

## CHAPTER 11 - 101 THE NUTS AND BOLTS OF CHAPTER 11 PRACTICE: A PRIMER

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### Confirmation Is Not the End of the Case

**Editors' Note:** This is the twentieth of 22 installments that are being published here, with permission from the American Bankruptcy Institute. The series, read consecutively, will give the reader a broad overview of the Chapter 11 bankruptcy process. The installments are chapters from a CD-Rom that is available for purchase for \$50 (\$20 to ABI members) through the ABI. For more information, you can call the ABI at (703) 739-0800 or go to [www.abiworld.org](http://www.abiworld.org). The authors welcome your comments and questions as well, and you may feel free to contact them. Jonathan Friedland is a member of the ABI Board of Directors as well as a member of NACM Oregon.

#### The Day After

Along with the date the court approves a debtor's plan of reorganization (the date of confirmation), a date must be scheduled in which the provisions of the plan actually go into effect. This date when the confirmed plan takes effect is known as the "Effective Date." Case law differs as to the timing of the Effective Date as it relates to the Date of Confirmation.

In support of the proposition that the effective date should be reasonably close to the confirmation date, one court held that "[t]he effective date of the plan is expressly designated as the critical point for the major financial standards for confirmation. The valuations required by these sections are likely to be less accurate if the effective date is not close to the date of the hearing on confirmation." *In re Jones*, 32 B.R. at 958 n.13 (Utah 1983). On the other hand, effective dates have been set three, six, or more months after confirmation—some have been set with reference to some fact, such as the debtor's obtaining exit financing or amassing sufficient funds to pay administrative claims.

#### Discharge

Bankruptcy Code § 1141(c) states:

Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan, is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

Thus, the general rule is that confirmation discharges any lien securing a claim, whether or not the lien is challenged by

the debtor or treated by the plan, unless the plan or confirmation order provides otherwise. This conflicts with case law providing that liens ride through bankruptcy if they are not affirmatively dealt with in the case. The solution to this uncertainty is to provide for treatment, discharge or ride through, with a catchall provision in the plan or order confirming the plan.

Bankruptcy Code § 1141(d) provides:

Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan:

- (A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not:
  - (i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;
  - (ii) such claim is allowed under section 502 of this title; or
  - (iii) the holder of such claim has accepted the plan; and
- (B) terminates all rights and interests of equity security holders and general partners provided by the plan.

Thus, under the terms of the statute, the debtor is discharged from both pre-petition and post-petition pre-confirmation debts. However, the discharge does not necessarily terminate a pre-petition debt for all purposes. Rather, the discharge is better understood as an injunction preventing collection on claims other than in accordance with the terms of the plan.

Only debtors that reorganize in Chapter 11 and remain in business receive a discharge. There is no discharge for debtors that liquidate in Chapter 11.

Bankruptcy Code § 1141(d)(2) provides that confirmation does not effect a discharge of individual debtors who would not be permitted a discharge under Section 523. This means that if an individual debtor has debts that would be nondischargeable in a Chapter 7 case, they will also be nondischargeable in a Chapter 11. In addition, while a

business debtor's discharge is effective upon confirmation, an individual debtor's Chapter 11 discharge must await completion of plan payments, unless the court orders otherwise.

### **Res judicata Effect of the Plan**

A plan of reorganization that has been confirmed by a final order of the bankruptcy court is *res judicata* as to the matters it addresses, so long as its confirmation was not obtained by fraud or by the denial of due process. The *res judicata* effect of a final confirmation order, which has been described as equivalent to that of a judgment rendered on the merits by a federal district court, bars any collateral attack on the plan, its confirmation, or the reorganization process it ordains. Therefore, only a direct attack, such as an objection to confirmation or appeal of the confirmation order, is available to defeat confirmation.

### **What Happens to the Debtor's Assets?**

Once the debtor enters the post-confirmation stage of its life cycle, it regains control of its assets without many of the regulations that existed during the bankruptcy. Unless those rights are vested somewhere else by the confirmed plan, the debtor may use or dispose of its property without the court approval that was required during the bankruptcy. As stated in the Bankruptcy Code, "Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." See § 1141(c).

### **Liquidating Trusts**

A liquidating trust (sometimes also known as a litigation trust or a post-confirmation estate) is often created in a post-confirmation estate for the purpose of litigating unresolved claims. This practice finds its authority in § 1123(b)(3) of the Bankruptcy Code, which provides that the contents of a plan may provide for: settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest.

### **The Reorganized Debtor**

In many aspects in the post-confirmation period business for the debtor will return to normal. The debtor is free to enter into agreements, borrow money, buy and sell assets all without court approval. The UST and the court take a far reduced role in monitoring the debtor, and instead rely on creditors, interest holders, and often the debtor itself to carry out implementation of the confirmed plan. The philosophy of the Bankruptcy Code is that during the bankruptcy, the court will provide shelter to the debtor, but this changes at plan confirmation. Post-confirmation the debtor is removed from "the 'tutelage' status... which may limit and hamper [the corporation's] activities and throw doubt upon its responsibility." *In re Shuman*, 277 B.R. 638, 652 (E.D. Penn. 2001). The debtor still has a duty to follow the confirmed plan and comply with any orders issued during the bankruptcy. These duties vary depending on the

circumstances of the bankruptcy, but typically include distributing funds, securities or property to holders of allowed claims and interests.

### **What Happens to the Estate?**

Though the debtor is now existing in a post-confirmation 'business as normal state,' the case will continue for some time while the court rules on various post-confirmation matters, which may include claim objections, avoidance actions, and sometimes disputes regarding interpretation or implementation of the plan. The bankruptcy does not officially end until a final order closing the case is entered by the court. Depending on the size of the estate, the number of claims filed, the complexities of the claims and defenses, and the court's docket is sometimes several years or more before this final decree is entered. Although the 'estate' ceases to exist once the plan is confirmed, the final order ending the matter will still need to be entered before the matter is considered closed.

### **The Bankruptcy Court's Continuing Jurisdiction**

With the debtor existing in a post-confirmation state and the court adjudicating matters related to the bankruptcy, questions arise regarding the scope of jurisdiction that remains with the bankruptcy court. The bankruptcy code doesn't put a limit on the post-confirmation jurisdiction of the court, but § 1142 does outline how the court's jurisdiction begins to weaken.

### **Implementation of Plan**

Notwithstanding any otherwise applicable non-bankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court.

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.

The bankruptcy court's jurisdiction is further diminished upon "substantial consummation" of a plan pursuant to § 1101(2).

Varying interpretations of the scope of post-confirmation jurisdiction has led to language commonly being added to plans and confirmation orders stating specific retention-of-jurisdiction provisions, the idea being this language will decrease the likelihood of a nonbankruptcy court misinterpreting or incorrectly enforcing a provision of the plan.

The confirmed plan has the effect of creating a contract between the debtor and its creditors, while simultaneously lifting the automatic stay. This situation creates concurrent jurisdiction between the bankruptcy and the nonbankruptcy courts. Hence the effort by plan proponents to include broad retention of jurisdiction provisions in the plan or confirmation order to ensure jurisdiction exclusivity (where possible) remaining with the bankruptcy court. At the same

time, “a court “cannot write its own jurisdictional ticket” by seeking to retain jurisdiction where none exists.” *See Diagnostics International Inc. v. Aerobic Life Products Co. (In re Diagnostics International Inc.)*, 257 B.R. 511 (Bankr. D. \_\_\_\_).

Consequently, regardless of its intended scope and breadth, a retention of jurisdiction provision cannot create post-confirmation jurisdiction in a bankruptcy court beyond the limited circumstances where such jurisdiction would otherwise exist.

### **A Final End to the Bankruptcy**

In the eyes of the bankruptcy court, the debtor ends its post-confirmation life in several ways. Ideally, the end comes after the estate has been fully administered and the Court enters an ‘Order For Final Decree’ pursuant to the Bankruptcy Rule 3022. It is not necessary to leave the case open until the plan is fully consummated; most plans provide that that the case can be reopened for cause shown. Importantly, U.S. Trustee fees remain payable as long as a case is open.

If circumstances arise where the reorganized debtor is unable to implement aspects of the confirmed plan and a default occurs, several options exist: (1) it might try continuing to perform and try to cure the default; (2) it might voluntarily convert the case to Chapter 7 to permit an orderly disposition of its assets; (3) it might commence a new bankruptcy case to reorganize or liquidate; and (4) it might seek to modify its existing plan.

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