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Hooray for Gibberish! A Glossary of Bankrupcty Slang for the Occasional Practitioner or Bewildered Judge

Richard I. Aaron

Hooray for Gibberish! A Glossary of Bankruptcy Slang for the Occasional Practitioner or Bewildered Judge[1]

Richard I. Aaron[2]

INTRODUCTION

"I know you guys have your own language. But if you want me to rule on these motions you're going to have to let me in on it," explained the United States District Judge during argument in a hearing addressing *first day orders* of a corporate reorganization. Gobbledygook keeps out not only the layperson; it excludes the essential professional, too, when the short hand of the specialist becomes incomprehensible to all but the cognoscenti.

Shorthand expression serves an essential function. "Cramdown" captures a complex idea and is much easier to say than: "The fair and equitable distribution of Bankruptcy Code section 1129(b) as an alternative to confirmation by consent defined by Bankruptcy Code section 1129(a) using the weighted majority of voting classes set out in Bankruptcy Code section 1126."[3]

Bankruptcy is a fresh start for the honest but beleaguered debtor; and, bankruptcy is a fair sharing of the inadequate assets of the debtor amongst the trade creditors.[4] Bankruptcy is a trip to the dentist for two root canals.[5] After five-hundred years of development,[6] bank-

1. Any appearance of tagging on to the brilliant *Hooray for Yiddish* is deliberate. Leo Rosten, HOORAY FOR YIDDISH (Simon and Schuster, 1968). I would prefer to place the failure to successfully capture the clarity, nuance or humor of *Hooray for Yiddish* upon Mr. Rosten who had no interest in bankruptcy.

2. Professor, S.J. Quinney College of Law, University of Utah.

3. United States Bankruptcy Code ("Bankruptcy Code"), 11 U.S.C. §§ 1126-1129 (1978).

4. Nelson v. Carland, 42 U.S. (1 How.) 265 (1843); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819). JAMES MACLACHLAN, HANDBOOK OF THE LAW OF BANKRUPTCY § 1 (1956). *See also* 1 HAROLD REMINGTON & JAMES M. HENDERSON, A TREATISE ON THE BANKRUPTCY LAW OF THE UNITED STATES § 1 (5th ed. 1950): ("[T]he primary object of bankruptcy laws has come to be 'to secure a just distribution of the bankrupt's property among his creditors; the secondary object is the release of the bankruptcy from the obligation to pay his debts."); Louis E. Levinthal, *The Early History of Bankruptcy Law*, 66 U. PA. L. REV. 223, (1918) (The core of all bankruptcy systems includes collective action by creditors against insolvent debtors, the prevention of fraud and the administration of the debtor's estate. Some bankruptcy systems, but not all, discharge the debtor.)

5. Bankruptcy Code § 109 defines who is eligible to use bankruptcy. No where is the debtor, individual or entity, asked, "How did you get into this mess?" SOL STEIN, BANKRUPTCY: A FEAST FOR LAWYERS (M. Evans, New York, 1992) (an angry narrative of his company in Chap-

ruptcy is many different experiences, solutions, and strategies, all of them vexing to the outsider.

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ter 11, principally blaming the lawyers). Shirley Nichols was profiled on The News Hour with Jim Lehrer, Bankruptcy Law Reform, (PBS Television broadcast, June 8, 1998), *available at* http://www.pbs.org/newshour/bb/law/jan-june98/bankrupt_6-8.html. She was forced into bankruptcy after losing her job and home in an unsuccessful attempt to keep up with medical bills. Grandmother Jan Cameron describes her descent into bankruptcy after loss of job and unsuccessful effort at credit counseling in *Jan Cameron, The problem was me: Taking responsibility for Bankruptcy*, THE SALT LAKE TRIB., Feb. 6, 2005, at AA3; Ruth Ann and James Wilson are personifications of the data base of ELIZABETH WARREN AND AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE, (2003). *See also* Teresa A. Sullivan, Elizabeth Warren, and Jay Lawrence Westbrook, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT, (2000); Teresa A. Sullivan, Elizabeth Warren, and Jay Lawrence Westbrook, AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA, (1989); Elizabeth Warren, *Financial Collapse and Class Status: Who Goes Bankrupt?*, 41 Osgoode Hall L.J. 115 (2002); Elizabeth Warren, *Bankrupt Children*, 86 Minn. L. Rev. 1003 (2002); Teresa A. Sullivan, Deborah Thorne, Elizabeth Warren, *Young, Old, and In Between: Who Files for Bankruptcy*, 2001 No. 9 Norton Bankr. L. Adviser 1 (Sept. 2001); Melissa B. Jacoby, Teresa A. Sullivan, Elizabeth Warren, *Medical Problems and Bankruptcy Filings*, 2000 No. 5 Norton Bankr. L. Adviser 1 (May 2000). The data assembled to profile consumer bankrupts is part of an on-going funded research Consumer Bankruptcy Project initiated in 1981. Teresa A. Sullivan, Elizabeth Warren, and Jay Lawrence Westbrook, *Folklore and Facts: A Preliminary Report from the Consumer Bankruptcy Project*, 60 Am, Bankr. L. J. 293 (1986). The most recent insight into the misfortune that is bankruptcy is David U. Himmelstein, Elizabeth Warren, Deborah Thorne, and Steffie Woolhandler, *Market Watch: Illness and Injury As Contributors to Bankruptcy*, 24 Health Affairs No. 1 (January/February 2005) *available at* www.healthaffairs.org; and reported in Reed Abelson, *Study Ties Bankruptcy to Medical Bills*, NEW YORK TIMES, Feb. 2, 2005. The study finds that forty-two percent of the polled bankrupt debtors reported medical costs as contributing to bankruptcy, even though the vast majority of the subjects had medical insurance.

6. Bankruptcy can be traced to Roman law through the Italian city-states and the term, "*banca rotta*." English bankruptcy begins with the Act of 1542, 34 & 35 Hen. 7, Ch. 4 (Eng.). The Statute of Fraudulent Conveyances, 1570, 13 Eliz., Ch. 5 (Eng.); *Amendments in the Reign of James*, 1604, 1 Jam., Ch. 15 (Eng.); 1623, 21 Jam., Ch. 19 (Eng.), helped form the foundation of English bankruptcy law until the revision in 1824, 6 Geo. 4, Ch. 16 (Eng.). A detailed discussion of the evolution is found in 8 William S. Holdsworth, *A History of English Law,* Ch. IV, § 6 at 229-45 (1926); W.G. Jones, THE FOUNDATIONS OF ENGLISH BANKRUPTCY (1976); Ian Duffy, *English Bankrupts* 1571 - 1861, 24 AM. J. LEGAL HIST. 283 (1980); Stefan A. Riesenfeld, *The Evolution of Modern Bankruptcy Law*, 31 MINN. L. REV. 401, 422-24 (1947); and E. Welbourne, *Bankruptcy Before the Era of Victorian Reform*, IV CAMBR. HIST. J., 52 (1932).

English bankruptcy rose with the mercantile development of the sixteenth century. Blackstone notes that traders deal on credit so they alone should be subject of bankruptcy. William Blackstone, Commentaries on the Law of England, 473 - 74 (1766). Orlando Bump, LAW AND PRACTICE IN BANKRUPTCY 4 (Beard Books, 11th ed. 1898): ("The relief afforded and the penalties denounced applied to traders; and to this class alone were proceedings in bankruptcy available in England at the date of the adoption of the Constitution of the United States, B the law holding it to be at that time an unjustifiable practice for any person other than a trader to encumber himself with debts to any consider amount."); Robert Weisberg, *Commercial Morality, The Merchant Character, and the History of Voidable Preference*, 39 STAN. L. REV. 3, 32 (1986): ("Blackstone's view reflects the success of the ideology of commerce that took hold in the eighteenth century and turned the morally questionable and perceptually elusive phenomena of trade and credit into necessities, and then into virtues.").

Chapter 7 looks backwards upon the debtor's financial wreckage to liquidate what is left[7], distribute the proceeds amongst the creditors[8], and return the unburdened individual debtor back into the marketplace.[9] Other bankruptcy options look forward to pay creditors with future income according to a confirmed plan.[10] Viewed from either direction, the assumed reach of bankruptcy is astounding.[11]

Whichever chapter is chosen, bankruptcy is a Carrollian place where things are not as they are promised in the non-bankruptcy world.[12] Obligations are eliminated.[13] Solemn contracts can be

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7. Bankruptcy Code § 704(1) describes the trustee's obligation to collect the property of the estate, expansively defined in Bankruptcy Code § 541, and turn it into cash.

8. Bankruptcy Code § 726 describes the distribution in priority from the administrative expense first priority of Bankruptcy Code § §507(a) - 503(b), through remaining priorities; on to general claims, § 726(a)(2); general claims which are filed late, § 726(a)(3); and, after penalties and interest, even back to the debtor if there are assets remaining, § 727(a)(6).

9. Bankruptcy Code § 727(a)(1) grants the individual, i.e., not the corporate, debtor a discharge unless some offense, §§ 727(a)(2) - (10), justifies denying the discharge.

10. Bankruptcy Code § 1129 describes the elements needed to confirm a plan in chapter 11; Bankruptcy Code § 1325 describes the elements needed to confirm a plan in Chapter 13; and Bankruptcy Code § 1225 describes the elements needed to confirm a plan in Chapter 12.

11. Bankruptcy Code § 541(a)(1) reaches "all legal or equitable interest of the debtor in property . . . wheresoever located and by whomever held. . . ." *See, e.g.*, United States v. Whiting Pools, Inc., 462 U.S. 198 (1983) (holding that the United States must return the property seized from the taxpayer to enforce a tax lien when the debtor filed a Chapter 11 petition the day after the seizure.) When the petition is filed, Bankruptcy Code § 362(a) purports to stop the world on its axis by staying unilateral action by creditors. *E.g., In re* Soares, 107 F.3d 969 (1st Cir. 1997) holds that a judicial foreclosure sale of a defaulted home mortgage completed after the filing of the petition in Chapter 13 is void. *In re* Pierce, 91 Fed. Appx. 927 (5th Cir. 2004) unpublished, affirms the bankruptcy court's conclusion that a sheriff's foreclosure sale thirty-minutes after the bankruptcy petition was void.

In re Yukos Oil Co., 2004 WL 3172372 (Bankr. S.D. TX 2004), illustrates this point. The court issues a temporary restraining order to stop the tax sale by the Russian Federation of the oil and gas reserves in Russia, valued at $20 billion, grounding American bankruptcy court jurisdiction upon the $2 million on deposit in a Texas bank, the retainer to its Texas law firm, and the 15% stock interest held by American investors.

12. " 'There's no use trying,' she said: 'One can't believe impossible things.' 'I daresay you haven't had much practice', said the Queen. 'When I was your age, I always did it for half-an-hour a day. Why, sometimes I've believed as many as six impossible things before breakfast.'" THROUGH THE LOOKING GLASS, 225 THE LEWIS CARROLL BOOK (Tudor Publishing 1944).

13. Bankruptcy Code § 727(a)(1), discharges an individual debtor from claims, promissory notes, lawsuits and judgments. The corporate debtor, which cannot be discharged in Chapter 7, may use Chapter 11 and find a discharge in Bankruptcy Code § 1141(d) and bind all participants to the terms of the confirmed plan, Bankruptcy Code § 1141(a). In bankruptcy the claims are expansively defined in Bankruptcy Code § 101(5) even to the point of monetizing what, outside of bankruptcy, would be equitable relief available because the conventional money judgment is inadequate. *See, e.g. In re* Ward, 194 B.R. 703 (Bankr. D. MA 1996) (Injunction to enforce non-competition covenant in a franchise is a dischargeable claim); Cf. Kennedy v. Medicap Pharmacies, Inc. 267 F.3d 493 (6th Cir. 2001) (State law controls damage measure for breach of non-competition covenant). To be discharged means that there is no liability on the claim. Bankruptcy Code § 727(b). Any discharged judgment is voided, and the collection of the discharged debt is enjoined. Bankruptcy Code § 524(a).

honored or discarded.[14] Loans negotiated or welded with boilerplate can be revised.[15] And, the rights of claimants at state law can be reordered.[16]

GLOSSARY

In Humpty Dumpty fashion,[17] an explanation in context is offered for the some of the arcanum heard in the gatherings of the bankruptcy bar.[18] Cross reference terms are signaled by italics. The etymology of

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Bankruptcy is specifically entrusted to Congress by U.S. Const. Art. I, § 8, cl. 4: "Congress shall have Power To establish. . .uniform Laws on the subject of Bankruptcies throughout the United States." Further, U.S. Const. Art. I, § 10, mandates that "No State shall. . .pass any. . .Law impairing the Obligation of Contracts. . . ." Therefore the discharge of a debt has been viewed as the hallmark of federal bankruptcy. Sherwood Partners, Inc. v. Lycos, Inc., 394 F.3d 1198 (9th Cir. 2005) (California statute for preference recovery after assignment for benefit of creditors is preempted by federal bankruptcy). The distinguished scholar Gerrard Glenn very much disagreed with this view: Gerrard Glenn, The Law Governing Liquidation. "Now that, as the writer believes, is wholly wrong. . . .The real test of a bankruptcy law, it is submitted should be quite different. It should relate to the distinction between proceedings by way of agreement and proceedings wholly in invitum through the direct aid of the courts." §§ 124 – 125, at 210-211.

14. Bankruptcy Code § 365 gives the choice to assume or to reject contracts and leases.

15. In Chapter 13, the debtor may "modify" the terms of a secured interest that is not a lien on real property that is solely the debtor's residence. Bankruptcy Code §§ 1322(b)(2) and (5). In chapter 11, the plan may similarly modify the rights of secured creditors, Bankruptcy Code § 1123(b)(5). Further, even if the proposed plan is rejected by the voting classes, the court may imposed the plan on classes if the court finds that it "fair and equitable" to do so. Bankruptcy Code § 1129(b).

16. Bankruptcy Code § 364(d)(1): "The court. . .may authorize the obtaining of credit. . .secured by a senior or equal lien. . . ." Bankruptcy Code § 510(c). . . .[T]he court may (1) under principles of equitable subordination subordinate for purposes of distribution all or part of an allowed claim. . ." Bankruptcy Code §§ 503, 507, and 726 define the priorities by which claims shall be recognized.

17. " 'That's a great deal to make one word mean,' Alice said in a thoughtful tone. 'When I make a word do a lot of work like that,' said Humpty Dumpty, 'I always pay it extra.'" ALICE IN WONDERLAND (Disney 1951).

18. There is no claim that the list of terms is exhaustive. Some line-drawing is necessary and debatable. "Predatory lending" may be a good example. It is not included in this glossary. Some borrowers with impaired credit may seek financing from "sub-prime lenders." The practices of some lenders in this market are abusive of the debtors. These might include loan to value ratios that foretell disaster, loan flipping, fraudulent misrepresentation, boilerplate waiver of important protections, and high pressure sales strategies. The scope and character of the lending is detailed in many sources including: United States Gov't Accounting Office Report GAO-04-280 Consumer Protection: Federal and State Agencies Face Challenges in Combating Predatory Lending, 18 (March 2004) (describing the attributes of predatory lending); Kathleen C. Engel and Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1259 -1270 ("Predatory Lending" defined); and Leetra Harris and Brian Nichols, *Legislative Review: Banking and Finance*, 19 GA. STATE U. L. REV. 14 - 45 (2002) (The practices and debate leading to enactment of 2002 Ga. Laws 455 curtailing predatory lending).

Borrowers in financial distress will consider bankruptcy as a remedy. *E.g.*, *In re* Johnson, 292 B.R. 821 (Bankr. E.D. Pa. 2003)(dismissing title insurer and its agent from chapter 13 debtor's

the term is not pursued here, as the origins of "eat dirt plan" are probably best left obscure.

Absolute Priority. Before investors can participate in a reorganization, the non-consenting senior debt classes must be fully paid. The secured creditor must be paid before the unsecured creditor; and the unsecured creditor must be paid before the ownership interest can survive.[19]

"I should take your promise to pay the $50,000 on my equipment when you guys stiffed me on my security interest and filed bankruptcy when I threatened to repossess? And the trade gets 10 cents on the dollar while you guys keep the business? I'm not that crazy."

The problem arises particularly in Chapter 11 *cramdown* where plan confirmation is without the consent of all of the classes of creditors. The concept is expressed statutorily as the "fair and equitable" criteria found in Bankruptcy Code sections 1129(b)(2)(i), (ii), and (iii). The controversial response is the *new value* offering where the equity interest of the insolvent debtor cannot participate unless the equity interest purchases an interest in the debtor. See, also, *sweat equity.*

Auction. At one level, public outcry is the obvious mode of selling off assets of the estate.[20]

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action against multiple defendants alleging predatory lending in the refinancing of debtor's home mortgage); *In re* Maxwell, 281 B.R. 101 (Bankr. D. Mass. 2002) (granting partial summary judgment on various issues to Chapter 13 debtor's action against multiple defendants alleging that the refinancing of her home mortgage was predatory, including ground that loan was unconscionable under state law). The Supreme Court recently defined the rate of interest appropriate in achieving the value for cramdown in Bankruptcy Code § 1325(a)(5) in Till v. SCS Credit Corp., 541 U.S. 465 (2004). While not involving predatory lending practices, the sub prime lender claimed a contract rate of interest significantly above conventional market rates which the Court rejected as the appropriate measure.

However, the issues are not distinctive to bankruptcy and are resolved in a variety of contexts such as foreclosure proceedings. The most dramatic recent example is a British case in which the initial home improvement loan of £7000 ended up in a claim by the mortgage lender of £384,000 after several years of default fees and late interest penalties accumulated. The trial court held that the predatory character of the loan terms made the loan unenforceable. Russell Jenkins, *Judge Writes Off Couples 'Ufair' Debt of £400,000*, TIMES (LONDON), October 29, 2004, at 1.

19. Walter J. Blum and Stanley A. Kaplan, *The Absolute Priority Doctrine in Corporate Reorganizations*, 41 U. CHI. L. REV. 651, 652 (1974). The rule is long standing. N. Pac. Ry. Co. v. Boyd, 228 U.S. 482, 504-505 (1913) (rule applied in railroad reorganizations pre-dating the bankruptcy business reorganization). Case v. Los Angeles Lumber Prods. Co., 308 U.S. 106, 116 (1939) (the Boyd rule applies in corporate reorganization designed in former Bankruptcy Act §77B).

20. Bankruptcy Code § 363(b) authorizes the trustee to sell bankruptcy property at a sale approved by the bankruptcy court. Fed. R. Bankr. Proc. 6004(f)(1) permits private or public sale. Whatever is most likely to produce the highest recovery for the estate is the guiding principle. *See, e.g. In re* Mickey Thomson Entm't Group, Inc., 292 B.R. 415 (B.A.P. 9th Cir. 2003) (purported motion to approve settlement was really the sale of an estate chose in action for which a bidder offered a higher price).

At another level, it is a theoretical critique of Chapter 11, arguing that distribution in Chapter 11 is hobbled by the inherently flawed judicial valuation process, and should be replaced by public sale as a more accurate measure of market valuation.[21]

Bad Faith. No where is bad faith stated as an eligibility criteria for bankruptcy but it is everywhere applied, especially by judges of courts of equity, which bankruptcy is, and with varying intensity.[22]

Bankruptcy remote. "I'll take the cash. You can have the cause of action." A financing arrangement especially popular in financing of *single-entity real estate* ventures to avoid bankruptcy. The financed assets are placed in one entity which issues debt documents acquired by the investors or lenders. The entity charter has conditions such as corporate by-laws that require the unanimous directors' consent to bankruptcy to file a voluntary petition and an independent director sits who will not join in any such petition.[23] The strategy may not be completely effective as illustrated by *In re* Kingston Square Ass'n. where involuntary petitions were successfully filed against the entities even

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21. *See, e.g.* Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law*, HARVARD UNIV. PRESS, 1986, at 210-224 (elimination of Chapter 11 would promote sale of the reorganized debtor through chapter 7 public sale of securities); Douglas G. Baird, *Revisiting Auctions in Chapter 11*, 36 J.L. & ECON. 633 (1993); ("The case for the mandatory auction is easiest when the firm in question is publicly traded. It is not enough, however, to assert that a regime of mandatory auctions for these firms is superior to existing Chapter 11. One needs to ask if there are possible reforms in which one can have the best of both worlds and ensure that early auctions take place when it is in everyone's interest, but not otherwise."); Bruce A. Markell, *Owners, Auctions, and Absolute Priority in Bankruptcy Reorganizations*, 44 STAN. L. REV. 69, 107 (1991) ("Insights from auction theory can help creditors and potential investors to quantify the owners' perceived value of the debtor, and can facilitate the transfer of that value to the debtors' creditors."); and Douglas G. Baird, *The Uneasy Case for Corporate Reorganization*, 15 J. OF LEGAL STUD. 127, 145 (1986) ("The thrust of the argument presented in this paper is that the owners of a firm, especially a publicly held firm, would likely prefer a sale of the firm outright to whomever was willing to pay the most for it.").

22. "Chapter 11 bankruptcy is not supposed to be like a '7-11' convenience store . . . [for debtor to pick and choose]." *In re* Silberkraus, 253 B.R. 890, 903 (Bankr. C.D. Calif. 2000), *aff'd* 336 F.3d 864 (9th Cir. 2003) (debtor and debtor's attorney sanctioned for bad faith filing to avoid executory contract). The results are about as coherent as one would expect where the measure is the indignation level of the judge or the proverbial chancellor's foot. Justice Brennan, for example, applauds the strategy of Texaco in selecting bankruptcy to fend off the Pennzoil judgment on appeal when an appeal bond would exceed the appellant's worth. Pennzoil Co. v. Texaco Inc., 481 U.S. 1 (1987),(Brennan, J., concurring). Other courts have said that using bankruptcy to avoid paying for a supersedeas bond while seeking a stay of judgment is bad faith. In the Matter of Little Creek Dev. Co., 779 F.2d 1068 (5th Cir. 1986); *In re* Chu, 253 B.R. 92 (C.D. Calif. 2000); Epic Metals Corp. v. Condec, Inc., 232 B.R.; 806 (M.D. Fla. 1999); *In re* Harvey, 101 B.R. 250 (Bankr. D. Nev. 1989); *In re* Davis, 93 B.R. 501 (Bankr. S.D. Tex. 1987); and *In re* Karum, 66 B.R. 436 (Bankr. W.D. Wash. 1986).

23. Harold S. Novikoff and Barbara S. Kohl, *Bankruptcy "Proofing": Bankruptcy Remote Vehicles and Bankruptcy Waivers*, ALI-ABA Chapter 11 Reorganizations, February 24, 2000; City Bar Assoc. of New York, *Structured Financing*, 50 BUS. LAW 527 (1995)

though the petitioning creditors were solicited by the directors of the debtor.[24]

The term does not refer to the wiley debtor who seeks to hide assets in some remote corner of the earth. Compare *Chapter 747.*

Best-interest-of-creditors test. The threshold confirmation standard that Chapter 11 or Chapter 13 plan must provide creditors with more than liquidation through Chapter 7. Bankruptcy Code section 1129(a)(7) and Bankruptcy Code section 1325(a)(4).

Boot strap plan. A plan funded from future income to the reorganized debtor.[25]

Break-up fee. An incentive offered to prospective buyers or banks which fund the reorganization to incur the expense of investigating and valuing the debtor.[26]

Burial Expenses. As in real life, so also in business life, the expense of disposing of the deceased must be paid ahead of creditors of the living debtor. The expenses of administration in liquidating Chapter 7 after conversion from an unsuccessful Chapter 11, Chapter 12, or Chapter 13 have priority over administrative expenses allowed in the pre-conversion case. This is the rule stated in Bankruptcy Code section 726(b).[27] Also, see *disgorge.*

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24. *In re* Kingston Square Assoc., 214 B.R. 713 (Bankr. S.D.N.Y. 1997).

25. *See, e.g., In re* Duratech Indus., Inc., 241 B.R. 291, 295 (Bankr. E.D. N.Y. 1999).

26. "A 'break-up fee' is a fee paid to a potential acquiror of a business, or certain assets, by the seller, in the event that the transaction contemplated fails to be consummated and certain criteria in the purchase agreement are met. The condition most commonly giving rise to the payment of a break-up fee is the seller's acceptance of a later bid. Break-up fees may take the form of paying the out-of-pocket expenses incurred in arranging the deal, including due diligence expenses, or break-up fees may be wholly independent of the transaction costs." *In re* Integrated Resources Inc., 135 B.R. 746, 750 (Bankr. S.D.N.Y. 1992) *aff'd* 147 B.R. 650, 655, and 657 (S.D.N.Y. 1992)(break-up fee to bank approved over the objection of some committees).

27. ". . . [E]xcept that in a case that has been converted to this chapter under section 1009, 1112, 1208, or 1307 of this title, a claim allowed under section 503(b) of this title incurred under this chapter after such conversion has priority over a claim allowed under section 503(b) of this title incurred under any other chapter of this title. . ." *In re* LPM Corp., 300 F.3d 1134, 1137 (2002); *see also, In re* MacNeil, 102 B.R. 766 (B.A.P. 9th Cir. 1989) (declaration of Chapter 7 administrative expenses over Chapter 11 super priority) *vacated,* 907 F. 2d 903 (9th Cir. 1990) upon grounds that opinion was advisory when requisite factual determination was missing; *In re* Canton Jubilee, Inc., 253 B.R. 770 (Bankr. E.D. Tex. 2000) (fact that sale was completed in Chapter 7 does not transform Chapter 11 expenses in promoting sale into Chapter 7 administrative expenses); *In re* Summit Ventures, Inc., 135 B.R. 478 (Bankr. D. Vt. 1991) (The superpriority of the post-petition financer to Chapter 11 debtor was subordinate to the Chapter 7 administrative expenses); *In re* California Devices, Inc., 126 B.R. 82 (Bankr. N.D. CA 1991) (burial expenses have priority over Chapter 11 adequate protection payments); *In re* Rittenouse, 76 B.R. 610 (Bankr. S.D. OH 1987) (attorney's fees earned in Chapter 11 would be paid at the conclusion of Chapter 7 if there are sufficient funds available); *In re* IML Freight, Inc., 52 B.R. 124, 134 (Bankr. D. Utah 1985) (Chapter 11 administrative fees may not be paid if Chapter 7

Business judgment. "The courtroom is not a boardroom. The judge is not a business consultant."[28]

Bustout Also, *bust-out.* Acquiring assets on credit and discharging the debt through bankruptcy. As to a business plan to acquire inventory or equipment with intent to defraud the vendors, it is a crime.[29] As to an individual with a credit card, it may or may not result in discharge of the debt.[30]

Carve Out. Fee arrangements for the debtor's attorney paid out of the assets secured to the bank.[31]

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administrative estate is insufficient); and *In re* Codesco, Inc., 18 B.R. 225, 227 (Bankr. S.D.N.Y.1982) (Chapter 11 attorney subordinated).

Interim fees paid in Chapter 11 may have to be disgorged for improvident payment in light of subsequent events. United States Trustee v. Johnston, 189 B.R. 676, 677 (N.D. Miss. 1995) (attorney ordered to disgorge a portion of interim fee award paid in Chapter 11 after conversion to Chapter 7); *In re* Metro. Elec. Supply Corp., 185 B.R. 505 (Bankr. E.D. Va. 1995); *In re* Lochmiller Industries, Inc., 178 B.R. 241, 251 (Bankr. S.D. Cal. 1995). Cf. *In re* Unitcast, Inc., 219 B.R. 741 (BAP 6th Cir. 1998) (order to disgorge interim fees is discretionary, not mandatory, and bankruptcy judge properly exercised discretion not to order fees returned). But, *In re* Printcrafters, Inc., 233 B.R. 113 (D. Colo 1999) (holding that Colorado law recognizes attorney's lien as a possessory security interest, thus protecting the Chapter 11 retainer to the extent that the work was performed at the time of the conversion to Chapter 7.)

28. *In re* Curlew Valley Assocs., 14 B.R. 506, 511 (Bankr. D. Utah 1981) (bankruptcy judge should not interfere with business decision to bale haycrop by roll baling rather than square baling).

29. Isaak v. Trumbull Savings and Loan Co, 169 F.3d 390 (6th Cir. 1999); United States v. Cobleigh, 75 F.3d 242 (6th Cir. 1996); United States v. Mohammed, 53 F.3d 1426 (7th Cir. 1995); United States v. Tashjian, 660 F2d 829 (1st Cir. 1981); and United States v. Hewes, 792 F.2d 1302 (11th Cir. 1984).

30. *Compare In re* Tamecki, 229 F.3d 305 (3rd Cir. 2000)(debts are not discharged); with *In re* Padilla, 222 F.3d 1184 (9th Cir. 2000)(debts are discharged).

31. Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1 (2000). (unanimously holding that a recovery of expenses for preservation of estate assets by Bankruptcy Code § 506(c) may be imposed on the secured creditor only at the behest of the trustee).

In re Hamakua Sugar Co., Inc., 124 F.3d 211 (9th Cir. 1997) (pro rata distribution from carve out fund created in post-petition financing order did not require attorneys to give release to bank before payment); *In re* Twenty-Six Realty Assocs., L.P., 1995 WL 17012 (E.D.N.Y. 1995) (paying debtor's counsel from carve out fund created by secured lender was not a conflict of interest); *In re* Lavelle Aircraft Co., 1995 WL 334325 (E.D. Pa.1995) (excluding creditors committee counsel from carve out fund was within discretion of the bankruptcy court); *In re* Hotel Syracuse, 275 B.R. 679 (Bankr. N.D. N.Y. 2002) (carve out for payment of debtor's counsel but not committee counsel did not violate bankruptcy priorities); *In re* Nuclear Imaging Sys. Inc., 270 B.R. 365 (Bankr. E.D. Pa. 2001) (carve out in Chapter 11 did not become estate property after conversion to Chapter 7); *In re* EWI, Inc., 208 B.R. 885 (Bankr N.D. Ohio 1997) (carve out fund extended to attorney for financial advisor in sale of division of the debtor); *In re* Blackwood Assocs., L.P., 187 B.R.856 (Bankr. E.D.N.Y. 1995) (stipulation defined access to carve out fund so that on failure and lender's exercise of rights to cash collateral attorney no longer was entitled to payment from the fund);Unsecured Creditors' Committee v. Jones Truck Lines, Inc., 156 B.R. 608 (W.D. Ark. 1992) (court was not required to provide counsel for committee payment through carve-out fund); *In re* Evanston Beauty Supply, Inc., 136 B.R. 171(Bankr. N.D. Ill. 1992) (stipulation for carve out fund controlled payment for attorneys' fees and precluded claim under theory of benefitting the estate); and *In re* Ames Dept. Stores, Inc., 115 B.R. 34 (Bankr.

Cash Out. Paying off the secured creditor in Chapter 11 to satisfy the rule of *absolute priority*.

Chapter 20 bankruptcy. A Chapter 7 petition followed promptly by a Chapter 13 petition. The objective is to reduce the amount of debt through Chapter 7 so that the Chapter 13 plan can offer more payment to the debts which are not dischargeable through Chapter 7, but which are discharged through Chapter 13's super discharge.[32] The Supreme Court has upheld this strategy in Johnson v. Home State Bank.[33] Chapter 10 bankruptcy is rejected, however, in *In re* Turner.[34] The debtor sought to file a Chapter 13 petition while the Chapter 7 petition was still pending, that is, one-half of each chapter or 6 1/2 and 3 1/2 = 10. *In re* Keach reaches the opposite conclusion.[35]

S.D.N.Y. 1990) (carve out for professional fees is necessary to assure good representation in Chapter 11).

For more extended analysis see: Richard B. Levin, *Almost All You Ever Wanted to Know About Carve Out*, 76 AM. BANKR. L.J. 445 (2002) (the limitations of Bankruptcy Code § 506(c) and the utility of carve out agreements); Richard I. Aaron, *"Carve-Out" As A Noun*, 7 J. OF BANKR. L. AND PRAC. 487 (1998) (proposal to amend U.C.C. to support carve-out is opposed); Craig B. Cooper, *The Priority of Post-petition Retainers, Carve-outs, and Interim Compensation Under the Bankruptcy Code*, 15 CARDOZO L. REV. 2337 (1994) (arguing that interim compensation should be final payment, of which carve-out is one example); James S. Cole, *The "Carve Out" From Liens and Priorities to Guarantee Payments in Chapter 11*, 1993 DET. COLLEGE OF L. REV. 1499(criticizing misuse of carve out); David Gray Carlson, *Secured Creditors and Expenses of Bankruptcy Administration*, 70 N.C. L. REV. 423, 448 (1992) (criticizing carve out for attorneys from postpetition lender as thwarting the limitations on Bankruptcy Code § 506 as found by some courts); and Bruce Henoch, Note, *Postpetition Financing: Is There Life After Debt*, 8 BANKR. DEV. J. 575, 601 (1991) (carve out is one facet of the array of postpetition financing devices).

32. Bankruptcy Code § 1328(a) permits the discharge of debts by the completed Chapter 13 plan which are excepted from Chapter 7 discharge by Bankruptcy Code § 523. A major example would be debts incurred by the misrepresentation of credit.

33. Johnson v. Home State Bank, 501 U.S. 78 (1991) (holding that it is not a bad faith filing *per se*).

34. *In re* Turner 207 B.R. 373 (B.A.P. 2nd Cir. 1997) (ruling that the Chapter 13 petition filed before discharge in Chapter 7 was a nullity. The ruling was in the context of debtors' claim that the automatic stay barred a foreclosure sale which took place after the automatic stay in their Chapter 7 case was lifted to facilitate the sale. The Chapter 13 petition was presumably in the clerk's office at the time of the foreclosure sale since the mail was delivered, but the petition was not time-stamped until an hour after the foreclosure sale.)

35. *In re* Keach, 243 B.R. 851 (B.A.P. 1st Cir. 2000) (holding this strategy was permissible, under the circumstances of the case, and reversed dismissal of the petition by the bankruptcy court. The state court jury found that the building contract dispute which prompted the debtor to walk off of the job was a deceptive practice and awarded punitive as well as compensatory damages. The bankruptcy court ruled that the state court judgment determined the non-dischargeability objection by the creditor in the Chapter 7 case, and refused the motion to convert to Chapter 13 because the total amount of the debts, at that time, exceeded the eligibility limit. Meanwhile an appeal of the issue preclusion ruling on the non-dischargeability was fumbled and withdrawn and the judgment creditor pursued her now non-dischargeable claim. The opinion by Judge Queenan includes his usual exhaustive review of the meaning of good faith from the prior Bankruptcy Act through the present to conclude that filing Chapter 13 after the discharge order

Chapter 22 or 33 bankruptcy. The business debtor who finds bankruptcy relief through Chapter 11 so enticing that it files again and again. US Airways, Continental Airlines and Trump Casinos are examples.

Chapter 747 bankruptcy. The debtor who flees off shore to avoid the American creditors. Two debtors from opposite ends of the spectrum may choose this form of relief. One is the immigrant consumed by the American consumer marketplace. The other is the believer in the offshore asset protection trust.

The second debtor simply wants to send his property fleeing. It is not likely to be successful. Bankruptcy Code section 541(a)(1) boldly claims ". . .all legal or equitable interests of the debtor in property. . . ." ". . .wherever located and by whomever held. . . ." It is true that there is an exception in Bankruptcy Code section 541(c)(2) to trusts that include asset protection trusts like spendthrift trusts, but American legal policy is against self-settled trusts. Thus, the debtor's choice to go offshore. The bankruptcy courts are skeptical about the debtor's claim of no more interest in the trust which the debtor created and funded. Courts have used the power of contempt to coerce repatriation of the assets.[36] Compare, *bankruptcy remote.*

Cramdown. Also, *Cram down.* A vernacular expression of forcing the plan upon an unwilling creditor class, ie, cramming it down the throat of the creditor.

In Chapter 11 cases, the plan of reorganization may be confirmed by the consent of the creditors and interests voting in classes;[37] or may be coerced upon objecting creditors who reject the plan in their class vote. *Cramdown* is expressed statutorily in Bankruptcy Code

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but before conclusion of the Chapter 7, for the objective of coercing the judgment creditor with a 5% lump sum payment, was not bad faith.

36. *See, e.g. In re* Lawrence, 238 B.R. 498 (Bankr. S.D. Fla. 1999) (penalty of $10,000 per day plus incarceration ordered against debtor claiming trust protected by the Republic of Mauritius); *In re* Portnoy, 201 B.R. 685 (Bankr. S.D.N.Y. 1996) (denying debtor's motion for summary judgment in creditor's adversary proceeding to deny discharge finding debtor had interest in trust created in Jersey so factual issue about failure to list assets arose). Also, an important non-bankruptcy case is Federal Trade Comm'n. v. Affordable Media, 179 F.3d 1228 (9th Cir. 1999) (sustaining contempt order against judgment debtors' defense of inability to comply because of terms of Cook Island's trust). However, S.E.C. v. Brennan, 230 F.3d 65 (2nd Cir. 2000) held that the repatriation order of the District Court of New York violated the automatic stay imposed in the New Jersey bankruptcy of the debtor because the order was an attempt to collect a money judgment and excepted from the exception in Bankruptcy Code § 362(b)(4). The majority acknowledged that ". . .the question is a close one. . .", and Judge Calabresi dissented.

37. Voting is by classes according to the weighted majority expressed in Bankrutpcy Code § 1126. A disputed issue is the degree to which classes may be *gerrymandered* to control the outcome of the voting.

§1129(b) as the "fair and equitable" standard. See also, *absolute priority*.

In Chapter 13 cases cramdown is expressed statutorily in Bankruptcy Code section 1325(a)(5)(B) which requires the secured creditor to accept payments for the statutorily defined value of the collateral using Bankruptcy Code section 506(a). That provision recognizes the sometimes rapid disjoinder between the amount promised in the debtor's note and the recovery which the lender can make disposing of the collateral in the market: "Drive it off of the lot, and it depreciates 20%." This common devaluation of the collateral is not "cramdown". Compare *lien stripping*.

Critical vendor. "You don't pay, I don't ship. I don't ship, you close down." A creditor who claims to be essential to the reorganization of the debtor and demands full payment for pre-bankruptcy debt. Courts disagree as to the authority to meet such demands as it amounts to a preference of the creditor.[38] See *doctrine of necessity*.

Cross Collateralization. "I can't provide heat to Tiny Tim on Christmas Eve because I can't pay for the heating oil to be delivered." Conditioning the financing to the debtor upon securitization of the prepetition debt.[39]

Debt for dirt. See *Eat Dirt Plan*.

Delawarization. See, *National Bankruptcy Court of Delaware*

Disgorge. "My name is Big Julie. The United States trustee sent me to collect. Now!" Attorneys have been ordered to disgorge fees which they have been paid prior to court approval; been paid without satisfying requirements of accounting or disinterestedness; or been

38. For example the Seventh Circuit held in the Kmart case that an order paying critical vendors must be supported by a showing that the other creditors would be benefitted. *In re* Kmart, 359 F.3d 866 (7th Cir. 2004). The district court denied any authority to go beyond statutory priorities in *In re* FCX, Inc., 60 B.R. 405 (Bankr. E.D.N.C. 1986) (priority wage claims could be paid but not trade claims). Compare, however, *In re* Just for Feet, Inc., 242 B.R. 821 (Bankr. D. DE 1999) which allows payment of vendors of popular brands like Nike, New Balance, Reebok, Adidas because customers will not come to the debtor's stores without such stock. The toolmakers supplying debtors' divisions were paid in *In re* Eagle-Picher Indus., Inc., 124 B.R. 1021 (Bankr. S.D. Ohio 1991) to enable debtor to survive in a highly competitive environment. Wages and benefits for active employees were authorized in *In re* Ionosphere Club, Inc., 98 B.R. 174 (Bankr. S.D.N.Y. 1989) but striking employees could not be paid.

39. *In re* Ellingsen MacLean Oil Co., Inc., 834 F.2d 599 (6th Cir. 1987) (following emergency telephonic hearing, the bankruptcy court perfected the funding to the debtor who supplied heating oil to customers in the Michigan Upper Peninsula the week of Christmas). As in *In re* Adams Apple, Inc., 829 F.2d 1484 (9th Cir. 1987), the cross-collateralization may not be specifically sanctioned as much as immunized from any attack upon the lending or granting of a lien for credit by the provisions of Bankruptcy Code § 364(e). Compare, *In re* Saybrook Mfg. Co., 963 F.2d 1490 (11th Cir. 1992) (rejecting this defense and held squarely that cross-collateralization was not with the provisions of Bankruptcy Code § 364 or the equitable powers of the court).

paid improvidently in light of subsequent events.[40] Also, see, *burial expenses.*

DIP. The debtor-in-possession is the norm in Chapter 11 with authority to operate the business.[41] A trustee may displace the debtor-in-possession only upon a showing of mismanagement or fraud.[42]

Dirt for debt. See Eat Dirt Plan.

Disinterested. A requirement to qualify for appointment of the attorney for the debtor-in-possession or the trustee in bankruptcy.[43]

Doctrine of Necessity. Payment of pre-petition claims immediately because claimants are essential to debtor's survival. Also known as the "necessity of payment doctrine" or "emergency preferential orders". The doctrine of necessity is found in the railroad reorganization practice that precedes the bankruptcy reorganization of the twentieth century.[44] The issue is the legitimacy of its current existence. See discussion at *critical vendor* and *First Day Orders.*

DOPE. The debtor out of possession in Chapter 11 because a trustee has been appointed pursuant to Bankruptcy Code section 1104.

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40. Interim fees paid in Chapter 11 may have to be disgorged for improvident payment in light of subsequent events. United States Trustee v. Johnston, 189 B.R. 676, 677 (Bankr. N.D. Miss. 1995) (attorney ordered to disgorge a portion of interim fee award paid in chapter 11 after conversion to Chapter 7); *In re* Metropolitan Electric Supply Corp., 185 B.R. 505 (Bankr. E.D. Va. 1995); *In re* Lochmiller Industries, Inc., 178 B.R. 241, 251 (Bankr. S.D. Cal. 1995). Cf. *In re* Unitcast, Inc., 219 B.R. 741 (B.A.P. 6th Cir. 1998) (order to disgorge interim fees is discretionary, not mandatory, and bankruptcy judge properly exercised discretion not to order fees returned). But, *In re* Printcrafters, Inc., 233 B.R. 113 (Bankr. D. Colo. 1999) held that Colorado law recognizes attorneys lien as a possessory security interest, thus protecting the Chapter 11 retainer to the extent that the work was performed at the time of the conversion to Chapter 7.

41. Bankruptcy Code § § 1101(1), 1107 and 1108.

42. Bankruptcy Code § 1104.

43. Bankruptcy Code § 327(a) as defined, Bankruptcy Code § 101(14). *See, e.g. In re* Pillowtex, Inc., 304 F.3d 246 (3rd Cir. 2002) (hearing required to determine whether payment of fees was preferential despite offer to return fees and waive any claim to them); *In re* First Jersey Securities, Inc., 180 F.3d 504 (3rd Cir. 1999) (law firm was a preferred creditor by virtue of payment of pre-petition services and not disinterested); *In re* Arochem Corp., 176 F.3d 610 (2nd Cir. 1999) (special counsel was not disabled from representation in limited context in Chapter 11 because of pre-bankruptcy representation of a shareholder and director); *In re* Federated Dep't. Stores, 44 F.3d 1310 (6th Cir. 1995) (financial advisor to the Chapter 11 debtor was not disinterested and must disgorge fees); *In re* Prince, 40 F.3d 356 (11th Cir. 1994) (the attorney who represented both the debtor and the debtor's spouse had a conflict of interest which warranted the denial of fees); and *In re* Roberts, 46 B.R. 815 (Bankr. D. Utah 1985) *aff'd en banc*, 75 B .R. 402 (Bankr. D. Utah 1987) (the attorney who represented the officers of the family corporation as well as the corporation was owed fees for non- bankruptcy related work was not disinterested). R. Craig Smith, *Conflicts of Interest Under the Bankruptcy Code: A Proposal to Increase Confidence in the Bankruptcy System*, 8 GEO. J. OF LEGAL ETHICS 1045 (1995) (the ABA Model Rules of Professional Conduct should be the measure for conflicts of interest in bankruptcy).

44. Russell A.Eisenberg and Frances F. Gecker, *The Doctrine of Necessity and Its Parameters*, 73 MARQ. L. REV. 1 (1989).

Double Deeming. Bankruptcy Code section 1111(a) states that claims listed on the Chapter 11 schedules as undisputed and fixed do not require the filing of a proof of claim. They are "deemed" filed within Bankruptcy Code section 501. Then, Bankruptcy Code section 502(a) deems filed claims as allowed clams. In Chapter 11, creditors whose claims are not contested need not file proofs of their claim because "double deeming" recognizes them as allowed claims for treatment under the plan of reorganization.[45]

Drop Dead Clause. A provision which allows relief from the automatic stay imposed by Bankruptcy Code section 362 when specified default occurs.[46]

Eat Dirt Plan. "You can have the 30 lots next to the swamp, which my expert swears is worth much more than your mortgage debt, and I'll keep the 20 wooded lots to sell off to fund my plan."

A reorganization plan which claims to satisfy Bankruptcy Code section 1129(b)(2)(A)(iii) or Bankruptcy Code section 1325(5)(C) by offering the secured party a part of land pledged as its collateral. The debtor asserts that this is the "*indubitable equivalent*" of the value of

45. What happens to the claim if the Chapter 11 case is converted to a Chapter 7 case? Fed. R. Bankr. Proc. 1019(3) effects "triple deeming" by deeming the claims filed in Chapter 11, filed in the superceding Chapter 7.

46. The provision may arise in settlement of early proceedings to lift the stay or provide financing to the reorganizing debtor; or may precede the bankruptcy case, that is, a prepetition waiver. The vitality of such provisions is unsettled. *E.g.*, *In re* Pease, 195 B.R. 431 (Bankr. D. Neb. 1996) (holding that the waiver of the automatic stay obtained prior to bankruptcy in loan negotiation was not enforceable); and *In re* Powers, 170 B.R. 480 (Bankr. Mass. 1994) (waiver of automatic stay obtained in prior Chapter 11 was not self-executing and required motion for relief from the stay). Lines may be drawn between single-asset Chapter 11 cases and other cases. *E.g.*, *In re* Shady Grove Tech. Center Assoc., LP, 227 B.R. 422 (Bankr. D Md. 1998) (lender met burden of showing that waiver in sophisticated workout should be enforced); *In re* Archway Apartments, Ltd., 206 B.R. 463 (Bankr. M.D. Tenn. 1997) (a provision should limit the time for confirmation of a single-asset Chapter 11 plan of reorganization). The power of the clause may be limited to the case while actively administered. *E.g.*, In re Diviney, 225 B.R. 762 (B.A.P. 10th Cir. 1998) (drop dead clause did not survive confirmation of the Chapter 13 plan). Cases are reviewed in Neil J. Siegel, *Waiving (Some of) Your Bankruptcy Rights Before You File - Should You Be Worried?* 74 CONN. BAR J. 115 (2000). Further analysis is found in Irving D. Labovitz, A *Review of Current Cases and Developing Trends Considering the Efficacy of Section 362 Automatic Stay Waivers in Commercial Mortgages, Or, "What Do You Have To Lose"?*, 103 COMM. L. J. 271 (1998); Mark F. Hebblein, *Prepetition Waivers of the Automatic Stay in Bankruptcy: The Economic Case for Nonenforcement*, 115 BANKING L.J. 126 (1998); and Michael St. Patrick Baxter, *Prepetition Waivers of the Automatic Stay: A Secured Lender Guide*, 52 BUS.LAW. 577 (1997).

The provision would usually be a deal struck between lender and debtor, but it may be imposed by the court. *See, e.g.*, In the Matter of Mendoza, 111 F.3d 1264 (5th Cir. 1997) (it was not an abuse of discretion for bankruptcy judge to impose a "drop dead" clause when modifying the Chapter 13 confirmed plan).

the secured party's claim and the plan may be confirmed without the secured party's assent (that is "*crammed down*").[47]

Effective date [of the plan]. The date designated in the confirmed plan for the plan to take effect. Usually this date is the first day on which the confirmation order becomes final.[48]

Equity Cushion. The amount left in the value of the collateral after the lien[s] is/are satisfied. The issue is whether an equity cushion establishes the adequate protection which Bankruptcy Code section 361

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47. The courts have not been warm to such plans. An eat dirt plan shifts the risk of selling the property and its future value from the debtor to the lender. The eat dirt plan expresses great confidence in the valuation made by the bankruptcy court. The statutory question in Chapter 11 is whether such a plan is the *indubitable equivalent* promised in Bankruptcy Code § 1129(b)(A)(iii)? *In re* Arnold & Baker Farms, 85 F.3d 1415 (9th Cir. 1996) *cert. denied*, 519 U.S. 1054 (1997) (holding that a plan which offered the secured party 566.5 acres of the 1320 acres pledged to the debtor under a deed of trust was not the *indubitable equivalent.* The bankruptcy court valued the land at $7300 per acre and concluded that the $4,135,450 for the 566.6 acres was more than sufficient to satisfy the $3,837,618 secured claim. The Bankruptcy Appellate Court and the affirming Ninth Circuit were suspicious of placing such confidence in judicial determinations of value even though the court did not find the valuation erroneous. In contrast the Fifth Circuit held that surrender of all of the secured party's collateral was the *indubitable equivalent*). Matter of Sandy Ridge Development Corp., 881 F.2d 1346 (5th Cir. 1989). Courts have said that the partial surrender of land of a sufficient value to satisfy the oversecured creditor should be the *indubitable equivalent* but have denied confirmation of the particular plans before the court: *In re* Fay Assocs. Ltd. Partnership, 225 B.R. 1 (Bankr. D.C. 1998); *In re* May 174 B.R. 832 (Bankr. S.D. Ga. 1994); In the Matter of Martindale, 125 B.R. 32 (Bankr. D. Idaho 1991); and *In re* Walat Farms, 70 B.R. 330 (Bankr. E.D. Mich. 1988). *In re* Atlanta Southern Bus. Park Ltd., 173 B.R. 444 (Bankr. N.D. Ga. 1994) (confirming such a plan). In Chapter 12 and Chapter 13, the Second Circuit and Firth Circuit have ruled that the plan can either "surrender" all of the collateral or "distribute a value" that may be only a part of the collateral. This recognizes the choice of Bankruptcy Code § 1225(a)(5)(B) or (C) and Bankruptcy Code § 1325(a)(5)(B) or (C). *In re* Williams, 168 F.3d 845 (5th Cir. 1999); *see also In re* Kerwin, 996 F.2d 552 (2nd Cir. 1993).

48. The "effective date of the plan" is not a defined term even though the confirmed plan has binding effect. Bankruptcy Code § 1141. Yet there are many complex issues that center on the date when the plan becomes operative. *E.g.,* certain priority claims must be cashed out on that date. Bankruptcy Code § 1129(a)(9)(B) and (C). Valuations made at various stages of the proceeding are no longer accurate. *In re* Potomac Iron Works, Inc.1997 WL 836529 (Bankr. D. Md. 1997) (holding the effective date selected must be reasonable and one year after confirmation to allow the debtor to collect receivables needed to fund the plan was not reasonable). Also, footnote 1 listing sections referencing "effective date of the plan." The effective date cannot be on the date of the petition and must be not earlier than the confirmation. *In re* Musil 99 Bankr. 448 (Bankr. D. Kan. 1987). The issue is analysed in *In re* Jones, 32 Bankr. 951, 958 n.13 (Bankr. D. Utah 1983) (payments to unimpair creditors could not be made after the effective date of the plan); and *In re* Loveridge Mach. & Tool Co., Inc., 36 B.R. 159, 166-167 (Bankr. D. Utah 1983)(contract rate of interest should govern amount paid to oversecured creditor). Benjamin Weintraub and Michael J. Crames, *Deferring Consummation, Effective Date or Reorganization and Retention of Postconfirmation Jurisdiction: Suggested Amendments to the Bankruptcy Code and Bankruptcy Rules*, 64 AM. BANKR. L. J. 245 (1990).

promises to stayed creditors. *In re* Alyucan Interstate discusses the issue and concludes that it is not.[49]

Exclusivity. Facilis descensus Averno est.[50] The same friendly folk who brought the business to ruin are now in charge! The privilege of the debtor to propose the plan of reorganization without having to confront competing plans. It is specifically provided by Bankruptcy Code section 1121(b) and is one of the most valued facets of Chapter 11.[51]

First Day Orders. The orders requested by the debtor, and some creditors, to implement the Chapter 11 proceedings necessary at the very outset of the case. These would typically include orders for bank accounts, financing to meet immediate needs like payroll and the like.[52]

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49. 12 B.R. 803 (Bankr. Utah 1981).

50. Aeneid. Book VI, 126. Virgil (70 B.C.E. - 19 B.C.E.). Roughly, "The road to hell is paved with good intentions."

51. "In large Chapter 11 cases the right of exclusivity is one of the main sources of debtor, and therefore management, leverage. Because exclusivity matters, many judges have used hearings on extension of exclusivity as status conferences. Particularly in the Southern District of New York, extensions are likely to be doled out routinely. . . . Such policies leave creditors with virtually no alternative but to negotiate a consensual plan." LYNN M. LOPUCKI, STRATEGIES FOR CREDITORS IN BANKRUPTCY PROCEEDINGS, § 11.07, 544 (3rd ed. Aspen Law & Business 1997). "The right to propose a plan is one of the fundamental powers to be exercised in a Chapter 11 reorganization. To the extent that the debtor retains an exclusive right, it not only retains control over the management of the case, it is also able to exercise increased negotiating leverage over its creditors." REFORMING THE BANKRUPTCY CODE, THE NATIONAL BANKRUPTCY CONFERENCE'S CODE REVIEW PROJECT, Recommendation Chapter 11 A.1. to grant expedited appeal of orders on 1121 (Final Report, Revised ed. 1997). *See also* ELIZABETH WARREN, BUSINESS BANKRUPTCY 126 (1993) (discussing strategic value). Gov't document JU 13:2 B 22/2; Novica Petrovski, *The Bankruptcy Code, Section 1121: Exclusivity Reloaded*, 11 AM. BANKR. INST. L. REV. 451, 453 (2003) ("Section 1121 of the Bankruptcy Code, is a very powerful tool for debtors"). "Although reductions are rarely granted, a Chapter 11 debtor-in-possession is almost routinely permitted to extend its exclusive periods at least once, and additional extensions are not uncommon, particularly in relatively large, complex cases." Richard M. Cieri, Scott J. Davido, and Heather Lennox, *Applying an Ax When a Scalpel Will Do: The Role of Exclusivity in Chapter 11 Reform*, 2 J. BANKR. L. AND PRAC. 397, 410 (1993).

52. The range of "first day orders" is defined only by the character of the debtor's business and the scope of its financial problems. Bankruptcy brings some substantive rights that may need to be invoked at the outset. Access to "cash collateral" [a term defined by Bankruptcy Code § 363(a)] may be immediate according to Federal R. Bankr. P. 4001(1)(b). The debtor has the right to reject or assume executory contracts or leases in Bankruptcy Code § 365, and the survival of a franchise may require closing of a number of leased outlets immediately. The debtor can obtain financing with graduated levels of protection in Bankruptcy Code § 364, including priming other liens.

There are likely to be a number of operational issues for which immediate authorization is needed. These include cash management issues such as opening bank accounts or investing funds pursuant to Bankruptcy Code § 345; giving adequate assurance to utilities as required by Bankruptcy Code § 366; and may include special problems like paying custom duties, or honoring customer warranty claims, gift certificates or lay-a-way plans.

Gap Period. The time of involuntary petitions between the filing of the petition commencing the case and the dismissal or entry of an order for relief.[53]

Gerrymander. ". . .[T]hou shalt not classify similar claims differently in order to gerrymander an affirmative vote on a reorganization plan."[54] What are "substantially similar. . . claims" within Bankruptcy Code section 1122(a) when the Chapter 11 plan confirmation process

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There are urgent administrative matters to be raised in the "first day order" package. Employment of lawyers or other professionals require court approval under Bankruptcy Code § 327. If there are brother-sister, or parent-subsidiary entities, an order for joint administration of the cases under F.R.B.P. 1015 may be essential. If the debtor is a large enterprise with many claims anticipated, retaining a claim agent may be needed because the bankruptcy clerks' office cannot handle the expected volume.

Sometimes the "first day orders" raise more controversial issues about the payment of prepetition claims. The *doctrine of necessity* is the equitable ground which the court may invoke under Bankruptcy Code § 105(a) to allow payment to *critical vendors.* How far the doctrine will reach is the question which each court has to decide. For example the court denied any authority to go beyond statutory priorities in *In re* FCX, Inc., 60 B.R. 405 (E.D. N.C. 1986) (priority wage claims could be paid but not trade claims). Compare, however, *In re* Just for Feet, Inc., 241 B.R. 821 (Bankr. D. DE 1999) which allows payment of vendors of popular brands like Nike, New Balance, Reebok, Adidas because customers will not come to the debtor's stores without such stock. The toolmakers supplying debtors' divisions were paid in *In re* Eagle-Picher Industries, Inc., 124 B.R. 1021 (Bankr. S.D. Ohio 1991) to enable debtor to survive in a highly competitive environment. Wages and benefits for active employees were authorized in *In re* Ionosphere Club, Inc., 98 B.R. 174 (Bankr. S.D.N.Y. 1989) but striking employees could not be paid.

53. In voluntary petitions in bankruptcy, the filing of the petition commencing the case automatically results in an order for relief. Bankruptcy Code § 301. However, involuntary petitions require adjudication of the petition allegations putting the order for relief in abeyance. Bankruptcy Code § 303(h). Transactions with the debtor during the gap period are perilous. *E.g., In re* Bankvest Capital Corp., 375 F.3d 51 (1st Cir. 2004) (payments by debtor to its bank during gap period, which bank transferred to purchaser of loan portfolios, would not be recoverable, assuming that they were in violation of the automatic stay, even if avoidable as post-petition transfers prohibited by Bankruptcy Code § 549, because bank's status under Bankruptcy Code § 502(h) would give bank priority).

54. Matter of Greystone III Joint Venture, 995 F.2d 1274, 1279 (5th cir. 1992) (as amended on rehearing), *cert. denied* 113 S.Ct. 72 (1992) (the deficiency claim created by Bankruptcy Code § 1111(b) is not properly classified separately from the unsecured creditor class). The courts agree that motivation to juggle class membership to achieve plan confirmation is not an appropriate application of Bankruptcy Code § 1122(a). *E.g. In re* Barakat, 99 F.3d 1520 (9th Cir. 1996), *cert. denied* 117 S.Ct. 1312, and *reh'g. denied*, 117 S.Ct. 1725 (1997); *In re* Boston Post Road Ltd., 21 F.3d 477 (2nd Cir. 1994), *cert. denied* 115 S.Ct. 897 (1994); John Hancock Mutual Life. Insur. Co .v. Route 37 Bus. Park Ass'n., 987 F.2d 154 (3rd Cir. 1993); Matter of Lumber Exchange Bldg. Ltd., 968 F.2d 647 (8th Cir. 1992); and *In re* Bryson Properties XVIII, 961 F.2d 496 (4th Cir. 1992), *cert. denied* 113 S.Ct. 191 (1992). As the preceding cases illustrate, much of the discussion centers on Bankruptcy Code § 1111(b) which gives distinctive treatment to secured claims held without recourse so that the secured party's rights can arise only in a Chapter 11 case and not under applicable state law. The provision has special importance in single-asset real estate cases. David Gray Carlson, *Chapter 11 Issues: The Classification Veto in Single-Asset Cases Under Bankruptcy Code Section 1129(a)(10)*, 44 S.C. L. REV. 565 (1993) (there is distinction between trade credit and deficiency of secured credit that legitimizes separate classification of the unsecured claims).

requires voting by the weighted majorities of classes or interests described in Bankruptcy Code section 1126?[55]

Go naked. The professional who avoids paying high premiums for malpractice insurance and places all assets in other hands, such as family members or trusts, that tort creditors will not be able to reach, or will be discouraged from reaching.[56]

Going concern bonus. See, *reorganization bonus.*

Indubitable equivalent. A term of art originating in the case of *In re* Muriel Holding Corp, where Judge Learned Hand held that the stay imposed under former Bankruptcy Act section 77B (11 USC sec. 207) must be lifted because the reorganization plan failed to give the secured creditor the indubitable equivalent of its mortgage interest.[57] The concept is embodied in Bankruptcy Code section 1129(b)(2)(A)(iii). See, *cramdown.*

Bankruptcy Code section 361(3) picks up the term as one of the standards by which the debtor proposes to adequately protect the secured party who seeks relief from the automatic stay. It is not a defined term and is not limited to application in that section.

Ipso facto clause. A contract provision automatically terminating the contract upon the bankruptcy or insolvency proceeding of a party. These clauses are ineffective to stop an executory contract or unexpired lease, Bankruptcy Code section 365(e); or to prevent the estate from using or selling assets, Bankruptcy Code section 363(l).[58]

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55. Steelcase Inc. v. Johnston, 21 F.3d 323 (9th Cir. 1994) (allowed the separate classification of the one creditor objecting to the plan because a pending lawsuit with the debtor affected the amount of its claim). *In re* U.S. Truck Co., 800 F.2d 581 (6th Cir. 1986) (permitting the separate classification of the Teamsters for claims arising from rejection of the collective bargaining agreement. The single class designation prevented the Teamsters from dominating the unsecured creditor class).

56. *See, e.g. In re* Goldenberg, 253 F.3d 1271 (11th Cir. 2001) (nearly three and one-half million dollars in IRA's and single premium annuities were exempt under Florida law for surgeon who filed chapter 7 petition on the day state malpractice action was submitted to the jury after being certified to the Florida Supreme Court.) Goldenberg v. Sawczak, 791 So. 2d 1078 (Fla. 2001). Matter of Smiley, 864 F.2d 562 (7th Cir. 1989) (dismiss the petition of ophthalmologist who created tenancy by the entireties to avoid malpractice judgment). Alan Bloom, Greg Davidian, William Ginsberg, *Insurance: Going Naked or Going in Style*, 13 WHITTIER L. REV. 445 (1992). (risk management strategies include going without insurance or self-insuring). David J. Morrow, *Key to a Cozier Bankruptcy: Location, Location, Location*, N.Y. TIMES, Jan. 7, 1998, at A1 (Dr. Garcia-Rivera carries no malpractice insurance and protects $500,000 home through Florida homestead).

57. 75 F.2nd 941 (2nd Cir. 1935)

58. *See, e.g.*, Days Inn of America, Inc. v. 161 Hotel Group, Inc., 55 Conn. App. 118, 739 A.2d 280 (Conn. Ct. App. 1999) (*ipso facto* clause in hotel franchise, ineffective in bankruptcy, could not shield guarantor of franchisee from its guaranty after franchisee filed bankruptcy). While simple to state, the application of and exceptions to the rules bristle with issues. Is the contract executory? Has the lease been effectively terminated prior to bankruptcy? Is it a contract for

Jurisdiction by ambush. The bankruptcy court, a non-Article III court, can finally decide a non-core judicial matter if the parties consent to the jurisdiction of the bankruptcy court. 28 U.S.C. § 157(c)(2). Consent should be affirmative on the record. It should not rest on failure to object.[59]

Lien Stripping. Valuing the collateral and proposing in the plan to satisfy the lien when that value has been paid. The remaining deficiency on the debt is an unsecured claim receiving whatever percentage the class of unsecured claims is paid under the plan. More precisely, the Chapter 13 debtors sought to modify the home mortgage but the Supreme Court held in Nobelman v. American Savings Bank that Bankruptcy Code section 1322(b)(2) prohibited modifying the rights of creditors whose secured claim was only upon the debtor's principal residence.[60] Compare, *strip off.*

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financial accommodation such as a loan commitment? Is it a contract for personal service that is non-delegable such as lead baritone at the *Met* on Saturday? *See, e.g.*, Summit Invest. and Dev. Corp. v. Leroux, 69 F.3d 608 (1st Cir. 1995) (*ipso facto* clause in partnership agreement was ineffective even though state partnership law terminated upon bankruptcy; and exception for non-assignment law in § 365(e)(2) did not track amendment of § 365(c) (1)(A) barring hypothetical assignment).

59. The following cases are wrong: *In re* Pioneer Inv. Servs. Co., 946 F.2d 445 (6th Cir. 1991) (assuming that noncore proceeding was at issue, failure to object to final jurisdiction was consent); *In re* Men's Sportswear, Inc., 834 F.2d 1134 (2nd Cir. 1987) (consent to jurisdiction over contract breach action inferred from the failure to object); and *In re* Daniels-Head & Assoc., 819 F.2d 914 (9th Cir. 1987). Fed. R. Bankr. P. 7008(a) (last sentence) and Fed. R. Bankr. P. 7012(b) (last sentence) make clear the requirement for express consent. "Jurisdiction by ambush" described the distinction between summary and plenary jurisdiction of the bankruptcy court before the 1978 Bankruptcy Reform Act. It was a trap for the unwary prior to the Bankruptcy Code. Bankruptcy Act § 2 (11 U.S.C. § 11) (repealed 1978) and Bankruptcy Act § 23a (11 U.S.C. § 46a) (repealed 1978) involved constructive possession and consent by failure to object. JAMES ANGELL MACLACHLAN, HANDBOOK OF THE LAW OF BANKRUPTCY §§ 194 *et. seq.* (West 1956) and George Treister, *Bankruptcy Court Summary Jurisdiction*, 36 CAL. STATE B. J. 1085 (1961).

"Jurisdiction by ambush" has been inappropriately applied to the jurisdiction which the bankruptcy court asserts over the counterclaim filed against the creditor's proof of claim. *See, e.g. In re* EXDS, Inc., 301 B.R. 436 (Bankr. D. Del. 2003) (by filing proof of claim, creditor submitted to the equity jurisdiction of the bankruptcy court and was not entitled to trial by jury); and *In re* County of Orange, 203 B.R. 977 (Bankr. C.D. Cal. 1996) (creditor submitted itself to summary jurisdiction for the counterclaim for breach of contract and malpractice by filing proof of claim; however, the court allowed the withdrawal of the claim).

60. 508 U.S. 324 (1993). In effect, the Court is reading Bankruptcy Code § 1322(b)(2) as if it said: "modify the rights of holders of secured claims, other than [rights with respect to the secured] claim secured only by a security interest in real property that is the debtor's principal residence."

In 1994 Congress amended Bankruptcy Code §1123(b)(5) to put the same restricting language in Chapter 11. However, no action was taken to amend Bankruptcy Code § 1222(b)(2) so that lien stripping of the family farm was upheld in Harmon v. United States, 101 F.3d 574 (8th Cir. 1996).

The debtor may *strip off* lien of the junior mortgage when there is no equity to support the lien in Chapter 13. *In re* Zimmer, 313 F.3d 1220 (9th Cir. 2002); *In re* Lane, 280 F.3d 663 (6th Cir.

Marshal assets. A doctrine of equity that a creditor protected by two sources from which to satisfy a debt should turn first to that source which will allow other creditors to satisfy their debts, too.[61]

Means Test. "How do you like living in Florida, Mr. Bilzerian?"[62]

The core of the new legislation recently enacted.[63] The legislation amends existing Bankruptcy Code section 707(b) which allows dismis-

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2002); *In re* Pond, 252 F.3d 122 (2nd Cir. 2001); *In re* Dickerson, 222 F.3d 924 (11th Cir. 2000); *In re* Tanner, 217 F.3d 1357 (11th Cir. 2000); *In re* Bartee, 212 F.3d 277 (5th Cir. 2000), *reh'g en banc denied*, 228 F.3d 411 (5th Cir. 2000); *In re* McDonald, 205 F.3d 606 (3rd Cir. 2000); *In re* Mann, 249 B.R. 831 (Bankr. 1st Cir. 2000); and *In re* Lam, 211 B.R. 36 (Bankr. 9th Cir. 1997), *appeal dismissed*, 192 F.3d 1309 (9th Cir. 1999).

Additional collateral may take the property out of the "only. . .debtor's principal residence" category: *See, e.g.*, Wilson v. Commonwealth Mortgage Corp., 895 F.2d 123 (3rd Cir. 1990) ("any and all appliances, machinery, furniture and equipment" went beyond the residence). Other examples include: *In re* Bouvier, 160 B.R. 24 (Bankr. D. R.I. 1993) (business assets of the debtor's corporation); *In re* Hammond, 156 B.R. 943 (Bankr. E.D. Pa. 1993) (appliances, furniture and equipment); *In re* Reeves, 65 B.R. 898 (N.D. Ill. 1986) (fixtures); *In re* Ramirez, 62 B.R. 668 1986) (rental units); *In re* Morphis, 30 B.R. 589 (Bankr. N.D. Ala. 1983) (house and adjoining lot); *In re* Green, 7 B.R. 8 (Bankr. S.D. Ohio 1980); and *In re* Baksa, 5 B.R. 184 (Bankr. N.D. Ohio 1980) (cars and furniture). Boilerplate may or may not be permissible. *In re* Davis, 689 F.2d 208 (6th Cir. 1993) (boilerplate "rents, royalties, profits and fixtures" does go beyond the residence); *but see In re* Hirsch, 155 B.R. 688(Bankr. E.D. Pa. 1993) (holding that the boilerplate is within the category). Insurance is another disputed issue. *See, e.g.,* Transmouth Fin. Corp. v. Hill, 106 B.R. 145 (W.D. Tenn. 1989); *In re* Wilson, 91 B.R. 74 (Bankr. W.D. Mo. 1988); and United Co. Fin. Corp. v. Brantley, 6 B.R. 178 (Bankr. N.D. Fla. 1980) (ruling that taking life insurance as collateral makes the mortgage vulnerable to modification.) Matter of Washington, 967 F.2d 173 (5th Cir. 1992); *but see In re* Williams, 161 B.R. 27 (Bankr. E.D. Ky. 1993); *see also In re* Davis, 989 F.2d 208 (6th Cir. 1993) (fire insurance is not collateral other than the principal residence of the debtor).

61. *See, e.g. In re* Enfolinc, Inc., 233 B.R. 351 (Bankr. E.D. Va. 1999) (refusing to order marshalling when the creditor held a priority security interest in the corporate debtor assets and principals of the debtor assigned certificates of deposit to the creditor. The creditor did not hold two sources of the same debtor); First Nat'l Mercantile Bank and Trust Co. v. Hazen, 96 B.R. 924 (Bankr. W.D. Mo. 1988) (secured party could be ordered to seek satisfaction first out of second mortgage upon property which the trustee of the debtor had no claim). The doctrine is a corollary of the equitable maxim, "equality is equity." GEORGE NORTON POMEROY, 1 POMEROY'S EQUITY JURISPRUDENCE § 410 (4th ed. 1918); and GEORGE L. CLARK, EQUITY, § 369 (1954).

62. Philip Shenon, *Home Exemptions Snag Bankruptcy Bill*, N.Y. TIMES, April 6, 2001, A1 (Paul Bilzerian has filed second bankruptcy with $140 million of listed debts but retains $5 million home he calls "Taj Mahal" under Florida homestead laws).

63. H.R. 685 and S. 256, 109th Cong. 1st Sess., Bankruptcy Abuse and Consumer Protection Act of 2005, Pub. L. No. 109-9, 119 Stat. 23 (2005) (enacted); H.R. 975 and S. 1920, 108th Cong. 1st Sess., Bankruptcy Abuse Prevention and Consumer Protection Act of 2004; H.R. 333 and S. 220, Bankruptcy Abuse Prevent and Consumer Protection Act of 2001, 107th Cong. 1st Sess; H.R. 333 and S. 220 are identical to H.R. 2415, Bankruptcy Reform Act of 2000. H.R. 2415 passed the House in a voice vote and the Senate 70 to 28 but was pocket vetoed by President Clinton on December 19, 2000. H.R. 2415, 106th Cong. 2nd Sess, was the conference replacement of S. 625 and H.R. 833. H.R. 833 and S. 625 were separately passed in May of 1999, but did not come out of conference before the end of the 1st Session of the 106th Congress. These bills were replacements of H.R. 3150 and S. 1301, 105th Cong. 1st Sess. (1998), which were passed in the Fall of 1998, but did not come out of conference before the end of the 2nd Session of the 105th Congress. H.R. 3150 was a successor to H.R. 2500 introduced in the Fall of 1997.

sal of the consumer Chapter 7 petition if the court finds that it would be a "substantial abuse". In defining "substantial abuse" courts have applied a kind of "means test", viz., does the debtor have the resources to make payments to creditors through a Chapter 13 plan?[64] The judicial expression of substantial abuse will be obviated by the elaborate statutory definition when the statute becomes effective six months after enactment.

National Bankruptcy Court of Delaware. Because Delaware is the state of incorporation for many large corporations, venue laid in the United States District Court for the District of Delaware is disproportionate. This enables Delaware bankruptcy courts to shape the business reorganization process.[65]

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146 Cong. Rec. S11683-02, S11702, 2000 WL 1796598 (Cong. Rec.), Proceedings for 106th Cong. 2nd Sess., December 7, 2000, explains the proposed means test in the floor debate.

Amongst the extensive literature analyzing the proposals is: Jean Braucher and Charles W. Mooney, Jr., *Means Measurement Rather than Means Testing*, 22 AM. BANKR. INST. L. J. 6 (2003) (surcharge chapter 7 debtors with higher income); Rebecca M. Burns, *Killing Them With Kindness: How Congress Imperils Women and Children in Bankruptcy Under the Facade of Protection*, 76 AM. BANKR. L. J. 203 (2002) (proposed reform will impact women and children negatively); Marianne B. Culhane and Michaela M. White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors*, 7 AM. BANKR. INST. L. REV. 27 (1999) (97% of Chapter 7 debtors had too little income to repay even 20% of their unsecured debts over a five year period); and Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177 (1999) (only fair that persons able to pay creditors should do so).

64. *See, e.g., In re* Taylor, 212 F.3d 395 (8th Cir. 2000), *cert. denied*, 121 S.Ct. 564 (2000) (pension which is excluded from the estate as an asset should be counted as income available to pay creditors); *In re* Stewart, 175 F.3d 796 (10th Cir. 1999) (the totality of the debtor-physician's circumstances, including choosing lower income fellowship, established his ability to pay creditors); *In re* Kornfield, 164 F.3d 778 (2nd Cir. 1999) (exempt pension should be factored into hypothetical chapter 13 plan); *In re* Lamanna, 153 F.3d 1 (1st Cir. 1998)(Living at home with parents gave debtor $770 monthly income above expenses); *In re* Koch, 109 F.3d 1285 (8th Cir. 1997) (exempt workmens' compensation should be factored into hypothetical Chapter 13 plan); *In re* Krohn, 886 F.2d 123 (6th Cir. 1989) (debtor had future income that would help to pay creditors); and *In re* Kelly, 841 F.1d 908 (9th Cir. 1988) (attorney had substantial income above expenses).

65. Lynn LocPucki, testimony before the Subcomm. on Commercial and Admin. Law of House Comm. on the Judiciary, 108th Cong. 1st Sess. (July 21, 2004), 2004 WL 84558186 (rise of filings of large publicly held companies in the Delaware bankruptcy court to 34% of all of such filings by 2000 and recommending change in the venue rules for bankruptcy cases). Lynn LoPucki, *Courting Failure. How Competition for Big Cases is Corrupting the Bankruptcy Courts* (Univ. of Mich. 2005) (state and judicial interest in corralling large bankruptcy cases). Lynn M. LoPucki and Sara D. Kalin, The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of a "Race to the Bottom", 54 VAND L. REV. 231 (2001) (outcome measures indicate that creditors are not benefitted by business reorganization in Delaware bankruptcy court); Theodore Eisenberg and Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967 (1999) (sizable percentage of large corporations in bankruptcy reorganize in Delaware bankruptcy court); *but see*, Barry E. Adler and Henry N. Butler, *On the "Delawarization of Bankruptcy" Debate*, 52 EMORY L. J. 1309 (2003) (the evidence of a competition for the bankruptcy business

New value. A controversial exception to the *absolute priority rule* by which equity interests may purchase their participation in the reorganized corporation when the plan is forced on the participants by *cramdown.*[66]

Negative Amortization. A plan in which the payments do not amortize the debt initially but with higher interest rate and possible balloon payment at the end.[67]

New debtor syndrome. The creation of an entity burdened with debt close to the time of the filing of the bankruptcy petition.[68]

No asset case. The filed schedules in a Chapter 7 case indicate that no dividend will be available for creditors. Federal Rules of Bankruptcy Procedure 2002(e) provides that the clerk will so advise in the notice of the first meeting of creditors and that creditors should not file a proof of claim.[69] Statistically, the overwhelming majority of con-

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is not that stark or destructive). S. 314, 109th Cong., 1st Sess., Fairness in Bankruptcy Litigation Act of 2005 proposes to revise the venue rules in bankruptcy.

66. *See, e.g., In re* Potter Material Serv. Inc., 781 F.2d 99 (7th Cir. 1986) (the sole shareholder of the debtor's guarantee of $600,000 secured loan to the debtor coupled with cash that paid creditors 3% was new value). Other courts finding a new value contribution include: *In re* U.S. Truck Co., 800 F.2d 581 (6th Cir. 1986); *In re* Jartran, Inc., 44 B.R. 331 (Bankr. N.D. Ill. 1984) and *In re* Landau Boat Co., 13 B.R. 788 (Bankr. W.D. Mo. 1981). *In re* Ambanc La Mesa Ltd., 115 F.3d 650 (9th Cir. 1997) finds a contribution of one-half percent too de minimus to constitute new value. *In re* Snyder, 967 F.2d 1126 (7th Cir. 1992) finds a lien release on equipment and cash contribution amounting to 2.7% of unsecured claims was not sufficient new value. However, *In re* Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351 (7th Cir. 1990) held that an off-the-balance-sheet contribution by way of the shareholder's guarantee of new loans was not sufficient new value assuming that the doctrine existed under the Bankruptcy Code. The court's dicta doubted that the rule is still viable. In the Matter of Greystone III Joint Venture, 948 F.2d 134 (as amended on reh'g 1992), *cert. denied* 113 S.Ct. 72 (1992) held that the new value was not codified in the Bankruptcy Code, but that portion of the opinion was withdrawn on rehearing with the dissent of the original judge of the opinion.

The Court has twice addressed the measure of new value contributions without squarely holding that the doctrine is a corollary to Bankruptcy Code § 1129(b)(2)(B)(ii); or that the doctrine was not enacted as part of the Bankruptcy Reform Act in 1978. Bank of America Nat'l. Trust and Sav. Assoc. v. 203 North LaSalle Street Partnership, 119 S.Ct. 1411 (1999) (the debtor's plan failed to satisfy the absolute priority standard because debtor had the exclusive right to propose a plan and used values determined by the court rather than the market). Norwest Bank Worthington v. Ahlers, 485 U.S. 197 (1988) (the offer of sweat equity by the reorganizing farmer was not something of value in the market traded in by creditors).

67. In the Matter of D & F Constr., Inc., 865 F.2d 673 (5th Cir. 1989) (holding that such a plan is not "fair and equitable" even if it may literally satisfy the terms of Bankruptcy Code § 1129(b)(2)); *but see, In re* Nauman, 213 B.R. 355 (9th Cir. B.A.P. 1997) which holds that the debtor's Chapter 12 plan was feasible even though property was negatively amortized.

68. E.g., *In re* Duvar Apt., Inc., 205 B.R. 196 (B.A.P. 9th Cir. 1996) (affirmed lift of the automatic stay upon the apartment building which was debtor's sole asset because the creation of the entity prior to bankruptcy was in bad faith); *In re* Yukon Enter., Inc., 39 B.R. 919 (Bankr. C.D. Cal. 1984) (declaring such to be presumptively in bad faith and subject to dismissal).

69. If subsequently assets are recovered, a new notice will be sent to creditors advising them to submit claims within 90 days. Fed. R. Bankr. Proc. 3002(c)(5).

sumer Chapter 7 bankruptcies are no asset or nominal asset cases. Cf. *Nominal asset case.*

Nominal asset case. The filed schedules and disclosures at the first meeting of creditors indicate that administrative expense and other priorities in Bankruptcy Code sections 503 and 507 will exhaust whatever assets are disclosed. There will be no dividend for general creditors.

Notice and hearing. Sometimes known as a *scream or die.* The reference to action taken "on notice and a hearing" is ubiquitous in bankruptcy.[70] It does not mean that a hearing will be conducted to take evidence and argument on the proposed action. The party receiving the notice has the burden of seeking a hearing. Bankruptcy Code section 102(1)(B).

Percentage Plan. A plan promising to pay creditors a percentage of their claims. E.g. "The plan will pay members of the class 10% of their allowed claims."[71] Compare, *Pot Plan.*

Period of exclusivity. See, *exclusivity.*

Pot Plan. A plan promising to pay a stated sum over a period of time, or a "pot of money" for creditors. E.g., "The plan will pay $300 each month for 36 months."[72] Compare, *Percentage plan.*

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70. A partial list of examples include: Bankruptcy Code § 362(d) (provide relief from the automatic stay); Bankruptcy Code §§ 363(b)(1), (c)(2)(B) (sale of certain estate property can be authorized only after "notice and a hearing"); Bankruptcy Code §§ 364(b),(c), and (d) (Authorizing the trustee to obtain credit, including credit pursuant to a *priming lien*); Bankruptcy Code § 365(d)(10) (excusing trustee from duty to perform obligations on an equipment lease); Bankruptcy Code § 503(b) (approve administrative expense claims); Bankruptcy Code § 510(c) (subordinate claims); Bankruptcy Code §§ 554(a) and (b) (abandon property); Bankruptcy Code § 706(b) (convert Chapter 7 case to Chapter 11); Bankruptcy Code § 725 (disposes of encumbered property); Bankruptcy Code § 1108 (terminate authority to operates business in chapter 11); Bankruptcy Code § 1121(d) (extend or shorten the debtor's period of *exclusivity*); Bankruptcy Code § 1125(b) (determine that the plan proponent's disclosure statement is adequate); and Bankruptcy Code § 1127(b) (approve modification of the Chapter 11 plan).

71. *See, e.g.* Matter of Witowski, 16 F.3d 739, 741 (7th Cir. 1994) (the plan could be modified to pay creditors 19% when fewer creditors filed claims than anticipated by the original 10% plan); *In re* Phelps, 149 B.R. 534, 537 n.3 (Bankr. N.D. Ill. 1993) (debtor may choose a percentage plan or a pot plan).

72. The litigated issue is usually modification of the plan when fewer creditors than anticipated bother to file claims. *See, e.g., In re* Than, 215 B.R. 430, 432 n.2 (B.A. P. 9th Cir. 1976); *In re* Powers, 202 B.R. 618 (B.A.P. 9th Cir. 1996); Mayer v. Pagano, 2002 WL 31159110 (Bankr. D. N.D.Calif. 2002); *In re* Golek, 308 B.R. 332 (Bankr. D. Ill. 2004) (although phrased as $76 per month for 36 months, the plan was a percentage plan to achieve 10% achieved early when proceeds from the sale of debtor's residence were applied); *In re* Stamm, 265 B.R. 10 (Bankr. D. Mass. 2001) (plan for term of 60 months could not be reduced because fewer creditors than anticipated filed proofs of claim). Reference to a "pot plan" has appeared outside of Chapter 13. *See, e.g., In re* New York Medical Group, 265 B.R. 408, 411 (Bankr. S.D.N.Y. 2001) (Creditor with malpractice claim against Chapter 11 debtor could proceed in state court to establish liability of insurer).

Pre-packaged Plan. Filing Chapter 11 with a plan of reorganization already negotiated.

There are many advantages. The time before plan confirmation in Bankruptcy Code section 1141 is drastically reduced, and the prospects for successful reorganization go up as the time in the limbo of bankruptcy goes down. The plan is obtained largely by consent rather than by *cramdown.*

Priming lien. "When this mall is completed, the tenants will be fighting to get a lease. So, what's another $10 million?"

A lien which is placed in priority to an existing lien.[73]

Reorganization Bonus. The difference between the value of the Chapter 11 debtor if reorganized through Chapter 11 or liquidated through Chapter 7.[74]

Retention, Surrender, or Reaffirmation. Three statutorily stated choices open to the consumer debtor, using Chapter 7, regarding collateral pledged to a secured party.[75] Compare, *Ride through.*

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73. Bankruptcy Code § 364(d) ("The court. . .may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate. . .if the priming lien is the only credit available and the existing secured creditor is adequately protected"). *See, e.g., In re* Swedeland Dev. Group, Inc., 16 F.3d 552 (3rd Cir. 1994) (bankruptcy court erred in granting priming lien to complete golf course and residential project); discussed, Lawrence K. Snider and Paul B. Lewis, *Case and Controversy. Priming Liens and the Undersecured Creditor After In re Swedeland Development Group, Inc.*, 4 J. BANKR. L. & PRAC. 211 (1995). *See also, In re* Reading Tube Ind., 72 B.R. 329 (Bankr. E.D. Penn. 1987) (priming lien rejected because debtor failed to show that alternative credit was unavailable); and *In re* Beker Ind. Corp., 58 B.R. 725 (Bankr. S.D.N.Y. 1986) (priming lien approved because debenture holders were adequately protected by going concern value and lien on other plants). Cf., James Rogers, *The Impairment of Secured Creditors' Rights in Reorganization: A Study of the Relation Between the Fifth Amendment and the Bankruptcy Clause*, 96 HARV. L. REV. 973 (1983) (the Bankruptcy Clause and not the Fifth Amendment is the standard for protecting the core expectations of the secured creditor).

74. *See, e.g.,* Walter J. Blum, *The Law and Language of Corporate Reorganization*, 17 U. CHI. L. REV. 565, 571-72 (1950) (the going concern bonus captured in reorganization); Proposed Bankruptcy Revision: Hearings on H.R. 31 & H.R. 32 Before the Subcomm. on Civil & Constitutional Rights of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 1938-41 (1976)(testimony of William Rochelle on behalf of the National Bankruptcy Conference on the going concern bonus to be protected in business reorganization); H.R. Rep. No. 595, 95th Cong., 1st Sess. 220 (1977) (purpose of the reorganization proposals to retain going concern bonus).

75. Bankruptcy Code § 521(2) requires the consumer debtor to declare the debtor's intentions, within thirty days, to keep or to return to the secured party the collateral. Bankruptcy Code § 722 enables the debtor to redeem qualified collateral, including an automobile, by paying off the secured party a lump sum for value determined by Bankruptcy Code § 506(a). A third choice is to enter into a reaffirmation agreement with the secured creditor which satisfies the requirements of Bankruptcy Code § 524(c) and (d). Compare *cramdown* in Chapter 13 where the debtor can modify the terms of the secured loan and make installment payments. Till v. SCS Credit Corp., 124 U.S. 1951 (2004) held that a consumer debtor in Chapter 13 could re-write the interest rate by a court-approved formula when using Bankruptcy Code §' 1325(a)(5)(B) to retain the debtor's truck.

Ride through. The secured creditor or the debtor may proceed as if the bankruptcy petition has not been filed. A secured creditor need not file a claim, and the plan may ignore the secured creditor. Assuming that the secured claim is not vulnerable to any bankruptcy avoiding power, the secured creditor simply rides through the proceeding. The secured creditor may enforce its security interest once the automatic stay is terminated.

The debtor may have performed all of the terms of the security agreement prior to the filing of the petition. May the debtor simply ride through and continue to meet the terms as if the bankruptcy petition was never filed?[76] Compare, *Retention, Surrender, or Reaffirmation.*

Stalking horse. A bankruptcy sale buyer who is a bidder with the expectation that other bidders will be interested for a higher price.[77]

Standing trustee. The United States trustee may designate an individual to be standing trustee for all of the cases filed under Chapter 13, Bankruptcy Code section 1302; or filed under Chapter 12, Bankruptcy Code section 1202.[78]

The question is whether these three statutory choices are the only choices when the consumer debtor in Chapter 7 has not defaulted on the security agreement prior to filing the bankruptcy petition? The circuits are completely divided: *In re* Burr, 160 F.3d 843 (1st Cir. 1998) (the three options are exclusive); *In re* Johnson, 89 F.3d 249 (5th Cir. 1996) (the three options are exclusive); *In re* Taylor, 3 F.3d 1512 (11th Cir. 1993) (the three options are exclusive); and *In re* Edwards, 901 F.2d 1383 (7th Cir. 1990) (the three options are exclusive). Cf. *In re* Parker, 139 F.3d 668 (9th Cir. 1998), *cert. denied*, 119 S.Ct. 592 (1998) (debtor may continue to make payments); *In re* Boodrow, 126 F.3d 43 (2nd Cir. 1997), *cert. denied*, 118 S.Ct. 1055 (1997) (debtor may continue to make payments); *In re* Belanger, 962 F.2d 345 (4th Cir. 1992) (debtor may continue to make payments); and Lowry Fed. Credit Union v. West, 882 F.2d 1543 (10th Cir. 1989) (debtor may continue to make payments). The new Bankruptcy Abuse and Consumer Protection Act of 2005 eliminates the debtor's choice to simply continue performance of a purchase money security interest by an amendment to add Bankruptcy §521(a)(6) to that effect.

Official Form 8 deleted the debtor's statement acknowledging §521(2) because, as the Advisory Committee Notes state, ". . . .the form is not intended to take a position. . ." on the split in the cases. To circumvent the restrictive view, some attorneys refuse to sign the statement that they find it is in the best interest of the debtor to reaffirm. The reaffirmation agreement is not enforceable in such form. A hearing is then necessary before the bankruptcy court to make the agreement enforceable. The bankruptcy court can find that the reaffirmation agreement has been signed so compliance has been achieved even though not enforceable in form. *In re* Claflin, 249 B.R. 840 (B.A.P. 1st Cir. 2000) (holding that this is not satisfactory compliance with the choice the debtor must make amongst the three options).

76. *Id.*.

77. *In re* Simon Transportation Services, Inc. 292 BR 207 (Bankr. D. Utah 2003) (insider stalking horse imposes the burden on the debtor to justify the sound business reason for the sale and the notice given to interested parties). *In re* Integrated Resources, Inc., 135 B.R. 746, 750 (Bankr. S.D.N.Y. 1992) ("[A]n initial bid that is then 'shopped around' to attract higher offers").

78. 28 U.S.C. § 586 defines the duties of the United States trustee, an office within the Department of Justice. Trustees for cases filed under Chapter 7 or Chapter 11 are drawn from a panel of trustees previously created. 28 U.S.C. § 586(a)(1). If there are a sufficient number of

Stand alone plan. A plan which is internally funded; it does not require outside funding.

Strip down. See, *lien stripping.*

Strip off. If the first mortgage exceeds the value of the property, should the junior mortgage be eliminated?[79] Compare, *lien stripping*

Strong arm. The powers granted hypothetically to a trustee under Bankruptcy Code section 544(a).[80]

Substantive Consolidation. An equitable doctrine which allows the merging of estates into a single administrative estate, sometimes even including non-debtor entities into the debtor entity.[81]

Surcharge the collateral. See *carve out.*

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cases, the United States trustee may appoint a standing trustee for the Chapter 13 or Chapter 12 cases rather than use the panel of trustees.

79. The debtor may not *strip off* the lien of a junior mortgage when there is no equity to support the lien in Chapter 7. *See, e.g. In re* Talbert, 344 F.3d 555 (6th Cir. 2003) and Ryan v. Homecomings Financial Network, 253 F.3d 778 (4th Cir. 2001). Nancy H. Kratzke, *Take If Off, Take It All Off: The Lien Stripping Dilemma and Judicial Treatment of Wholly Unsecured Junior Residential Mortgagees under Federal Bankruptcy Laws*, 2 J. BANKR. L. & PRAC. 4 (2003). The problem arises in the interaction between Bankruptcy Code § 506(a) and (d), the former limiting the secured claim ". . .to the extent of the value of such creditor's interest. . ."; and the latter saying that ". . .the lien is void . . . to the extent that a lien . . . is not an allowed secured claim." Dewsnup v. Timm, 502 U.S. 410 (1992) allowed secured claim had different meanings in the two subsections because the Court did not want to transform Bankruptcy Code § 506(d) into an "avoiding power" finessing other provisions of the Bankruptcy Code. This construction sent Justice Scalia into furious dissent. But the policy that discrete remedies are intended by the different bankruptcy chapters is upheld.

The debtor may *strip off* lien of the junior mortgage when there is no equity to support the lien in Chapter 13. *In re* Zimmer, 313 F.3d 1220 (9th Cir. 2002); *In re* Lane, 280 F.3d 663 (6th Cir.2002); *In re* Pond, 252 F.3d 122 (2nd Cir.2001); *In re* Dickerson, 222 F.3d 924 (11th Cir. 2000); *In re* Tanner, 217 F.3d 1357 (11th Cir. 2000); *In re* Bartee, 212 F.3d 277 (5th Cir. 2000), *reh. en banc denied*, 228 F.3d 411 (5th Cir. 2000); *In re* McDonald, 205 F.3d 606 (3rd Cir. 2000); *In re* Mann, 249 B.R. 831 (Bankr. 1st Cir. 2000); and *In re* Lam, 211 B.R. 36 (Bankr. 9th Cir. 1997), *app. dismissed*, 192 F.3d 1309 (9th Cir. 1999).

80. These powers are the rights of a levying creditor and the rights of a bona fide purchaser as to real property. Bankruptcy Code § 544(a)(1) - (3).

81. Substantive consolidation is not specifically authorized by the Bankruptcy Code or by Federal Rules of Bankruptcy Procedure. As such it contrasts with Fed. R. Bankr. P. 1015(b) which allows the joint administration of related entities in bankruptcy. The estates are not commingled in joint administration. The joint administration of the bankruptcy estates of husband and wife is specifically recognized by Bankruptcy Code § 302.

The equitable doctrine of substantive consolidation is readily applied where the debtor and its wholly owned affiliates have bankruptcy cases pending in the same judicial district. Prior to bankruptcy the debtors have integrated their management, balance sheets, tax returns, and their creditors are not distinguishable. *In re* Richton Int'l Corp., 12 B.R. 555 (Bankr. S.D.N.Y. 1981). As the circumstances move away from the easy cases, the court is asked to balance administrative convenience with the prejudice to creditors who deal separately with the debtor entities: *In re* Augie/Restivo Banking Co. Ltd. 860 F.2d 515 (2nd Cir. 1980) and *In re* Auto-Train Corp., Inc., 810 F.2d 270 (D.C. Cir. 1987) (substantive consolidation denied). *See also*, F.D.I.C. v. Colonial Realty Co., 966 F.2d 57 (2nd Cir. 1992) and Eastgroup Prop. v. Southern Motel Assoc., Ltd., 935 F.2d 245 (11th Cir. 1991) (substantive consolidation granted).

Sweat equity. "I'll work hard and use my experience as my share in the business. That's worth a lot."

For ownership interests to remain after reorganization, the *absolute priority rule* requires that secured debt and unsecured debt must be paid in full or unanimously consent to continued participation by equity. Bankruptcy Code section 1129(b)(2). Courts have recognized that excluded ownership may buy back into the business by contributing *new value.* The Supreme Court rejected the claim that new value could consist of the debtor's contribution of labor and experience in Norwest Bank of Worthington v. Ahlers.[82]

Two track. A term of opprobrium for the cumbersome process ante-dating the 1978 Bankruptcy Reform Act. Bankruptcy Act, Chapter XI and Chapter X, imagined more informal and more elaborate procedures for small versus large, publicly held corporations. Chapter XII was designed for limited partnerships typically operating office and apartment buildings or malls. The rallying cry of the Bankruptcy Reform Act of 1978 was a single Chapter 11 business reorganization.[83]

Special concern about the small, closely held corporation and the single-asset real estate debtor typically operating an apartment or shopping center, resulted in amendment in 1994 to define "single asset real estate" and "small business debtor."[84] The small business and

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The extreme reach of the doctrine is the consolidation of non-debtor entities with the debtor entity. Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215, *reh'g denied*, 313 U.S. 600 (1941) and *In re* Bonham, 229 F.3d 750 (9th Cir. 2000) (substantive consolidation of the debtor's wholly owned corporation who are not debtors into the debtor's estate because assets are commingled and creditors had no credible claim to reliance upon separate entities). Substantive consolidation of non-debtor entities has the obvious consequence of finessing the procedure for involuntary bankruptcy provided by Bankruptcy Code § 303.

Also, Mary Elisabeth Kors, *Altered Egos: Deciphering Substantive Consolidation*, 59 U. PITT. L. REV. 381 (1998); Christopher Predko, *Substantive Consolidation Involving Non-Debtors: Conceptual and Jurisdictional Difficulties in Bankruptcy*, 41 WAYNE L. REV. 1741 (1995); J. Stephen Gilbert, *Substantive Consolidation in Bankruptcy: A Primer*, 43 VAND. L. REV. 207 (1990); and Patrick C. Sargent, *Bankruptcy Remote Finance Subsidiaries: The Substantive Consolidation Issue*, 44 BUS. LAW. 1223 (1989).

82. 485 U.S. 197 (1988). Under the prior Bankruptcy Act, Justice Douglas wrote for a unanimous Court in Case v. L.A. Lumber Prod. Co., 308 U.S. 106, *reh'g denied*, 308 U.S. 637 (1939) that a plan which allowed the shareholders to retain an interest because their familiarity with the business, financial standing and influence was essential to its success, was not a fair and equitable plan. In dictum he said that the proper payment of new value would allow the shareholders to retain an interest in the reorganized company.

83. E.g., Peter Coogan, *A Debtor's Choice of a "Chapter" Rehabilitation Proceeding under the "Bankruptcy Act"*, 1 VT. L. REV. 117 (1976); Lawrence King, *Chapter 11 of the 1978 Bankruptcy Code*, 53 AM. BANKR. L. J. 107, 107-109 (1979); and Ronald Trust and Lawrence King, *Congress and Bankruptcy Reform Circa 1977*, 33 BUS. LAW. 489, 529-57 (1978).

84. The Bankruptcy Reform Act of 1994, H.R. 5116, 103rd Cong. 2nd Sess, Pub. L. 103-394 (October 22, 1994) codified in part as Bankruptcy Code § 101(51B) and 101(51C).

single-asset real estate debtor may be subject to different criteria in Chapter 11 reorganization.[85]

Vulture fund. An investment group specializing in bankrupt companies. One investment strategy is to control the reorganization by acquiring sufficient claims to control the voting. The assets of the reorganized debtor are sold off. The strategy assumes that creditors will sell their claims for a pittance to be done with the debtor. There is some discussion about good faith and disclosure but Bankruptcy Rule 3001 supports a caveat emptor approach.[86]

CONCLUSION

Bankruptcy is a Carrollian world where language demands explication. Dewsnup v. Timm is an example.[87] Bankruptcy Code section 506(a) defines an "allowed claim of a creditor secured by a lien" as the ". . . .value of such creditor's interest in the estate's interest in such property." The Chapter 7 debtors borrowed $119,000 on their farm in 1978, but farm decline dropped the land value to $39,000 when the bankruptcy court valued the land in 1987. The debtors pointed to Bankruptcy Code section 506(d) which declared that "To the extent that a lien secures a claim. . .that is not an allowed secured claim, such a lien is void. . . ." The debtors asked the court to void the $87,000 no longer secured by the farm land values as the Third Circuit allowed.[88] In the vernacular, the debtors asked the court to pair down or lien strip the excess. Justice Blackmun, for the majority, held that a Chap-

85. E.g., Bankruptcy Code § 362(d)(3) expediting relief from the automatic stay for the single asset real estate debtor; and Bankruptcy Code § 552(b)(2) gives special recognition to the prepetition security interest in rents and hotel receipts. As to the small business debtor, Bankruptcy Code § 1102(a)(3) permits dispensing with the creditors' committee; Bankruptcy Code § 1121(e) shortens the time for plan proposal; and Bankruptcy Code § 1125(f) permits faster plan disclosure and confirmation. As to all business entities, Bankruptcy Code § 105(d) specifies powers of case management for the bankruptcy judge.

86. Amongst the voluminous literature, the following describes the scope of the market and raise various theories of fairness to the different interests affected. Chaim J. Fortgang & Thomas M. Mayer, *Trading Claims and Taking Control of Corporations in Chapter 11*, 12 CARDOZO L. REV. 1 (1990); Michael H. Whitaker, *Regulating Claims Trading in Chapter 11 Bankruptcies: A Proposal for Mandatory Disclosure*, 3 CORNELL J.L. & PUB. POL'Y, 303 (1993); Victor Brudney, *Corporate Bondholders and Debtor Opportunism: In Bad Times and Good*, 105 HARV. L. REV. 1821 (1992); Andrew Africk, Comment: *Trading Claims in Chapter 11; How Much Influence Can be Purchased in Good Faith Under Section 1126(c)?*, 139 U. PA. L. REV. 1393 (1991).

87. 502 U.S. 410 (1992).

88. Gaglia v. First Federal Savings & Loan Ass'n., 889 F.2d 1304 (3rd Cir. 1989) (Chapter 7 debtors could avoid the lien on their residence to the amount exceeding its value because that would be the same effect if they liquidated the property). The ruling is abrogated by Dewsnup v. Timm, 502 U.S. 410 (1992) and Nobelman v. American Savings Bank, 403 U.S. 324 (1993) (Chapter 13 debtors are barred from modifying the rights of secured creditors claiming only the debtor's principal residence.)

ter 7 debtor could not lien strip because "allowed secured claim" did not have the same meaning in section 506(a) as in section 506(d).[89] A fuming Justice Scalia said that ". . .[T]he Court replaces what Congress said with what it thinks Congress ought to have said. . . ."[90] " 'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'It means just what I choose it to mean - neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master – that's all."[91]

89. *Dewsnup*, 502 U.S. at 417 and n3. ("Accordingly, we express no opinion as to whether the words 'allowed secured claim' have different meaning in other provisions of the Bankruptcy Code").

90. *Dewsnup*, 502 U.S. at 420 (Scalia, J., dissenting).

91. THROUGH THE LOOKING GLASS, HUMPTY DUMPTY 238 (Tudor Publishing 1944).