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The Lost Art of Chapter 11 Reorganization

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THE LOST ART OF CHAPTER 11 REORGANIZATION

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I. PROLOGUE

As we sat outside the courtroom waiting for the bidding procedures hearing to commence before yet another § 363 sale, getting ready to do battle over breakup fees and to deal with the Unsecured Creditors Committee over what avoidance claims would fund the liquidating trust, my son Craig, a member of our firm turned to me and asked "gee Dad, they call Chapter 11 the reorganization provision of the [Bankruptcy] Code but it doesn't seem like there is ever a case anymore that I would look at as a true reorganization. Has it always been that way?" "No son," I replied, "I can remember a time, long, long ago, before white knights came riding in on their stalking horses when insolvency lawyers and their debtor clients had to actually negotiate creatively with creditors who actually expected a reasonable dividend to be paid on their claims, and there was a bargaining process to determine what it would take to satisfy creditors while allowing a troubled company to rehabilitate itself and continue in business without sacrificing its going concern value and hence equity. Ah, those were the days."

"Well," Craig asked, snapping me back to reality, "what happened?" It seems like every case now is a form of liquidation either occurring through a § 363 sale or some other device, and while someone may end up with the assets of a business as a going concern, it is the debtor and the unsecured creditors who are left to pick up the pieces through some sort of liquidating trust.

So it was that father and son decided to investigate this issue and determine whatever happened to the seemingly lost art of Chapter 11 reorganization. Has it truly been "lost," and if so is that necessarily a good or bad thing?

II. THE PREMISE

To attempt to answer this question, we must first establish as a premise what exactly constitutes a Chapter 11 reorganization. The provisions of Chapter 11 certainly provide a framework for what we call a reorganization but just as certainly do not require it.[1] Liquidation of assets is perfectly permissible through a Chapter 11 plan.[2] Generally reorganization can be defined as a proceeding that results in a restructuring and payment of debt that leaves a business intact in some form as a going concern.[3] It may or may not result in a change of ownership and control. As it has been aptly put, a Chapter 11 reorganization involves "a 'hypothetical sale' of the debtor's assets . . . [wherein] existing [creditors] exchange . . . claims or interests for . . . new claims against the reorganized debtor."[4] A liquidation on the other hand results, whether in a Chapter 11 or Chapter 7, in an actual sale of assets with proceeds used to pay creditors' claims as far as they go in the order of priority established by the Code.

Either of these processes may be driven by market conditions or the courts or may be the result of a combination of both.[5] Market conditions and the economy generally have, and will always have, an impact on decisions made by debtors and creditors as to whether reorganization or liquidation will be more beneficial to either or both.[6] As insolvency laws became more structured, proceedings and decisions originally controlled

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1. "[F]lexibility and equity [were] built into Chapter 11" to address the "multiple [and] competing considerations" of a reorganization. *See* NLRB v. Bildisco & Bildisco, 465 U.S. 513, 525 (1984).

2.

> While we typically think of Chapter 11 as the "reorganization" section of the Bankruptcy Code (as opposed to Chapter 7, the "liquidation" section), it is not uncommon for debtors to use the Chapter 11 process to liquidate. This is because Chapter 11 provides more flexibility and control in determining how to go about selling off the various aspects of the debtor's business and distributing the proceeds. A typical mechanism for effecting a Chapter 11 liquidation is the creation of a "liquidating trust"—state-law trust managed by a group of creditors that succeeds to the debtor's assets and administers the liquidation and distribution process.

In re Insilco Techs., Inc., 480 F.3d 212, 214 n.1 (3d Cir. 2007).

3. *See generally* Robert K. Rasmussen & David A. Skeel, Jr., *The Economic Analysis of Corporate Bankruptcy Law*, 3 AM. BANKR. INST. L. REV. 85 (1995).

4. *Id.* at 94.

5. *See* Rasmussen & Skeel, *supra* note 3, at 91.

6. *See id.* at 93.

by the courts were replaced in large part by decisions which are made primarily by a debtor in conjunction with creditor groups. However, courts still maintain an impact on the process. That impact has, over time, shifted from actual decision making to resolution of disputes pertaining to these decisions.[7]

This analysis is not a new concept. Advocates of what one author has referred to as the "rehabilitationist" view refer back to the old days "in which financially distressed companies . . . were [primarily] rehabilitated."[8] This typically carried with it some "sort of change in ownership."[9] Advocates of a return to this era express concern with the increased use and significance of § 363 sales and claim that such processes depress the availability of traditional reorganization.[10] A contrary view has been expressed by a group referred to as "efficientists" who opine that the era of what we have referred to as "traditional" reorganizations may in fact be "drawing to a close" as a result of "larger economic forces [which] have caused 'going concern' value to be less common [and] which in turn make[] preserving the historic debtor entity less viable [and] render[s] [the current model of] [C]hapter 11 obsolete."[11]

It is the position of this Article that the truth must lie somewhere in between. However, in order to determine how we have gotten where we are today, we must examine where we have come from and how that process has evolved.

III. BACK IN THE DAY

We must first look back at the predecessors of the current Bankruptcy Code which were individual congressional legislative Acts during the Eighteenth Century culminating in the Bankruptcy Act of 1898 (Bankruptcy Act),[12] as amended by the Chandler Act of 1938 (Chandler Act).[13]

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7. Note specifically the removal of the courts from various aspects of the process under the Code as opposed to the Act (*see* text accompanying *infra* note 13), i.e., the disinvolvement of the courts in the administrative aspect of cases and the creation of the U.S. Trustee system itself.

8. *See* James H.M. Sprayregen et al., *Chapter 11: Not Perfect But Better Than the Alternative*, 24 AM. BANKR. INST. J. 1, 60 (2005).

9. *See id.*

10. *See id.*

11. *See id.*

12. Bankruptcy Act, ch. I, 30 Stat. 544, 544-66 (1898) (amended 1938).

13. Chandler Act, ch. I, 52 Stat. 840, 840 (1938) (amended 1978). The combined law of U.S. Bankruptcy from 1898-1978 as encompassed by the Bankruptcy Act and the Chandler Act is

The economic underpinnings of a business reorganization derive from the notion that creditors will achieve a greater percentage recovery of the debt that is owed to them where a business continues as a going concern.[14] It is assumed that the debtor can repay a larger portion of its debts from future earning power or the sale of the business as a going concern.[15] Thus, the debtor will realize a larger profit if given time to restructure the debtor's business model or to find a buyer who is willing to pay the true value of the business and its assets instead of the reduced payout from the conditions of a firehouse sale.[16]

In early American History, most bankruptcy legislation was a temporary fix—usually in response to a national economic "panic"— what today might be called a recession or depression.[17] In the late nineteenth century, equity receiverships developed to confront the problem of distressed railroads.[18] These equity receiverships were very similar to an assignment for the benefit of creditors under modern state law[19] or a "liquidating"[20] Chapter 11.[21] The receiver would take possession of the entity and run the business while selling off the assets for the benefit of creditors.[22] This began the transition from a completely manager-controlled process to a creditor-driven proceeding, which became even more pronounced under the Bankruptcy Act of 1898.[23]

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collectively described herein as the "Act."

14. *See* Ali M.M. Mojdehi & Janet Dean Gertz, *The Implicit "Good Faith" Requirement in Chapter 11 Liquidations: A Rule in Search of a Rationale*, 14 AM. BANKR. INST. L. REV. 143, 151-52 (2006). "The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders. The premise of a business reorganization is that assets are used for production in the industry for which they are designed are more valuable than those same assets sold for scrap." *Id.* (quoting H. REP. No. 95-595, at 220 (1977)).

15. *See, e.g.*, Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. Lasalle St. P'ship, 526 U.S. 434, 453 (1999) (referencing two recognized policies underlying Chapter 11 reorganizations: preserving going concerns and maximizing property available to satisfy creditors).

16. *See* ELIZABETH WARREN & JAY WESTBROOK, THE LAW OF DEBTORS AND CREDITORS, ch. 8 (4th ed. 2001).

17. Charles Jordan Tabb, *The History of the Bankruptcy Law in the United States*, 3 AM. BANKR. INST. L. REV. 5, 13-21 (1995).

18. *Id.* at 21-22.

19. *See, e.g.*, FLA. STAT. § 727.101 (2007).

20. *See In re* Jartran, Inc., 886 F.2d 859, 868 (7th Cir. 1989) (holding that liquidating plans were permissible under Chapter 11).

21. *Cf.* Tabb, *supra* note 17, at 23.

22. *Id.* at 22.

23. *See* David A. Skeel, Jr., *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, 51 VAND. L. REV. 1325, 1359 (1998); Bankruptcy Act, ch. I, 30 Stat. 544, 544-65 (1898) (amended 1938).

The Bankruptcy Act remained in effect for more than eighty years during both the harsh economic times of the Great Depression and the booming growth following the second World War. Corporate reorganization was first given real form in the 1930s in response to the hazards of the Great Depression.[24] Major changes to the Bankruptcy Act came in 1938 under the Chandler Act,[25] which classified reorganizations under chapters that were based on the types of entities being reorganized: Chapter X for large corporate re-organizations,[26] Chapter XI for small business workouts involving unsecured debt,[27] and Chapter XII for real property reorganizations.[28] Chapters X, XI, and XII and the judicial and business practices that arose around and because of these business reorganization models directly influenced and led to Congress's move to enactment the modern Code under the 1978 amendments.[29]

A cursory review of the concepts encompassed by each is necessary to understand the current state of business reorganization under Chapter 11 of the Bankruptcy Code of 1978 and its subsequent amendments and case law interpretations that affect the modern bankruptcy practitioner on a nearly daily basis in making decisions regarding reorganization and liquidation.

IV. CHAPTER X

Chapter X exemplified a large and complex topic of corporate reorganization and was designed primarily for large publicly traded corporations.[30] It applied to corporations subject to ordinary bankruptcy plans of reorganization and affected all claims both secured and unsecured as well as corporate stocks.[31] Under Chapter X of the Act, it was mandatory that a reorganization trustee be appointed to oversee the business, at least for every debtor owing in excess of $250,000.[32] Chapter X reorganization involved corporate finance of a high complexity that was not usual in ordinary bankruptcies under Chapter XI and Chapter XII.[33]

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24. Tabb, *supra* note 17, at 28.
25. Chandler Act, ch. I, 52 Stat. 840 (1938).
26. *Id.* ch. X, 52 Stat. 840, 883.
27. *Id.* ch. XI, 52 Stat. 840, 905.
28. *Id.* ch. XII, 52 Stat. 840, 916.
29. Tabb, *supra* note 17, at 30.
30. *See* Chandler Act, ch. X, §§ 126-133, 52 Stat. 840, 883, 885-90 (1938).
31. *See generally id.*
32. *Id.* ch. XII, § 156, 52 Stat. at 888.
33. JAMES ANGELL MACLACHLAN, HANDBOOK OF THE LAW OF BANKRUPTCY 24 (1956).

Plans were required to receive preliminary approval by a court before being submitted to security holders for acceptance.[34] If the debt exceeded $3 million, the plan was subject to the oversight of the Securities and Exchange Commission (SEC) for examination and reporting, and every plan required judicial scrutiny.[35] A court could examine and disregard any employment or contractual agreement and had the power to order compensation to any parties in interest for services in connection with either the administration of the estate or a plan approved by the judge.[36]

V. CHAPTER XI

Chapter XI of the Bankruptcy Act was introduced in 1938 as part of the Chandler Act in the wake of the devastating economic upheavals of the Great Depression.[37] It is a descendent of § 12 of the 1898 Bankruptcy Act which was later repealed.[38] Chapter XI was meant to deal with financial problems that were encountered in a small business "plan of arrangement"[39] and intended to be undertaken by the private business owner as compared with those of the primarily publicly-traded businesses involved in Chapter X proceedings. Generally, a Chapter XI workout or plan of arrangement was considered to be principally concerned with small, local businesses and was a preferred option to the traditional liquidating bankruptcy.[40] Whereas, Chapter X bankruptcies required a greater deal of experience in securities and corporate law and a deeper understanding of corporate finance;[41] under Chapter XI, individual partnerships and corporations including limited partnerships could seek protection of bankruptcy.[42] Chapter XI was also open to wage earners although they were offered more protections and were encouraged to file under Chapter XIII.[43] A consolidated association of corporations was eligible for a voluntary Chapter XI[44] and a bankruptcy court could ignore the structure of corporate entities and consolidate a number of corporations

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34. *See* Chandler Act, ch. X, §§ 174-176, 52 Stat. 840, 890-91 (1938).
35. *See id.* ch. X, § 172, 52 Stat. 840, 890-91.
36. *Id.* ch. X, art. XIII, § 242, 52 Stat. 840, 900.
37. *Id.* ch. XI, 52 Stat. 840, 905; *see also* Tabb, *supra* note 17, at 28-29.
38. MACLACHLAN, *supra* note 33, at 24.
39. *See* Chandler Act, ch. XI, § 306, 52 Stat. 840, 906 (1938).
40. MACLACHLAN, *supra* note 33, at 24.
41. *See id.* at 24.
42. DANIEL R. COWANS, BANKRUPTCY LAW AND PRACTICE § 902 (7th ed. 1998).
43. *Id.*
44. *Id.*

into a single Chapter XI filing.[45] The choice of remedies between Chapters X, XI, and XII was governed partly by the following: statutory limitations and case law, practices and attitudes of government agencies, past relationships with creditors, and judicial attitudes of business and financial considerations.[46] Often times, larger corporations would seek loopholes to avoid the cumbersome Chapter X filing for the benefits available in a Chapter XI proceeding.[47]

Chapters X and XI were considered to be mutually exclusive remedies; when one was appropriate, an attempt to maintain the opposite would be grounds for a dismissal by a court.[48] Chapter XI was appropriate to allow an extension of time to pay debt to unsecured creditors or a scaling down of the amount of debts.[49] However, where major restructuring of the corporation such as eliminating classes of equity holders or some large unsecured creditor was needed, Chapter XI would not be adequate, and a court would impose the requirement to proceed under Chapter X.[50] Although this may seem to have been a fairly straightforward rule, actually choosing between Chapter X and Chapter XI caused great consternation to bankruptcy attorneys of the day. Under the 1898, Bankruptcy Act and the Chandler Act modifications, the SEC could intervene whenever there were public investors holding equity securities such as common or preferred shares or debt securities such as bonds or debentures.[51] It was presumed that "unscrupulous" management would seek Chapter XI protection to avoid the close examination of the elected trustee that occurred in Chapter X because all of corporate management's misdeeds, or even normal business practices that might be portrayed negatively, were far more likely to come to light.[52] Chapter X cases were filed voluntarily by the professional management on occasion, and especially when the management had confidence that the shareholders would be removed and the professional management might be retained in the newly reorganized entity.[53]

Unlike the remedies of Chapters X and XI, Chapters XI and XII were not mutually exclusive.[54] Only where there were no secured interests in

45. *Id.*
46. *Id.* § 904.
47. COWANS, *supra* note 42, § 902.
48. *Id.* § 904.
49. *See* Chandler Act, ch. XI, art. VIII, § 357, 52 Stat. 840, 910 (1938).
50. COWANS, *supra* note 42, § 904.
51. *See id.*
52. *See id.*
53. *Id.*
54. *Id.*

real property was Chapter XII considered inappropriate.[55] On the other hand, if the core function of the bankruptcy was to reorganize the secured interests, a Chapter XI would not be considered appropriate by the supervising court.[56] In Chapter XII, there was no formal creditor committee; however, there was often something similar to the modern committee[57] found in Chapter XI after the 1978 amendments.[58] Like the modern Code, Chapter XII allowed creditors to compose a plan;[59] however, there was no such benefit to creditors under Chapter XI.[60] Generally, tax considerations favored Chapter XI or Chapter XII in that forgiveness of debt was a non-taxable event under bankruptcy whereas forgiveness of debts that arose in private workouts was both taxable and heavily taxed.[61]

It was possible under the Act to convert Chapter XII into either Chapter X or Chapter XI, but the debtor's consent was necessary.[62] It was not possible to have an involuntary Chapter XI; however, it was possible to have an involuntary Chapter X.[63] Chapter XI was generally appropriate where a simple plan of arrangement with the creditors could suffice to carry the debtor through troubled times; however, "[i]f 'surgery' on the corporate structure affecting the rights of equity holders" was needed, Chapter X was the appropriate choice.[64] To transfer Chapter XI into Chapter X, the SEC or other interested party had to file a Motion for Conversion within 120 days from the first day set for the first meeting of creditors and this was of course a strategic weapon against the debtor.[65] It was possible to extend the 120 day limitation for conversion from Chapter XI into Chapter X.

Under Chapter XI, the day-to-day running of the business could be handled by either a debtor in possession (DIP), a receiver, or a trustee.[66] In Chapter XI, much like under § 363 of the modern Code, it was impossible for the DIP to conclude a sale without court permission, but ironically such

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55. COWANS, *supra* note 42, § 904.
56. *Id.*
57. *See* 11 U.S.C. §§ 1102-1103 (2000).
58. COWANS, *supra* note 42, § 904.
59. Chandler Act ch. XII, art. IX, 52 Stat. 840, 922 (1938).
60. *See generally id.*, ch. XI, 52 Stat. 840, 905-16 (1938).
61. COWANS, *supra* note 42, § 904.
62. BANKRUPTCY RULE OF PROCEDURE 11-17 (1976).
63. COWANS, *supra* note 42, § 901; Chandler Act, ch. III, § 4, 52 Stat. 840, 844-45 (1938).
64. *See* S.E.C v. Am. Trailer Rentals Co., 379 U.S. 594, 610-12, 615 (1965); *see also* COWANS, *supra* note 42, § 905.
65. COWANS, *supra* note 42, § 905.
66. *Id.* § 907.

permission was not required to enter into a contract for sale of the business.[67] Under Chapter XI, where the creditors did not have faith or confidence in the DIP, the proper action was to seek the appointment of a receiver.[68] A Chapter XI receiver was also appointed where there was no successful rehabilitation of the debtor.[69] Under Chapter XI, a receiver was not able to object to creditors' claims, but creditors were able to object to the ill-asserted claims of other creditors.[70] Confirmation of a plan under Chapter XI served to vest title and possession back from the DIP to the debtor, although usually these were one in the same party.[71] Thus, the debtor had control of its "assets free of all controls of the court and creditors except as provided in the plan."[72] In the 1970s, Chapter XI rules were implemented including an early version of the automatic stay,[73] which helped the effectiveness of Chapter XI.[74]

Under Chapter XI, the DIP, the receiver, or the trustee had a duty to file a statement of the financial condition of the estate within one month of the petition.[75] This was not nearly the same level of burden as the financial disclosure required under the Chapter X requirements,[76] or the disclosure statements required under a modern Chapter 11,[77] and thus Chapter XI was preferred to Chapter X. Generally, all that was necessary was to file was a customary profit and loss statement.[78] Unlike under the Code, it was possible at least in New York for a small corporation to represent itself as a debtor under Chapter XI.[79]

The Act was very similar to the current § 363[80] in that it allowed a court to authorize the DIP, the receiver, or the trustee upon notice and as the court prescribed and upon cause shown to sell or lease any property of the debtor upon terms or as approved by the court.[81] It was possible to make a sale on no notice or short notice with sufficient cause.[82] Normally

67. *Id.*
68. *See* Chandler Act, ch. II, § 2, 52 Stat. 840, 842 (1938); COWANS, *supra* note 42, § 907.
69. COWANS, *supra* note 42, § 907.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Cf.* 11 U.S.C. § 362 (2000).
74. COWANS, *supra* note 42, § 910.
75. *See, e.g.*, Chandler Act, ch. V, § 43, 52 Stat. 840, 860 (1938).
76. *See id.* ch. X, art. VII, 52 Stat. 840, 888-90.
77. *See generally* 11 U.S.C. §§ 521, 1106-1107 (2000); *cf.* 11 U.S.C.A. § 1116 (West 2007).
78. *See* Chandler Act, ch. X, art. IV, § 130, 52 Stat. 840, 886 (1938).
79. *Id.*
80. 11 U.S.C. § 363 (2000).
81. Chandler Act, ch. XI, art. III, § 313(2), 52 Stat. 840, 907 (1938).
82. *See id.* § 315.

under Chapter XI, it was not possible for a sale of all the assets of the debtor unless there was an emergency that would warrant authority for the total sale.[83] Rarely did a court find such emergency authority, and it was generally held that a sale of all of the assets under Chapter XI must be questioned so that a court would review such a sale with some scrutiny.[84] This was because Chapter XI did not allow for secured creditors' interest to be affected.[85] Under Chapter XI, court permission was necessary for the DIP to redeem property from a lien or sale where it appeared desirable for the continuing operation of the business.[86]

Under Chapter XI, there were no sub-priorities; all administrative expenses where paid at the same priority rate.[87] Under Chapter 11, there were two main types of plans of arrangement: plans that obtained additional time to pay obligations, an extension plan, or "settlement of the obligations by the payment of less than is owed[,]" a composition plan.[88] A court would confirm a plan under Chapter XI after all creditors affected by the plan accepted its arrangements in writing, the debtor made a deposit, and the court found the arrangement was in good faith.[89]

VI. CHAPTER XII

Chapter XII was only available to non-corporate debtors[90] and thus was not normally the envy of the larger corporations. However, a large single asset structure such as an apartment building or high-rise could be titled to an individual who could hold the asset in trust and seek the benefits of Chapter XII.[91] As can be imagined, such a practice contained numerous pitfalls. Chapter XII required that the creditors hold secured interest in a debtor's real property;[92] the essence of a Chapter XII was the modifications of secured claims on real property or chattels real.[93]

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83. *See In re* Pure Penn Petroleum Co., 188 F.2d 851, 854 (2d Cir. 1951).
84. *Cf.* 11 U.S.C. § 363 (2000).
85. *See generally* Chandler Act, ch. XI, 52 Stat. 840, 905, 910 (1938).
86. COWANS, *supra* note 42, § 921.
87. *Id.* § 926.
88. *Id.* § 928.
89. Chandler Act, ch. XI, art. IX, §§ 361-362, 52 Stat. 840, 911 (1938).
90. COWANS, *supra* note 42, §§ 904, 1051.
91. *Id.* § 1051.
92. Chandler Act ch. XII, art. II, § 406, 52 Stat. 840, 916 (1938).
93. COWANS, *supra* note 42, § 904.

Chapter XII became used considerably during the 1970s because of "the disasters that befell many real estate limited partnerships."[94] Chapter XII had provisions that were both variations of both Chapters X and XI, and it might be considered as half-way between the two.[95] Under Chapter XII, it was possible to confirm a plan which was rejected by some secured creditors.[96] Chapter XII encompassed both general and limited partnerships.[97] To seek protection under Chapter XII, it was necessary to have a legal or equitable ownership of real property or chattel as security for a debt.[98] Corporations at times sought to take advantage of Chapter XII; however, where a corporation transferred a property to a trustee to take advantage of Chapter XII, the courts held the transaction improper.[99] Under Chapters XII and X, secured creditors could be adversely affected; however, there were limits to the amount a secured creditors' interest could be altered.[100]

A Chapter XII plan of arrangement was generally similar to Chapter XI in that the effort was to gain additional time to pay an extension or to pay a percentage of the total debt, or under Chapter XII, creditors were allowed to create a plan for confirmation.[101] Under Chapter XII, not all creditors were required to file a claim to share in the distribution.[102] The operation of Chapter XI is confined to unsecured debts although actions on secured claims can be temporarily stayed.[103] Chapters XII and XIII provide procedures for permanently affecting creditors with both secured and unsecured claims against individuals.[104]

"By the 1960s and early 1970s, the use of Chapter XI to reorganize publicly held firms had become increasingly routine."[105] This allowed a growing class of corporate managers to retain their positions.[106]

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94. *Id.* § 1051.

95. *Id.*

96. Chandler Act, ch. XII, art. IX, §§ 468, 472, 52 Stat. 840, 923 (1938).

97. COWANS, *supra* note 42, § 1052.

98. Chandler Act, ch. XII, art. II, § 406, 52 Stat. 840, 916 (1938); *see* COWANS, *supra* note 42, § 1052.

99. COWANS, *supra* note 42, § 1052 (citing *In re* Hook, 1 BANKR. CT. DEC. 573 (Conn. 1974)).

100. *Id.* § 1055.

101. Chandler Act, ch. XII, art IX, § 466, 52 Stat. 840, 922-23 (1938).

102. *See* Chandler Act, ch. XII, art. VII, § 454, 52 Stat. 840, 920 (1938).

103. *Id.* ch. XI, art. II-III, §§ 307, 314, 52 Stat. 840, 906-07.

104. *Compare* Chandler Act, ch. XII, art. VIII, § 461, 52 Stat. 840, 921-22, *with* Chandler Act, ch. XIII, art. VIII, § 646, 52 Stat. 840, 934.

105. *See* Skeel, *supra* note 23, at 1374-75.

106. *Id.* at 1375 (stating "managers of a troubled firm and their lawyers had strong incentives to try for Chapter XI, since this chapter would enable both to retain their positions").

Additionally, lower courts had an incentive to choose a Chapter XI reorganization rather than a Chapter X proceeding, which required a sharing of authority with the SEC and delayed the process.[107] As the problems with the Bankruptcy Act became more pressingly clear, Congress authorized commissions to study the program and develop solutions to the growing problems.[108]

These problems were certainly symptomatic of the degree to which the remedies available in Chapters X, XI, and XII had become merged together by creative lawyering and the willingness of courts to accept and embody them in rulings. It was also a clear signal of changing times and the move away from strict court-control of the reorganization process to reflect the desire of the participants, debtor, and creditor groups to exert control over the process. Because the participants in the process suffer the ultimate economic benefits and consequences, this seemed only logical.

VII. ENTER THE CODE

The 1978 implementation of the Code was an attempt by Congress to expand the jurisdiction of the bankruptcy courts and overhaul the system in an effort to streamline the reorganization process.[109] The Code changes were driven by the need for a more efficient reorganization scheme.[110] The massive overhaul has been characterized by some as an effort to balance the sometimes competing interests of encouraging a market based upon economic efficiency and insuring equity, fairness, and justice.[111] The Code was an attempt to sculpt a bankruptcy system that was market driven and gave significantly greater control to creditors.[112] Under the new Code, creditors were more involved in the reorganization process, the U.S. Trustee was present to ensure the integrity of the process, and the Code

107. *Id.*

108. *See* Marjorie L. Girth, *A Response to the New Economics of the American Family*, 12 AM. BANKR. INST. L. REV. 59, 60 (2004).

109. *See* Skeel, *supra* note 23, at 1377; *see also* Ralph Brubaker, Symposium, *One Hundred Years of Federal Bankruptcy Law and Still Clinging to an In Rem Model of Bankruptcy Jurisdiction*, 15 BANK. DEV. J. 261, 270 (1999) (detailing the change in jurisdiction of the Bankruptcy courts over time).

110. *See Skeel*, *supra* note 23, at 1377.

111. Todd J. Zywicki, *Rescuing Business: The Making of Corporate Bankruptcy Law in England and the United States, Bruce G. Carruthers & Terence C. Halliday*, 16 BANKR. DEV. J. 361, 368-69 (2000) (book review).

112. *See* George W. Kuney, *Hijacking Chapter 11*, 21 EMORY BANKR. DEV. J. 19 (2005) (describing in unflattering terms both the aims guiding implementation of the Code as well as the numerous, and sometimes unforeseen, market forces that affect the reorganization process).

allowed a more efficient voting process.[113] As aforementioned, the courts were legally removed from the administrative process and became more focused on dispute resolution.

The Code streamlined the business reorganization process into an ostensibly single method of reorganization, and the entire process is now contained within the current Chapter 11.[114]

VIII. METAMORPHOSIS

The current Chapter 11 of the Code was designed to promote reorganization and to give creditors a much greater say in the process. It was designed with the goal of promoting the bargaining process with checks and balances among the constituent groups.

For example, on the debtor's side, the automatic stay, the exclusivity, and the prospect of confirmation by cramdown are significant weapons. On the creditors' side, the termination of exclusivity, the prospect of competing plans, the right to vote by impaired class, the absolute priority rule, the prospect of conversion to Chapter 11, and ultimately liquidation are among other things which provide significant leverage.

The notion has been that the confirmation process would occur through the filing of a plan and disclosure statement, approval of the disclosure statement, dissemination of adequate information to creditors, balloting by impaired class, and approval of some version of the plan through a confirmation hearing. In addition to tabulating ballots by class, the right to object to confirmation would be additional protection for creditors as well as the prospect to the debtor of losing its equity in a non-consensual plan confirmed by cramdown.

These rules worked well to the extent that the nature of the cases populating the system were driven by what has been referred to as financial distress, which could be adjusted in a market context, while a debtor enjoyed the breathing room provided by the automatic stay. The provisions of the Code were designed to allow a DIP to continue to

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113. *See, e.g.*, 11 U.S.C. §§ 1102-1103 (describing the constituency and powers of a creditors' committee); *see also In re* Intercat, Inc., 247 B.R. 911, 920-21 (Bankr. S.D. Ga. 2000) (noting that the "appointment of a trustee is a power which is critical for the court to exercise in order to preserve the integrity of the bankruptcy process and to insure that the interest of creditors are served"); 11 U.S.C. 1126 (describing acceptance of a plan).

114. *See* 11 U.S.C. §§ 1101-1129 (2000). Note the authors have spent considerably less time writing the history of the Code compared to the Act. While practitioners have lived with the Code for the past twenty-eight years, there are increasingly fewer practitioners who have practiced under the Act.

operate, hopefully solve its financial issues, and formulate and confirm a plan that would allow for a payment stream to creditors through the aforementioned "hypothetical" sale of the assets and conversion to claims against a reorganized debtor.

The bargaining process would occur while the debtor maintained exclusivity with the understanding that the termination of exclusivity could bring with it a competing plan, change in equity ownership, conversion to Chapter 7, and resulting liquidation. Still, this was premised on the assumption that the debtor's financial distress was curable, either through an infusion of capital, changes in the business model, increased cash flow created by the "stretch," or reduction of existing debt to be paid by a reorganized debtor over time. A debtor in true economic distress, as it had been defined, cannot normally be reorganized, and for a business truly unable to solve its economic woes, the concept of reorganization will normally fail, resulting in some form of liquidation.

It is true that most debtors will not be able to effectively organize, and the success ratio of Chapter 11 cases, although not easily quantifiable, is normally historically deemed to be low. Indeed, many Chapter 11 cases are not even filed with a belief that they can be reorganized. Instead, they are a strategic way to delay creditors to achieve negotiating leverage. Over the course of time, the notion that a Chapter 11 case must be a true reorganization or result in a piecemeal liquidation of the debtor's business in a Chapter 7 case has eroded. The provisions of Chapter 11 have been adapted by creative lawyering and judicial willingness to consider flexibility over time to meet the evolving needs of the marketplace—just as they did under the Act which lead to the implementation of the Code. The occurrence of a paradigm "reorganization" in which a confirmed plan of reorganization results in a debtor emerging from the ashes of its prepetition tribulations in phoenix-like fashion has more or less become the exception, rather than the rule.

IX. THE CHAPTER 11 AUCTION BLOCK

A. *Using Bankruptcy Protection to Effect a Sale of Substantially All of the Debtor's Assets*

It is often the case that a petition under Chapter 11 is filed with no intention of "reorganizing," and the use of Chapter 11 to maximize value with the goal of effectuating an efficient and orderly sale process has existed from the inception of the Code. The Code's various mechanisms for adjusting debt and selling assets "free and clear," along with the comfort and finality that the blessing of a court provides, render bankruptcy an attractive medium for the sale and acquisition of assets. Financially troubled companies make attractive acquisition targets, especially if the reasons for the company's financial troubles lie in an excessively burdensome debt structure, rather than a flawed premise or business model. The interested purchasers of such companies hope to acquire the target's assets and successful operations without the assumption of its large encumbering debts. Frequently, stock acquisitions and statutory mergers will not achieve this goal because the crushing debt and liabilities held by the pre-acquisition target company often follow the purchaser along with the desirable assets. Accordingly, a financially troubled company must preserve its going concern value while significantly reducing and restructuring its debts to render the company an attractive acquisition.

This is frequently achieved utilizing reorganization pursuant to Chapter 11 of the Code, which provides an opportunity for a debtor to reorganize its business and financial affairs under the supervision and regulation of a bankruptcy court. Chapter 11 embodies a policy that it is generally preferable to liquidation because it enables a debtor to continue to operate and to reorganize its business. The ability for a debtor to maintain control of the business as a DIP[115] and to continue operations often enables the debtor to preserve a significantly positive difference between the going concern value of the business and the firesale liquidation value.[116]

The ability to restructure and to drastically reduce the debts and liabilities of a target company before it sells its assets, the ability to preserve the going concern value of the target company, and the protection of a court order approving the sale make the Chapter 11 bankruptcy proceedings an attractive forum for the sale of financially troubled companies.

115.

> [T]he Code contains a presumption that the debtor's business will continue to operate and that the debtor will remain in possession after entry of an order for relief, unless it can be established that cause exists for the appointment of a trustee. This assures the debtor considerable control over operations . . . [and] plan negotiations.

COLLIER ON BANKRUPTCY § 1100.01 (Alan N. Resnick & Henry J. Sommer eds., 15th ed., Matthew Bender & Co. 2003). Unless an independent trustee is appointed, the DIP serves as, and has the powers and responsibilities of the trustee in bankruptcy. 11 U.S.C. § 1107 (2007).

116. COLLIER ON BANKRUPTCY, *supra* note 115, § 1100.01. This is an interest near and dear to the hearts of creditors who will rarely be paid in full on their claims and to the company's principals who in many cases have personally guaranteed such claims.

> The Chapter 11 process provides the acquirer with the imprimatur of a court order determining that the particular sale has been made in good faith, is not challengeable and is often free and clear of liens, security interests and most liabilities. By ignoring or penetrating the shroud of stigma and uncertainty that looms ominously over a bankruptcy process, astute acquirers are successfully expanding their businesses and investments by bidding for and purchasing the businesses or assets of distressed debtors in a manner that offers protection to all parties in interest and avoids future litigation.
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> . . . .
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> [U]se of the Chapter 11 process is frequently sought by all parties, as it often has the effect of sanitizing the purchase and affording all the parties protection against hindsight re-evaluations as to the fairness of the transaction.[117]

The storybook Chapter 11 process is to effectuate a stand-alone reorganization, in which the debtor can emerge as a solvent going concern. However, in many cases, a stand-alone reorganization is not a feasible and realistic goal, and a sale of the company as a going concern may be the best method to generate the capital needed to fund the company's reorganization and future survival. Additionally, a downturn in economic conditions and the increased costs of securing rescue financing for troubled companies cause many Chapter 11 debtors to promptly attempt to sell their operations and assets to prevent further erosion in value.[118] Frequently, the going concern value of a debtor company and its assets far exceed the value of the same assets if the company were to be broken up

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117. Harvey R. Miller & Shai Y. Waisman, *Chapter 11: An Acquisition Opportunity for Financial and Strategic Buyers*, 18 BANKR. STRATEGIST 1 (July 2001).

118. Miller & Waisman, *supra* note 117.

> With more frequency than over the past decade, distressed companies are finding themselves compelled to sell their businesses or major assets in an effort to realize going-concern values for the benefit of their creditors and, hopefully, stockholders. In that scenario, a larger number of distressed companies have found it necessary to resort to the provisions of Chapter 11 of the U.S. Bankruptcy Code to consummate a sale.

Id.; Miller and Waisman observe this pattern in the context of the bursting technology bubble, but such a pattern is even more relevant in the context of the current downturn in the real estate market and related industries.

and liquidated. For these reasons, creditor constituencies and particularly secured creditors often strongly advocate a prompt sale of the company as a going concern so that they can receive the maximum value from the assets of the debtor.

B. *Sale of Substantially All of the Debtor's Assets*

The provisions of the Code provide two primary ways to acquire the assets of a Chapter 11 debtor. A DIP may sell its assets under § 363(b)(1)[119] of the Bankruptcy Code, or a sale may be effectuated under a plan of reorganization pursuant to § 1123 of the Code.[120] Depending on the objectives of the parties, each procedure offers its own benefits and limitations.

A sale of a substantial portion of a company's assets under § 363(b)(1) would not be viewed as "in the ordinary course of business" and is thus completed only with the approval of a bankruptcy court after notice to creditors and interested parties.[121] This process allows the court to evaluate the best interests of the debtor's estate and the parties in interest and typically results in competitive bidding in an attempt to yield the maximum value for the estate and its creditors.[122]

> A prime objective of a Chapter 11 case is to maximize the value of the debtor's estate. In the context of a § 363(b) sale, the bankruptcy court is sensitive to the need to protect the interests of the debtor's estate, including its creditors, equity interest holders

119. "The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1) (2000).

120. 11 U.S.C. § 1123 (2000).

121.

> Pursuant to § 363(b), the business or assets of a debtor may be sold at any time after the commencement of a Chapter 11 case and independently of a Chapter 11 plan, with substantial protections for the purchaser. Section 363(b) provides that after notice and a hearing, a debtor may sell property of the estate, though outside the ordinary course of business. This statutory provision has been construed by the bankruptcy court to enable the sale of all or substantially all a debtor's assets and operations without the requirement of the confirmation of a plan of reorganization.

Miller & Waisman, *supra* note 117.

122. The Code contemplates that the debtor will appropriately advertise and that offers for the assets and operations will be entertained. *See id.* Additionally, a § 363(b) sale may implicate the sale marketing obligations and requirements found under state law. *See generally, e.g.*, Revlon, Inc. v. MacAndrews & Forbes Holdings Inc., 506 A.2d 173 (Del. 1985).

and other parties in interest. Consequently, the objective of any sale pursuant to § 363(b) is to get the best offer for the debtor's estate.

> To achieve that most effectively, all proposed sales under § 363(b) require court approval, a noticed and advertised hearing and are subject to higher or better offers for the property to be sold.[123]

The second method of purchasing a debtor company in Chapter 11 is to do so through a plan of reorganization,[124] which may provide for a sale of the debtor company and its assets pursuant to § 1123(a)(5) of the Code.[125] The purchase of a debtor via a plan of reorganization often provides the buyer with more opportunity for input and control over the terms of the sale. Sales that occur via a confirmed plan not only allow the buyer to negotiate the terms of the acquisition, but also allow the buyer to concurrently assist in shaping the reorganization of the debt structure of the company that it is about to acquire. Because of the democratic nature of the process, confirming a plan of reorganization often does not require the same court scrutiny in evaluating what is in the best interest of the estate, and the sale is not required to consist of an open auction process. As long as the Code's requirements on plan confirmation procedures and plan contents are met, the terms of the plan can be extremely creative and can vary significantly from case to case.

X. TO PLAN OR NOT TO PLAN

The procedures authorized by § 363(b)(1) are common and effective means to sell the assets of the debtor; however, the sub-section offers very little opportunity for buyers to exert control over the process. A sale under § 363(b)(1) involves an open bidding process, and the bids are evaluated to determine which offer would yield the most benefit for the bankruptcy estate.[126] The control that a bidder exerts in this process lies merely in the

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123. Miller & Waisman, *supra* note 117.

124. Confirmation of a Chapter 11 plan of reorganization is a regulated process of negotiation between the debtor, the creditors, and other parties at interest. The confirmed plan will contain the details of who will be paid, how much they will be paid, and from where the money to pay will be generated. The Code contains minimum requirements for the contents of a plan. However, if the plan meets the requirements of the Code, there are few limits on the creativity that a party can use in drafting the terms of a plan of reorganization.

125. *See* 11 U.S.C. § 1123(a)(5) (2000).

126. *See* 11 U.S.C. § 363 (2000).

control over the details of the offer and the ability to persuade a court that the offer is in the best interests of the estate.

A court evaluates a trustee or DIP's decision to sell its assets under a test similar to the business judgment rule, thus giving a great deal of deference to the trustee's decision.[127] However, while this test grants deference to the decisions of the trustee, "when a pre-confirmation § 363(b) sale is of all, or substantially all, of the Debtor's property, and is proposed during the beginning stages of the case, the sale transaction should be 'closely scrutinized, and the proponent bears a heightened burden of proving the elements necessary for authorization.'"[128]

A sale of all or substantially all of the assets of a Chapter 11 debtor outside of a confirmed plan of reorganization must be made for a sound business purpose[129]; however, many courts have determined that a sale of all or substantially all of the debtor's assets under § 363 may undermine the Chapter 11 process by circumventing the procedures and protections (i.e., disclosure, voting, and substantive plan content requirements) of the plan confirmation process.[130] A party may be able to effectively stop a §

127.

> This Court follows the "sound business purpose" test when examining § 363(b) sales. The test consists of four elements. A trustee or debtor-in-possession must prove that: (1) a sound business reason or emergency justifies a pre-confirmation sale; (2) adequate and reasonable notice of the sale was provided to interested parties; (3) the sale has been proposed in good faith; and (4) the purchase price is fair and reasonable. The first requirement is a sound business reason justifying the pre-confirmation sales. This element is similar to many states "business judgment rule," where great deference is given to a business in determining its own best interests.

In re W.A. Mallory Co., 214 B.R. 834, 836 (Bankr. E.D. Va. 1997) (citations omitted).

128. *In re* Med. Software Solutions, 286 B.R. 431, 445 (Bankr. D. Utah 2002) (quoting *In re* Channel One Commc'ns, Inc., 117 B.R. 493, 496 (Bankr. E.D. Mo. 1990)).

129.

> The plain meaning of the statute would imply that the bankruptcy court has unfettered discretion in approving sales outside of an approved plan of reorganization because the statute does not specifically set forth that limitation. The Court, however, agrees with the majority of bankruptcy courts in accepting the boundaries set by the Second Circuit Court of Appeals that requires "a judge determining a § 363(b) application [to] find from the evidence presented before him at the hearing a good business reason to grant such an application" to sell substantially all of a debtor's assets outside the confines of a confirmed plan.

Id. at 440 (citing *In re* Lionel Corp., 722 F.2d 1063, 1063 (2d Cir. 1983)).

130. *See, e.g.*, *In re* Lionel Corp., 722 F.2d 1063, 1071 (2d Cir. 1983).

363 sale, by objecting to the sale on the grounds that the sale constitutes an impermissible *Sub Rosa* plan.[131]

On the flip side, because of the procedures and protections in place to prevent abuses of the bankruptcy process and to protect the various parties' interests, plan confirmation can be a timely and expensive process. Included in the substantive and procedural hurdles to the sale of the debtor via a plan of reorganization are the drafting of a plan that will meet the requirements of the Code and which will be favorable to those parties who must vote to accept the plan, obtaining the court's approval of a disclosure statement,[132] responding to the objections of opposing parties, soliciting approval of the plan, and completing the terms set forth in the plan. An interested buyer must be aware of the burdens to confirm a plan and to include the time and expense in the overall cost of acquiring the target company.

Parties that wish to purchase a Chapter 11 debtor have far more ways to influence the acquisition process under the plan confirmation process than under § 363. If a buyer is a party in interest,[133] then the interested buyer may itself propose a plan of reorganization.[134] The ability to draft a plan of reorganization gives the buyer direct control over the terms of the proposed plan. Additionally, parties with standing may object to the terms of a plan proposed by another party on the grounds that it does not meet the requirements imposed by the Code.[135] Moreover, the buyer may also be eligible to vote to accept or reject competing plans of reorganization and may be able to increase his voting power by purchasing additional claims against the estate.

As previously noted, the Code contains the minimum requirements for the contents of a Chapter 11 plan of reorganization;[136] however, the fact that a plan meets the substantive statutory requirements does not ensure

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131. *See In re* Cont'l Airlines, Inc., 780 F.2d 1223, 1226 (5th Cir. 1986).

132. The Code requires that a disclosure statement, which contains information regarding the plan of reorganization, must be approved before solicitation for acceptance of a plan of reorganization. 11 U.S.C. § 1125(b). The approval of a disclosure statement may be a timely and costly process and can be an area of significant dispute.

133. A party in interest is a term that is not directly defined by the Code; however, 11 U.S.C. § 1109 includes as possible parties in interest the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee. 11 U.S.C. § 1109 (b) (2000 & Supp. I 2004).

134. "Any party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may file a plan . . . ." 11 U.S.C. § 1121(c) (2000).

135. "A party in interest may object to confirmation of a plan." 11 U.S.C. § 1128(b) (2000).

136. *See* 11 U.S.C. § 1123 (2000).

that the plan will be confirmed. Confirmation of a plan generally requires the various classes[137] of creditors and other interest holders to accept the plan.[138] Thus, the ability to write and propose a plan may give an interested buyer control over the drafting of the terms of the plan, but drafting a plan that will be confirmed requires the drafter to consider the interests and demands of the various parties who will vote on whether to accept the plan in addition to the statutory requirements of the Code.

Depending on the nature of their claims, interested buyers may be among those parties who will have the opportunity to vote for or against the confirmation of the plan.[139] Both the amount and number of claims that the party holds against the debtor's estate determine the weight of a party's vote on the confirmation of a plan.[140] Thus, if a creditor holds large enough portions of the claims against the debtor's estate, then the creditor could have a large influence on the acceptance or rejection of a proposed plan.

Regardless of which of the above procedures is ultimately used, the liquidation of substantially all of the debtor's assets through a Chapter 11 bankruptcy proceeding has grown to be a widely utilized and accepted practice.

XI. LIQUIDATING PLANS OF REORGANIZATION?

A. *Chapter 7 Light—Same Great Taste with Fewer Calories*

As noted above, it is permissible[141] and frequently the case[142] that a plan of reorganization provides for the sale of substantially all of the debtor's assets and the distribution of the proceeds amongst creditors. However, even where a determination has been made to liquidate rather than reorganize, a debtor's most valuable assets are often not easily saleable (such as valuable litigation claims held by the debtor which must be prosecuted to realize cash for creditors), and maximum liquidation value may be realized and maximized only by continued control and administration of such assets by interested parties.

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137. *See generally* 11 U.S.C. § 1122 (2000) (requiring that classes consist of substantially similar claims).

138. *See* 11 U.S.C. 1126(c) (2000).

139. *See* 11 U.S.C. § 1126(a) (2000).

140. 11 U.S.C. § 1126(c) (2000).

141. *See* 11 U.S.C. § 1123(b)(4) (2000).

142. For example, this is true especially with respect to debtors whose assets are for the most part tied up in a large single asset, such as single asset real estate cases.

This set of circumstances has resulted in what can perhaps be described as the antithesis of the paradigm "reorganization"—the growing popularity of liquidating plans of reorganization and in particular the use of liquidating trusts to liquidate assets for the benefit of creditor beneficiaries. In such cases, the terms of the confirmed plan, rather than the Code, determine the manner in which assets are liquidated and how such assets are utilized to pay creditors. Often, the estate's assets are transferred into a trust created by the terms of the confirmed plan, and, upon the effective date of the plan, the creditors of the estate trade their creditor status for a beneficiary interest in the trust res. These liquidating trusts are, in almost all cases, administered by a liquidating trustee, and the terms of the trust often mirror the procedures and priorities set forth in the Code. In fact, in many cases, such liquidating trusts grant the liquidating trustee the powers and duties of a Chapter 7 trustee to administer assets in much the same way as if the case were to proceed under Chapter 7. Additionally, despite many jurisdictional quandaries, these liquidating trusts often continue to be administered under the supervision of a bankruptcy court in much the same way as a Chapter 7 bankruptcy proceeding.

This widespread phenomenon grew in popularity following the mass tort and asbestos bankruptcies of the 1980s. Such bankruptcy proceedings were saddled with the task of administering vast amounts of assets to satisfy an even greater and usually insurmountable amount of debt, much of which consisted of unliquidated claims, contingent tort claims, or both.[143] By funding a trust with the debtor's assets and channeling litigation claims to look to the trust for payment, the liquidating trust (also sometimes called a litigation trust) provided procedures and mechanisms for the orderly administration of claims and assets. The trust provided such order without the excessive burden on the docket and resources of the bankruptcy court that would be caused by leaving the case in a bankruptcy proceeding for decades. These post-confirmation trusts often provide for reduction in notice and approval requirements,[144] especially with respect,

143. *See, e.g.*, *In re* Johns-Manville Corp., 68 B.R. 618, 621 (Bankr. S.D.N.Y. 1986) (stating "[o]ne of the most innovative and unique features of the Manville Plan of Reorganization (the'Plan') is the establishment of two Trusts out of which all asbestos-related claims will be paid.").

144. *See, e.g.*, *In re* Antonelli, 148 B.R. 443, 444, 447 (D. Md. 1992); *aff'd*, 4 F.3d 984 (4th Cir. 1993); State of Maryland v. Antonelli Creditors Liquidating Trust, 123 F.3d 777, 780 (4th Cir. 1997) (plan of reorganization required the Antonellis to transfer substantially all of their property interests to a liquidating trust for liquidation "as rapidly as market conditions allow." "By using a trust, the Antonellis and the creditors hoped to avoid the expense and delay of having the bankruptcy court separately approve each of more than 150 property sales.").

to administrative matters,[145] and additionally, may provide for alternative methods for liquidation of claims including arbitration and estimation procedures.

The initial manifestations of these post-confirmation trusts, even outside of the context of mass tort liability, were actually utilized as tools of reorganization to allow the debtor to continue its existence severed from its insurmountable debt, while simultaneously providing for the liquidation, administration, and hopefully satisfaction of the claims against the debtor.[146] However, over time these tools have evolved (or devolved) into mechanisms often used for orderly liquidation of a debtor's assets.[147]

The growing popularity of this type of approach was recently noted by the Third Circuit Court of Appeals, which stated,

> While we typically think of Chapter 11 as the "reorganization" section of the Bankruptcy Code (as opposed to Chapter 7, the "liquidation" section), it is not uncommon for debtors to use the Chapter 11 process to liquidate. This is because Chapter 11 provides more flexibility and control in determining how to go about selling off the various aspects of the debtor's business and distributing the proceeds. A typical mechanism for effecting a Chapter 11 liquidation is the creation of a "liquidating trust"—a state-law trust managed by a group of creditors that succeeds to the debtor's assets and administers the liquidation and distribution process.[148]

The use of a "liquidating plan" is often coupled with the aforementioned procedures for the sale of a debtor's assets under 11 U.S.C. § 363. This is particularly common in cases in which substantially

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145. This includes the approval and payment of administrative and professional fees, which are often paid without court involvement upon simply providing notice to an oversight committee or similar procedures.

146. *See, e.g.*, *In re Johns-Manville Corp.*, 68 B.R. at 622; *see also* Holywell Corp. v. United States, 85 B.R. 898 (Bankr. S.D. Fla. 1988); Hollywell Corp. v. Smith, 503 U.S. 47, 51 (1992) (although debtor entities continued to exist, liquidating trust vested with all property of the estate).

147. *See, e.g.*, *In re* Lisanti Foods, No. 05-3912, 2007 U.S. App. LEXIS 18445 (3d Cir. June 28, 2007); Morrow v. Microsoft Corp., 499 F.3d 1332, 1335 (3d Cir. 2007); Trs. of the Trism Liquidating Trust v. IRS (*In re* Trism, Inc.), 126 Fed. Appx. 339 (8th Cir. 2005); Feltman v. Warmus (*In re* Am. Way Serv. Corp.), 229 B.R. 496, 502 (Bankr. S.D. Fla. 1999) (referring to the joint plan of liquidation creating the liquidating trusts).

148. *In re* Insilco Techs., Inc., 480 F.3d 212, 214 n.1 (3d Cir. 2007).

all of the debtor's saleable assets[149] are administered by way of a § 363 sale leaving the estate with proceeds of the sale along with unliquidated litigation claims,[150] including avoidance actions. In such scenarios, a liquidating trust is funded with some or all of the § 363 sale proceeds, and is vested with the estate's litigation claims,[151] which are then prosecuted, and hopefully liquidated to cash, by the liquidating trustee for the benefit of the creditors who, after confirmation, become the beneficiaries of the newly created trust.[152] Additionally, the liquidating trustee is often concurrently saddled with the administration and resolution of claims and the objections related thereto.[153]

An objective observer might notice that a Chapter 7 bankruptcy estate seems to be an extremely well-tested, tried and true form of a liquidating trust administered under the powers of a bankruptcy court by a court-appointed and experienced trustee. Why then are these liquidating Chapter 11 cases not simply converted to Chapter 7 for liquidation? At the most fundamental level, the answer is control.

Creditors are often hesitant about trusting the destiny of their claims to the perceived whims of a Chapter 7 trustee and the trustee's chosen professionals, who are frequently perceived to look for the low hanging fruit rather than the maximization of estate assets.[154] Liquidating trusts created by the terms of a plan and drafted by the largest creditor beneficiary or a creditors committee allow creditors to feel comfortable that they are placing the hopes of satisfying their claims (often through the litigation of claims formerly belonging to the debtor) in the hands of a person of their choosing, frequently with counsel of their choosing, and

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149. These assets often include real property, tangible personal property, accounts receivable, intellectual property, and other assets easily converted to cash in the marketplace. *See, e.g.*, ACC Bondholder Group v. Adelphia Commc'ns. Corp. (*In re* Adelphia Commc'ns. Corp.), 361 B.R. 337, 342 (S.D.N.Y. 2007).

150. These claims include claims against former directors and officers or professionals such as attorneys and accountants. *Id.*

151. These are in many cases the most valuable assets to the estate, but the most difficult to easily convert to cash. *Id.*

152. *Id.*; *see also* Binder v. Price Waterhouse & Co., LLP (in re Resorts Int'l, Inc.), 372 F.3d 154, 157 (3d Cir. 2004) (Trust beneficiaries traded their creditor status to attain rights to the Trust's assets).

153. *See, e.g.*, Trs. of the Trism Liquidating Trust v. IRS (*In re* Trism, Inc.), 126 Fed. Appx. 339 (8th Cir. 2005).

154. Notably, the authors of this Article view these perceptions to be just that—perceptions—and believe that the competing interests and practical implications exist whether a fiduciary is serving as a liquidating trustee, Chapter 7 trustee, plan administrator, or other similar title. In fact, the professionals who serve in such variant roles are often the same individuals.

under the terms, conditions, and distribution schemes that they deem appropriate.

B. *Liquidating Reorganization with Evaporating Jurisdiction*

It is almost intuitive to bankruptcy practitioners that following the confirmation of a plan of reorganization, the estate assets are vested in the reorganized debtor, the estate ceases to exist, and the affairs of a reorganized debtor continue to operate after emerging from Chapter 11 through a plan of reorganization are almost exclusively governed by the terms of the plan of reorganization and the application of non-bankruptcy law.[155] However, when the estate's assets are vested in a liquidating trust or a similar non-debtor entity, rather than with a reorganized debtor, the jurisdictional boundaries of the bankruptcy court are often overlooked[156]—in no small part due to the confusion (or perhaps intentional blissful ignorance) of attorneys and bankruptcy judges alike.

A liquidating trust is no different than a post-confirmation reorganized debtor. It is an entity which inherits the assets of the bankruptcy estate, which ceases to exist post-confirmation, and which is governed by the terms of the plan of reorganization and applicable non-bankruptcy law.[157] However, because these liquidating trusts bear substantial similarities to liquidation under Chapter 7, they are often administered by the bankruptcy court in much the same manner as Chapter 7 proceedings.

This process is especially evident in cases where the plan of reorganization which establishes the trust is drafted in such a way to leave much of the procedures for administration of the trust to the imagination and interpretation of a court. Such vagaries lead bankruptcy practitioners and courts to utilize the procedures set forth in the Code and the Rules of Bankruptcy Procedure regardless of their applicability. For better or for worse, a liquidating trust, like a reorganized debtor, is a creature of state law and is administered with far less court oversight and control than a Chapter 7 liquidation.

In fact, independence and flexibility in the liquidation process is in most cases the precise incentive for utilizing a plan of liquidation rather than simply converting a case to Chapter 7. A plan of reorganization under Chapter 11 determines the manner in which the property of the estate will be divided amongst creditors—whether that division and distribution is

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155. *See* 11 U.S.C. § 1141 (2000).

156. 28 U.S.C. § 1334.

157. *See, e.g.*, Binder v. Price Waterhouse & Co., LLP *(In re* Resorts Int'l, Inc.), 372 F.3d 154, 165 (3d Cir. 2004).

through cash payment, assignment of property, or administration through a trust. By consummation of a confirmed plan, the debtor's relationship with its creditors is supplanted by the terms of the plan setting forth the manner in which the bankruptcy estate created under § 541 is to be distributed. The bankruptcy estate is no more, and the creditors' claims against that estate are administered as provided for by the plan.

In light of the foregoing, the above described charade of administering a liquidating trust as a "Chapter 7 light" presents serious problems of subject matter jurisdiction and clogs the bankruptcy courts' dockets with cases that have already emerged from the bankruptcy system and with respect to which there is no bankruptcy estate to be administered.

C. *Jurisdictional Quandaries and Boundaries*

As a threshold matter, 28 U.S.C. § 1334 is the basis for the district court's "bankruptcy jurisdiction." Section 1334(b) provides in relevant part that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."[158] This provision establishes the jurisdiction of the district courts over three types of proceedings: those that arise under title 11,[159] those that arise in cases under title 11, and those related to cases under title 11.[160]

The test to determine whether a claim is "related to" a case under title 11 was articulated by the Third Circuit in *Pacor, Inc. v. Higgins*,[161] which stated, "The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy*."[162]

This test has been adopted by the vast majority of circuit courts and was specifically adopted by the Eleventh Circuit in the *Lemco Gypsum*

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158. 28 U.S.C. § 1334(a) (2000).

159. "Arising under" cases are matters invoking a substantive right created by the Bankruptcy Code, for example, an action to avoid a preferential transfer under 11 U.S.C. § 547 or fraudulent transfer under 11 U.S.C. § 548. *See* Wood v. Wood, 825 F.2d 90, 97 (5th Cir. 1987). The "arising in" category involves administrative matters or matters that could only arise in bankruptcy—for example, the filing of a proof of claim or an objection to the discharge of a particular debt. *See* Warren v. Calania Corp., 178 B.R. 279, 281 (M.D. Fla. 1995).

160. *See In re* Toledo, 170 F.3d 1340, 1344 (11th Cir. 1999) (quoting Celotex Corp. v. Edwards, 514 U.S. 300, 307 (1995)).

161. Pacor, Inc. v. Higgins, 743 F.2d 984 (3d Cir. 1984).

162. *Id.* at 994.

bankruptcy proceedings.[163] In adopting this test, the Eleventh Circuit expressly noted, however, that, "[t]he fact that property was once owned by a bankrupt does not supply federal jurisdiction of all future disputes concerning the property."[164] This commentary is particularly applicable with regards to the application of "related to" jurisdiction to post-confirmation proceedings and matters involving an entity vested with property of the estate through a confirmed plan. Despite the apparent breadth of the *Pacor* test, "related to" jurisdiction becomes very limited following the confirmation of a plan of reorganization. In *Binder v. Price Waterhouse & Co., LLP*,[165] the Third Circuit addressed the problematic nature of applying its own *Pacor* test to post-confirmation matters:

> After confirmation of a reorganization plan, retention of bankruptcy jurisdiction may be problematic. This is so because, under traditional *Pacor* analysis, bankruptcy jurisdiction will not extend to a dispute between non-debtors unless the dispute creates "the logical possibility that the estate will be affected." At the most literal level, it is impossible for the bankrupt debtor's estate to be affected by a post-confirmation dispute because the debtor's estate ceases to exist once confirmation has occurred.[166]

"Of course, a bankruptcy court does not lose all jurisdiction once a [C]hapter 11 plan has been confirmed. Nevertheless, its role is limited to matters involving the execution, implementation, or interpretation of the plan's provisions, and to disputes requiring the application of bankruptcy law."[167] Accordingly, the scope of the bankruptcy court's jurisdiction following confirmation is significantly limited.[168]

The effect of the above jurisdictional limitations is particularly evident with respect to those liquidating trusts which attempt to use the bankruptcy court to resolve its post-confirmation disputes and liquidate its claims. For

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163. Miller v. Kemira, Inc. *(In re* Lemco Gypsum, Inc.), 910 F.2d 784, 788 (11th Cir. 1990).

164. *Id.* at 789.

165. Binder v. Price Waterhouse & Co., LLP (*In re* Resorts Int'l, Inc.), 372 F.3d 154, 165 (3d Cir. 2004).

166. *Id.* at 164-65 (citations omitted).

167. Zahn Assocs., Inc. v. Leeds Bldg. Prods, Inc. (*In re* Leeds Bldg. Prods., Inc.), 160 B.R. 689, 691 (Bankr. N.D. Ga. 1993) (citations omitted).

168. *See* H & L Developers v. Arvida/JMB Partners (*In re* H & L Developers), 178 B.R. 71, 76 (Bankr. E.D. Pa. 1994) (noting that the court's jurisdiction begins to weaken once a plan is confirmed); Eastland Partners Ltd. v. Brown (*In re* Eastland Partners Ltd.), 199 B.R. 917, 919-20 (Bankr. E.D. Mich. 1996) ("Following confirmation of a [C]hapter 11 debtor's plan, a bankruptcy court has a fairly narrow jurisdiction.").

example, in *Grimes v. Graue (In re Haws)*,[169] the bankruptcy court held that it did not have post-confirmation jurisdiction over an action brought by a trustee of a liquidating trust against a partner of the debtor for breach of fiduciary duty.[170] The bankruptcy court noted that because the property of the estate was vested in the reorganized debtor following confirmation of a plan of reorganization, the proceeding must significantly affect consummation of the plan to establish subject matter jurisdiction.[171] Because the plaintiff failed to demonstrate how any damages recovered from the defendant were necessary to effectuate the terms of the plan, and the bankruptcy court was not being asked to construe or interpret the confirmed plan or to implement or effectuate the terms of the plan, it did not have subject matter jurisdiction over the liquidating trustee's claims.[172]

Even courts applying narrow standards to the exercise of "related to" jurisdiction over post-confirmation matters find that jurisdiction exists to "protect its [confirmation] decree, to prevent interference with the debtor's plan of reorganization, and to otherwise aid in its execution."[173] Additionally, under a far broader approach, the fact that the outcome of a dispute will significantly affect a reorganized debtor's ability to repay creditors under the terms of the plan may justify the exercise of post-confirmation jurisdiction.[174] However, this approach has been rejected by many courts noting that the breadth of such an analysis could provide subject matter jurisdiction *ad infinitum*.[175] Moreover, courts have particularly noted in the case of liquidating trusts that there is no longer an estate or creditors of the estate because creditors have traded their creditor interest in exchange for status as beneficiaries of the trust established by the confirmed plan.[176]

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169. Grimes v. Graue (*In re* Haws), 158 B.R. 965 (Bankr. S.D. Tex. 1993).

170. *Id.* at 971.

171. *Id.* at 970-71.

172. *Id.* at 971; *see also* Rahl v. Bande, 316 B.R. 127, 133 (S.D.N.Y. 2004).

173. State of Montana v. Goldin (*In re* Pegasus Gold Corp.), 296 B.R. 227, 235 (D. Nev. 2003) (citations omitted) (noting that jurisdiction existed to prevent conduct and events that obstructed the means to fulfill the plan of reorganization).

174. *See* Eastern Airlines, Inc. v. Brown & Williamson Tobacco Corp. *(In re* Ionosphere Clubs, Inc.), No. 89 B 10448, 1999 Bankr. LEXIS 1875, at *31-32 (Bankr. S.D.N.Y. May 12, 1999).

175. Binder v. Price Waterhouse & Co., LLP (*In re* Resorts Int'l, Inc.), 372 F.3d 154, 164 (3d Cir. 2004) ("bankruptcy court jurisdiction 'must be confined within appropriate limits and does not extend indefinitely, particularly after the confirmation of a plan and the closing of a case.'" (citing Donaldson v. Bernstein, 104 F.3d 547, 552 (3d Cir. 1997)).

176. *See, e.g.*, *In re Resorts Int'l, Inc.*, 372 F.3d at 165.

The "close nexus" approach appears to be the better and most widely accepted test to determine the bankruptcy court's post-confirmation jurisdiction. "'Matters that affect the interpretation, implementation, consummation, execution, or administration of the confirmed plan[177] will typically have the requisite close nexus' to the bankruptcy case to support 'related to' jurisdiction," along with the jurisdiction over the "arising" matters.[178] This test is *in pari materia* with the Code which specifically anticipates court post-confirmation jurisdiction to implement and consummate a confirmed plan.

Section 1142 of the Bankruptcy Code states in relevant part:

> (b) The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan.[179]

Those who wish to liquidate a debtor's assets must pick their poison, and if they determine that they want to liquidate through a Chapter 11 plan which vests the assets in a non-debtor entity for purposes of liquidation, then the plan should be carefully and specifically drafted so as to provide for the rules and procedures necessary to administer the post-confirmation entity. Furthermore, they should be prepared for the likely scenario that they will find themselves in a non-bankruptcy forum with respect to the liquidation of the former bankruptcy estate's litigation claims and disputes arising under the trust.

While the trend toward utilizing liquidating trusts and similar mechanisms to distribute estate property amongst creditors remains a viable option, to the extent that the average debtor's goal is a sale or an orderly liquidation, serious thought should be given to whether non-

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177. It is often the case that the terms of a confirmed plan and confirmation order expressly retain jurisdiction for various purposes, and while it is recognized that parties cannot create jurisdiction through the terms of a plan, when such retention language is within the bounds of § 1334 jurisdiction, it is relevant to a court's decision to exercise such jurisdiction. *See, e.g.*, Almac's, Inc. v. Yucaipa Capital Fund, 202 B.R. 648, 656 (Dist. R.I. 1996); Gray v. Polar Molecular Corp., 195 B.R. 548, 554-55 (Bankr. D. Mass. 1996). While such provisions do not on their own create jurisdiction, where jurisdiction otherwise exists, they will often be given effect. *In re Resorts Int'l, Inc.*, 372 F.3d at 167.

178. Rahl v. Bande, 316 B.R. 127, 133 (S.D.N.Y. 2004) (quoting *In re Resorts Int'l, Inc.*, 372 F.3d at 167).

179. 11 U.S.C. § 1142 (2000).

bankruptcy liquidation[180] would be a more productive and cost effective means. This is especially true where the alternative is the creation of a liquidating trust to ultimately be governed by non-bankruptcy law in any event and only after a costly Chapter 11 plan confirmation process.

XII. THE IMPACT OF BAPCPA ON THE EVOLVING PROCESS

Against this backdrop along comes the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). Its provisions include not only significant revisions to the process of consumer bankruptcy which have been the focus of much publicity but also include selective but important revisions to various aspects of business bankruptcy law which cannot help but have an impact on the Chapter 11 reorganizations process. It is not the purpose of this Article to bemoan the provisions of BAPCPA. In fact, its business bankruptcy provisions have been soundly criticized on many fronts with the blame being placed in various places including the impact of lobbying efforts by various creditor interest groups, lack of solicitation of appropriate input from the parties most involved in the process, and even congressional overreaction to recent high profile cases such as Enron, Worldcom, Adelphia, and others.[181] The question here is the extent to which the business bankruptcy provisions of BAPCPA impact the ability to utilize the provisions of Chapter 11 to accomplish a true reorganization as it has been described above. Or, alternatively, whether they encourage the continuing trend of utilization of the Chapter 11 process to accomplish a controlled form of liquidation.

Clearly, certain provisions of BAPCPA discourage true reorganization or at least make it more difficult. These would certainly include provisions which limit the automatic stay,[182] limit exclusivity,[183] and increase the debtor's burdens regarding assumption and rejection of executory contracts and unexpired leases.[184] They would also include those provisions which have the prospect of adding significant additional cost

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180. Such non-bankruptcy liquidation includes an assignment for the benefit of creditors under state law. *See, e.g.*, FLA. STAT. §§ 727.101-116 (2007).

181. An excellent discussion of the significant business provisions of BAPCPA and their potential problems in the reorganization process can be found in the article, Richard Levin & Alesia Ranney-Marinelli, *The Creeping Repeal of Chapter 11: The Significant Business Provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 603 (2005).

182. *See* 11 U.S.C. § 362 (2000).

183. *See* 11 U.S.C.A. § 1121(d)(2) (West 2008).

184. *See* 11 U.S.C. § 365(d)(4) (2005).

to the reorganization process. A primary example of this would be the changes created by BAPCPA regarding reclamation rights,[185] adequate assurance of payment regarding utility service,[186] increased tax burdens,[187] and a host of others.

One of the new provisions that will have a significant effect on many reorganizing debtors, especially high volume purchasers and sellers such as retailers and middleman wholesalers is the change to 11 U.S.C. § 503(b)(9). Under BAPCPA, a seller may seek an administrative expense claim for goods delivered in the twenty days before the petition date. This means that by the effective date of a plan the reorganizing debtor will have to pay such a claim in cash.[188] As demonstrated by *In re Dana Corp.*, this could seriously alter a debtor's bargaining position during the process of a reorganization.[189]

In *Dana Corp.*, the debtors filed a petition under Chapter 11 of the Code, and the court entered an order establishing the last date to file proofs of claims for all prepetition claims.[190] Over six months after the bar date had passed, a creditor filed a claim under 11 U.S.C. § 503(b)(9), seeking $1,401,053 for goods it delivered to the debtors during the twenty-day period immediately preceding the date they filed for bankruptcy, and it asked the court for enlargement of time to file its claim because it had not received notice of the bar date.[191] The court found that the creditor was not entitled to an enlargement of time under the movant's theory of excusable neglect.[192] However, this case demonstrates the drastic effects the modified provisions 11 U.S.C. § 503(b)(9) might have on a reorganizing debtor. Had the movant (here Goodyear Tire and Rubber) timely filed, or the court found excusable neglect, the debtor would have had nearly a million and a half less dollars to use in the reorganization process because the claim would have been paid on the effective date of the plan as an administrative priority.[193] This sets up further litigation hurdles and evidentiary matters (i.e., What date were goods actually delivered or as in *Dana Corp.*, may a latecomer seller jump into the process with a large administrative claim?) that will likely increase the transactional costs of the reorganization

185. *See* 11 U.S.C.A. § 503(b)(9) (West 2008).

186. *See* 11 U.S.C.A. § 366(c) (West 2008).

187. *See* 11 U.S.C. § 346 (2000).

188. *See* 11 U.S.C.A. § 1129(a)(9) (West 2008).

189. *In re* Dana Corp., No. 06-10354, 2007 Bankr. LEXIS 1934, at *2 (Bankr. S.D.N.Y. May 30, 2007).

190. *Id.* at *3, *5.

191. *Id.* at *2-4.

192. *See id.* at *16-19.

193. *See* 11 U.S.C.A. § 1129(a)(9) (West 2008).

process. Under this statutory scheme, a high volume debtor seeking to reorganize will need to carefully weight its cash on hand against potential administrative claims for goods received in the twenty days before bankruptcy to determine the feasibility of a plan. The costs of reorganization are increased because more time and expense will be spent determining the administrative status of goods delivered pre-petition and greater cash will be needed on hand at the effective date of the plan.

A further change under BACPA limits the amount of time a court may extend a debtor's time to accept or reject a non-residential lease to a maximum of 210 days.[194] Congress's intent in revising this section, was to "'establish a firm, bright light deadline by which an unexpired lease of nonresidential real property must be assumed or rejected.'"[195] This creates the very real probability of limiting the time of the overall negotiation process for reorganization. If a debtor cannot come to terms with his creditors within the 210-day window, the debtor will be forced to make a potentially costly decision about his leases before the negotiation process of reorganization has had time to come to fruition. In the meantime, an early decision on assumption followed by a default could seriously increase Chapter 11 administrative debt.

Of additional note is the change to the exclusivity period under which a debtor may propose a plan of reorganization.[196] A debtor has a more limited time during which it has bargaining power to develop a plan of reorganization before creditors can enter the process with the obvious incentive to seek to benefit themselves at the expense of the debtor.[197]

As noted by Judge Lynn in *In re Gen. Electrodynamics Corp.*:

> Congress enacted provisions favoring special classes of creditors to the exclusion of all other considerations. Thus, in amending, for example, sections 365, 366 and 1121 of the Code, Congress has presumably intentionally, made [C]hapter 11 much less suitable as a remedy than it was before BAPCPA became effective. Companies such a Kmart, Mirant Corp. and United Airlines, all of which have

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194. 11 U.S.C.A. § 365 (d)(4)(B)(i) (West 2008).

195. *In re* Tubular Techs., LLC, 348 B.R. 699, 708 (Bankr. D.S.C. 2006) (citing H.R. REP. NO. 109-31(I), at 88 (2005)).

196. *See* 11 U.S.C.A. § 1121(d) (West 2008).

197. *See In re* Mirant Corp., 348 B.R. 720, 723 (Bankr. N.D. Tex. 2006) (noting that "[T]he severe limitations [BAPCPA] imposes on the length of reorganization cases reinforce the court's conclusion that much more delay in the rehabilitation (or other disposition) of [a debtor] should not be tolerated."); *see also In re* Congoleum Corp., 362 B.R. 198, 204-05 (Bankr. D.N.J. 2007) (describing the rigidity of the time limitations on reorganization).

> survived through use of [C]hapter 11, very likely could not restructure effectively under the Code since the passage of BAPCPA.[198]

These extra burdens generally require that the debtor establish and effectuate its reorganization plan in a shortened period of time. Instead of looking to a long term solution to a business problem via a reorganized debtor, these changes appear to encourage a more short term solution such as sale of the assets or some form of liquidation as described above.

While the provisions of BAPCPA create significant additional burdens, it cannot truly be said at this point in time that they significantly impact the decision and the ability to reorganize as opposed to liquidate. It still seems appropriate that this decision is a reflection of trends which have been in place for a significant period of time and which are driven by the market place and the economy. Indeed, these provisions may reflect the trend rather than advance it.

XIII. CONCLUSION

The statutory provisions and case law related to the current process of reorganization available under Chapter 11 of the Code have and will continue to provide an effective tool for reorganization of businesses where in fact that reorganization is appropriate and desired. While the increased burdens created by BAPCPA may have an effect on decisions to utilize Chapter 11 and to pursue reorganization as opposed to liquidation under Chapter 11, these probably impact smaller cases more than the larger ones on a decisional basis.

More significantly, the trend which was implemented and refined pre-BAPCPA of utilizing the Chapter 11 process to accomplish a controlled liquidation, embodied in the concept of the § 363 sale and the use of liquidating trusts, will continue because that is what the marketplace dictates and requires. That may be the result of creditor control over the process as opposed to the desires of debtors, but it is and will continue to be an economic reality.

Is that good or bad? That certainly depends on the perspective of the party answering the question. Ultimately, if the insolvency process is designed to provide a maximum return to creditors, than creditor control that advances the current trend is justified. Conversely, if one desires the return to the days when a true bargaining process occurred in the

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198. *In re* Gen. Electrodynamics Corp., 368 B.R. 543, 549 (Bankr. N.D. Tex. 2007).

reorganization process with the goal of saving companies through restructuring debt, it may not be justified.

The good news is that the framework still exists statutorily and under decisional law for the reorganization process to occur as originally contemplated where it is economically justified and desired. Where it is not, the process also works to allow liquidation as an alternative.

While cries have been heard for the privatizing of the reorganization process, we are unlikely to see that occur anytime in the near future. We must, therefore, as practitioners, continue to work within the current boundaries which are only capped by creative lawyering and a willingness of courts to permit it. Maybe things haven't changed as much as we think.