XI.

[34] *See* Janaf Shopping Center, Inc. v. Chase Manhattan Bank, 282 F.2d 211 (4th Cir. 1960); *In re* Hunterbrook Bldg. Corp., 276 F.2d 190 (2d Cir. 1960) (where the court said that § 146(3) does not require certainty of success, but it does require at least a fair assurance). The opposition of some creditors to the reorganization is a factor to be weighed but is not determinative of good faith. Corr v. Flora Sun Corp., 317 F.2d 708 (5th Cir. 1963); Janaf Shopping Center v. Chase Manhattan Bank, *supra*. *But see* Leas v. Courtney Co., 261 F.2d 13 (4th Cir. 1958). For cases where reorganization is impossible, see *In re* Drusilla Carr Land Corp., 101 F.2d 897 (7th Cir.), *cert. denied*, 307 U.S. 623 (1939); Manati Sugar Co. v. Mock, 75 F.2d 284 (2d Cir. 1935); *In re* Ware Metal Prods., 42 F. Supp. 538 (D. Mass. 1941).

[35] *See* Marine Harbor Properties, Inc. v. Manufacturers Trust Co., 317 U.S. 78, 84 (1942) (it must be established that "at least in some substantial particular the prior proceedings withhold or deny creditors . . . benefits, advantages, or protection which Chapter X affords."). For cases where pending suits were held inadequate, see *In re* Loeb Apartments, Inc., 89 F.2d 461 (7th Cir. 1937) (delay in prior proceeding); *In re* Sponsor Realty Corp., 48 F. Supp. 735 (S.D.N.Y. 1943) (protection of security); *In re* 263 West 38th St. Corp., 37 F. Supp. 667 (S.D.N.Y. 1941) (values existing for creditors will be better protected or perhaps enhanced by reorganization). For cases where pending suits were held adequate, see Fidelity Assur. Ass'n v. Sims, 318 U.S. 608 (1943) (liquidation proceeding); *In re* Colorado Trust Deed Funds, Inc., 311 F.2d 288 (10th Cir. 1962) (receivership proceeding); *In re* Sheridan View Bldg. Corp., 149 F.2d 532 (7th Cir.), *cert. denied*, 326 U.S. 737 (1945) (foreclosure); *In re* Biltmore Grande Apartment Bldg. Trust, 146 F.2d 81 (7th Cir. 1944) (no equity over a first mortgage in respect to which a foreclosure suit was pending); *In re* Suburban Properties, Inc., 110 F.2d 438 (7th Cir. 1940) (foreclosure proceeding); *In re* St. Charles Hotel Co., 60 F. Supp. 322 (D.N.J.), *aff'd*, 149 F.2d 645 (3d Cir. 1945) (equity receivership); *In re* Reliable Estates, Inc., 33 F. Supp. 588 (E.D.N.Y. 1940) (property being administered in state court proceeding under first mortgage). If the desired relief is available in both proceedings, the interests of the parties will be best served in that proceeding in which the cost will be less. *See In re* Williamsport Wire Rope Co., 10 F. Supp. 481 (M.D. Pa.), *appeal dismissed*, 78 F.2d 1023 (3d Cir. 1935) (receivership).

[36] Marine Harbor Properties, Inc. v. Manufacturers Trust Co., 317 U.S. 78 (1942).

determined as of the time of filing the petition and not afterwards.[37]

Good faith includes a genuine need for relief under chapter X.[38] The petition must not be filed for the purpose of harassing the debtor, or of hindering or delaying creditors, or of perpetrating some fraud or evasion.[39]

The debtor's existing value is an important factor to be considered in determining good faith. There must be some existing value which can be preserved before a chapter X reorganization is justified.[40] Therefore, if the debtor is hopelessly insolvent and its financial condition has so far deteriorated that liquidation is the only answer, the petition must be dismissed.[41] A voluntary petition is filed in good faith if the debtor has a substantial equity in the assets;[42] no equity is necessary when the petition is involuntary.[43]

A petitioning debtor is guilty of bad faith in seeking reorganization on exaggerated valuations of assets.[44] Conversely, concealment of assets also warrants a finding that a petition was not filed in good faith.[45]

Authority to file a petition may affect the determination of good faith. In the case of an involuntary petition, the fact that counsel was not authorized by all named creditors to file the petition has a bearing on good faith.[46] Dismissal is not required, however, unless those creditors actually do not favor reorganization and as a result do not consent to the use of

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[37] *In re* Riddlesburg Mining Co., 224 F.2d 834 (3d Cir. 1955).

[38] Grubbs v. Pettit, 282 F.2d 557 (2d Cir. 1960); Price v. Spokane Silver & Lead Co., 97 F.2d 237 (8th Cir.), *cert. denied*, 305 U.S. 626 (1938).

[39] International Bhd. of Teamsters v. Quick Charge, 168 F.2d 513 (10th Cir. 1948) (good faith lacking when a company not in financial difficulties files a reorganization petition with the object of obtaining a general restraining order against interference with its affairs when the only interference is by a labor union seeking collective bargaining rights); *In re* Cook, 104 F.2d 981 (7th Cir. 1939) (a petition filed by an indenture trustee in order to escape from an accounting in a prior proceeding was dismissed as not filed in good faith); *In re* Cook, 101 F.2d 394 (7th Cir. 1938), *cert. denied*, 306 U.S. 642 (1939) (if directors merely seek to withdraw the property from the state court's custody by filing a petition for the reorganization of the debtor, their action is fraudulent and the petition is not filed in good faith); *In re* Northeastern Water Cos., 24 F. Supp. 653 (N.D.N.Y. 1938) (where the real purpose of the reorganization proceeding was to hold the debtor in its present status for a time sufficient for interested parties to obtain money to pay its debts, through the elimination and reorganization of solvent affiliated companies, the proceeding is one to restrain creditors and not in good faith).

[40] *In re* Julius Roehrs Co., 115 F.2d 723 (3d Cir. 1940); *In re* Drusilla Carr Land Corp., 101 F.2d 897 (7th Cir.), *cert. denied*, 307 U.S. 623 (1939).

[41] Fidelity Assur. Ass'n v. Sims, 318 U.S. 608 (1943); Goodman v. Michael, 280 F.2d 106 (1st Cir. 1960).

[42] *In re* Diversey Hotel Corp., 165 F.2d 655 (7th Cir.), *cert. denied*, 333 U.S. 861 (1948) (where the best offer secured by debtor in an attempt to sell its property would cause substantial loss to its bondholders, a majority of whom wish to see a reorganization attempted, good faith exists); *In re* Mortgage Sec. Corp., 75 F.2d 261 (2d Cir. 1935) (corporation may maintain a petition even though its assets have diminished to the point that junior classes of stockholders have no interest remaining). *See also* Sylvan Beach v. Koch, 140 F.2d 852 (8th Cir. 1944) (where a corporation had conveyed all its property to trustees to conduct its business for certain beneficiaries, the giving of the trust deed constituted, in practical effect, a reorganization of the debtor, and rendered its petition for a subsequent reorganization under chapter X a fraud on the trustees); *In re* Antone Bldg. Corp., 88 F.2d 329 (7th Cir. 1937) (an involuntary petition is not filed in good faith where the debtor has parted with all its property to a bondholders' committee). But where there is a reasonable expectancy of future assets, *e.g.*, the uncovering of new ore fields, good faith was held to exist. White v. Penelas Mining Co., 105 F.2d 726 (9th Cir. 1939).

[43] *In re* Equity Co. of America, 115 F.2d 570 (7th Cir. 1940); Wayne United Gas Co. v. Owens-Illinois Glass Co., 91 F.2d 827 (4th Cir. 1937).

[44] *In re* Geiser Mfg. Co., 18 F. Supp. 506 (M.D. Pa. 1937).

[45] *In re* Ware Metal Prods., 42 F. Supp. 538 (D. Mass. 1941).

[46] *In re* Suburban Properties, 110 F.2d 438 (7th Cir. 1940).

their names.[47] There is some indication that the filing of a voluntary petition must be duly authorized by the debtor's directors.[48]

When a business is incorporated for the express purpose of taking advantage of the reorganization provisions of chapter X, a question of good faith is raised. One circuit has declared that such a transaction perpetrates a legal fraud on creditors and that it is not within the purview of the statute.[49] Another circuit, however, has taken the position that circumstances may warrant such a procedure.[50] One leading writer has asserted that the latter view is preferable because it exemplifies the flexible nature of the concept of good faith.[51]

Once good faith or any other issue raised in an answer is tried and determined finally at the hearing for approval of the petition, such determination is conclusive for all purposes of chapter X.[52] An order approving a petition operates as an automatic stay of a prior bankruptcy proceeding, mortgage foreclosure, equity receivership, or any other proceeding to enforce a lien against the debtor's property.[53] The stay is designed to prevent creditors from enforcing their security or making efforts in other forums to liquidate or rehabilitate the debtor. A creditor may petition the judge for relief from or modification of a stay that is unfairly hampering his interests; but such relief will not be given if it would substantially hinder or obstruct the reorganization.[54] However, a secured creditor may not be held off indefinitely without some assurance that a plan will be forthcoming.[55]

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[47] Humphrey v. Bankers' Mortgage Co., 79 F.2d 345 (10th Cir. 1935).

[48] *See* White v. Penelas Mining Co., 105 F.2d 726 (9th Cir. 1939).

[49] Milwaukee Postal Bldg. Corp. v. McCann, 95 F.2d 948 (8th Cir. 1938). The Fifth Circuit appears to follow this rule in Mongiello Bros. Coal Corp. v. Houghtaling Properties, Inc., 309 F.2d 925 (5th Cir. 1962). *See also In re* North Kenmore Bldg. Corp., 81 F.2d 656 (7th Cir. 1936).

[50] *In re* Loeb Apartments, Inc., 89 F.2d 461 (7th Cir. 1937). Where a state court proposed to continue a burdensome foreclosure receivership and refused to consider any plan of reorganization, and a bondholders' committee which had acquired title to the property from the defaulting individual mortgagor organized a corporation to take title and assume the bonded indebtedness and then caused it to file a petition, the petition was approved as filed in good faith. *In re* Knickerbocker Hotel Co., 81 F.2d 981 (7th Cir. 1936).

[51] 6 COLLIER ¶ 6.07.

[52] Bankruptcy Act § 145, 11 U.S.C. § 545 (1965).

[53] Bankruptcy Act § 148, 11 U.S.C. § 548 (1965). *See* Bankruptcy Act § 113, 11 U.S.C. § 513 (1965) (temporary stay prior to approval or dismissal of petition enjoining or staying commencement or continuation of suit against debtor). *See also* Bankruptcy Act § 116(4), 11 U.S.C. § 516(4) (1965) (stay after approval of the petition enjoining or staying commencement or continuation of suit to enforce a lien). The rights of stayed creditors are protected by Bankruptcy Act § 261, 11 U.S.C. § 661 (1965), which provides that "all statutes of limitation affecting claims and interests provable under this chapter and the running of all periods of time prescribed by this act in respect to the commission of acts of bankruptcy, the recovery of preferences, and the avoidance of liens and transfers shall be suspended while a proceeding under this chapter is pending and until it is finally dismissed." *See also* United States v. Hotel Buckminster, 59 F. Supp. 65 (D. Mass.), *aff'd sub nom.* John Hancock Mut. Life Ins. Co. v. Thompson, 147 F.2d 761 (1st Cir. 1944) (recording of notice of lien not precluded by § 148). Note that Bankruptcy Act § 116(2), 11 U.S.C. § 516(2) (1965) allows the judge, after the approval of the petition, to authorize certificates of indebtedness for cash, property, or other consideration with such security and priority in payment over existing obligations, secured or unsecured, as is equitable.

[54] *In re* New York, N.H. & H.R.R., 102 F.2d 923 (2d Cir. 1939). *See also In re* Commonwealth Bond Corp., 77 F.2d 308 (2d Cir. 1935) (stay must relate to main purpose of proceeding and must contribute to the execution of a plan).

[55] Central Hanover Bank & Trust Co. v. Callaway, 135 F.2d 592 (5th Cir. 1943); Lincoln Alliance Bank & Trust Co. v. Dye, 115 F.2d 234 (2d Cir. 1940); Guaranty Trust Co. v. Henwood, 86 F.2d 347 (8th Cir. 1936), *cert. denied*, 300 U.S. 661 (1937). A creditor may be al-

IV. CREDITORS—CLAIMS, CLASSIFICATION AND REPRESENTATION

Following the approval of the petition creditors must file proofs of claims. Any creditor may object to the allowance of a claim of another creditor or interest of a stockholder. After filing, the creditors must be classified according to the nature of their claims for the purposes of treatment in the plan and voting on the plan.

Claims. A creditor is defined as the holder of any claim.[56] A claim is then defined to include all claims, secured or unsecured, liquidated or unliquidated, fixed or contingent, against a debtor or its property, except stock.[57] This includes unmatured claims[58] and tort claims,[59] but the judge, in his discretion, may discount contingent or unmatured claims.[60] If discounting the claims is impossible, then the plan must provide for them.[61] If the claims can be liquidated, the judge may determine the method to be used, considering the facts of the case and the interests of the debtor and the creditor.[62]

An unliquidated claim may become liquidated during the reorganization. The debtor will be bound by an in rem judgment properly rendered in a suit pending when the reorganization petition was filed. On the other hand, an in personam judgment will bind the debtor only if the trustee, receiver, or debtor in possession was a party and directed by the reorganization court to defend the suit.[63] Where the representative of the debtor was made a party but at a time when no opportunity to defend on the merits existed, the judge may refuse to recognize the judgment and may require the creditor to prove his claim again.[64]

Any person injured by the rejection of an executory contract is also deemed to be a creditor.[65] A claim resulting from an anticipatory breach prior to the reorganization proceeding is determined and computed ac-

lowed to proceed: (1) if the security involved will not be dealt with in the plan or its withdrawal will not affect the plan, *In re* New York, N.H. & H.R.R., 102 F.2d 923 (2d Cir. 1939); (2) if the plan does not provide adequate protection, *In re* Murel Holding Corp., 75 F.2d 941 (2d Cir. 1935); (3) if there seems to be no likelihood that a proper plan can be evolved, Lincoln Alliance Bank & Trust Co. v. Dye, *supra. But see* John Hancock Mut. Life Ins. Co. v. Casey, 149 F.2d 484 (1st Cir. 1945) (where judge had under advisement the question of whether to order bankruptcy liquidation or to transfer the proceeding to chapter XI, he committed no abuse of discretion in refusing to vacate the injunction).

[56] Bankruptcy Act § 106(4), 11 U.S.C. § 506(4) (1965).

[57] Bankruptcy Act § 106(1), 11 U.S.C. § 506(1) (1965).

[58] Consolidated Rock Prods. Co. v. DuBois, 312 U.S. 510 (1941).

[59] Foust v. Munson S.S. Lines, 299 U.S. 77 (1936).

[60] Consolidated Rock Prods. Co. v. DuBois, 312 U.S. 510 (1941).

[61] *In re* Radio-Keith-Orpheum Corp., 106 F.2d 22 (2d Cir. 1939), *cert. denied*, 308 U.S. 622 (1940).

[62] Foust v. Munson S.S. Lines, 299 U.S. 77 (1936) (where liquidation before special master exposed claimant to serious peril of substantial loss and where a pending state court action would not hinder, burden, delay or be inconsistent with the chapter X proceeding, an abuse of discretion may be committed by the judge if he refuses to allow liquidation in the state court proceeding). *See* United States v. Peerless Weighing & Vending Mach. Corp., 96 F.2d 996 (2d Cir. 1938) (plan may provide for payment being liquidated in a pending proceeding). *See also In re* International Ry., 95 F. Supp. 140 (W.D.N.Y. 1949) (where a claim for future cost of work was liquidated by the reorganization court).

[63] *In re* Paramount Publix Corp., 85 F.2d 42 (2d Cir. 1936).

[64] *See In re* James A. Brady Foundry Co., 3 F.2d 437 (7th Cir. 1924).

[65] Bankruptcy Act § 202, 11 U.S.C. § 602 (1965). *See* note 155 *infra.*

cording to the law applicable to the contract.[66] If under state law the reorganization proceedings constitute an anticipatory breach of the contract, the damages should be computed as of the filing date.[67] If the contract is rejected under chapter X after surviving the early proceedings, the rejection is a breach relating back to the filing of the petition for reorganization.[68]

The debtor, as lessee, may reject an unexpired lease of real estate. A claim by the lessor is "limited to an amount not to exceed the rent, without acceleration, reserved by such lease for the three years next succeeding the date of the surrender of the premises to the landlord or the date of re-entry of the landlord, whichever first occurs, whether before or after the filing of the petition, plus unpaid accrued rent, without acceleration, up to such date of surrender or re-entry."[69] The date of surrender has been interpreted as the transition to, and acceptance by, the landlord of possession.[70] A proviso requires scrutiny of "the circumstances of an assignment of a future rent claim and the amount of the consideration paid for such assignment in determining the amount of damages allowed the assignee thereof."[71]

Interest on a claim occasionally presents a problem. The absolute priority rule has been held to apply to interest.[72] Prior claimants are therefore entitled to interest accrued up to the time of payment of their claims before inferior claimants are allowed to participate.[73] Post-petition interest may be allowed: (1) when the debtor is ultimately proven solvent; or (2) when income is produced during the reorganization by the secured property; or (3) when the amount of security meets both the principal and interest claims.[74] But, no interest is allowed beyond the date of filing the petition when the mortgaged assets are insufficient to satisfy the principal debt and the remaining assets are inadequate to meet both the interest deficiency and the unsecured claims with interest.[75]

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[66] *See* Application of Ross Dev. Co., 98 F. Supp. 872 (E.D.N.Y. 1951).

[67] *See* Seedman v. Friedman, 132 F.2d 290 (2d Cir. 1942).

[68] Bankruptcy Act § 63c, 11 U.S.C. § 103c (1965). The expiration of the time allowed in a bar order for the filing of claims will not prevent the presentation of a claim based upon the rejection of an executory contract. *In re* Greenpoint Metalic Bed Co., 113 F.2d 881 (2d Cir. 1940).

[69] Bankruptcy Act § 202, 11 U.S.C. § 602 (1965). The section may not be nullified by the provisions of particular leases. Oldden v. Tonto Realty Corp., 143 F.2d 916 (2d Cir. 1944).

[70] City Bank Farmers Trust Co. v. Irving Trust Co., 299 U.S. 433, 443 (1937). *See also In re* United Cigar Stores Co. of America, 86 F.2d 629 (2d Cir. 1936), *cert. denied*, 300 U.S. 679 (1937) (premises sublet, date of surrender is when landlord is notified of rejection pursuant to an order of the court).

[71] Bankruptcy Act § 202, 11 U.S.C. § 602 (1965). *See In re* McCrory Stores Corp., 12 F. Supp. 267, 270 (S.D.N.Y. 1935).

[72] Consolidated Rock Prods. Co. v. DuBois, 312 U.S. 510 (1941).

[73] *In re* Deep Rock Oil Corp., 113 F.2d 266 (10th Cir.), *cert. denied.*, 311 U.S. 699 (1940). Since the accrual of interest is deferred during bankruptcy, it is considered part of the claim when a reorganization arises out of a pending bankruptcy. *In re* Oklahoma Ry., 61 F. Supp. 96 (W.D. Okla. 1945); *In re* Wickwire Spencer Steel Co., 12 F. Supp. 528 (W.D.N.Y. 1935).

[74] United States v. Edens, 189 F.2d 879 (4th Cir. 1951), *aff'd per curiam*, 342 U.S. 912 (1952). *But cf. In re* Leeds Homes, Inc., 222 F. Supp. 20 (E.D. Tenn. 1963), *aff'd*, 332 F.2d 648 (6th Cir. 1964) (post-petition interest denied even though security sufficient to pay both principal and interest). Note that interest upon interest is not allowed. Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156 (1956).

[75] Institutional Investors v. Chicago, M., St. P. & Pac. R.R., 318 U.S. 523 (1943); Ticonic Nat'l Bank v. Sprague, 303 U.S. 406 (1938).

Proofs of Claim. Following the approval of the petition, the judge prescribes the manner and time within which proofs of claim may be filed and allowed.[76] The manner and time for claim presentation are entirely at the discretion of the judge.[77]

The judge may establish a bar time after which proofs of claim will not be accepted. The bar order has no application to claims for specific property in the possession of the trustee, or the debtor continued in possession if no trustee is appointed.[78] Furthermore, amendments may be permitted after the bar time has expired if the proof of claim was filed prior to that time and the amendment is not in fact the presentation of a new claim.[79] The judge, of course, has the discretion to extend the time,[80] but judges have been reluctant to do so, especially where the proceedings are in an advanced stage.[81]

The existence *vel non* of a valid claim is generally determined at the time of filing the petition under chapter X or, where the reorganization proceeding develops out of a pending bankruptcy, at the time of filing of the bankruptcy petition.[82] But all valid claims are allowed if they arise after the reorganization petition has been filed and before either the qualification of a receiver or trustee or before the petition is approved and the debtor is continued in possession, whichever occurs first.[83]

Objections. Any creditor may object to the allowance of any claim or interest. The objection is to be heard and summarily determined by the court.[84] Typical grounds for objection are that the claim or interest (1) does not exist;[85] (2) arose out of an illegal[86] or fraudulent[87] transaction;

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[76] Bankruptcy Act § 196, 11 U.S.C. § 596 (1965).

[77] Fleeger v. Ames, 120 F.2d 803 (10th Cir. 1941). Note that some districts make provision by local rule.

[78] Rowan v. Harburney Oil Co., 91 F.2d 122 (10th Cir. 1937); *In re* Burgemeister Brewing Co., 84 F.2d 388 (7th Cir. 1936).

[79] *In re* Wilshire Professional Bldg., 98 F. Supp. 204 (S.D.N.Y. 1951); *In re* Kellett Aircraft Corp., 97 F. Supp. 979 (E.D. Pa. 1951).

[80] Bankruptcy Act § 119, 11 U.S.C. § 519 (1965).

[81] North Am. Car Corp. v. Peerless Weighing & Vending Mach. Corp., 143 F.2d 938 (2d Cir. 1944); Standard Steel Works v. American Pipe & Steel Corp., 111 F.2d 1000 (9th Cir. 1940); *In re* Corona Radio & Television Corp., 102 F.2d 959 (7th Cir. 1939). Note that reasonable notice of the bar time should be given. *See* New York v. New York, N.H. & H.R.R., 344 U.S. 293 (1953).

[82] *In re* Paramount Publix Corp., 85 F.2d 42 (2d Cir. 1936); Planert v. Cosmopolitan Bond & Mortgage Co., 79 F.2d 547 (7th Cir. 1935), *cert. denied*, 296 U.S. 657 (1936). Note that this rule does not apply to claims under Bankruptcy Act §§ 67b (statutory liens), 201, 202, 11 U.S.C. §§ 107b, 601, 602 (1965). Whether a valid and subsisting claim exists is determined by reference to state law in the absence of overruling federal law. Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156 (1946). *See In re* V-I-D, Inc., 198 F.2d 392 (7th Cir. 1952), *cert. denied*, 344 U.S. 914 (1953) (a claim unenforceable under state law will not be disallowed where a bankruptcy court orders distribution according to criteria established by the Bankruptcy Act.).

[83] Bankruptcy Act § 201, 11 U.S.C. § 601 (1965). The Act determines the rights, duties, and liabilities of creditors between the filing of the reorganization petition and the approval of that petition. Bankruptcy Act § 200, 11 U.S.C. § 600 (1965). Sections dealing with certain bona fide transactions in personal property and transfers of real property are incorporated. Bankruptcy Act §§ 70d, 21g, 11 U.S.C. §§ 110d, 44g (1966). *See In re* North Atl. & Gulf S.S. Co., 200 F. Supp. 818 (S.D.N.Y.), *aff'd sub nom.* Schilling v. McAllister Bros., 310 F.2d 123 (2d Cir. 1962).

[84] Bankruptcy Act § 196, 11 U.S.C. § 596 (1965).

[85] *In re* Philip A. Singer & Bros., 114 F.2d 813 (3d Cir.), *cert. denied*, 311 U.S. 649 (1940).

[86] *In re* American Fuel & Power Co., 122 F.2d 223 (6th Cir. 1941), *appeal dismissed*, 322 U.S. 379 (1944); *In re* Wilton-Maxfield Management Co., 117 F.2d 913 (9th Cir. 1941).

[87] *In re* Van Sweringen Corp., 111 F.2d 378 (6th Cir. 1940).

(3) was the result of an ultra vires act;[88] (4) lacked consideration;[89] (5) is barred by the statute of limitations;[90] (6) would be a penalty;[91] or (7) was transferred or assigned for inadequate consideration due to fraud, misrepresentation, overreaching or violation of fiduciary duty.[92] Claims of creditors who have received or acquired preferences, liens, conveyances, transfers, assignments or encumbrances, void or voidable under the Act, are not allowed unless the preferences, liens, conveyances, transfers, assignments, or encumbrances are surrendered.[93]

If an objection is not supported by evidence, a claim valid on its face may be allowed.[94] The party objecting has the burden of going forward with the evidence, but the burden of proof rests on the claimant.[95] Objections may be compromised[96] and claims which have been allowed or rejected may be reconsidered.[97] A creditor's claim may be offset against a debt provided the court feels that from all of the facts equity requires it.[98] The court has summary jurisdiction to determine set-offs.[99]

Classification. Classification of creditors is important because it determines the treatment under the plan. Since voting is calculated by class, classification also determines how a creditor's vote will be tabulated. Creditors are divided into classes according to the nature, *i.e.*, the legal character or effect, of their claims,[100] which is usually decided as of the date of the filing of the reorganization petition.[101] If the petition is filed in a

[88] *In re* Bankers Trust Co., 15 F. Supp. 21 (E.D. Mich. 1936).

[89] *In re* 4500 North Hermitage Ave. Apartments Corp., 118 F.2d 857 (7th Cir. 1941).

[90] *In re* Madison Rys., 102 F.2d 178 (7th Cir. 1939).

[91] *In re* Tastyeast, Inc., 126 F.2d 879 (3d Cir.), *cert. denied*, 316 U.S. 696 (1942) (interest as penalty). Debts owing to a governmental body as a penalty or forfeiture will only be allowed up to actual pecuniary loss sustained, together with any "reasonable and actual costs occasioned thereby and such interest as may have accrued on the amount of such loss according to law." Bankruptcy Act § 57j, 11 U.S.C. § 93j (1965).

[92] *In re* Van Sweringen Co., 119 F.2d 231 (6th Cir.), *cert. denied*, 314 U.S. 671 (1941); *In re* Norcor Mfg. Co., 109 F.2d 407 (7th Cir.), *cert. denied*, 310 U.S. 625 (1940). Note that the court may either disallow the whole claim, or the interest, or allow it only for the amount actually paid.

[93] Bankruptcy Act § 57g, 11 U.S.C. § 93g (1965).

[94] Fleeger v. Ames, 120 F.2d 803 (10th Cir. 1941).

[95] United Hotels Co. of America, Inc. v. Mealey, 147 F.2d 816 (2d Cir. 1945); Alexander v. Theleman, 69 F.2d 610 (10th Cir.), *cert. denied*, 293 U.S. 581 (1934).

[96] *In re* Burns Bros., 14 F. Supp. 910 (S.D.N.Y. 1936).

[97] Bankruptcy Act §§ 2(a)(2), 57k, 11 U.S.C. §§ 11(a)(2), 93k (1965).

[98] United States v. John A. Johnson & Sons, 111 F. Supp. 785 (E.D. Tenn. 1953); *see* Bankruptcy Act § 68, 11 U.S.C. § 108 (1965).

[99] Susquehanna Chem. Corp. v. Producers Bank & Trust Co., 174 F.2d 783 (3d Cir. 1949); *In re* Cuyahoga Fin. Co., 136 F.2d 18 (6th Cir. 1943) (even though the creditor had not filed a claim or consented to the court's jurisdiction).

[100] Bankruptcy Act § 197, 11 U.S.C. § 597 (1965). This section also provides for notice and a hearing, if necessary, upon the application of a creditor. Notice is given to holders of secured claims and others as the judge may designate. The value of the security is determined summarily and any excess is classified as unsecured. *See* Mokava Corp. v. Dolan, 147 F.2d 340 (2d Cir. 1945); *In re* Cosgrove-Meehan Coal Corp., 136 F.2d 3 (3d Cir.), *cert. denied*, 320 U.S. 777 (1943); St. Louis Union Trust Co. v. Champion Shoe Mach. Co., 109 F.2d 313 (8th Cir. 1940); *In re* Ogden Apartment Bldg. Corp., 90 F.2d 712 (7th Cir. 1937).

[101] *In re* Pittsburgh Rys., 111 F.2d 932 (3d Cir. 1940), *aff'd sub nom.* Philadelphia Co. v. Dipple, 312 U.S. 168 (1941); Butzel v. Webster Apartments Co., 122 F.2d 362 (6th Cir. 1940); Price v. Spokane Silver & Lead Co., 97 F.2d 237 (8th Cir.), *cert denied*, 305 U.S. 626 (1938). Note that this rule does not apply to claims under Bankruptcy Act §§ 67b (statutory liens), 201, 202, 11 U.S.C. §§ 107b, 601, 602 (1965).

pending bankruptcy, the determining date will be the date of the original bankruptcy petition.[102]

Although the judge exercises a discretionary power in the classification of creditors,[103] certain guidelines are well established. The most important is the absolute priority rule,[104] which requires that full and complete compensation be given a superior class for their surrendered rights before the next class below may participate.[105] Since creditors are superior to stockholders, they must be separately classified.[106] Similarly, secured and unsecured creditors must be separately classified since secured creditors are superior.[107] Within these groups the classification will depend upon the nature of the claim.

Secured creditors are separately classified if their mortgages or liens differ.[108] Of course, where the security transaction is invalid, the creditor will be classified as unsecured.[109] Unsecured creditors are similarly classified into different groups if their claims are unequal. When certain unsecured creditors have some priority or preference over other unsecured creditors, they are separately classified.[110]

A special priority is given to unsecured claims which arise within six months of the reorganization and which are deemed operating expenses.[111] This priority usually applies against the debtor's current income, but can be satisfied out of all of the debtor's property if there was either a benefit to the secured creditors or the expenses were a necessity of the business.[112] The six months' rule is usually applied to a public or semi-public corporation, but there is some indication that the rule also applies to a private corporation.[113]

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[102] Planert v. Cosmopolitan Bond & Mortgage Co., 79 F.2d 547 (7th Cir. 1935), *cert. denied*, 296 U.S. 657 (1936).

[103] Texas Co. v. Blue Way Lines, Inc., 93 F.2d 593 (1st Cir. 1937); *In re* Palisades-on-the Desplaines, 89 F.2d 214 (7th Cir. 1937). The federal equity receivership cases will guide the discretion. *In re* Sixty-Seven Wall St. Restaurant Corp., 23 F. Supp. 672 (S.D.N.Y. 1938).

[104] Kyser v. MacAdam, 117 F.2d 232 (2d Cir. 1941); St. Louis Union Trust Co. v. Champion Shoe Mach. Co., 109 F.2d 313 (8th Cir. 1940).

[105] Institutional Investors v. Chicago, M., St. P. & Pac. R.R., 318 U.S. 523 (1943); Consolidated Rock Prods. Co. v. DuBois, 312 U.S. 510 (1941).

[106] *In re* Deep Rock Oil Corp., 113 F.2d 266 (10th Cir.), *cert. denied*, 311 U.S. 699 (1940).

[107] *In re* East Boston Coal Co., 30 F. Supp. 811 (M.D. Pa. 1940); *In re* Utilities Power & Light Corp., 29 F. Supp. 763 (N.D. Ill. 1939).

[108] Mokava Corp. v. Dolan, 147 F.2d 340 (2d Cir. 1945) (first mortgages on different property); Kyser v. MacAdam, 117 F.2d 232 (2d Cir. 1941) (mortgage and mechanic's lien). Purchase money mortgages on different parcels of land in the same locality and project may be classified together, notwithstanding variations in the value of property, the amounts and maturity dates of the mortgages, and other similar factors. *In re* Palisades-on-the-Desplaines, 89 F.2d 214, 217 (7th Cir. 1937).

[109] United States Hoffman Mach. Corp. v. Lauchli, 150 F.2d 301 (8th Cir. 1945); Nash v. Onondaga Hotel Corp., 140 F.2d 209 (2d Cir. 1944).

[110] *See In re* Cosgrove-Meehan Coal Corp., 136 F.2d 3 (3d Cir.), *cert. denied*, 320 U.S. 777 (1943) (a claim for services performed in saving some of the debtor's property is entitled to priority in the fund produced).

[111] *In re* North Atl. & Gulf S.S. Co., 200 F. Supp. 818 (S.D.N.Y.), *aff'd sub nom.* Schilling v. McAllister Bros., 310 F.2d 123 (2d Cir. 1962).

[112] *Id.* Some circumstances might call for a longer time. *See* Southern Ry. v. Carnegie Steel Co., 176 U.S. 257 (1900); *In re* Chicago, R.I. & Pac. Ry., 90 F.2d 312 (7th Cir.), *cert. denied*, 302 U.S. 717 (1937).

[113] Dudley v. Mealey, 147 F.2d 268 (2d Cir.), *cert. denied*, 325 U.S. 873 (1945). *But cf. In re* Pussey & Jones Corp., 295 F.2d 479 (3d Cir. 1961); *In re* North Atl. & Gulf S.S. Co., 200 F. Supp. 818 (S.D.N.Y.), *aff'd sub nom.* Schilling v. McAllister Bros., 310 F.2d 123 (2d Cir. 1962).

Subordination agreements among creditors are given effect in determining classification,[114] and equity may sometimes require the subordination of other claims. Usually, equitable subordination is imposed in cases of illegality,[115] fraud,[116] unjust enrichment or breach of a fiduciary relationship,[117] and transactions between an officer and the company or between a parent and a subsidiary corporation.[118]

Where creditors have distinct voting interests, because of some dual status such as creditor and stockholder, they may be separately classified.[119] On the other hand, mere bias or leaning in voting interests does not provide a sufficient foundation for classification.[120] Classification is subject to a later modification.[121] For example, a change in the proposed treatment of claims that were originally classed together requires separate classification.[122]

Representation. Any creditor has the right to be heard on all matters arising in a proceeding under chapter X[123] and a similar right to appeal.[124] This right also extends to a representative of the creditor—an attorney, or duly authorized agent or committee.[125]

A representative may perform any act under chapter X,[126] but a power of attorney is necessary to define the scope of an agent's or committee's authority.[127] The representative is a fiduciary,[128] and conflicts of interests or disloyalty will not be tolerated.[129] The judge has the power to supervise

[114] Elias v. Clarke, 143 F.2d 640 (2d Cir.), *cert. denied*, 323 U.S. 778 (1944); *In re* Allied Properties Co., 118 F.2d 773 (6th Cir. 1941); St. Louis Union Trust Co. v. Champion Shoe Mach. Co., 109 F.2d 313 (8th Cir. 1940).

[115] *In re* Inland Gas Corp., 187 F.2d 813 (6th Cir. 1951); Columbia Gas & Elec. Corp. v. United States, 151 F.2d 461 (6th Cir. 1945), 153 F.2d 101 (6th Cir.), *cert. denied*, 329 U.S. 737 (1946). *But cf.* West 52nd Theatre Co. v. Tyler, 178 F.2d 128 (2d Cir. 1949).

[116] *See* Pepper v. Litton, 308 U.S. 295 (1939).

[117] *In re* Commonwealth Light & Power Co., 141 F.2d 734 (7th Cir.), *cert. denied*, 322 U.S. 766 (1944); President & Directors of Manhattan Co. v. Kelby, 147 F.2d 465 (2d Cir. 1944), *cert. denied*, 324 U.S. 866 (1945).

[118] *In re* V. Loewer's Gambrinus Brewery Co., 167 F.2d 318 (2d Cir. 1948); *In re* Kansas City Journal-Post Co., 144 F.2d 791 (8th Cir. 1944).

[119] Kaufman County Levee Improvement Dist. No. 4 v. Mitchell, 116 F.2d 959 (5th Cir. 1941).

[120] J. P. Morgan & Co. v. Missouri Pac. R.R., 85 F.2d 351 (8th Cir.), *cert. denied*, 299 U.S. 604 (1936).

[121] *Id.*

[122] Kyser v. MacAdam, 117 F.2d 232 (2d Cir. 1941).

[123] Bankruptcy Act § 206, 11 U.S.C. § 606 (1965). Creditors may petition the judge for an order designating them as recipients of notice. *In re* International Power Secs. Corp., 38 F. Supp. 543 (D.N.J. 1941); *In re* 8309 Talbot Place Corp., 27 F. Supp. 40 (E.D.N.Y. 1939).

[124] Young v. Higbee Co., 324 U.S. 204 (1945).

[125] Bankruptcy Act § 209, 11 U.S.C. § 609 (1965). *See* Bankruptcy Act §§ 163-66, 11 U.S.C. §§ 563-66 (1965) for the preparation and availability of lists. An attorney must file a statement with the court listing the names and addresses of the creditors he represents, the nature and amount of their claims, and the time of acquisition, excepting claims alleged to have been acquired more than one year prior to the filing of the petition. Bankruptcy Act § 210, 11 U.S.C. § 610 (1965). Every representative, person or committee, of more than twelve creditors must file under oath a statement including certain essential ingredients as specified in the Act. Bankruptcy Act § 211, 11 U.S.C. § 611 (1965).

[126] Manufacturers' Trust Co. v. Kelby, 125 F.2d 650 (2d Cir.), *cert. denied*, 316 U.S. 697 (1942).

[127] *In re* Pilsener Brewing Co., 79 F.2d 63 (9th Cir. 1935).

[128] Brown v. Gerdes, 321 U.S. 178 (1944); Woods v. City Nat'l Bank & Trust Co., 312 U.S. 262 (1941).

[129] Woods v. City Nat'l Bank & Trust Co., 312 U.S. 262 (1941); American United Mutual Life Ins. Co. v. City of Avon Park, 311 U.S. 138 (1940).

those acting in a representative capacity, and he may (1) disregard any provision of the authorization agreement, (2) demand an accounting, (3) restrain the exercise of any power which he finds to be unfair or not consistent with public policy, and (4) limit any claim or stock acquired by the representative in contemplation or in the course of the reorganization to the actual consideration paid.[130] Further, the representative will not be allowed to appear in the chapter X proceeding until he has satisfied the court that he has complied with all applicable state and federal laws regulating his activities and personnel.[131]

V. Proceedings Subsequent to Approval of Petition

After the approval of the petition and before any plan for reorganization is submitted, the court must provide for the management of the debtor corporation. Where the indebtedness of the debtor, liquidated as to amount and not contingent as to liability, is $250,000 or over, the judge must appoint a trustee upon approval of the petition.[132] If the indebtedness is less than $250,000, the judge has a choice between appointing a trustee or allowing the debtor to continue in possession.[133] In any event, since a debtor in possession holds its powers in trust for the creditors, the creditors have the right to require the exercise of those powers for their benefit.[134]

Where a trustee is appointed, the judge may appoint as an additional trustee a person who is a director, officer, or employee of the debtor to operate the business and manage the property of the debtor.[135] A trustee must be a disinterested individual who is competent to perform his duties, or a corporation authorized by its charter or by-laws to act as a trustee.[136] The Act disqualifies a person from acting as a trustee if:[137]

(1) he is a creditor or stockholder of the debtor;[138] or
(2) he is or was an underwriter of any of the outstanding securities of the debtor or within five years prior to the date of the filing of the petition was underwriter of any securities of the debtor; or
(3) he is, or was within two years prior to the date of the filing of the petition, a director, officer, or employee of the debtor or any such underwriter,

[130] Bankruptcy Act § 212, 11 U.S.C. § 612 (1965). *See, e.g., In re* Castle Beach Apartments, Inc., 113 F.2d 762 (2d Cir. 1940) (judge may prohibit vote of representative).

[131] Bankruptcy Act § 213, 11 U.S.C. § 613 (1965). *See* S. Rep. No. 1916, 75th Cong., 3d Sess. 34 (1938). *See also* 6A Collier ¶ 9.32 for a discussion of the effect of the Securities Act of 1933 and the Securities and Exchange Act of 1934.

[132] Bankruptcy Act § 156, 11 U.S.C. § 556 (1965).

[133] *Id. See also* Bankruptcy Act § 159, 11 U.S.C. § 559 (1965) (where the indebtedness is less than $250,000, the judge may at any time terminate the appointment of a trustee and restore the debtor to the possession of its property, or, if the debtor has been continued in possession, terminate its possession and appoint a trustee).

[134] *In re* Martin Custom Made Tires Corp., 108 F.2d 172 (2d Cir. 1939).

[135] Bankruptcy Act § 156, 11 U.S.C. § 556 (1965). *See also* Bankruptcy Act § 160, 11 U.S.C. § 560 (1965): "In any case, the judge at any time, without or upon cause shown may appoint additional trustees and co-trustees, or remove trustee and appoint substitute trustees; and upon each such appointment the judge shall fix a hearing . . . to consider objections to the retention in office of the trustee . . . ."

[136] Bankruptcy Act § 45, 11 U.S.C. § 73 (1965). Note that under chapter X the trustee need not reside or have his office within the district.

[137] Bankruptcy Act § 158, 11 U.S.C. § 558 (1965).

[138] *See In re* Realty Associates Sec. Corp., 56 F. Supp. 1007 (E.D.N.Y. 1944) (nominal ownership of the subsidiary's stock in their fiduciary capacity as trustees of the parent does not prevent such persons from being deemed disinterested).

or an attorney for the debtor of such underwriter;[139] or
(4) it appears that he has, by reason of any other direct or indirect relationship to, connection with, or interest in the debtor or such underwriter, or for any reason an interest materially adverse to the interests of any class of creditors or stockholders.

These tests are not exclusive but they do cover most conflicts which could arise. The purpose of the requirement of disinterestedness is to insure that a trustee will be independent of all conflicting interests which might color his decisions concerning estate matters. An attorney appointed to represent a trustee must also be disinterested.[140] However, an exception is made if an attorney is employed for a specified purpose other than representing the trustee in conducting the chapter X proceeding, such as a managerial function.[141]

At the first required hearing or any adjournment thereof, or, upon application, at any other time, the creditors may object to the continuance of the debtor in possession or the appointment of a trustee upon the ground that he is not qualified or not disinterested.[142] In order to successfully attack the judge's order the creditor must show an abuse of discretion on the part of the judge.[143]

If a trustee has been appointed, he has the ultimate responsibility for the preparation of a reorganization plan. The trustee is under a duty to furnish all creditors with a brief statement concerning the property, liabilities, and financial condition of the debtor, the operation of its business and the desirability of its continuance.[144] This information enables the creditors to make informed suggestions for the formulation of a plan.[145] If a debtor is continued in possession, the judge may at any time appoint a disinterested person as an examiner to prepare a plan.[146] If the creditors be-

[139] *See In re* TMT Trailer Ferry, Inc., 334 F.2d 118, 119-20 (5th Cir. 1964) ("A trustee would not be disinterested . . . if the proponents of a plan assured him of emoluments and security rather than merely nominating him for approval by the court and subject to the usual control of the Board of Directors."). Note that the provision permitting the appointment of an additional trustee who is a director, officer, or employee of the debtor must be made to harmonize with section 158(3) of the Act, and that portion of the latter prohibiting the appointment of such a person must be held inapplicable. Meredith v. Thralls, 144 F.2d 473 (2d Cir.), *cert. denied*, 323 U.S. 758 (1944). However, an additional trustee must meet the other requirements of disinterestedness. *In re* Ocean City Auto. Bridge Co., 184 F.2d 726 (3d Cir. 1950) (he cannot be a stockholder or have acted as counsel for various stockholders and creditors of the corporation).

[140] Bankruptcy Act § 157, 11 U.S.C. § 557 (1965). *See In re* Progress Lectro Shave Corp., 117 F.2d 602 (2d Cir. 1941); *In re* Chicago Rapid Transit Co., 93 F.2d 832 (7th Cir. 1937) (where an attorney's firm has represented, for the year immediately preceding, an important creditor and majority stockholder of the debtor corporation, even though the matters in which such attorney was employed had no relation to the debtor's reorganization, that firm of attorneys should not be retained as counsel by the trustee).

[141] Bankruptcy Act § 157, 11 U.S.C. § 557 (1965). *See In re* McGrath Mfg. Co., 95 F. Supp. 825 (D. Neb. 1951) (employment of an attorney for the handling of business matters such as the leasing of property and the collection of accounts, though the attorney was not disinterested).

[142] Bankruptcy Act § 162, 11 U.S.C. § 562 (1965).

[143] This may be done by showing an improper appointment, *i.e.*, one harmful to the interest of creditors or the administration of the estate. *See, e.g., In re* Hotel Martin Co., 83 F.2d 233 (2d Cir. 1936) (where a bank controlled the election of directors, and the appointment of the debtor to continue in possession would mean that the interests of the bank as mortgagee would be paramount and the other creditors and stockholders would have little to say about management, the judge did not abuse his discretion in appointing a trustee).

[144] Bankruptcy Act § 167(5), 11 U.S.C. § 567(5) (1965).

[145] *See* Bankruptcy Act § 167(6), 11 U.S.C. § 567(6) (1965).

[146] Bankruptcy Act § 168, 11 U.S.C. § 568 (1965).

lieve that an investigation is warranted to determine whether the debtor corporation has claims against management or other persons, or that claims exist which the debtor is not satisfactorily pursuing, they may seek an examination of the facts or petition the judge for the appointment of an examiner.[147]

Where a trustee has been appointed, he must either submit a plan or a report of the reasons why a plan cannot be effected.[148] A hearing is then held and the creditors may object to the plan or report, make amendments, or propose other plans. Where the debtor is continued in possession, each creditor may file one or more plans, and a hearing is provided to consider objections and amendments.[149]

VI. Provisions of a Plan

Chapter X requires the inclusion of certain provisions in any plan and permits the inclusion of others.[150] The plan must alter or modify the rights of at least one class of creditors either by issuance of new securities or otherwise.[151] However, a plan which merely provides for the new corporation to pay the debts in full as they mature has been interpreted as a change of creditor's rights within the statute.[152] A secured creditor's rights are modified within the meaning of the Act if the date for full payment of the principal is extended or if a reduced amount in cash is accepted in full payment of the debt.[153]

The plan may deal with all or any part of the debtor's property[154] and may provide for the rejection of most executory contracts.[155] The plan must provide for the payment of all costs and expenses of administration and other allowances which may be made or approved by the judge;[156] must specify what claims, if any, are to be fully paid in cash[157] and the creditors or any class of them not affected by the plan and the provisions, if

[147] Gochenour v. Cleveland Terminals Bldg. Co., 118 F.2d 89 (6th Cir. 1941); *see* Bankruptcy Act § 21(a), 11 U.S.C. § 44(a) (1965) (concerning examinations).

[148] Bankruptcy Act § 169, 11 U.S.C. § 569 (1965).

[149] Bankruptcy Act § 170, 11 U.S.C. § 570 (1965). *See* Bankruptcy Act § 171, 11 U.S.C. § 571 (1965) for the provision concerning notice under §§ 169, 170. Note that the judge may advance the time of the hearing upon the application of any creditor.

[150] Bankruptcy Act § 216, 11 U.S.C. § 616 (1965).

[151] Bankruptcy Act § 216(1), 11 U.S.C. § 616(1) (1965).

[152] Continental Ins. Co. v. Louisiana Oil Ref. Corp., 89 F.2d 333 (5th Cir. 1937), *cert. denied*, 305 U.S. 622 (1938).

[153] *In re* Janson Steel & Iron Co., 47 F. Supp. 652 (E.D. Pa. 1942).

[154] Bankruptcy Act § 216(2), 11 U.S.C. § 616(2) (1965).

[155] Bankruptcy Act § 216(4), 11 U.S.C. § 616(4) (1965). Contracts in the public authority may not be rejected. The term "in the public authority" is not defined in the Act nor by the courts. The Congressional purpose was to prevent the cancellation of contracts with public agencies or bodies where the public interest would be affected. *Hearings on H.R. 8046 Before the House Comm. on the Judiciary*, 75th Cong., 2d Sess. 171-99 (1937-1938). If a contract has not already been dealt with, a party to the contract may insist that it either be rejected or fully assumed, but mere failure to reject does not amount to an assumption; and where a plan neither rejects nor assumes an executory contract, but nevertheless assigns it to a new corporation, the party to the contract, without protesting, will be bound by confirmation of the plan. Mohonk Realty Corp. v. Wise Shoe Stores, Inc., 111 F.2d 287 (2d Cir.), *cert. denied*, 311 U.S. 654 (1940). A plan cannot modify the terms of a leasehold estate belonging to a debtor. *In re* Michigan-Ohio Bldg. Corp., 97 F.2d 845 (7th Cir. 1938). The proper procedure is to provide for a modification of the leasehold by a plan with provisions for rejection if the modification is not accepted by the lessor. Institutional Investors v. Chicago, M., St. P. & Pac. R.R., 318 U.S. 523 (1943).

[156] Bankruptcy Act § 216(3), 11 U.S.C. § 616(3) (1965).

[157] Bankruptcy Act § 216(5), 11 U.S.C. § 616(5) (1965).

any, made for them;[158] must include in the charter of the debtor, or any corporation organized to carry out the plan, those provisions for the protection of the creditors which are enumerated in the Act;[159] and must provide adequate means for the execution of the plan.[160]

Any class of creditors which is affected by the plan and does not accept it by the required two-thirds majority must be provided with adequate protection for the realization of their claims against the property.[161] Therefore, the dissenting classes must receive complete compensation or the "in-

[158] Bankruptcy Act § 216(6), 11 U.S.C. § 616(6) (1965). *See* Principale v. General Pub. Util. Corp., 164 F.2d 220 (2d Cir. 1947) (court has power to exclude non-original holders of securities).

[159] Bankruptcy Act § 216(12), 11 U.S.C. § 616(12) (1965).

[160] Bankruptcy Act § 216(10), 11 U.S.C. § 616(10) (1965). Note that the Act lists a number of methods which might be used. Whatever means are chosen must conform with applicable state and federal laws. *In re* Ambassador Hotel Corp., 124 F.2d 435 (2d Cir. 1942); *In re* Elless Co., 84 F. Supp. 280 (E.D. Mich.), *aff'd and modified on other grounds*, 174 F.2d 925 (6th Cir. 1949) (corporation laws of state or incorporation will control); *see* Baker Share Corp. v. London Terrace, Inc., 130 F.2d 157 (2d Cir. 1942) (powers and voting trusts); Brockett v. Winkle Terra Cotta Co., 81 F.2d 949 (8th Cir. 1936) (issuance of stock). *See also* Clayton Act, 15 U.S.C. §§ 12-27, 44 (1963); Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa-77bbbb (1963); Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1963). Note Bankruptcy Act § 264, 11 U.S.C. § 664 (1965) which provides that § 5 of the Securities Act of 1933 does not apply to certain transactions under chapter X; Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79-79z-6 (1963). *See also In re* 333 North Mich. Ave. Bldg. Corp., 84 F.2d 936 (7th Cir.), *cert. denied*, 299 U.S. 602 (1936) (plan may authorize the organization of a new corporation under the laws of the state where the objects of the plan can be more advantageously carried out, rather than the state where the debtor's property is located).

[161] Bankruptcy Act § 216(7), 11 U.S.C. § 616(7) (1965). The dissenting class must be protected by one of the following methods:

(a) The transfer, sale, or retention by the debtor, of the property subject to such claims. Where a nonassenting class of secured creditors have security exceeding the value of their claims, this provision may afford a successful means of treatment. *See, e.g.*, Texas Hotel Secs. Corp. v. Waco Dev. Co., 87 F.2d 395 (5th Cir. 1936), *cert. denied*, 300 U.S. 679 (1937). Where the value of the security is less than the claims, adequate protection may be afforded if the creditors are allowed to come in as unsecured creditors for any excess of the amount of their claims over the value of the security. *In re* Englander Spring Bed Co., 86 F.2d 998 (2d Cir. 1936).

(b) By a sale of such property free of such claims, at not less than a fair upset price, and the transfer of such claims to the proceeds of such sale. Upset price is merely a minimum price below which the court will not permit the property to be sold. *See* Country Life Apartments, Inc. v. Buckley, 145 F.2d 935, 938 (2d Cir. 1944) (adequate protection where upset price was fair market value; "[n]or does it make any difference that no actual bid was forthcoming at the auction sale. The trustee's plan gave the nonassenting creditors the opportunity the Bankruptcy Act requires. The fact that they either did not wish to or could not take advantage of this opportunity is immaterial.")

(c) By appraisal and payment in cash of the values of such claims. *See, e.g.*, National City Bank v. O'Connell, 155 F.2d 329 (2d Cir. 1946) (payment in full). The appraisal provision may not be used to secure value for the benefit of junior interests. *See* Preble Corp. v. Wentworth, 84 F.2d 73 (1st Cir.), *cert. denied*, 299 U.S. 575 (1936) (where mortgage bondholders refused to consent to a reorganization plan and the value of the property was substantially less than the debt, the debtor's property could not be taken from the bondholders by an appraisal of their securities).

(d) By such method as will, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection. For a case where this subsection was regarded as an alternative ground, see National City Bank v. O'Connell, 155 F.2d 329 (2d Cir. 1946).

Where the value of the property is such that it is insufficient to satisfy the claims of all or some of the junior creditors, their claims over and above the value of the property are worthless and the plan may disregard them since there is no need for adequate protection where there is no interest or equity to be protected, *i.e.*, they are not affected by the plan. Case v. Los Angeles Lumber Prods. Co., 308 U.S. 106 (1939); *In re* 620 Church St. Bldg. Corp., 299 U.S. 24 (1936). For plans providing inadequate protection, see Horn v. Ross Island Sand & Gravel Co., 88 F.2d 64 (9th Cir. 1937); Oakland Hotel Co. v. Crocker First Nat'l Bank, 85 F.2d 959 (9th Cir. 1936); Brockett v. Winkle Terra Cotta Co., 81 F.2d 949 (8th Cir. 1936). For plans providing adequate protection, see *In re* Chelsea Hotel Corp., 246 F.2d 133 (3d Cir. 1957); Country Life Apartments, Inc. v. Buckley, 145 F.2d 935 (2d Cir. 1944); *In re* Georgian Hotel Corp., 82 F.2d 917 (7th Cir.), *cert. denied*, 298 U.S. 673 (1936).

dubitable equivalence" of their surrendered rights.[162]

If the plan creates or extends any indebtedness for a period of more than five years, provisions may be made for the retirement of such indebtedness by stated or determinable payments out of a sinking fund or otherwise.[163] If the indebtedness is secured, the retirement provided must be within the expected useful life of the security. If the indebtedness is unsecured, or if the expected useful life of the security is not fairly ascertainable, then the retirement must be within a reasonable time, which must be specified and not in excess of forty years.

With respect to the manner of selection of the directors, officers, or voting trustees of the reorganized corporation, if any, the plan must include provisions which are equitable, compatible with the interests of creditors, and consistent with public policy.[164] This has been interpreted to require an allocation of voting power that will recognize the respective rights of the various classes of creditors.[165]

The plan may provide for the settlement or adjustment of claims belonging to the debtor or to the estate.[166] If such claims are not settled or

[162] *In re* Herweg, 119 F.2d 941 (7th Cir. 1941); Kyser v. MacAdam, 117 F.2d 232 (2d Cir. 1941); White v. Penelas Mining Co., 105 F.2d 726 (9th Cir. 1939); Texas Hotel Secs. Corp. v. Waco Dev. Co., 87 F.2d 395 (5th Cir. 1936), *cert. denied*, 300 U.S. 679 (1937) (inadequate protection given by scaling down past and future mortgage interest and extending maturity of principal seven years when the debtor is solvent); *In re* Granville & Winthrop Bldg. Corp., 87 F.2d 101 (7th Cir. 1936), *cert. denied*, 301 U.S. 702 (1937) (inadequate protection given by providing for a liquidating trust of fifteen years for bond holders with certificates of interest representing no interest in the property but only an interest in the net income and proceeds of property to be operated by liquidating trustees); Francisco Bldg. Corp. v. Battson, 83 F.2d 93 (9th Cir. 1936) (inadequate protection provided by substituting $340,000 five per cent income bonds for $524,000 six per cent first-mortgage bonds).

[163] Bankruptcy Act § 216(9), 11 U.S.C. § 616(9) (1965). *See In re* Quaker City Cold Storage Co., 71 F. Supp. 124 (E.D. Pa. 1947) (whether the proposed plan for reorganization of debtor should be amended by increasing the annual sinking fund payment in order to reduce a new first mortgage was optional and the court would not impose its personal preference, in absence of contention that fund was dangerously low); *In re* Gibson Hotels, Inc., 24 F. Supp. 859 (S.D.W. Va. 1938) (where plan provides that all earnings of the debtor's property must be applied to necessary expenses of operation, or retirement of bond indebtedness, or to be turned over to the mortgage trustees to become subject to their liens and to be used only upon the conditions and for the purposes stated in the plan, there is no unfairness in failing to make an affirmative provision for a sinking fund).

[164] Bankruptcy Act § 216(11), 11 U.S.C. § 616(11) (1965); *see In re* Boston Metropolitan Bldgs., Inc., 92 F. Supp. 843 (D. Mass. 1950) (plan was amended to provide for approval by the court of the initial board of directors and officers of the new corporation); *In re* Lower Broadway Properties, Inc., 58 F. Supp. 615 (S.D.N.Y. 1945) (voting trust upheld); *In re* Mortgage Guarantee Co., 36 F. Supp. 988 (D. Md. 1941) (voting trust approved); *In re* Reo Motor Car Co., 30 F. Supp. 785 (E.D. Mich. 1939) (plan providing that during period of a loan the corporation would be managed by a board of directors elected by voting trustees to be named by the court).

[165] *In re* Indiana Cent. Tel. Co., 24 F. Supp. 342 (D. Del. 1938) (where the parent of a subsidiary in reorganization owned all of the stock of the subsidiary and sixty-seven per cent of its bonds, plan enabled it to elect a majority of the first board of directors). *See also In re* Hudson & Manhattan R.R., 174 F. Supp. 148 (S.D.N.Y. 1959), *aff'd sub nom.* Spitzer v. Stichman, 278 F.2d 402 (2d Cir. 1960) (plan required trustee to submit amendment providing that initial directors of corporation be selected by the court from among nominees to be submitted by bondholders); *In re* Prudence Bonds Corp., 16 F. Supp. 324 (E.D.N.Y. 1935) (when the new board has members selected by bondholders, it may be necessary to give the majority of the bondholders' representatives the right to veto decisions where there is a conflict of interest between bondholders and stockholders).

[166] Bankruptcy Act § 216(13), 11 U.S.C. § 616(13) (1965). For plans where large claims by creditors and conflicting claims arising out of manipulation were compromised, see *In re* Associated Gas & Elec. Co., 61 F. Supp. 11 (S.D. Ill. 1944), *aff'd*, 149 F.2d 996 (2d Cir.), *cert. denied*, 326 U.S. 736 (1945); *In re* McCrory Stores Corp., 14 F. Supp. 739 (S.D.N.Y. 1935). *See also* Coral Gables First Nat'l Bank v. Constructors of Florida, Inc., 299 F.2d 736 (5th Cir.

adjusted in the plan, then a provision must be made for their retention and enforcement by the trustee or by an examiner if the debtor has been continued in possession.[167] The plan may also include any other appropriate provisions not inconsistent with the provisions of chapter X.[168]

After a hearing on the proposed plan or plans,[169] the district judge must approve the plan or plans which in his opinion have the necessary provisions and which are fair and equitable, and feasible.[170] The judge then sets a time within which the creditors and stockholders affected by the plan may accept it,[171] and the plan is distributed.[172]

VII. Acceptance, Confirmation and Consummation of Plan

After the judge approves the plan, the creditors are given an opportunity to accept or reject it. Following an affirmative vote by the requisite number of creditors and stockholders, the plan must be confirmed by the judge before it may go into effect.

Acceptance. The plan must be accepted in writing by the creditors holding two-thirds in amount of the allowed claims in each class. Claims of creditors not affected by the plan, or those whose acceptance or failure to accept is in bad faith, or those who do not accept and are provided for in the plan are excluded in determining the size of each class.[173]

Only those creditors whose interests are materially and adversely affected by the plan are allowed to vote.[174] A creditor whose claim is worthless because the property of the debtor cannot meet the claims of senior lien holders has no interest that can be materially or adversely affected.[175] Similarly, a creditor who is to be paid in full with cash[176] or a secured creditor who retains a lien on the debtor's property which is adequate to meet his claim[177] is not materially and adversely affected by the plan.

If the plan is accepted by the requisite majority, those voting against the acceptance will be bound by it even though their interests are material-

1962) (plan provided for continuation of litigation in state court between the debtor and a mortgagee).

[167] Bankruptcy Act § 216(13), 11 U.S.C. § 616(13) (1965). *See In re* Universal Lubricating Systems, Inc., 150 F.2d 832 (3d Cir.), *cert. denied*, 326 U.S. 744 (1945).

[168] Bankruptcy Act § 216(14), 11 U.S.C. § 616(14) (1965).

[169] Bankruptcy Act §§ 169, 170, 11 U.S.C. §§ 569, 570 (1965). Note that if a plan has been submitted to the Securities and Exchange Commission pursuant to § 172 the judge cannot approve the plan until a report has been filed, or the judge has been notified that no report will be filed, or a reasonable time has expired for the filing of a report as fixed by the judge. Bankruptcy Act §§ 172-74, 11 U.S.C. §§ 572-74 (1965).

[170] Bankruptcy Act § 174, 11 U.S.C. § 574 (1965).

[171] *Id.*

[172] Bankruptcy Act § 175, 11 U.S.C. § 575 (1965) provides for material to be sent with the plan in order to facilitate informed voting. Bankruptcy Act § 176, 11 U.S.C. § 576 (1965) prohibits the solicitation of any acceptance or authority to accept before the entry of an order approving a plan and the transmittal thereof to the creditors and stockholders. Any such solicitation is invalid unless the consent of the court has been obtained.

[173] Bankruptcy Act § 179, 11 U.S.C. § 579 (1965).

[174] *See* Bankruptcy Act § 107, 11 U.S.C. § 507 (1965).

[175] *In re* 620 Church St. Bldg. Corp., 299 U.S. 24 (1936); *In re* V-I-D, Inc., 226 F.2d 113 (7th Cir. 1955), *cert. denied*, 350 U.S. 968 (1956). *See also In re* Frank Fehr Brewing Co., 268 F.2d 170 (6th Cir. 1959), *cert. denied*, 362 U.S. 963 (1960).

[176] *See* Country Life Apartments, Inc. v. Buckley, 145 F.2d 935 (2d Cir. 1944).

[177] Gross v. Bush Terminal Co., 105 F.2d 930 (2d Cir. 1939); Central States Life Ins. Co. v. Koplar Co., 85 F.2d 181 (8th Cir. 1936).

ly changed.[178] Since a creditor may be represented by an attorney at law or a duly authorized agent or committee,[179] valid acceptances may be filed by the representative.[180] A committee must be given authority, by a proxy or by power of attorney or by having the securities deposited under an agreement authorizing the acceptance of the plan.[181] The judge has the authority to disqualify a claim for the purpose of determining the requisite majority for the acceptance of the plan if the acceptance or failure to accept is not in good faith.[182] This provision "was intended to apply to those . . . whose selfish purpose was to obstruct a fair and feasible reorganization in the hope that someone would pay them more than the ratable equivalent of their proportionate part of the bankrupt's assets."[183] Of course, this type of behavior must be distinguished from the selfish reasons used in determining what is best for oneself. The latter does not necessarily amount to bad faith.[184] A purchase of a claim in order to secure approval or rejection of the plan is not in itself bad faith.[185] But the purchase and the price paid are factors to be considered in determining good faith.[186]

Even though the Act makes no provision concerning who may object to a vote, it does give creditors and others the right to be heard on all matters.[187] In addition, the courts have recognized objections by junior creditors or lien holders even though they have no equity in the debtor's property.[188] There can be no withdrawal of an acceptance without judicial approval upon the showing of a substantial reason.[189]

The Act provides for the alteration of a plan after its submission for acceptance.[190] The judge must approve all changes, and his decision is final

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[178] *In re* Radio-Keith-Orpheum Corp., 106 F.2d 22 (2d Cir. 1939), *cert. denied*, 308 U.S. 622 (1940); *In re* Michigan-Ohio Bldg. Corp., 97 F.2d 845 (7th Cir. 1938); Ogilvie v. Dexter Horton Estate, 86 F.2d 282 (9th Cir. 1936), *cert. denied*, 299 U.S. 615 (1937); Campbell v. Alleghany Corp., 75 F.2d 947 (4th Cir.), *cert. denied*, 296 U.S. 581 (1935). Note that a creditor need not file a rejection if he does not wish to approve a plan. *In re* Kenilworth Bldg. Corp., 105 F.2d 673 (7th Cir. 1939).

[179] Bankruptcy Act § 209, 11 U.S.C. § 609 (1965).

[180] *In re* Pilsener Brewing Co., 79 F.2d 63 (9th Cir. 1935) (agent); *In re* Pressed Steel Car Co., 16 F. Supp. 329 (W.D. Pa. 1936) (broker).

[181] Standard Gas & Elec. Co. v. Deep Rock Oil Corp., 117 F.2d 615 (10th Cir.), *cert. denied*, 313 U.S. 564 (1941); *In re* Witherbee Court Corp., 88 F.2d 251 (2d Cir.), *cert. denied*, 301 U.S. 701 (1937); *In re* Wabash-Harrison Bldg. Corp., 85 F.2d 395 (7th Cir.), *cert. denied*, 298 U.S. 685 (1936); Penn-Florida Hotels Corp. v. Atlantic Nat'l Bank, 84 F.2d 15 (5th Cir. 1936).

[182] Bankruptcy Act § 203, 11 U.S.C. § 603 (1965). A hearing upon notice is required.

[183] Young v. Higbee Co., 324 U.S. 204, 211 (1945). *See* American United Life Ins. Co. v. City of Avon Park, 311 U.S. 138 (1940) (bad faith where individual will obtain an undisclosed benefit); *In re* Fuller Cleaning & Dyeing Co., 118 F.2d 978 (6th Cir. 1941) (bad faith where bondholders agreed to vote in favor of plan as part of an agreement for the purchase of their interests); *In re* Pine Hill Collieries Co., 46 F. Supp. 669, 671 (E.D. Pa. 1942) ("[p]ure malice, 'strikes' and blackmail, and the purpose to destroy an enterprise in order to advance the interests of a competing business, all plainly . . . [constitute] bad faith . . . .").

[184] Teton, *Reorganization Revised*, 48 YALE L.J. 573, 601, 602 (1939).

[185] *In re* P-R Holding Corp., 147 F.2d 895 (2d Cir. 1945); Mokova Corp. v. Dolan, 147 F.2d 340 (2d Cir. 1945).

[186] American United Mut. Life Ins. Co. v. City of Avon Park, 311 U.S. 138 (1940).

[187] Bankruptcy Act §§ 206-07, 11 U.S.C. §§ 606-07 (1965).

[188] *In re* Witherbee Court Corp., 88 F.2d 251 (2d Cir.), *cert. denied*, 301 U.S. 701 (1937).

[189] *In re* Frank Fehr Brewing Co., 268 F.2d 170 (6th Cir. 1959), *cert. denied*, 362 U.S. 963 (1960); Continental Ins. Co. v. Louisiana Oil Ref. Corp., 89 F.2d 333 (5th Cir. 1937), *cert. denied*, 305 U.S. 622 (1938); *In re* Eldredge Brewing Co., 26 F. Supp. 920 (D.N.H. 1939) (reasons unsubstantial); *In re* Clark & Willow Sts. Corp., 21 F. Supp. 43 (E.D.N.Y. 1937); *In re* Pressed Steel Car Co., 16 F. Supp. 329 (W.D. Pa. 1936).

[190] Bankruptcy Act § 222, 11 U.S.C. § 622 (1965).

unless there is an abuse of discretion.[191] If, in the judge's opinion, the change would not materially and adversely affect the creditors' interests, it need not be voted on.[192] If the judge finds that the proposed change would materially and adversely affect the creditors' interests, a hearing must be had and a time must be set for the acceptance or rejection of the change.[193]

Confirmation. The Act provides for a hearing to consider confirmation of the plan after the creditors have voted for acceptance.[194] The order of the judge approving a plan does not affect the right of a creditor to object to the confirmation of the plan.[195]

In order to confirm the plan, the judge must be satisfied that (1) all proceedings subsequent to the approval of the petition, all necessary provisions for obligations owing to the United States,[196] and all provisions required to be in the plan have been complied with; (2) that the plan is fair and equitable, and feasible; (3) that good faith exists in the proposal and acceptance of the plan and no forbidden promises or means were used;[197] (4) that all payments made or promised for services, costs and expenses have been fully disclosed to the judge and are reasonable, or, if to be fixed later, will be subject to the approval of the judge;[198] and (5) that the identity, qualifications, and affiliations of the directors or officers, or voting trustees, if any, have been fully disclosed, and their appointment is equitable, compatible with the interests of creditors and consistent with public policy.[199]

Fair and Equitable and Feasible. The requirement that the plan be fair and equitable and feasible provides substantial protection for the creditors' interests. These requirements must be found at both the approval and the confirmation of the plan. The fair and equitable standard refers to the distribution under the plan, whereas the feasible standard refers to the economic soundness of the plan.

Valuation of the debtor's property is an important step in determining both the fairness of the distribution and the economic feasibility of the

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[191] *In re* 1934 Realty Corp., 150 F.2d 477 (2d Cir.), *cert. denied*, 326 U.S. 734 (1945); *In re* Diversey Bldg. Corp., 141 F.2d 65 (7th Cir. 1944); Rogers v. Consolidated Rock Prods. Co., 114 F.2d 108 (9th Cir. 1940) (proposed modification not timely under circumstances of case).

[192] *In re* P-R Holding Corp., 147 F.2d 895 (2d Cir. 1945).

[193] If a creditor who has previously accepted the plan does not file a written rejection of the proposed change within the time fixed by the judge, he is deemed to have accepted the change unless his previous acceptance provides otherwise. Bankruptcy Act § 223, 11 U.S.C. § 623 (1965).

[194] Bankruptcy Act § 179, 11 U.S.C. § 579 (1965).

[195] Bankruptcy Act § 180, 11 U.S.C. § 580 (1965).

[196] *See* Bankruptcy Act § 199, 11 U.S.C. § 599 (1965).

[197] The proposal may be in bad faith if the plan is so visionary or impractical that it would be impossible to accomplish. *See* Price v. Spokane Silver & Lead Co., 97 F.2d 237 (8th Cir.), *cert. denied*, 305 U.S. 626 (1938); *In re* Tennessee Publishing Co., 81 F.2d 463 (6th Cir.), *aff'd*, 299 U.S. 18 (1936). One writer has said that the second part of the subsection, dealing with the means or promises forbidden by the Act, refers to §§ 152, 153, and 154 of title 18 of the United States Code, the criminal provisions dealing with bankruptcy. 6A COLLIER ¶ 11.08.

[198] This subsection was enacted to eliminate private agreements fixing compensation or reimbursement. Leiman v. Guttman, 336 U.S. 1 (1949). Criminal penalties are levied on such agreements. 18 U.S.C. § 155 (1965).

[199] Bankruptcy Act § 221, 11 U.S.C. § 621 (1965). For an example of judicial approval of a plan, see *In re* Waltham Watch Co., 97 F. Supp. 189 (D. Mass.), *aff'd sub nom.* Horowitz v. Kaplan, 193 F.2d 64 (1st Cir. 1951), *cert. denied*, 342 U.S. 946 (1952).

plan. The capital structure of the reorganized company must not only respect the priorities of the claimants but also should provide a reasonable prospect for survival.[200] The debtor must, therefore, be evaluated as a going concern via the capitalization of prospective earnings.[201] The nature and condition of the properties, the past earnings record, and all circumstances which indicate whether or not that record is a reliable criterion of future performance should be considered.[202] A liquidation value might be applicable if all or part of the debtor's property is non-productive,[203] or if the liquidation value is higher than the going concern value.[204] Where the plan provides for eventual liquidation, liquidating values should be used.[205] The judge's findings on value, being findings of fact, will not be reversed unless clearly erroneous.[206]

The requirement that the plan be fair and equitable also demands that the absolute priority rule be followed.[207] The plan must provide for participation of claims and interests in complete recognition of their strict priorities, and the debtor's property must support the extent of participation afforded each class of claims or interests.[208] The United States Supreme Court has said:

> [I]t is necessary to fit each into the hierarchy of the new capital structure in such a way that each will retain in relation to the other the same position it formerly had in respect of assets and of earnings of various levels. If that is done, each has obtained new securities which are the equitable equivalent of its previous rights . . . .[209]

The Court noted in another case that "[s]o long as the new securities offered are of a value equal to the creditor's claims, the appropriateness of the formula employed rests in the informed discretion of the court."[210] As a result, the securities must be distributed so that the respective position of the creditors as to their rank and surrendered rights will be recognized in the allocation of voting power and control.[211]

If there is a necessity of seeking new money from a group not having an equity, the participation accorded them must not be more than the reason-

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[200] Institutional Investors v. Chicago, M., St. P. & Pac. R.R., 318 U.S. 523 (1943).

[201] Consolidated Rock Prods. Co. v. DuBois, 312 U.S. 510 (1941).

[202] *Id.*

[203] *In re* Warren Bros. Co., 39 F. Supp. 381 (D. Mass. 1941).

[204] *In re* Porto Rican American Tobacco Co., 112 F.2d 655 (2d Cir. 1940).

[205] *In re* Lorraine Castle Apartments Bldg. Corp., 53 F. Supp. 994 (N.D. Ill. 1944), *aff'd*, 149 F.2d 55 (7th Cir.), *cert. denied*, 326 U.S. 728 (1945); *In re* Dover Boiler Works, Inc., 38 F. Supp. 701 (D.N.J. 1941); *In re* Mortgage Guarantee Co., 36 F. Supp. 988 (D. Md. 1941).

[206] *In re* 620 Church St. Bldg. Corp., 299 U.S. 24 (1936).

[207] Institutional Investors v. Chicago, M., St. P. & Pac. R.R., 318 U.S. 523 (1943); Marine Harbor Properties, Inc. v. Manufacturers Trust Co., 317 U.S. 78 (1942); Consolidated Rock Prods. Co. v. DuBois, 312 U.S. 510 (1941); Case v. Los Angeles Lumber Prods. Co., 308 U.S. 106 (1939); Northern Pac. Ry. v. Boyd, 228 U.S. 482 (1913).

[208] Consolidated Rock Prods. Co. v. DuBois, 312 U.S. 510 (1941); Case v. Los Angeles Lumber Prods. Co., 308 U.S. 106 (1939).

[209] Institutional Investors v. Chicago, M., St. P. & Pac. R.R., 318 U.S. 523, 563 (1943).

[210] Consolidated Rock Prods. Co. v. DuBois, 312 U.S. 510, 529-30 (1941).

[211] *In re* Tharp Ice Cream Co., 25 F. Supp. 417 (E.D. Pa. 1938) (where proposed plan for reorganization of an insolvent corporation provided for payment of creditors in preferred stock and permitted existing stockholders having no equity to retain their stock, creditors were entitled to full voting control); *In re* United Rys. & Elec. Co., 11 F. Supp. 717 (D. Md. 1935). *See also* *In re* Chain Inv. Co., 102 F.2d 323 (7th Cir. 1939).

able equivalent of their contribution.[212] Approval by a large majority of the creditors[213] or by a state commission[214] does not control the judge's determination as to the fairness and equity or feasibility of the plan.

The requirement of feasibility is designed to insure that the reorganized corporation will be in a solvent condition and will have reasonable prospects of financial stability and success.[215] The capital structure of the reorganized company should "be consistent with the value of the underlying enterprise . . . [and should] be formulated with reference to the expected course of income."[216] Among the many factors to be considered by the judge in determining the feasibility of the plan are: (1) debt-equity ratio;[217] (2) amount of fixed charges;[218] (3) amount of proposed dividends;[219] (4) provisions for working capital;[220] (5) prospective credit;[221] and (6) sinking fund provisions.[222] A simple and conservative capital structure should be created with the dominant purpose being the survival of the new company.[223]

If the judge finds that the plan meets all of the foregoing requirements he will confirm it. After confirmation, the plan is binding upon all creditors, whether or not they "are affected by the plan or have accepted it or have filed proofs of their claims or interests and whether or not their claims or interests have been scheduled or allowed or are allowable."[224] All questions which could have been raised become res judicata.[225] If the judge refuses confirmation, either the chapter X proceedings must be dismissed or bankruptcy liquidation ordered.[226]

Substantial Consummation. A plan may be changed until it has been consummated and a final decree is entered closing the estate[227] or until it is deemed substantially consummated.[228] A plan is deemed substantially consummated if, insofar as applicable, each of the following events has occurred:

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[212] Consolidated Rock Prods. Co. v. DuBois, 312 U.S. 510 (1941).

[213] Case v. Los Angeles Lumber Prods. Co., 308 U.S. 106 (1939).

[214] Metropolitan Holding Co. v. Weadock, 113 F.2d 207 (6th Cir. 1940).

[215] Price v. Spokane Silver & Lead Co., 97 F.2d 237 (8th Cir.), *cert. denied*, 305 U.S. 626 (1938); *In re* 333 North Mich. Ave. Bldg. Corp., 84 F.2d 936 (7th Cir.), *cert. denied*, 299 U.S. 602 (1936).

[216] *In re* Indiana Limestone Corp., SEC Release No. 63 (Feb. 2, 1945).

[217] *See In re* Lorraine Castle Apartments Bldg. Corp., 53 F. Supp. 994 (N.D. Ill. 1944), *aff'd*, 149 F.2d 55 (7th Cir.), *cert. denied*, 326 U.S. 728 (1945).

[218] *Id. See also In re* Waern Bldg. Corp., 145 F.2d 584 (7th Cir. 1944), *cert. denied*, 324 U.S. 871 (1945).

[219] *See In re* Waern Bldg. Corp., 145 F.2d 584 (7th Cir. 1944), *cert. denied*, 324 U.S. 871 (1945); *In re* Michigan-Ohio Bldg. Corp., 97 F.2d 845 (7th Cir. 1938).

[220] *See In re* Reo Motor Car Co., 30 F. Supp. 785 (E.D. Mich. 1939); *In re* Pressed Steel Car Co., 16 F. Supp. 325 (W.D. Pa. 1936); *In re* Celotex Co., 12 F. Supp. 1 (D. Del. 1935).

[221] *See In re* Pressed Steel Car Co., 16 F. Supp. 325 (W.D. Pa. 1936); *In re* United Ry. & Elec. Co., 11 F. Supp. 717 (D. Md. 1935).

[222] *See In re* Waern Bldg. Corp., 145 F.2d 584 (7th Cir. 1944), *cert. denied*, 324 U.S. 871 (1945).

[223] Consolidated Rock Prods. Co. v. DuBois, 312 U.S. 510 (1941).

[224] Bankruptcy Act § 224(1), 11 U.S.C. § 624(1) (1965).

[225] Prudence Realization Corp. v. Ferris, 323 U.S. 650 (1945).

[226] Bankruptcy Act §§ 236, 237, 11 U.S.C. §§ 636, 637 (1965).

[227] *See* Mohonk Realty Corp. v. Wise Shoe Stores, Inc., 111 F.2d 287 (2d Cir.), *cert. denied*, 311 U.S. 654 (1940).

[228] Bankruptcy Act § 229, 11 U.S.C. § 629 (1965).

> (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 . . . .[229]

Any creditor upon proper notice "may apply to the judge for an order declaring the plan to have been substantially consummated."[230] After the plan has been substantially consummated or an order of substantial consummation has been entered, the plan may not be altered or modified if the proposed alteration or modification would materially and adversely affect the participation provided for any class of creditors.[231] After the final decree is entered, changes cannot be made unless the judge has reserved the jurisdiction to do so in his final decree[232] or the estate is formally opened again.[233] Even if the judge has reserved jurisdiction or formally reopens the estate, no change may be made if the plan is substantially consummated and if such change would materially and adversely affect a party in interest.[234]

Distribution. After confirmation, distribution to creditors is then commenced under the provisions of the plan. Creditors who filed a proof of claim which was allowed and those whose claims, not contingent, unliquidated or disputed, were listed by the trustee or debtor in possession will participate in the distribution.[235] The latter claims may be objected to, and the objection must be heard and summarily determined by the court.[236] Section 204 provides:

> Upon distribution . . . the judge may, upon notice to all persons affected, fix a time, to expire not sooner than five years after the final decree closing the estate, within which, as provided in the plan or final decree—
> (1) the creditors, other than holders of securities, shall file, assign, transfer, or release their claims; and
> (2) the holders of securities shall present or surrender their securities. After such time no such claim or stock shall participate in the distribution under the plan.[237]

Section 205 then provides: "The securities or cash remaining unclaimed at

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[229] *Id.*
[230] *Id.*
[231] *Id.*
[232] The Towers' Hotel Corp. v. Lafayette Nat'l Bank, 148 F.2d 145 (2d Cir. 1945); *In re* Tom Moore Distillery Co., 52 F. Supp. 938 (W.D. Ky. 1943).
[233] *In re* Diversey Bldg. Corp., 141 F.2d 65 (7th Cir. 1944); Curtis v. O'Leary, 131 F.2d 240 (8th Cir. 1942); Mohonk Realty Corp. v. Wise Shoe Stores, Inc., 111 F.2d 287 (2d Cir.), *cert. denied*, 311 U.S. 654 (1940).
[234] *See* H.R. REP. No. 2320, 82d Cong., 2d Sess. 16 (1952). *See also* S. REP. No. 1395, 82d Cong., 2d Sess. 3-4 (1952).
[235] Bankruptcy Act 224(4), 11 U.S.C. § 624(4) (1965). *See In re* Realty Associates Secs. Corp., 58 F. Supp. 220 (E.D.N.Y. 1944) (excess assets over those needed to continue debtor's regular business could be distributed to bondholders, whether or not a plan had been proposed); *In re* Realty Associates Secs. Corp., 53 F. Supp. 1010 (E.D.N.Y. 1943) (payment of small merchandise or service claimants before plan is approved).
[236] Bankruptcy Act § 225, 11 U.S.C. § 625 (1965).
[237] Bankruptcy Act § 204, 11 U.S.C. § 604 (1965).

the expiration of the time fixed . . . or of any extension thereof, shall become the property of the debtor or of the new corporation acquiring the assets of the debtor under the plan, as the case may be, free and clear of any and all claims and interest."[238]

Property dealt with in the plan becomes free and clear of all claims and interests of creditors, except those claims and interests otherwise provided for in the plan, the confirming order, the transfer order, or the retention order.[239] The Act provides for a final decree "discharging the debtor from all its debts and liabilities . . . 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."[240] The final decree may also include an injunction prohibiting all suits or actions by creditors interfering with the plan.[241]

VIII. Compensation and Allowances

Compensation and allowances may be given to creditors, committees, or representatives and their attorneys or agents in a reorganization proceeding. The judge is given broad discretion in fixing the compensation and allowances.[242] In determining allowances, the judge must first decide whether the services are compensable or the expenses are reimbursable, and then determine the amount to be allowed.[243] The claimant has the burden of proving that his claim comes within those allowed by statute[244] and the value of his services.[245]

Since each claim must stand on its own footing, it is hard to develop general rules governing the allowance of claims. Economy of administration, however, is clearly the basic aim.[246] The words "proper" and "reasonable" in the various sections on compensation and allowances require the judge to look at the value of the debtor's estate, the amount available for allowances, and the ability of the reorganized company to meet these obligations.[247] In specific instances, the judge should also consider the ne-

[238] Bankruptcy Act § 205, 11 U.S.C. § 605 (1965).

[239] Bankruptcy Act § 226, 11 U.S.C. § 626 (1965).

[240] Bankruptcy Act § 228(1), 11 U.S.C. § 628(1) (1965). Discharge of a debtor does not discharge or affect the liability of a co-debtor, guarantor, indorser, insurer, or other surety. *In re* Nine North Church St., Inc., 82 F.2d 186 (2d Cir. 1936); *In re* Diversey Bldg. Corp., 86 F.2d 456 (7th Cir. 1936), *cert. denied*, 300 U.S. 662 (1937). Note that the discharge may be set aside. *See* Bankruptcy Act §§ 2a(12), 102, 11 U.S.C. §§ 11a(12), 502 (1965). The final decree will not be vacated when rights of third persons have intervened and those rights would be affected. Curtis v. O'Leary, 131 F.2d 240 (8th Cir. 1942); Standard Steel Works v. American Pipe & Steel Corp., 111 F.2d 1000 (9th Cir. 1940).

[241] Bankruptcy Act § 228(3), 11 U.S.C. § 628(3) (1965). *See* Mar-Tex Realization Corp. v. Wolfson, 145 F.2d 360 (2d Cir. 1944) (the injunction supersedes any injunctions or stays entered during the course of the proceeding).

[242] Dickinson Industrial Site, Inc. v. Cowan, 309 U.S. 382 (1940); *In re* Mountain States Power Co., 118 F.2d 405 (3d Cir. 1941) (if allowances are so grossly inadequate as to constitute an abuse of discretion, the appellate court may raise them).

[243] Stark v. Woods Bros., 109 F.2d 969 (8th Cir. 1940).

[244] Gochenour v. Cleveland Terminals Bldg. Co., 142 F.2d 991 (6th Cir.), *cert. denied*, 323 U.S. 767 (1944); Cooke v. Bowersock, 122 F.2d 977 (8th Cir. 1941).

[245] Woods v. City Nat'l Bank & Trust Co., 312 U.S. 262 (1941).

[246] Greensfelder v. St. Louis Pub. Serv. Co., 114 F.2d 53 (8th Cir.), *cert. denied*, 311 U.S. 714 (1940); Milbank, Tweed & Hope v. McCue, 111 F.2d 100 (4th Cir. 1940); Straus v. Baker Co., 87 F.2d 401 (5th Cir. 1937).

[247] *In re* Solar Mfg. Corp., 215 F.2d 555 (3d Cir. 1954); Finn v. Childs Co., 181 F.2d 431 (2d Cir. 1950); Stark v. Woods Bros. Corp., 109 F.2d 969 (8th Cir. 1940).

cessity and extent of the services, the experience and skill required, and the responsibilities assumed.[248] In the final analysis, the test becomes one of benefit to the debtor's estate and the security holders.[249] A denial of allowances for compensation does not necessarily result in a denial of reimbursement for proper cost and expenses incurred.[250]

The Act provides for reimbursement, in the judge's discretion, for proper costs and expenses of the petitioning creditors and reasonable costs for services and reimbursement for proper costs and expenses of their attorney.[251] Since the Act separates the provisions for the petitioning creditors from the provisions for their attorneys, the attorney must secure his compensation himself and the creditors cannot include it in their claims.[252] The attorney may be denied an allowance for his services and/or reimbursement for his expenses if the reorganization was not instituted in good faith.[253] The attorney may not "share or agree to share his compensation . . . with any person not contributing thereto, or share or agree to share in the compensation of any person . . . to which he has not contributed . . . . [*H*]*owever*, . . . an attorney-at-law may share such compensation with a law partner or with a forwarding attorney-at-law, and may share in the compensation of a law partner."[254] The attorney must file a "petition setting forth the value and extent of the services rendered, the amount requested and what allowances, if any, have theretofore been made to him."[255] The petition must be accompanied by his affidavit stating whether he has an agreement with any other person for a division of compensation. If the attorney violates the provision against sharing his compensation, it will be withheld.[256]

Committees or representatives of creditors and their attorneys or agents are allowed, in the judge's discretion, reasonable compensation for services and reimbursement for proper costs and expenses incurred in connection with the administration of the estate or a plan approved by the judge, regardless of whether it is accepted or confirmed.[257] Compensation and al-

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[248] *In re* Solar Mfg. Corp., 215 F.2d 555 (3d Cir. 1954); *In re* Detroit Int'l Bridge Co., 111 F.2d 235 (6th Cir. 1940).

[249] Dickinson Industrial Site, Inc. v. Cowan, 309 U.S. 382 (1940).

[250] *See, e.g., In re* Paramount-Publix Corp., 12 F. Supp. 823 (S.D.N.Y. 1935), *rev'd on other grounds*, 83 F.2d 406 (2d Cir. 1936).

[251] Bankruptcy Act § 241, 11 U.S.C. § 641 (1965). *See In re* Arcade Malleable Iron Co., 35 F. Supp. 461 (D. Mass. 1940) (the § 132 filing fee is included in proper costs and expenses allowable to petitioning creditors). For an attorney the allowance of compensation includes the ordinary expenses of operating a law office. *In re* Tom Moore Distillery Co., 52 F. Supp. 938 (W.D. Ky. 1943); *In re* National Radiator Co., 29 F. Supp. 804 (W.D. Pa. 1939); Watters v. Hamilton Gas Co., 29 F. Supp. 436 (S.D.W. Va. 1939), *aff'd in part, rev'd in part on other grounds*, 111 F.2d 100 (4th Cir. 1940). Proper cost and expenses are those not a necessary incident to the attorney's employment. *In re* Mercantile Arcade Realty Corp., 20 F. Supp. 397 (S.D. Cal. 1937).

[252] *In re* Arcade Malleable Iron Co., 35 F. Supp. 461 (D. Mass. 1940). For an example of an allowance to the petitioning creditors' attorney, see *In re* Condor Pictures, Inc., 33 F. Supp. 174 (S.D. Cal. 1939), *aff'd*, 112 F.2d 575 (9th Cir. 1940). For a discussion concerning the measure of compensation awarded to petitioning creditors' attorneys, see Johnson v. Carolina Scenic Stages, 242 F.2d 263 (4th Cir. 1957).

[253] General Order 43 (applicable in chapter X cases under General Order 52(2)).

[254] Bankruptcy Act § 62c, 11 U.S.C. § 102c (1965).

[255] Bankruptcy Act § 62d, 11 U.S.C. § 102d (1965).

[256] *Id.*

[257] Bankruptcy Act § 242, 11 U.S.C. § 642 (1965).

lowance here may include work done prior to the chapter X proceeding, but the work must have had some direct relation to the reorganization[258] and no reimbursement will be allowed when the service is primarily rendered in the sole interest of the individual or group represented.[259] Also, if the claimant does some act which is the function or duty of the trustee, debtor in possession, or some other officer of the estate, he is not entitled to reimbursement unless he secured the judge's authorization to proceed after demonstrating the officer's inability or unwillingness to act.[260] There is a split of authority on whether compensation and allowances can be given if the reorganization is disrupted before a plan is approved.[261] Compensation and allowances should be given since (1) reimbursement should not depend on the outcome of the reorganization; (2) activity is contemplated and encouraged by those involved; and (3) the statutory provision allowing compensation "in connection with the administration of the estate" is broad enough to cover this situation.[262]

A committee of the creditors need not formally intervene in order to be entitled to allowances,[263] and more than one committee may exist for a class of creditors. In this situation duplication of services should not be a basis for the denial of reimbursement.[264] Of course, where there is an actual, clear and unnecessary duplication, a denial may follow;[265] but if the different committees are entitled to function, they should likewise be entitled to reimbursement.[266]

Since committees and attorneys are fiduciaries, compensation and/or allowances may be denied by the judge if a conflict of interest exists.[267] Similarly, the judge may reimburse part of the committee instead of the whole, even though the committee agreement provides otherwise.[268]

In addition, reasonable compensation for services and reimbursement for proper costs and expenses may, in the judge's discretion, be granted to creditors and their attorneys in connection with (1) the submission by them of suggestions for a plan or proposals in the form of plans; or (2)

[258] Finn v. Childs Co., 181 F.2d 431 (2d Cir. 1950); *In re* Detroit Int'l Bridge Co., 111 F.2d 235 (6th Cir. 1940).

[259] *In re* Craigie Arms, Inc., 52 F. Supp. 110 (D. Mass. 1943) (no allowance for attempt to secure interest on mortgage or for pressing claim which was finally compromised); *In re* National Radiator Co., 29 F. Supp. 804 (W.D. Pa. 1939) (no allowance for activity of attorney in attempting to obtain a preferred classification for the class of creditors represented).

[260] Gochenour v. Cleveland Terminals Bldg. Co., 142 F.2d 991 (6th Cir.), *cert. denied*, 323 U.S. 767 (1944); Sartorious v. Bardo, 95 F.2d 387 (2d Cir. 1938).

[261] For a case that answers in the negative because of a lack of benefit, see *In re* Waverly Furniture Co., 36 F. Supp. 188 (N.D.N.Y. 1940). For cases answering in the affirmative, see *In re* Columbia Ribbon Co., 117 F.2d 999 (3d Cir. 1941); *In re* Old Algiers, Inc., 25 F. Supp. 509 (S.D.N.Y. 1938). A similar problem arises under § 243. For a case answering in the negative, see *In re* Childs Co., 52 F. Supp. 89 (S.D.N.Y. 1943). For a case answering in the affirmative, see *In re* William J. Lemp Brewing Co., 45 F. Supp. 400 (E.D. Ill. 1942).

[262] 6A COLLIER ¶ 13.06, at 596-98.

[263] *In re* Philadelphia & Reading Coal & Iron Co., 105 F.2d 358 (3d Cir. 1939).

[264] *See* Finn v. Childs Co., 181 F.2d 431 (2d Cir. 1950).

[265] *In re* Starrett Corp., 92 F.2d 375 (3d Cir. 1937).

[266] *In re* Mountain States Power Co., 118 F.2d 405 (3d Cir. 1941).

[267] Woods v. City Nat'l Bank & Trust Co., 312 U.S. 262 (1941).

[268] *In re* Baldwin Locomotive Works, 35 F. Supp. 773 (E.D. Pa. 1940). *See In re* Detroit Int'l Bridge Co., 111 F.2d 235 (6th Cir. 1940) (allowance to a committee will be denied if the activity resulted from the efforts of an attorney without the active participation of the committee).

objections by them to the confirmation of the plan; or (3) the administration of the estate.[269] The judge may give consideration only to claims for services, costs and expenses which were beneficial in the administration of the estate or which contributed to the confirmed plan, or to a refusal to confirm a plan.[270]

A creditor who is a member of a class with no equity in the debtor's property may receive compensation or reimbursement for himself or his attorney if he comes within the terms of the section.[271] Unsuccessful opposition is denied compensation by the precise wording of the section since the services must contribute to the refusal of confirmation.[272]

When the compensation and allowance provisions are read with either section 246 or section 259, the judge has the discretion to grant compensation and allowances even though the reorganization is a failure and (1) the proceeding is either dismissed or bankruptcy liquidation ordered,[273] or (2) the proceeding is dismissed and a prior, superseded non-bankruptcy proceeding is reinstated.[274]

Compensation and allowances may be made only upon notice and hearing.[275] All claimants for compensation and allowance must:

> file with the court a statement under oath showing the claims against, or stock of, the debtor, if any, in which a beneficial interest, *direct or indirect*, has been acquired or transferred by him or for his account, after the commencement of such proceeding. No compensation or reimbursement shall be allowed to any committee or attorney, or other person acting in the proceedings in a representative or fiduciary capacity, who at any time after assuming to act in such capacity has purchased or sold such claims or stock, or by whom or for whose account such claims or stock have, without the prior

[269] Bankruptcy Act § 243, 11 U.S.C. § 643 (1965).

[270] *Id.*

[271] *In re* Utilities Power & Light Corp., 33 F. Supp. 347 (N.D. Ill. 1940). *But cf.* Watters v. Hamilton Gas Co., 29 F. Supp. 436 (S.D.W. Va. 1939), *aff'd in part, rev'd in part*, 111 F.2d 100 (4th Cir. 1940).

[272] In every other circumstance, the opposition is entitled to compensation and allowance even if unsuccessful as long as it meets the other requirements. *In re* Equitable Office Bldg. Corp., 83 F. Supp. 531 (S.D.N.Y.), *rev'd on other grounds*, 175 F.2d 218 (2d Cir. 1949). Some courts find no compensable benefit because of a duplication of services. *See In re* Porto Rican Am. Tobacco Co., 117 F.2d 599 (2d Cir. 1941); *In re* Philadelphia & Reading Coal & Iron Co., 61 F. Supp. 120 (E.D. Pa. 1945).

[273] Bankruptcy Act § 246, 11 U.S.C. § 646 (1965). *See In re* Columbia Ribbon Co., 117 F.2d 999 (3d Cir. 1941).

[274] Bankruptcy Act § 259, 11 U.S.C. § 659 (1965). *See* Smith v. Central Trust Co., 139 F.2d 733 (4th Cir. 1944). Note that there is a disagreement as to whether administrative expenses may be charged against all of the debtor's property. For a case in the affirmative, see *In re* Gage County Elec. Co., CCH FED. BANKING L. REP. ¶ 52,602 (1940). For cases that say that secured creditors must participate in the reorganization proceeding, or must derive benefit from or consent to or cause the activities for which the allowances are allowed before administrative expenses can be charged against secured assets, see *In re* Sheridan View Bldg. Corp., 154 F.2d 1008 (7th Cir. 1946); John Hancock Mutual Life Ins. Co. v. Casey, 139 F.2d 207 (1st Cir. 1943).

When a reorganization petition is filed in a pending bankruptcy, reasonable compensation for services and reimbursement for proper costs and expenses in the pending bankruptcy proceeding, if not already allowed, may be allowed, in the judge's discretion, to the attorney for petitioning creditors and to any other person and his attorney entitled to compensation or reimbursement in a bankruptcy proceeding. Bankruptcy Act § 244, 11 U.S.C. § 644 (1965).

[275] Bankruptcy Act § 247, 11 U.S.C. § 647 (1965). *See* Brown v. Gerdes, 321 U.S. 178 (1944). Bankruptcy Act § 250, 11 U.S.C. § 650 (1965) provides for appeals from orders granting or refusing to grant compensation and/or allowances.

consent or subsequent approval of the judge, been otherwise acquired or transferred.[276]

Even though the section specifically applies to the acquisition or transfer after the commencement of the proceeding, it has been held that such a transaction before the commencement would disqualify the claimant if he was acting in a representative capacity at the time of the transaction.[277] The judge's prior consent or subsequent approval will not qualify a voluntary transaction, but rather will qualify only involuntary transactions, such as a testamentary bequest or an inheritance.[278]

The "direct or indirect" beneficial interest language of the statute has caused some conflicts. It has been suggested that this language applies to trading in the stock of a holding corporation owning the stock or bonds of the debtor[279] and also the trading in the securities of a subsidiary of the debtor,[280] but as to the latter there is a contra holding.[281] Similarly, it has been held that an attorney for a bondholders' committee does not lose his allowance if his wife trades in the debtor's securities independently, without the consent, advice or knowledge of her husband.[282] But in another case allowances were denied where members of the immediate family traded in the debtor's securities.[283] A lawyer will not be able to collect his compensation and allowances when his partner trades in debtor's securities.[284] But an attorney is not precluded from collecting compensation and allowances if the person he represents is so precluded.[285] Both the forfeiture of future compensation and the forfeiture and return of compensation already received is required if these provisions are not obeyed.[286]

IX. Conclusion

The elaborate and complicated provisions for corporate reorganization under the Bankruptcy Act should not dismay the practitioner. Chapter X was enacted for the protection of the creditors, and even small creditors may benefit from intervention at certain points of the reorganization proceeding. It is hoped that the preceding pages of this Comment will give some guidance to those not intimately familiar with the intricacies of chapter X so that they may represent their clients more efficiently and with a keener understanding of the difficult problems involved.

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[276] Bankruptcy Act § 249, 11 U.S.C. § 649 (1965) (emphasis added). After the statement has been filed, the burden is upon the challenger to show a violation of the section. Berner v. Equitable Office Bldg. Corp., 175 F.2d 218 (2d Cir. 1949).

[277] *In re* Cosgrove-Meehan Coal Corp., 136 F.2d 3 (3d Cir.), *cert. denied*, 320 U.S. 777 (1943).

[278] Otis & Co. v. Insurance Bldg. Corp., 110 F.2d 333 (1st Cir. 1940). Note that approval is a matter of judicial discretion. *In re* 188 Randolph Bldg. Corp., 151 F.2d 357 (7th Cir. 1945). *See In re* Cosgrove-Meehan Coal Corp., 136 F.2d 3 (3d Cir.), *cert. denied*, 320 U.S. 777 (1943) (pledgee's sale of debtor's securities).

[279] *In re* Philadelphia & Reading Coal & Iron Co., 61 F. Supp. 120 (E.D. Pa. 1945).

[280] *In re* Midland United Co., 64 F. Supp. 399 (D. Del. 1946).

[281] *In re* Central States Elec. Corp., 112 F. Supp. 281 (E.D. Va.), *aff'd*, 206 F.2d 70 (4th Cir.), *cert. denied*, 346 U.S. 899 (1953). *See also Hearings on H.R. 8046 Before the Senate Comm. on the Judiciary*, 75th Cong., 2d Sess. 81 (1937-1938).

[282] *In re* Philadelphia & Reading Coal & Iron Co., 61 F. Supp. 120 (E.D. Pa. 1945).

[283] *In re* Midland United Co., 64 F. Supp. 399 (D. Del. 1946).

[284] *Id.*; *In re* Los Angeles Lumber Prods. Co., 37 F. Supp. 708 (S.D. Cal. 1941).

[285] Silbiger v. Prudence Bonds Corp., 180 F.2d 917 (2d Cir. 1950).

[286] Wolf v. Weinstein, 372 U.S. 633 (1963).