POSTCONFIRMATION LIQUIDATION VEHICLES (INCLUDING LIQUIDATING TRUSTS AND POSTCONFIRMATION ESTATES): AN OVERVIEW

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I. INTRODUCTION

Confirmation is not the end of a Chapter 11 case, as there is usually a need to collect, administer, and distribute estate assets of a Chapter 11 debtor after the confirmation of the plan. These tasks are commonly performed by some sort of postconfirmation liquidation vehicle (PCLVs), especially liquidating trusts.

The enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) has limited a debtor's exclusive period to propose, and solicit acceptances for, a plan of reorganization. In order to retain control of a case, debtors are likely to seek to confirm a plan within the shortened exclusivity period.

The shortening of Chapter 11 timelines is likely to increase the importance and prominence of PCLVs. PCLVs allow a Chapter 11 debtor to focus preconfirmation on the more pressing needs of its reorganization or liquidation while deferring issues regarding illiquid estate assets, causes of action, and claims reconciliation until after confirmation of its plan.

A. POSTCONFIRMATION LIQUIDATION VEHICLES AND POSTCONFIRMATION ESTATES

1. The Reorganized Debtor

In the normal course under section 1141 of the Bankruptcy Code, upon confirmation of a debtor's Chapter 11 plan, the property of the debtor is revested in the estate, except to the extent that the plan of reorganization/ liquidation or order confirming the plan provides otherwise.[1]

2. PCLVs

A Chapter 11 plan often provides for the establishment of one or more PCLVs to collect and administer the remaining assets of the debtor's estate, distribute such assets to various creditors, and, in some cases, pursue causes of action (including avoidance actions and other litigation) and claims of the estate against third parties and former insiders of the debtor. Such PCLVs are established under the terms of a Chapter 11 plan, and a trustee is named to administer the PCLVs. Often, the trustee's administration of the PCLV(s) is subject to the oversight of a committee on behalf of the beneficiaries of the PCLV. This oversight committee often includes, sometimes exclusively, members of the former unsecured creditors' committee.[2]

In smaller cases employing a PCLV, one PCLV is customarily established as a residuary for all of the debtor's assets and causes of actions that

are to be liquidated on behalf of creditors. In more complex cases, a number of PCLVs may be established for specific functions. For instance, a "liquidating" trust liquidating miscellaneous remaining assets may be complemented by a "litigation" trust pursuing causes of action and, possibly, one or more additional trusts, each holding a specific type of assets.[3] The functional nomenclature notwithstanding, each of these PCLVs is typically a liquidating trust established (and named) for a specific purpose.[4]

The establishment of a PCLV helps to speed the confirmation of a Chapter 11 plan by allowing the debtor's operating assets to emerge from Chapter 11 prior to the resolution of the litigation relating to the debtor and the estate and prior to the collection, liquidation, and distribution of estate assets. In the case of liquidating plans, they serve to enable confirmation notwithstanding that certain matters remaining unsettled, such as the litigation of claims and/or the recovery and liquidation of all of the debtor's assets and causes of action.

A speedy confirmation is important to maximizing the value of the debtor's operating assets as a going concern by removing the distraction and stigma of bankruptcy, limiting professional fees by reducing the number of professionals (and their involvement), and allowing the company to make quicker strategic decisions by removing bankruptcy court oversight, to at least a large degree. The disassociation of trust administration from the management of any remaining operating assets allows greater efficiency in both regards. For instance, the trust can sell any remaining illiquid assets over the time period necessary to maximize the consideration received rather than shoehorning the sale of illiquid assets into a timeline dictated by the needs of other operating assets, whether in terms of scheduling or cash-flow requirements.

As discussed below, a PCLV need not be a liquidating trust. There are a variety of forms that can be used, depending on the facts and goals of the situation. The different forms of PCLVs are generally similar, with the exception of certain tax issues.

Many cases that do not use a more formal PCLV use a "postconfirmation estate" to fulfill a similar role. The meaning of the term "postconfirmation estate" is nebulous at best, but it is often either (a) a liquidating trust in all but name,[5] or (b) a loosely defined entity or the reorganized or liquidating debtor fulfilling the role of a PCLV in pursuing causes of action, recovering and liquidating remaining assets, and making distributions to creditors.[6]

B. Effect of BAPCPA in Expediting Chapter 11 Cases and Likely Increasing Use of Liquidating Trusts

The enactment of BAPCPA is likely to increase the prominence of PCLVs. Prior to the enactment of BAPCPA, under section 1121 of the Bankruptcy Code, a debtor had an exclusive period of 120 days after the petition date to file a Chapter 11 plan and an exclusive period of 180 days after the petition date to solicit acceptances of a Chapter 11 plan. Under the pre-BAPCPA version of Code section 1121(d), upon motion of a party in interest and after notice and a hearing, a bankruptcy court could, for cause, increase or reduce the exclusive periods for proposing and/or soliciting acceptances of a Chapter 11 plan.

The exclusive right to file a plan is significant in a debtor's ability to manage the agenda and timing of its reorganization. As a practical matter, reductions in the exclusive period were rare, although not unknown, and bankruptcy courts tended to be permissive in granting a debtor's request to extend the exclusive periods. Some debtors have successfully sought a number of extensions of the exclusive periods such that the exclusive periods lasted for a number of years.[7] In some quarters, the repeated extension of the exclusivity periods was criticized as increasing the length (and attendant expense) of Chapter 11 cases and weighing the Chapter 11 process too far in favor of the debtor.

BAPCPA modified section 1121 to establish strict limits on a bankruptcy court's power to extend the debtor's exclusive periods. BAPCPA did not reduce the initial exclusivity periods of 120 days and 180 days for proposing a plan and soliciting acceptances of such plan but added section 1121(d)(2), which does not permit a bankruptcy court to extend the exclusivity period for (i) proposing a plan to a date more than 18 months after the petition date or (ii) soliciting acceptances of a plan to a date more than 20 months after the petition date.[8]

The limits that BAPCPA established on the exclusivity periods are generally construed as "creditor friendly." There is some irony to this, however, because in a number of past cases, creditors' favorable recoveries were sometimes owed (at least in part) to the debtor remaining in Chapter 11, with the protection of exclusivity, long enough to allow the "market to turn" and thereby dramatically increase the value of the debtor's assets (and creditors' recoveries).[9]

It is not clear exactly how BAPCPA's limit on extensions of exclusivity will affect Chapter 11 practice and the reorganization of complex corporate debtors. BAPCPA's limits on the extension of the exclusivity period

are effective on bankruptcy cases filed on or after October 17, 2005. As such, no bankruptcy cases have yet come up against the 18-month limit on the exclusive period for proposing a plan. This day of reckoning comes near, however, and greater clarity on this issue should emerge in the near future.[10]

BAPCPA's limits on the extension of exclusivity are likely to lead to further growth in the use of PCLVs in Chapter 11 plans, especially in complicated or contentious cases. Employing a PCLV can allow a debtor and its management to focus on the tasks necessary to confirm a Chapter 11 plan within BAPCPA's tighter strictures on reorganization.

II. WHAT DOES IT MEAN TO "EXIT" CHAPTER 11?

While it is generally clear when a debtor's bankruptcy case begins, as well as the impact of commencing a bankruptcy case, the end of a Chapter 11 bankruptcy case and its effects are not as clear. There are three separate events that could be seen as the "end" of a Chapter 11 bankruptcy case: (1) confirmation of a plan (whether reorganization or liquidation); (2) the effective date of such a plan; and (3) the entry of a final decree closing the case. Each of these milestones is discussed below.

A. CONFIRMATION VS. EFFECTIVE DATE VS. FINAL DECREE

1. Confirmation of a Chapter 11 Plan

Although sometimes viewed as the end of a bankruptcy case, confirmation is actually the crescendo—but not the finale—of a bankruptcy case. Confirmation occurs when the bankruptcy court approves the plan and enters an order evidencing such confirmation. In other words, through confirmation, the bankruptcy court provides its imprimatur to the plan as fulfilling the requirements of section 1129 of the Bankruptcy Code.[11]

The confirmation of a Chapter 11 plan basically authorizes a debtor to take the actions necessary to effectuate the transactions contemplated by the Chapter 11 plan. Typically, a plan contains a number of conditions that must be satisfied prior to the implementation of the transactions contemplated by the plan. Prior to the satisfaction of those conditions, the plan is not yet "effective," and bankruptcy court oversight continues, to at least some degree.

2. Effective Date of a Chapter 11 Plan

The Bankruptcy Code does not define the term "effective date" or specify when the "effective date" occurs, even though the term appears in sever-

al sections of the Bankruptcy Code. It is generally agreed that the "'effective date' of a plan is the date on which the provisions of such plan become effective and binding on the parties."[12] As such, the "effective date" of a Chapter 11 plan is generally the date, after all conditions precedent to the consummation of the plan have been satisfied, on which the various transactions contemplated by the plan occur and when the plan has been "substantially consummated" within the meaning of Code section 1101(2).[13]

The effective date is also the key date under Code section 1129 for determining certain financial requirements of the plan.[14] This causes the proposed effective date specified in the plan to be cited, on occasion, in disputes over plan feasibility. A proposed effective date set too far into the future is often viewed as an indication that the debtor may not be able to meet the milestones necessary to consummate the plan.[15]

Although the Bankruptcy Code and the Bankruptcy Rules do not expressly specify when an effective date should occur, Chapter 11 plans typically provide, subject to the approval of the bankruptcy court,[16] for the conditions precedent to, and the timing of, the effective date.[17] Some courts have held that the effective date should be on or near the date upon which the confirmation order is entered.[18] Others hold that the effective date should be on or near the date upon which the confirmation order becomes final[19]—as any appeal(s) would have been resolved and as this cann approximate the date upon which plan distributions will commence. Other courts have approved effective dates keyed to when substantial consummation of the plan occurs rather than when the confirmation order is entered or becomes final.[20] In complex Chapter 11 cases, there are generally a number of conditions precedent to the occurrence of the effective date, with the effective date to occur upon the first day that all of the conditions precedent to the effective date have been satisfied or waived.[21]

The debtor "emerges" from Chapter 11 on the effective date of the plan. The occurrence of the effective date also terminates (or at least transforms) the involvement of key players from the Chapter 11 case. For instance, on the effective date, the official committee of unsecured creditors typically dissolves, although its former members are often reincarnated as significant equityholders and possibly members of a post-effective date committee that is created to oversee the claims objection process and other administrative matters. In addition, the transactions occurring on the effective date also generally provide for the repayment of the DIP lenders, although often this indebtedness is merely rolled over into exit financing.

After the effective date, the reorganized debtor is no longer subject to the bankruptcy court oversight in operating its businesses and managing its properties. This allows the reorganized debtor greater operational flexibility. For instance, by no longer requiring bankruptcy court approval for transactions outside the ordinary course, the reorganized debtor can move more quickly to take advantage of strategic opportunities.

Despite the emergence of the reorganized debtor, however, the effective date does not mark the end of a bankruptcy case. Generally, after the effective date, the claims reconciliation process must be completed, as well as distributions to creditors made, assets recovered and liquidated, and litigation pursued for the benefit of the debtor's creditors.

3. Entry of a Final Decree

The issuance of a "final decree" by the bankruptcy court is necessary for the formal closing of a bankruptcy case. Bankruptcy Rule 3022 governs the issuance of a final decree, which implements section 350(a) of the Bankruptcy Code to close a reorganization case.[22] Bankruptcy Rule 3022 provides that a court shall enter a final decree "[a]fter an estate is fully administered in a Chapter 11 reorganization case, the court, on its own motion or on motion of a party in interest, shall enter a final decree closing the case."[23] Typically, it is the trustee or the debtor that files the motion seeking entry of a final decree, although such a motion may also be filed by the U.S. Trustee.

Whether a Chapter 11 case has been "fully administered" is determined on a case-by-case basis. Neither the Bankruptcy Code nor the Bankruptcy Rules define when a Chapter 11 case has been "fully administered." The Advisory Committee Note to the 1991 Amendments of the Fed. R. Bankr. P. provides some guidance on when a final decree should be entered. First, the entry of the final decree "should not be delayed solely because the payments required by the plan have not been completed."[24] Rather, the following factors should be considered in determining whether a Chapter 11 case has been "fully administered":

> (1) whether the order confirming the plan has become final, (2) whether deposits required by the plan have been distributed, (3) whether the property proposed by the plan to be transferred has been transferred, (4) whether the debtor or the successor of the debtor under the plan has assumed the business or the management of the property handled by the plan, (5) whether payments under the plan

have commenced, and (6) whether all motions, contested matters, and adversary proceedings have been finally resolved.[25]

Even the entry of a final decree is not as final as the term may imply. The entry of the final decree "does not deprive the court of jurisdiction to enforce or interpret its own orders."[26] Further, the case can be subsequently reopened upon a motion by the debtor or other party in interest pursuant to section 350(b) of the Bankruptcy Code.[27]

B. EFFECT OF THE EFFECTIVE DATE AND THE NEED FOR SOME SORT OF POSTCONFIRMATION ENTITY

Upon the occurrence of the effective date, what is the status of the bankruptcy estate?

Section 1141(b) provides that "[e]xcept 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." In other words, one view is that "upon confirmation of a plan of reorganization, property of the estate vests in the reorganized debtor…and the administration of the estate ceases."[28]

Consistent with this view is the proposition that conversion of a previously confirmed Chapter 11 case, with a revesting of the assets with the Chapter 7 trustee, is a legal impossibility.[29] Reasoning that a confirmed plan can only be revoked pursuant to Bankruptcy Code section 1144, courts have held that, in the absence of fraud and unless within 180 days of the confirmation order, a revocation of the plan and conversion of the case could not occur.[30] Noting that there is no provision in the Bankruptcy Code for the recreation of a new estate upon postconfirmation conversion, that property distributed under a plan could not be redistributed, and that nothing in the Bankruptcy Code provided for a reinstatement of the automatic stay, it was found that any benefit to creditors as a result of conversion would be illusory.[31] Moreover, after confirmation, the "debtor is discharged and the rights of debtor and creditor altered by the confirmed plan. The plan is binding and res judicata. Parties may seek enforcement of plan rights in non-bankruptcy forums."[32]

Other courts have held that, despite the vesting of all property of the estate in the debtor and/or PCLVs upon confirmation, a bankruptcy court can order a postconfirmation Chapter 7 conversion, thereby creating a Chapter 7 estate that succeeds to the property in possession of the reorganized debtor or PCLV.[33] These courts rely primarily on subsections 1112(b)(7) and (8) of the pre-BAPCPA Bankruptcy Code,[34] which state

that a court may convert a case to Chapter 7, when it is in the best interest of the creditors "for cause, including…(7) inability to effectuate substantial consummation of a confirmed plan; (8) material default by the debtor with respect to a confirmed plan."[35] Ignoring the procedural impediments raised by the courts denying postconfirmation conversion, these courts often look to the "language and purpose" of the debtor's plan as a basis for conversion and revesting of the estate assets with the Chapter 7 trustee.[36] Thus, when a court found that the PCLV was not created to be an independent for-profit corporation but instead to distribute assets to creditors, and provisions in the plan granting ongoing jurisdiction for the bankruptcy court to determine controversies, suits, and disputes related to the PCLV, it ruled that assets held by the PCLV become assets of the Chapter 7 estate upon conversion.[37]

BAPCPA's changes to section 1112(b) may resolve this unsettled issue in favor of the latter view. Nonetheless, due to the uncertainty regarding how courts will treat postconfirmation conflicts in the administration of estate assets by PCLVs, proponents of plans containing PCLVs should ensure that their plan (as well as the confirmation order and PCLV documents) contains specific provisions addressing how such conflicts will be dealt with. It is not sufficient to simply provide that the bankruptcy court will have ongoing jurisdiction; the plan should set forth the appropriate remedy or relief in the event of fraud, mismanagement, inability to effectuate substantial consummation of the plan, or material defaults regarding the PCLV, including terms as to whether or not the beneficiaries of the PCLV consent to Chapter 7 conversion and the revesting of the PCLV's assets with the trustee.

III. THE RELEVANCE OF PCLVS IS INCREASING AS MORE AND MORE CHAPTER 11 CASES LIQUIDATE

BAPCPA's limit on exclusivity is not the only spur for the increased usage of liquidating trusts and postconfirmation estates in Chapter 11. PCLVs have also become more popular because they (i) maximize value for creditors, (ii) are consistent with the growing trend of section 363 sales and liquidating plans, (iii) provide a potential source of recovery to otherwise out-of-the-money creditors, (iv) reduce the expenses of administering the estate, and (v) are attractive in the post-*Enron*/*WorldCom* world of Sarbanes-Oxley where claims might exist against the debtor's former insiders, accountants, financiers, and others.

A. MAXIMIZES VALUE FOR CREDITORS BY INCREASING SPEED OF RESTRUCTURING

The use of PCLV helps to maximize the value received by creditors for their claims. As is expected, creditors care not only about the amount of their recovery on their claims but also—due to the time value of money—when they actually receive their recovery. The use of a PCLV may not only increase the total recovery received by creditors but, also much more dramatically, shorten the time that creditors must wait to receive (at least a portion of) their recovery. The use of a PCLV allows a Chapter 11 plan to be confirmed, and distributions to begin, before all of the debtor's assets have been liquidated or litigation completed, because often the most complex and time-consuming matters are left for resolution by the PCLVs.

While the time value of money impacts every financial transaction, it has special resonance in Chapter 11 cases. Recent years have seen the market for distressed debt and bankruptcy claims explode at an exponential rate,[38] with the result that distressed debt traders have become ubiquitous in Chapter 11 cases.[39] The time value of money is a component in virtually every economic transaction but has greater significance in distressed debt than in other realms. The time value of money is basically an opportunity cost: what alternative investments exist? For many investors, this benchmark is probably the level of interest paid by banks or money markets, for others it can be the interest avoided by paying down a line of credit. Distressed debt funds, as competitors for capital in a highly leveraged world, often have target returns on the order of 20% per year. A benchmark of this magnitude causes distressed debt traders to be in quite a hurry for a restructuring to conclude.[40]

In a reorganization, the use of a PCLV can also increase creditor recoveries by protecting the value of the debtor's business and assets. Emerging quickly from Chapter 11 can help a reorganizing company, inter alia, (a) retain and recruit key employees; (b) maintain relationships with key suppliers concerned about the debtor's prospects, particularly with respect to long-term supply agreements or agreements with long lead times; (c) retain customers holding warranties; and (d) induce new and existing customers to enter into agreements requiring long-term performance by the debtor.[41] The use of a PCLV to pursue litigation postconfirmation nullifies plan confirmation deadlines that can be helpful in many cases in pushing parties toward the settlement table and resolving what would be difficult and expensive litigation in a timely manner.[42] The converse, however, is that insulating the reorganization from the litigation

avoids the possibility that deadlines relating to the plan confirmation process (or needs of debtor's business) will cause the debtor and/or creditors' committee to accept an unfavorable resolution of litigation.[43]

B. CONSISTENT WITH THE GROWING TREND OF MAJOR SECTION 363 SALES AND LIQUIDATING CASES RATHER THAN STAND-ALONE REORGANIZATIONS

Recent years have also seen a trend toward major section 363 sales—involving all, or substantially all, of the debtor's assets—and liquidating cases rather than stand-alone reorganizations.[44] The cause of this trend, and many of its consequences, are beyond the scope of this article, but what is clear is that these trends will also increase the popularity of PCLVs. It should be noted, however, that PCLVs are not used exclusively in Chapter 11 liquidations. PCLVs are commonly used even in stand-alone reorganizations because, in addition to their other benefits, a PCLV helps to separate the continuing claims process from the business operations of the reorganized debtor.[45] This separation also limits the leverage (or the perception of leverage) that a trade creditor has in seeking an overly advantageous settlement of claims or causes of action by the PCLV.[46] In addition, it permits the reorganized debtor's management to focus on operations rather than legacy bankruptcy issues.[47]

The sale of substantially all of the debtor's operating assets ends any likelihood of reorganization because there are no longer any operating assets around which to organize. In addition to any share of the section 363 sale proceeds to which they might be entitled, creditors are also entitled to the proceeds from the liquidation of any remaining assets of the estate. Such a liquidation can often be done more cheaply and efficiently through a PCLV rather than through the debtor.

C. PROVIDE A POTENTIAL SOURCE OF RECOVERY TO OTHERWISE OUT-OF-THE-MONEY CREDITORS

The beneficial interests in a PCLV can be used an additional source of plan currency, either to provide or supplement a claimant's recovery. Some recent cases have seen out-of-the-money creditors, or even equity holders, given the opportunity to participate in a rights offering as a form of recovery in exchange for their support in confirming a Chapter 11 plan.[48] Beneficial interests in a PCLV can facilitate in sharing the upside. In the event that the proceeds of the debtor's assets (or litigation recoveries) are high, even the most junior creditors can share in the recoveries.[49]

This provides an incentive for such creditors—and even equity—to support a Chapter 11 plan.

D. REDUCE THE EXPENSES OF ADMINISTERING THE ESTATE

During the Chapter 11 case, there can be redundancy in professional costs as counsel, financial advisors, and other professionals retained by the debtor, creditors' committee, secured lenders, and other parties in interest simultaneously evaluate decisions and options facing the debtor.[50] The consummation of a Chapter 11 plan will cut back on much of this redundancy and "often result in substantial savings," even after considering the cost of the PCLV and its professionals.[51] A PCLV, if properly structured, can also change the "adversarial environment" of Chapter 11 to become more cooperative.[52]

E. ATTRACTIVE IN THE POST-*ENRON/WORLDCOM* WORLD OF SARBANES-OXLEY TO PURSUE LITIGATION AGAINST INSIDERS AND FINANCIERS

In the post-*Enron/WorldCom* world, and with the enactment of Sarbanes-Oxley, litigation against a debtor's former officers and directors, as well as auditors, attorneys, prepetition financiers, and other insiders, is likely to grow. This litigation is complicated, expensive, and time-consuming. Such cases can take years to get to trial and many months to try, not something that fits with BAPCPA's contemplated timeline for plan confirmation process.

Such issues can be resolved by transferring the right to bring these actions (with unsecured and secured creditors even agreeing to share in recoveries) to a PCLV. Debtor's management is no longer faced with the prospect of suing those with whom they have possibly worked or with the expense and distraction of contentious litigation, and it can devote its energies toward more pressing, internal reorganization efforts and plan confirmation issues. On the other hand, creditors do not face the same concerns or constraints as debtor management, and those creditors faced with little or no cash distribution under the plan, are happy to take a flier on such litigation. By transferring this litigation to a PCLV, debtor management can avoid unattractive litigation while creating incentives for plan approval.

IV. EXPLANATION OF THE DIFFERENT FORMS OF PCLVS

In negotiating a Chapter 11 plan containing a PCLV, creditors have significant input regarding the form that the PCLV will take.[53] Typically, PCLVs are either an entity taxed as a grantor trust[54] or as a partnership.[55]

A. LIQUIDATING TRUSTS

The most common form of PCLV is a liquidating trust, which should be taxed as a grantor trust.[56] Under the Internal Revenue Code, the transfer of assets by the debtor to the liquidating trust will generally be "treated as a deemed transfer to the beneficiary-creditors followed by a deemed transfer by the beneficiary creditors to the trust."[57]

When the PCLV takes the form of a liquidating trust that will be taxed as a grantor trust, the key issue is whether the trust form will be respected.[58]

As a general matter, an entity will be taxed as a trust if "it can be shown that the purpose of the arrangement is to vest in trustees responsibility for the protection and conservation of property for beneficiaries who cannot share in the discharge of this responsibility and, therefore, are not associates in a joint enterprise for the conduct of business for profit."[59] If the PCLV does not qualify as a trust, whether due to excessive business activities or otherwise, the entity will be taxed as a business enterprise.[60] Under current law,[61] if a trust is characterized as a business entity and if it has multiple owners, it will likely be taxable as a partnership or disregarded as a pass-through vehicle. Taxation as a partnership is generally "less onerous" than taxation as a corporation, "unless interests in the partnership are publicly traded and the publicly traded partnership rules apply."[62]

Despite the relatively vague definition of "trust," a PCLV taking the form of a trust should generally be treated as a grantor trust for tax purposes.[63] Authority, including guidelines and case law, is "fairly clear" regarding whether a trust will be classified as a liquidating trust.[64] A PCLV taking the trust form will be classified as a "liquidating trust" if "it is organized for the primary purpose of liquidating and distributing the assets transferred to it, and its activities are all reasonably necessary to, and consistent with, the accomplishment of that purpose."[65] The IRS has published guidelines regarding what constitutes a "liquidating trust."[66] These guidelines are "not statements of substantive law, but are treated by most tax advisers as a combination checklist and safe harbor."[67]

The IRS set forth the criteria necessary for a trust to qualify as a liquidating trust in Revenue Procedure 82-58.[68] It is difficult, however, for liquidating trusts established in bankruptcy cases to meet the criteria established by Revenue Procedure 82-58. Therefore, in Revenue Procedure 94-45,[69] the IRS established a separate set of conditions that must be satisfied for a trust established pursuant to a confirmed Chapter 11 plan to be classified as a liquidating trust.[70] A liquidating trust formed pursuant to a confirmed Chapter 11 plan is "generally structured to satisfy, to the extent possible," the guidance set forth in Revenue Procedure 94-45.[71]

The key provisions of Revenue Procedure 94-45 are as follows[72] (with italics indicating the key provisions loosening the criteria that applied under Revenue Procedure 82-58):

(1) The trust is or will be created pursuant to a confirmed plan under Chapter 11 of the Bankruptcy Code for the primary purpose, as stated in its governing instrument, of liquidating the assets transferred to it with no objective to continue or engage in the conduct of a trade or business, *except to the extent reasonably necessary to, and consistent with, the liquidating purpose of the trust*.

(2) The plan and disclosure statement must explain how the bankruptcy estate will treat the transfer of its assets to the trust for federal income tax purposes. A transfer to a liquidating trust for the benefit of creditors must be treated for all purposes of the code as a transfer to creditors to the extent that the creditors are beneficiaries of the trust. The transfer will be treated as a deemed transfer to the beneficiary-creditors followed by a deemed transfer by the beneficiary-creditors to the trust. To the extent that the trust is being created for the benefit of equity interest holders in the debtor, the transfer to the trust should be treated as a transfer to the equity interest holders. The ruling request must explain whether the debtor or the bankruptcy estate will incur any tax liability from the transfer and, if so, how that liability will be paid.

(3) The plan, disclosure statement, and any separate trust instrument must provide that the beneficiaries of the trust will be treated as the grantors and deemed owners of the trust. The trust instrument (which may be the plan if there is no separate trust instrument) must require that the trustee file returns for the trust as a grantor trust pursuant to Treasury regulation section 1.671-4(a).

(4) The plan, disclosure statement, and any separate trust instrument must provide for consistent valuations of the transferred property by the trustee and the creditors (or equity interest holders), and those valuations must be used for all federal income tax purposes.

(5) Whether or not a reserve is established for disputed claims, all of the trust's income must be treated as subject to tax on a current basis, and the ruling request must explain, in accordance with the plan, how the trust's taxable income will be allocated and who will be responsible for payment of any tax due.

(6) The trust instrument must contain a fixed or determinable termination date that is generally not more than *five years* from the date of creation of the trust and that is reasonable based on all the facts and circumstances. If warranted by the facts and circumstances, provided for in the plan and trust instrument, and subject to the approval of the bankruptcy court with jurisdiction over the case on a finding that the extension is necessary to the liquidating purpose of the trust, the term of the trust may be extended for a finite term based on its particular facts and circumstances. The trust instrument must require that each extension be approved by the court within six months of the beginning of the extended term.

(7) *If the trust is to hold any operating assets of a going business, a partnership interest in a partnership that holds operating assets, or 50 percent or more of the stock of a corporation with operating assets, the ruling request must explain why it is necessary to retain these assets.*

(8) *If the trust is to receive transfers of listed stocks or securities or other readily marketable assets, the ruling request must explain the necessity for doing so*. The trust is not permitted to receive or retain cash or cash equivalents in excess of a reasonable amount to meet claims and contingent liabilities (including disputed claims) or to maintain the value of the assets during liquidation.

(9) The investment powers of the trustee, *other than those reasonably necessary to maintain the value of the assets and to further the liquidating purpose of the trust*, must be limited to powers to invest in demand and time deposits, such as short-term certificates of deposit, in banks or other savings institutions, or other temporary, liquid investments, such as Treasury bills.

(10) The trust must be required to distribute at least annually to the beneficiaries its net income plus all net proceeds from the sale of assets, except that the trust may retain an amount of net proceeds or net income reasonably necessary to *maintain the value of its assets* or to meet claims and contingent liabilities (including disputed claims).

(11) It must be represented that the trustee will make continuing efforts to dispose of the trust assets, make timely distributions, and not unduly prolong the duration of the trust.

As a technical matter, a trust established pursuant to a confirmed Chapter 11 plan cannot rely on Revenue Procedure 94-45 unless an IRS ruling is obtained by the trust.[73] As a practical matter, however, if the trust clearly meets all of the requirements contained in Revenue Procedure 94-45 without requiring an explanation, the IRS is "unlikely to find grounds for attack" of the trust's classification.[74] In contrast, if the trust's compliance with Revenue Procedure 94-45 is less clear and requires explanation (e.g., the trust holds operating assets of an active business), an IRS ruling should probably be sought before relying on Revenue Procedure 94-45.[75] It is not completely clear as to the extent to which Revenue Procedure 94-45 can be relied upon in a nonbankruptcy context.[76]

Generally, a grantor trust is treated as an entity to which a number of beneficiaries have contributed assets in exchange for a proportional interest in the trust's assets.[77] In the bankruptcy context, the distribution to creditors of beneficial interests in a liquidating trust (that is taxed as a grantor trust) is generally treated as though the following had occurred: (a) the debtor had transferred the assets earmarked for the trust to the creditors in satisfaction of their claims, and (b) the creditors contributed the received assets to the trust in exchange for beneficial interests in the liquidating trust.[78] Each creditor that is a beneficiary of the trust "would be treated as continuing to own the assets that it was deemed to contribute to the trust and would be required to take into account the items of income, gain, loss, and deduction attributable to those assets on a current basis."[79] Of course, in this context, the creditors merely own a proportional interest in all of the trust's assets, rather than in any specific asset(s).

Typically, trust agreements do not have elaborate allocation provisions.[80] This leaves much discretion to the accountants and leaves less for an IRS agent to audit other than inquiring into the details of actual alloca-

tions that are made in proportion to the respective beneficiaries' interests in the trust.[81]

B. PARTNERSHIPS

Postconfirmation partnerships, while likely impractical for larger bankruptcy cases,[82] appear to be used with some frequency when the unsecured creditor class is relatively small.[83] Partnerships, as compared to trusts, can be formed more easily and cheaply without the attendant concerns over tax qualification.

It is not difficult to ensure that the IRS will respect the choice of the partnership form.[84] Generally, any entity will be treated as a partnership unless that entity (a) attempts to classify itself as a trust, (b) is incorporated, and/or (c) elects to be taxable as a corporation.[85] While theoretically a particularly inert partnership might be more appropriately classified as a trust, "as a practical matter, the IRS has not sought to reclassify entities formed as state law partnerships or limited liability companies as trusts."[86]

The most significant issue in using the partnership form is avoiding treatment as a "publicly traded partnership."[87] A partnership treated as a "publicly traded partnership" will be treated as an association taxable as a corporation unless its income consists primarily of "qualified income."[88] A partnership is a "publicly traded partnership" if the partnership interests in such partnership are either (a) traded on an established securities market,[89] or (b) readily tradable on a secondary market.[90]

The form of the transfer of the interests in the liquidating partnership to the debtor's creditors is not important from the federal income tax perspective.[91] The debtor could transfer assets to its creditors in satisfaction of their claims with the creditors transferring these same assets to the newly-formed partnership in exchange for partnership interests, or, more commonly, the debtor will transfer its assets to the partnership and then transfer the partnership interests to its creditors.[92] No matter the method of the transfer of the partnership interests to creditors, "the results for federal income tax purposes will generally be analogous to the results of creating a grantor trust."[93] Under "limited" circumstances, the partnership interests may be viewed as having been transferred by the debtor to the creditors.[94]

A postconfirmation entity that is classified as a partnership (and avoids being a publicly traded partnership) will have its income taxed to its partners on a flow-through basis. Therefore, individual items of partnership

will retain their character in the hands of creditors.[95] Partnership agreements are also subject to complex allocation requirements.[96] As noted above, the use of a partnership form also presents the danger of the publicly traded partnership rules being applied.

Partnerships used as PCLVs may be more readily "auditable" as they tend to have complex allocation systems rife with references to the Treasury regulations establishing the capital account system, even if the partnership agreement itself does not comply with the capital account system.[97] This characteristic of partnership agreements leaves less discretion to the accountants and provides a backdrop against which it is easier for an IRS agent to spot departures from the capital account system.[98]

The major advantage to using a partnership form over a liquidating trust is the greater flexibility of the partnership form, particularly as partnerships are not subject to any limitation on their business activities.[99] Therefore, as a practical matter, the determination of whether to use a liquidating trust or a partnership often comes down to the value that creditors place on the ability to trade their interests in the PCLV, as restrictions on trading may be imposed to avoid application of the publicly traded partnership rules.[100]

C. LIMITED LIABILITY COMPANIES

While the use of limited liability companies (LLCs) by debtors for postconfirmation litigation, claims reconciliation, and distribution is not common,[101] some commentators expect that LLCs "will become increasingly popular" as postconfirmation litigation vehicles because of the "greater flexibility" of an LLC vis-à-vis a liquidating trust, partnership, or corporation.[102] However, that flexibility may actually cause debtors to choose to use a liquidating trust because of greater precedent, and the restrictions inherent to the liquidating trust form also provide some guidance as to what is and is not permissible. The flexibility of LLCs may implicitly lead practitioners to believe there is less certainty in how these entities will be treated for income tax purposes.

D. CORPORATIONS

Although the use of a corporate structure to collect and distribute assets postconfirmation is of dubious merit due to the two-level tax faced by corporations and their shareholders, two reported cases have been found where a corporation was used.[103] It is possible that the events leading to the bankruptcy have also created tax attributes, such as tax losses,

that ameliorate much of the double-taxation otherwise incurred through the use of a corporation. A corporate form is probably most often used where the postconfirmation administration is performed by the reorganized debtor.

V. U.S. TRUSTEE OVERSIGHT OF A PCLV

The U.S. Trustee's oversight of the debtor and any PCLV is limited after the occurrence of the confirmation date[104] and even more so after the effective date. Nonetheless, continuing U.S. Trustee oversight can be implied from their broad standing under the Bankruptcy Code[105] and from each debtor's obligation to pay quarterly U.S. Trustee fees until their case is converted or dismissed, without regard to whether a plan has been confirmed or has gone effective.[106] In some cases, the U.S. Trustee receives copies of disclosure reports[107] or professional invoices, but this appears to be governed by the plan and local practice, as influenced by the inclination of the U.S. Trustee, rather than the Bankruptcy Code. As a practical matter, active oversight by the U.S. Trustee is likely to substantially cease after the effective date. However, in cases where post-effective date malfeasance occurs, it is likely that the U.S. Trustee will reassert itself as a guardian of the bankruptcy system's integrity.[108]

VI. KEYS TO A SUCCESSFUL PCLV

The following are key points to consider no matter the form of the PCLV used.

A. STRUCTURAL CONSIDERATIONS

1. Naming and Retention of the Wind-Down Officer

PCLVs are typically governed by a board of directors-like oversight committee, drawn from its beneficiaries or other constituents, and run on a day-to-day basis by a single individual who is usually called a liquidating trustee, plan administrator, responsible person, or wind-down officer. (For the sake of simplicity, we refer to all such persons as the wind-down officer or WDO.)

WDOs are generally either a former member of the debtor's management or a professional WDO who specializes in wind-down or turnaround roles. Both approaches have merit, as a former member of management may have greater familiarity with the PCLV's assets while a professional WDO would have greater familiarity with the wind-down process. In particularly contentious cases, such as where fraud was in-

volved, a PCLV may benefit from the hiring of a professional WDO because (a) the professional WDO will not have any ties to any alleged wrongdoing in the past,[109] and (b) the professional WDO, as a repeat player in this process, can have a greater reputational incentive to administer the PCLV fairly and efficiently.

In order to pursue actions of the estate postconfirmation, the WDO needs to be named in the plan as an estate representative pursuant to section 1123(b)(3) of the Bankruptcy Code.

The identity of the WDO is generally agreed upon among the parties. In a reorganization, the dynamics of the plan negotiation process may determine whether the plan is implemented by the reorganized debtor or a WDO.[110] In liquidating cases, often, but not always, representatives of the beneficiaries of the WDO, such as the creditors' committee, exercise considerable influence in naming the WDO.[111]

Better practice is for the WDO to be retained pursuant to a separate agreement that specifically sets forth the terms of the retention, more specifically than the summary terms contained in the plan. This retention agreement should be approved by the bankruptcy court, either as part of the plan or by a separate motion or application.[112] Typically, the WDO is indemnified by the assets of the PCLV, but errors and omissions insurance as well as tail liability insurance policies are still necessary because once the assets of the PCLV are distributed, they are not available to protect the WDO.[113]

The retention agreement should be particularly clear regarding (a) the replacement or removal of the WDO; (b) the scope of the WDO's duties; (c) the fee structure; and (d) the mechanism for resolving any fee disputes.[114] The specification of these terms is important to ensure that they receive bankruptcy court "blessing," i.e., res judicata effect, thereby providing certainty and minimizing future disputes.

Clear definition of the liquidation trustee's duties also helps to minimize future fee disputes over duplicative duties and "turf battles" among parties with differing responsibilities under the plan. Of course, setting forth the duties of the WDO is particularly important when the plan splits duties among multiple entities, such as the WDO, reorganized debtor, oversight committee, and other estate representatives or if multiple PCLVs are set up for different assets or classes of beneficiaries.[115] The fee structure should be determined in advance because it is "hardly

unique" for creditors to criticize postconfirmation professional fees, particularly if beneficiaries' recoveries are low (or lower than expected).[116]

Generally, the plan will provide that professional fees do not need to be approved by the bankruptcy court to be paid.[117] However, the bankruptcy court will generally be retained as the forum to resolve any fee disputes, due to its experience with the case, the professionals and fee dispute issues. Oversight of professional fees is generally achieved by requiring notice (and providing the opportunity to object) to certain parties in interest, such as the oversight committee, the reorganized debtor, and/or other case constituents.

The proponents of the plan by which the PCLV will be established must select wisely[118] and be careful to include sufficient disclosure regarding the identity and affiliations of the proposed directors and officers (such as a WDO) for the debtor, its affiliates (if any) participating in a joint plan, and any successor to the debtor (such as a PCLV).[119] Also, note that some cases have extended the disclosure required under section 1129(a)(5) to include the individuals making up an oversight committee.[120]

2. Oversight Committee or Board of Directors

The WDO should report to an oversight committee[121] that represents the beneficiaries of the PCLV.[122] Limiting the number of members of the oversight committee (while ensuring that they are representative of the beneficiaries as a whole) helps to minimize administrative costs and logistical problems as well as disputes and administrative gridlock while increasing the flexibility of the PCLV. The administrative cost of actions by the PCLV, particularly in-person meetings, travel, and the like, increase with larger oversight committees.

3. Retention of Professionals for a PCLV

The WDO must be invested with authority to retain counsel and other professionals as necessary to administer the PCLV. The use of professionals previously involved in the bankruptcy helps to minimize the time and expense of "getting up to speed" and allows the WDO "not only to hit the ground running, but also to maintain that momentum in achieving the [PCLV's] goals."[123] Depending on the issues that the PCLV is likely to face, however, the PCLV may be able to retain less-expensive counsel that was also involved in the bankruptcy case, such as conflicts or special counsel.

If practicable, the PCLV's governance documents should provide that, absent a conflict, the WDO and the oversight committee can be represent-

ed by the same counsel and professionals.[124] This minimizes administrative and logistical hassles and is generally appropriate as the interests of the WDO and the beneficiaries of the PCLV are generally aligned.

4. Access to, Retention of, and Incentivizing Employees of Debtor

In order to maximize the value of the PCLV's assets, the PCLV must have sufficient information regarding the nature of these assets. Obviously, it is crucial that the WDO have access to the books and records of the debtor; however, particularly in bankruptcies and distressed situations, books and records often do not tell the whole story. As such, the WDO must have access to the employees of the debtor with the necessary knowledge and skill sets.[125] If the debtor is to be dissolved, the WDO must have the ability to retain the necessary employees to maximize the value of the PCLV.[126] The retention of certain employees of the debtor is a desirable complement to professionals hired by the WDO. Employees, particularly those with historical knowledge regarding the assets of the PCLV, can perform certain tasks more quickly and cheaply than professionals who may have to incur fees in effectively "reinventing the wheel."

The WDO should also have the authority, subject to the authority of the oversight committee, to install appropriate performance incentives for the retained employees, generally tied to the overall recoveries received by beneficiaries or another, more employee-specific metric.[127] It is easy to say that any employees of a liquidated debtor that are retained to help administer a PCLV should be thankful for their jobs and not receive any performance incentives. This is a short-sighted view. People generally perform better when properly incentivized, and the employees retained by a PCLV are in greater, not less, need of incentivization. Otherwise it is too easy to view their situation as short-term, dead-end employment.

5. Reporting Obligations and Communications with Constituencies

The importance of regular and frequent reporting cannot be overstated in light of cases like *Pioneer*, especially when the postconfirmation vehicle is formed to resolve issues in a contentious Chapter 11 case.[128] The PCLV's governing documents should set forth the reporting obligations of the WDO, both with respect to taxes and to communications with the oversight committee and the beneficiaries of the PCLV. The use of a website can minimize the costs of communication with the beneficiaries and also allow more timely and complete information to be communicated to beneficiaries.

Particularly in light of the large numbers of beneficiaries for a large PCLV, a WDO can have difficulty communicating with and making distributions to the various beneficiaries of the PCLV.[129] A WDO's ability to communicate with the beneficiaries can be increased while reducing the costs of such communication through the use of a website. These websites can contain updates and critical documents such as the plan and tax information.[130]

6. Unclaimed Distributions

Invariably, some of the distributions made by the WDO will be returned as undeliverable or otherwise be unclaimed. It is customary to include a provision that provides that distributions that have not been claimed within a certain period (often a year) after the initial effort at making such distribution are forfeited to the PCLV for the benefit of the PCLV's other beneficiaries.[131] The inclusion of a unclaimed distribution provision reduces the administrative expenses of the WDO and eliminates the need to maintain the records necessary to comply with any applicable escheat laws jurisdictions.[132]

7. Record Date for Distributions

The plan typically establishes a "record date" that establishes the date upon which indenture trustees and transfer agents will freeze their registers and that is the last day that transfers of claims against the debtor will be recognized.[133] The record date should be established well in advance of the occurrence of the effective date under the plan so that claim holders know the deadline for consummating any desired claims transfers and to ease the administrative process of closing and recording any transfers of claims against the debtor.[134] If the record date is too close to the effective date, some claim holders may experience delays in receiving their distributions.[135]

8. Funding, Budgeting, and Establishing Reserves for a PCLV

It is crucial that the governing documents of the PCLV ensure that sufficient funds will be available to administer the PCLV properly.[136] These administrative expenses generally consist largely, though not exclusively, of professional fees and expenses. In some cases, certain expenditures are necessary to maximize the value of any property held by the PCLV prior to the sale or distribution of such property. The plan will often provide for the reorganized debtor (or even a secured creditor) to provide a cash stake

to cover initial expenses, with this amount to be repaid through the proceeds of PCLV assets.

The proper pre-funding of administrative expenses helps to attract a qualified WDO (and to allow the WDO to retain qualified professionals). In addition, ensuring funding for administrative expenses means that the WDO, his professionals and the oversight committee will not have their options in administering the PCLV limited or "unduly influenced" by an immediate need for liquidity.[137]

9. Arbitration Provision Catch-All

In light of courts' differing interpretations of postconfirmation jurisdiction, it may be advisable to include an arbitration provision in the plan.[138] An arbitration provision would give the PCLV the option to arbitrate claims and causes of action rather than litigating them in a court other than the bankruptcy court.[139] Such an option would likely be attractive since other fora are unlikely to be as favorable to the PCLV as the bankruptcy court and would lack the bankruptcy court's familiarity with the overarching facts and circumstances of the debtor's case. In addition, the PCLV likely has more creditability before the bankruptcy court as a repeat player in that forum.

Through res judicata and the binding effect of confirmation, a plan provision allowing arbitration of claims and causes of action by the PCLV is likely to be enforceable against all parties, even those that object to such a provision in the plan. Some otherwise-objecting parties may fail (or choose not) to object to the arbitration provision because their focus is on other plan provisions during the confirmation process. Other parties may welcome the arbitration rather than litigation of claims and causes of action due to the increased speed and reduced cost of resolution by arbitration rather than litigation.

10. Definition of Allowed Claims

In drafting a Chapter 11 plan, care should be taken to reserve the PCLV's rights to object to claims during a post-effective date claims reconciliation process.[140] Many creditors may assume that any claims which are not the subject of an objection by the effective date of the plan are thereby "allowed claims" under the plan. This is erroneous, as the claims reconciliation process is often not completed prior to the effective date (a situation that will become even more common under BAPCPA's time limits) and plans typically set a deadline for objecting to claims at approximately 180 days after the effective date.[141] As such, care should be

taken in formulating the plan's definition of the terms "allowed claim" and "disputed claim" to provide clarity regarding which claims remain subject to objection.[142] In addition, to avoid any possibility of doubt, the plan should explicitly provide that the claims reconciliation process shall continue postconfirmation and post-effective date.[143]

11. Distribution Dates

The establishment of distribution dates, although appearing to be a rather ministerial consideration, actually presents traps for the unwary and should be carefully considered.[144] The establishment of dates arbitrarily requiring a distribution, whether or not material funds are available for distribution, can cause a PCLV to expend effort and incur cost to make distributions to a relatively small number of claims or of an immaterial amount of funds.[145] Determining distribution dates by the calendar, rather than the circumstances at hand, also removes the PCLV's discretion to determine when "distributions are appropriate from a resource, accounting and efficiency standpoint."[146] Therefore, it may be preferable for the timing of distributions to be at the discretion of the WDO or oversight committee.[147] However, if the WDO has discretion over the timing of distributions, it is virtually inevitable that at least some creditors will seek payment of their claims immediately after the claim is allowed.[148]

12. Cash-out Option for Beneficiaries of a PCLV

While interests in a PCLV may have significant worth, some creditors may be interested in selling their interests for a number of reasons, including (a) reduction of the time until their recovery is received; (b) certainty regarding the value of their recovery that could permit the more timely use of any tax benefits from their claims; (c) reduction of the administrative costs of retaining their interest (for instance, the necessity of having to comply with the tax requirements resulting from a beneficial interest in some types of PCLVs); and (d) creditor fatigue (i.e., a desire to close the position and never hear the debtor's name again). The market for the beneficial interests may be illiquid both before and after the effective date. A cash-out option, if available, for the beneficiaries would likely reduce transaction costs and increase the recovery for selling interest holders.[149]

The PCLV would likely benefit from a cash-out option because reducing the number of beneficiaries would likely reduce the PCLV's administrative expenses. Also, significant, actively involved interestholders may

help to ensure that the PCLV is acting effectively for the benefit of interest holders.

13. Securities Exemption/Trading of Interests in a PCLV

The interests in a PCLV may be considered "securities," particularly in light of the broad definition of "securities" under the federal securities laws. As such, to the extent that the PCLV may be deemed an "affiliate" of the debtor, it is valuable to provide in the plan and the PCLV documents that the interests in the PCLV are exempt from registration to the extent provided in section 1145 of the Bankruptcy Code.[150]

Creditors would generally prefer to have the ability to trade their interests in the PCLV.[151] Therefore, it can be desirable, in formulating the PCLV, to make the interests in the PCLV tradable, to the extent practicable. The desire to make PCLV interests freely tradable should be balanced, however, against any impact such structuring or trading would have on the value or administration of the PCLV. The trading of PCLV interests may result in burdensome tax and securities law issues for the PCLV.[152] For instance, the value of certain PCLV tax attributes could be impaired, the PCLV could become a "foreign trust" under section 7701(a)(3)(B) of the Internal Revenue Code, the PCLV could become subject to periodic reporting under the Securities Exchange Act of 1934 (the Exchange Act), and/or the PCLV may be required to comply with the Investment Company Act of 1940 (the Investment Company Act), depending on its assets and operations.[153] In at least some cases, Chapter 11 plans have specifically prohibited transfers of PCLV interests that would cause the PCLV to incur unfavorable tax consequences or become subject to onerous regulatory regimes,[154] or required prior consent of the PCLV to some or all transfers of PCLV interests.

14. Multiple Classes of Beneficial Interestholders in a PCLV

It can be valuable to establish multiple classes of beneficial interestholders in a PCLV. This can help to allow claimants that are expected to be out of the money to receive a recovery in the event that recoveries by the liquidating trust are larger than expected. It could even be enough to encourage them to support the plan.[155] Establishing multiple classes of beneficial interestholders also minimizes the possibility that one class of beneficial interestholders receives a windfall from higher-than-expected recoveries by the PCLV, a result that can be either good or bad, depending on your perspective.

15. Duration of a PCLV

The governing documents for the PCLV should provide for the circumstances in which the PCLV will terminate. One termination event is generally the distribution of all of the PCLV's assets, but often there is a time component as well,[156] although it may be extended subject to certain constraints.[157] Further, such requests for extension of duration of a PCLV are not always approved by the courts.[158]

It should be noted that, in light of their purpose, courts may find that a PCLV does not have the benefit of a wind-down period beyond the termination date provided in its terms, even where state law provides for a default wind-down period.[159]

B. SPECIFIC CONSIDERATIONS FOR PARTICULAR FORMS OF PCLVS[160]

1. Provisions Seeking to Ensure Appropriate Tax Treatment of a PCLV

The tax treatment of a liquidating trust can be unclear depending upon the facts presented and on the assets held in the liquidating trust.[161] The structure and terms of the liquidating trust can be used to make clear the type of tax treatment contemplated in plan negotiations and try to buttress such treatment by limiting the WDO's ability to take actions that could be interpreted as inconsistent with the desired tax treatment.[162]

A number of different types of provisions can help ensure appropriate tax treatment:[163]

(a) limitations on the WDO's authority;[164]

(b) guidance on tax reporting;[165]

(c) limitations on investment powers;[166] and

(d) limitations on the duration of the PCLV.[167]

2. LLC Provisions

The operations and internal affairs of a PCLV taking the form of an LLC will be governed by an LLC operating agreement.[168] Due to the flexibility of the LLC form, there are only a few key provisions that need to be included in a PCLV taking the form of a LLC. A PCLV taking the form of an LLC needs to be clear regarding the desired type of tax treatment, as many such LLCs seek to be treated as a partnership for

tax purposes[169] but others may be intended to qualify as a "disputed ownership fund" under Treasury Regulation section 1.468B-9.[170] In addition, members of a PCLV taking the form of an LLC typically would have substantially curtailed voting rights since substantially all decision-making authority should be vested in the manager of the PCLV and the oversight committee.[171]

C. POWERS OF A PCLV AND A WDO

1. Discretion to Pursue, Settle, and Abandon Claims and Causes of Action

Subject to the plan and its governing documents, a PCLV operates much like a normal business, subject to the oversight committee. Therefore, bankruptcy court approval is not necessary for most business decisions that the WDO may have to make.

The powers of a WDO are limited, but generally include the power to: sell certain PCLV property; pursue avoidance actions and other litigation to increase the assets of the PCLV; operate PCLV property (to the extent necessary to maintain its value); object to claims against the debtor and settle such claims, including disputed claims; employ attorneys, accountants, and agents; and make distributions to the beneficiaries of the liquidating trust pursuant to the plan.[172]

2. Ability to Sell Assets of a PCLV or to Incur Financing

The PCLV should provide the WDO with the power to sell PCLV property[173] and incur necessary financing,[174] in each case consistent with the PCLV's purpose of maintaining and liquidating the assets for distribution to beneficiaries rather than running an operational business. These decisions may be subject to the approval or review of the oversight committee (at least if the transaction is large enough) but generally is not subject to bankruptcy court approval after the effective date. If the Chapter 11 plan is properly structured, sales of property transferred by the debtor to the PCLV for sale to third-parties may take advantage, pursuant to section 1146(a) of the Bankruptcy Code,[175] of the exemption from transfers from "stamp tax or similar tax."[176]

3. Ability to Invest PCLV Property

The WDO should be given the authority to invest cash and other assets of the PCLV to obtain a market return on such assets pending the distribution of such cash to the beneficiaries.[177]

VII. PCLVS AS LITIGANTS

A. RETENTION OF JURISDICTION CLAUSES AND THEIR EFFECT

Chapter 11 plans typically include a provision regarding the matters over which the bankruptcy court retains jurisdiction after confirmation and the extent of such jurisdiction. Courts have differed over the effect that retention of jurisdiction clauses may have; some courts find that they have no effect, some find them completely enforceable, while still others find that they can only reduce the jurisdiction from the maximum level of jurisdiction permitted by statute.[178]

B. POSTCONFIRMATION JURISDICTION OF THE BANKRUPTCY COURT

Jurisdiction in bankruptcy matters is governed by 28 U.S.C.A. §§ 1334 and 157, but these provisions give little guidance regarding the nature and extent of postconfirmation jurisdiction. Pursuant to 28 U.S.C.A. § 1334, district courts have "original, but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."[179] In turn, 28 U.S.C.A. § 157 allows each district court to provide that "any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district."[180] Most, if not all, district courts have accepted the invitation in 28 U.S.C.A. § 157(a) and have proceeded to establish a standing reference of bankruptcy matters to the bankruptcy courts.[181] Bankruptcy courts can hear and decide on a final basis all "cases" under Chapter 11 and all "core proceedings arising under title 11, or arising in a case under title 11."[182] With respect to certain "non-core" matters, a bankruptcy court can only submit proposed findings of fact and conclusions of law to the district court, which is to conduct a de novo review before entering a final judgment.[183]

Many difficult bankruptcy jurisdiction questions turn on the construction of "related to" jurisdiction. In the preconfirmation context, the general test for whether a civil proceeding satisfies "related to" jurisdiction is whether "*the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy*."[184] In *Pacor, Inc. v. Higgins*, the Third Circuit clarified the general rule by holding that:

> the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the out-

> come could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way has an impact upon the handling and administration of the bankrupt estate.[185]

It is generally accepted that the jurisdiction of a bankruptcy court is reduced after plan confirmation,[186] although the exact extent of postconfirmation jurisdiction is unclear.[187] In *In re Resorts International, Inc.*[188] and *In re Pegasus Gold Corp.*,[189] the Third and Ninth Circuits, respectively, found that, after confirmation of a plan, "related to" jurisdiction only exists where there was a close nexus to the continued plan or proceeding that would be sufficient to uphold bankruptcy court jurisdiction over the matter. Both *Resorts International* and *Pegasus Gold*, however, involved reorganizing debtors, and it is not clear that their holdings are applicable to liquidating debtors. In fact, much of the policy for limiting postconfirmation jurisdiction is only applicable in reorganizing Chapter 11 cases.[190] Practically speaking, though, even in a reorganizing case it should not be hard to establish a sufficient nexus for jurisdiction. As the *Pegusus* court held, a nexus is established if the postconfirmation matter "could affect the implementation and execution of the plan.[191] It is hard to imagine a postconfirmation matter where a party would need or seek the intervention of the bankruptcy court that would not implicate the implementation or execution of the plan.

C. RETENTION OF CLAIMS AND CAUSES OF ACTION AND TRANSFER TO PCLVS

The Chapter 11 plan should provide for the retention after confirmation and the transfer to the PCLV of any assets necessary to make up the liquidating trust, including any claims or causes of action to be pursued.

While the use of creditors' committees, preconfirmation, to pursue derivative actions on behalf of the estate has been questioned recently,[192] a representative of the estate (such as a PCLV) appointed pursuant to section 1123(b)(3)(B) is generally not subject to the same sort of standing issues.[193] In order to provide the PCLV with standing to pursue the claims and causes of action transferred by the debtor, Code section 1123(b)(3) presents three general requirements, which are discussed in turn below.

The first requirement under section 1123(b)(3) is that "the plan must retain the claims to be asserted."[194] However, it is not clear how specifically a plan must describe a claim or cause of action in order to retain that claim or cause of action for postconfirmation enforcement since courts

have reached conflicting positions.[195] In order to retain a claim or cause of action, the plan must "clearly evince the debtor's intent to reserve claims" and not just be a "mere blanket reservation" of rights.[196] Plan provisions identifying claims and causes of action by type or category have been held not to be mere blanket reservations[197] and, therefore, sufficient to satisfy the standard under section 1123(b)(3).[198] Other courts, however, have applied a significantly stricter test requiring the plan to "specifically and unequivocally" describe each action to be retained.[199] Thus a PCLV may be precluded from postconfirmation recovery on claims and causes of actions that are not properly retained under the plan.[200] In addition to specifying the claims and causes of action to be pursued postconfirmation, it is important for the plan to identify the potential parties of such claims and causes of action[201] when practical.

The second requirement under section 1123(b)(3) is that "if the person seeking to enforce the claim is a stranger to the estate, the person must be appointed and be a representative of the estate…Courts will employ a case-by-case analysis to determine whether an appointed party's responsibilities qualify it as a proper representative of the estate.[202] The "primary concern is whether a successful recovery by the appointed representative would benefit the debtor's estate and particularly…the debtor's unsecured creditors."[203] Although recent cases have raised some doubt as to whether a creditors' committee can be given standing to prosecute estate claims preconfirmation,[204] a plan-authorized PCLV should have standing due to the explicit authorization of section 1123(b)(3) for postconfirmation estate representatives in conjunction with the bankruptcy court's approval of the plan.[205]

The third requirement under section 1123(b)(3) of the Bankruptcy Code is that "[t]he claims that are being reserved by the plan for later enforcement and adjudication must belong to the estate of the debtor' because 'the plan may only preserve those claims that a trustee in bankruptcy, or a debtor in possession, could have asserted prior to confirmation."[206] Also, according to the *Premium Escrow* court:

> If a [PCLV] prosecutes a cause of action that did not belong to the debtor or the estate prior to confirmation, that cause of action belongs to the [PCLV] personally rather than in its capacity as representative of the debtor's estate. As a personal claim, rather than a

cause of action wielded on behalf of the estate, such a claim is not subject to a court's jurisdiction under 28 U.S.C.A. § 1334.[207]

Most courts have found the broad definition of "claim" in section 101(5) to include avoidance actions in the context of Section 1123(b)(3)(B).[208] It should be noted, however, that in *Hartford Underwriters Ins. Co. v. Union Planters Bank N.A.*,[209] the Supreme Court held that the phrase "the trustee may" means that such an action is available to a trustee or a debtor-in-possession[210] but not to a third-party.[211] Each of the Bankruptcy Code sections governing avoidance actions provide that "the trustee may" pursue such avoidance actions.[212] Thus, although the Supreme Court limited the scope of its decision so as to not address the validity of "derivative standing,"[213] it has been suggested that section 1123(b)(3)(B) of the Bankruptcy Code cannot be used to designate an estate representative to pursue avoidance actions.[214] *Hartfords* can be distinguished, however, because, unlike the third-party in *Hartford*, the powers of a PCLV are derived from the explicit terms of a plan (and the PCLV's governing documents) that was subject to vote by creditors and confirmation by the bankruptcy court.

D. INVESTIGATION AND PURSUIT OF ESTATE CLAIMS AND CAUSES OF ACTION

The ability of a PCLV to maximize the value of its assets for its beneficial holders is dependent to a large degree on the tools available for investigating and prosecuting estate claims and causes of action.[215] This issue will become more prominent as the use of PCLVs grows and as the ability to investigate and assert estate claims preconfirmation diminishes under BAPCPA

Of primary concern is whether a PCLV can employ Fed. R. Bankr. P. 2004 examinations as a means to investigate potential claims.[216] In one recent case, the Southern District of Georgia held that a creditor trust could pursue 2004 subpoenas originally issued by the debtor prior to confirmation and directed to the debtor's former auditors preconfirmation.[217] Although Rule 2004 examinations are more commonly used in preconfirmation discovery, the court noted that "it is also true that courts often authorize Rule 2004 examinations post-confirmation" and that a "Rule 2004 examination is a broad tool and is often referred to as a 'fishing expedition.'"[218] In this particular case, the confirmation order authorized the creditors' trust to enforce the Bankruptcy Rule 2004 subpoenas in ques-

tion, and the court found that such enforcement was "critical to compliance with, and execution of, the plan; without the Rule 2004 authorization for the Trust, there would be no plan."[219] As such, the court found that subpoenas had a "close nexus" to the implementation of the plan and came within the court's postconfirmation "related to" jurisdiction.

In pursuing recovery actions, PCLVs must be careful to take into account any time limitations imposed by the PCLV's organizational documents and/or the confirmation order. For example, PCLV's have lost their ability to seek recovery from former debtor insiders when, by the explicit terms of the trust document, the trust expired.[220] This does not mean, however, that the expiration of the PCLV would moot claims against the PCLV,[221] nor would a question regarding the defendant's standing necessarily preclude the PCLV from maintaining an action.[222]

Moreover, a PCLV's ability to bring suit based on claims not owned or assigned by the estate and instead directly assigned by creditors to the PCLV is unsettled. One court has held that although Code section 546(e) precluded a PCLV from bringing suit to recover security settlement payments from former shareholders, section 546(e) did not bar the PCLV's claims under Delaware law "as a direct assignee of unsecured creditors."[223] However, "'[a] bankruptcy trustee has no standing generally to sue third parties on behalf of the estate's creditors, but may only assert claims held by the bankrupt corporation itself.'"[224]

Furthermore, the doctrine of in pari delicto—"[t]he defense of *in pari delicto* is intended for situations in which the victim is a participant in the misconduct giving rise to his claim"[225]—can preclude a PCLV from pursuing claims in which the debtor's or its management's conduct is implicated.[226] It is a fundamental principle of agency law that misconduct of management will be imputed to the corporation, and thus "[w]here a corporation's management and a third party collaborated in the fraudulent scheme, the trustee can sue only if it can establish that there has been damage to the third-party creditors."[227]

E. POSTCONFIRMATION ENFORCEMENT OF ARBITRATION CLAUSES

A significant issue for PCLVs is whether postconfirmation jurisdiction may be asserted over claims and causes of action arising out of prepetition agreements that provided for the arbitration of any such disputes.[228] The enforceability of arbitration agreements with respect to a debtor is

relatively well-settled, and much has been written about it,[229] but there are very few decisions in the context of PCLVs.[230]

The Federal Arbitration Act (FAA)[231] provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon which grounds as exist at law or equity for the revocation of any contract."[232] Generally, however, with respect to "core" matters, an arbitration provision will not be enforced if the enforcement of the arbitration provision would undermine a substantial purpose of the Bankruptcy Code.[233] In contrast, with respect to "non core" matters, the bankruptcy court must enforce an applicable arbitration provision.[234] A bankruptcy court's refusal to stay an adversary procedure, though interlocutory in nature, is nonetheless appealable under section 16 of the FAA.[235]

The enforceability of an arbitration provision can be confusing (and cumbersome) for PCLVs, particularly if the PCLV is pursuing both core and non-core claims.[236] At least one court has held that a PCLV can be compelled to arbitrate non-core matters (that are subject to an appropriate arbitration provision) but that a PCLV could not be compelled to arbitrate fraudulent transfer actions.[237]

Importantly, a "contractual right to arbitrate may be waived expressly or implicitly, and a party that chooses a judicial forum for the resolution of a dispute is presumed to have waived its right to arbitrate."[238] Courts will examine the totality of circumstances to determine if a party has waived the right to arbitrate by acting inconsistently with the right to arbitrate, with lack of diligence weighing heavily.[239] It has therefore been held that, following plan confirmation, a debtor's auditors had waived their contractual right to arbitrate a fraudulent transfer adversary brought preconfirmation because (1) defendants had initially indicated an intention to proceed with litigation not arbitration, (2) the plan provided that the bankruptcy court retained jurisdiction to adjudicate previously pending adversary actions, and (3) the auditors participated in the plan process, objecting to the plan, and only sought arbitration after plan confirmation.[240]

F. LITIGATION AGAINST FORMER INSIDERS OR OTHER ENTITIES INDEMNIFIED BY THE DEBTOR

PCLVs commonly pursue causes of action against former insiders of the debtor or other entities who may have a claim for indemnification against the debtor. PCLVs should be aware that, in the context of an ac-

tion against former insiders of a debtor (or other indemnified parties), where the reimbursement of the defendant's costs and attorney's fees is dependant on the challenged conduct having been undertaken in good faith, the final determination of good faith may not be a prerequisite to the advancement of litigation costs.[241] "It is well settled that absent an express indemnification agreement, implied indemnification is appropriate only in the context of vicarious liability."[242] Where the alleged indemnitee's own wrongdoing contributed to the injury, indemnity will not lie.[243] Litigation against insiders can raise issues beyond indemnification as well, such as the right to assert attorney-client privilege.[244]

G. MODIFICATION OF CONFIRMED PLAN

Once a plan has been substantially consummated, it cannot be modified.[245] Moreover, any modification preconsummation can be requested only by the debtor or plan proponent, thereby likely precluding a PCLV, in its own name, from seeking such relief.[246] However, it would appear to be permissible for a PCLV to seek the clarification of a provision of a substantially consummated plan pursuant to section 1142 of the Bankruptcy Code, which authorizes postconfirmation bankruptcy orders "necessary for the consummation of the plan."[247]

VIII. TERMINATION

Typically, a liquidating trust terminates in accordance with its terms, whether because the claims reconciliation process, the liquidation of assets, the pursuit of litigation, and the distribution of assets have all been completed or because the duration of the liquidation vehicle, under its governing documents, has expired.

A liquidating trust established under a Chapter 11 plan may not qualify as a "business trust" in order to eligible for Chapter 11 protection. It is not clear whether any liquidating trusts established under a Chapter 11 plan have sought bankruptcy protection themselves. However, there are a few cases involving liquidating trusts, which had been established outside of bankruptcy to wind up a corporation's affairs, subsequently seeking Chapter 11 protection and determining whether these liquidating trusts constituted "business trusts" under section 101(9) of the Bankruptcy Code.[248] These cases have reached differing results depending on the extent to which the liquidating trust engaged in business and on the extent to which its governing documents permitted it to be so engaged.[249] Based on these cases, while it is possible that a liquidating trust established pur-

suant to a Chapter 11 plan will be eligible, efforts taken to obtain favorable tax status are likely to cut against the liquidating trust being determined to be a "business trust."[250]

IX. CONCLUSION

Recent years have seen an increased use in PCLVs to perform a myriad of postconfirmation tasks that a Chapter 11 debtor is unwilling or unable to do. PCLVs can be used as a tool to expedite confirmation and incentivize otherwise "out-of-the-money" creditors to support confirmation. While PCLVs are not a panacea that can cure all postconfirmation ills, their use should continue to grow in coming years as BAPCPA imposes tighter plan confirmation deadlines that Chapter 11 debtor management must focus on meeting and because, although BAPCPA will reduce preference litigation, Sarbanes-Oxley will likely lead to more complex long-term litigation claims that will not easily fit into BAPCPA's confirmation agenda.

Research References:

Bankr. Serv., L Ed § 34:34, 44:231; Norton Bankr. L. & Prac. 2d §§ 79:16; 90:8; 8 Norton Bankr. L. & Prac. 2d 11 U.S.C. § 1141

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NOTES

1. 11 U.S.C.A. § 1141(b). Despite the language of section 1141(b), numerous courts have held that section 1141(b) does not permit a debtor to pursue a preference or other actions postconfirmation when that cause of action has not been specifically retained in the Chapter 11 plan pursuant to section 1123(b)(3). See, e.g., Browning v. Levy, 283 F.3d 761, 774-75, 27 Employee Benefits Cas. (BNA) 1948, 2002 FED App. 0088P (6th Cir. 2002); D & K Properties Crystal Lake v. Mutual Life Ins. Co. of New York, 112 F.3d 257, 261, 37 Collier Bankr. Cas. 2d (MB) 1380, Bankr. L. Rep. (CCH) P 77400 (7th Cir. 1997); Harstad v. First American Bank, 39 F.3d 898, 902-03, 26 Bankr. Ct. Dec. (CRR) 310, 32 Collier Bankr. Cas. 2d (MB) 542, Bankr. L. Rep. (CCH) P 76185 (8th Cir. 1994); see also 3 Collier Bankruptcy Manual, ¶ 1123.02[3][b] (3d ed. rev.); Norton Bankr. L. & Prac. 2d § 90:12.

2. In some cases, the terms for selecting oversight committee membership can be surprisingly complex. See Joint Chapter 11 Plan of Refco Inc. and Certain of its Direct and Indirect Subsidiaries (the Refco Plan), at § 5.11(b), In re Refco, Inc., Case No. 05-60006 (RDD) (Bankr. S.D.N.Y. Oct. 20, 2006).

3. See, e.g., Refco Plan, at §§ 5.7, 5.8 (providing for creation of litigation trust and private actions trust); Supplemental Modified Fifth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code (the Enron Plan), at Arts. XXII to XXVII, In re Enron Corp., Case No. 01-16034 (AJG) (Bankr. S.D.N.Y. Jul. 2, 2004) (providing for the establishment of a number of trusts, including those established to hold the equity of certain Enron operating assets, including Prisma Energy International, Inc., CrossCountry Distributing Com-

pany, and Portland General Electric Company, which were sold or distributed to creditors pursuant to the Enron Plan).

4. See, e.g., Plan Supplement to Fifth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code (the Enron Plan Supplement), at Sched. A, § 1.5, In re Enron Corp., Case No. 01-16034 (AJG) (Bankr. S.D.N.Y. Mar. 9, 2004) (stating that "litigation trust" is "liquidating trust" under applicable Treasury regulations); Refco Plan, at Ex. F, §1.4(a). "An organization will be considered a liquidating trust if it is organized for the primary purpose of liquidating and distributing the assets transferred to it, and if its activities are all reasonably necessary to, and consistent with, the accomplishment of that purpose." Treas. Reg. section 301.7701-4(d); accord Rev. Proc. 94-45, 1994-2 C.B. 684 (1994).

5. In at least some cases, what is described as a postconfirmation estate may really be a liquidating trust by another name. See Third Amended Joint Liquidating Plan of Reorganization of the Debtors and the Official Committee of Unsecured Creditors Pursuant to Chapter 11 of the United States Bankruptcy Code (the TWA Plan), at §§ I.B.111, VIII.A., In re Trans World Airlines, Inc., Case No. 01-00056 (PJW) (Bankr. D. Del. June 14, 2002) ("Post Confirmation Estate" defined as "The grantor trust to be created on the Effective Date in accordance with the provisions of Article VII of the Plan and the Post Confirmation Estate Agreement for the benefit of Holders of certain Allowed Claims." The "Post Confirmation Estate" was established for the "primary purpose of liquidating its assets, in accordance with Treasury Regulation Section 301.7701-4(d)." Effectively, this postconfirmation estate is a liquidating trust under another name.); Debtors' Joint Liquidating Plan Under Chapter 11 of the Bankruptcy Code Dated January 16, 2003, at § IV.F., In re Homelife Corp., Case No. 01-2412 (RB) (Bankr. D. Del. Jan. 16, 2003) (providing that postconfirmation estate will be "treated as a 'liquidating trust'" under the applicable Treasury regulations).

6. See, e.g., Modified Third Amended Liquidating Joint Plan of Reorganization of GCO Services, LLC and Gfinancial, LLC Under Chapter 11 of the Bankruptcy Code, at §§ 7.01, 7.02, In re GCO Services, LLC and Gfinancial, LLC, Case No. 02-15360 (ALG) (Bankr. S.D.N.Y. Mar. 11, 2004) (providing for appointment of "Responsible Officer" to administer wind down of debtors); In re GCO Services, LLC and Gfinancial, LLC, Case No. 02-15360 (ALG) (Bankr. S.D.N.Y. May 5, 2005) (stating that "Responsible Officer [is] charged with administration of Debtors' postconfirmation estates"). The postconfirmation estate may be a default result, substantially similar to a PCLV but less formal. Thus most recent debtors have preferred the more structured approach of using a PCLV.

7. See, e.g., In re Owens Corning,, Case No. 00-3837 (JKF) (Bankr. D. Del. Sept. 28, 2006) (remaining in Chapter 11 for almost six years prior to filing a plan of reorganization); In re UAL Corp., Case No. 02-48191 (Bankr. N.D. Ill. Jan. 20, 2006) (debtor requiring more than three years to confirm a plan).

8. 11 U.S.C.A. § 1121(d)(2).

9. See, e.g., In re Geneva Steel LLC, Case No. 02-21455 (Bankr. D. Ut.) (Approximately a year after emerging bankruptcy, debtor filed subsequent Chapter 11 where there was a considerable chance that even the secured bank group would be impaired. A couple of years later, the market for steel and steel-making equipment had improved so dramatically that secured creditors received payment in full, including interest and fees, and a significant distribution to unsecured creditors was made from liquidating sale of debtor's equipment and other assets.).

10. See, e.g., Debtors' Second Motion to Extend Their Exclusive Periods to File and Solicit Votes for Their Chapter 11 Plan, In re Calpine Corp., Case No. 05-60200 (BRL) (Bankr. S.D.N.Y. Nov. 22, 2006) ("As a result [of the exclusivity restrictions in Section 1121(d)(2)], at the 18th month of these cases, Calpine may face the proverbial Hobson's Choice of filing a plan that is not the most confirmable plan practicable, or suffering an expiration of the [e]xclusive [p]eriods with no plan on file.").

11. See 11 U.S.C.A. § 1129(c) ("[t]he court shall confirm a plan only if all of the following requirements are met").

12. Harold S. Novikoff & Andrew S. Jacobs, Post-Confirmation Issues: Ascertaining The Effective Date; Post-Confirmation Jurisdiction; Serial Filing; Post-Confirmation Litigation Vehicles, SK092 ALI-ABA 631, 635 (June 2005) (quoting Kenneth K. Klee, Adjusting Chapter 11: Fine Tuning the Plan Process, 69 Am. Bankr. L.J. 551, 560-61 (1995)); see also In re Potomac Iron Works, Inc., 217 B.R. 170, 172 n.1, Bankr. L. Rep. (CCH) P 77601, 80 A.F.T.R.2d 97-8418 (Bankr. D. Md. 1997) (also listing Bankruptcy Code sections in which the term "effective date" appears); Benjamin Weintraub & Michael J. Crames, Defining Consummation, Effective Date of Plan of Reorganization and Retention of Postconfirmation Jurisdiction: Suggested Amendments to the Bankruptcy Code and Bankruptcy Rules, 64 Am. Bankr. L.J. 245, 276 (1990) ("Effective Date is the date upon which a confirmed plan becomes operative and distribution of property and cash is commenced."). Cf. Fed. R. Bankr. P. 3020(e) (unless court orders otherwise, an order confirming a plan is stayed for 10 days following the entry of the confirmation order).

13. 11 U.S.C.A. § 1101(2).

14. See 11 U.S.C.A. § 1129.

15. Novikoff & Jacobs, SK092 ALI-ABA 631 at 636.

16. Courts have invalidated effective dates that were distant, indefinite, or that otherwise violated provisions of the Bankruptcy Code. See Novikoff & Jacobs, SK092 ALI-ABA 631 at 638. See In re Central European Industrial Development Co. LLC, 288 B.R. 572 (Bankr. N.D. Cal. 2003) (effective date should be reasonably close to confirmation date where delay is likely to prejudice creditors.); In re Yates Dev. Inc., 258 B.R. at 42 (Bankr. M.D. Fla. 2000) (an effective date is unreasonable when defined as the time when "an appellate court issues a ruling that [an] increase in the purchase price of the [optioned] property is unenforceable…[since] the only circumstance under which an effective date exists is a future appellate ruling in Debtor's favor."); In re Krueger, 66 B.R. 463, 465 (Bankr. S.D. Fla. 1986) (four-month delay between confirmation and effective date unreasonably resulted in creditors' subsidizing plan).

17. See Potomac Iron Works, 217 B.R. at 173 ("The effective date plays an important role in valuation and should therefore be set forth in the plan with specificity.")

18. See, e.g., Krueger, 66 B.R. at 465 (effective date set at approximately four months after confirmation hearing date not permitted because "[a]n effective date deferred beyond the interval essential for liquidation (not more than 45 days in this instance) is unreasonable."); In re Jones, 32 B.R. 951, 958 n.13, 10 Bankr. Ct. Dec. (CRR) 1446, 9 Collier Bankr. Cas. 2d (MB) 451, Bankr. L. Rep. (CCH) P 69374 (Bankr. D. Utah 1983); see also In re Luchenbill, 112 B.R. 204, 216, 20 Bankr. Ct. Dec. (CRR) 534 (Bankr. E.D. Mich. 1990) (holding that if a Chapter 12 plan fails to specify an effective date, the confirmation hearing date shall be the effective date); Matter of Milleson, 83 B.R. 696, 699 (Bankr. D. Neb. 1988) (effective date of Chapter 12 plan must be within one year of confirmation order entry).

19. See, e.g., In re T-H New Orleans Ltd. Partnership, 188 B.R. 799, 805 (E.D. La. 1995) , aff'd, 116 F.3d 790, 31 Bankr. Ct. Dec. (CRR) 114, 38 Collier Bankr. Cas. 2d (MB) 458 (5th Cir. 1997) (permitting effective date conditioned upon the exhaustion of appeal rights); Continental Securities Corp. v. Shenandoah Nursing Home Partnership, 188 B.R. 205, 216-17 (W.D. Va. 1995) (approving plan where payments would be made 10 days after confirmation order became final, where date confirmation order would become final was unclear); Potomac Iron Works, 217 B.R. at 174 (holding that a one-year-plus delay between confirmation order and effective date was unreasonable); In re Wonder Corp. of America, 70 B.R. 1018, 1021-22, 15 Bankr. Ct. Dec. (CRR) 812, 16 Collier Bankr. Cas. 2d (MB) 566 (Bankr. D. Conn. 1987) (an "effective date," in substance, to occur on 20th business day following date upon which confirmation order becomes final found reasonable, particularly "in recognition of a prospective lender's reluctance to advance funds until the appeal period has passed"); In re Loveridge Mach. & Tool Co., Inc., 36 B.R. 159, 167, 170-71, 11 Bankr. Ct. Dec. (CRR) 485, 9 Collier Bankr. Cas. 2d (MB) 1329, Bankr. L. Rep.

(CCH) P 69546 (Bankr. D. Utah 1983) (an effective date set at 30 days after confirmation order becomes final may be permissible).

20. See In re Inter Urban Broadcasting of Cincinnati, Inc., 1994 WL 646176, at *3 (E.D. La. 1994), dismissed, 74 F.3d 1238 (5th Cir. 1995) (permitting effective date defined in reference to the closing date of the sale of a radio station, which in turn was defined as no later than 15 days after the later of (i) FCC approval of the assignment of FCC licenses to the buyer or (ii) the confirmation order becoming final); Wonder Corp., 70 B.R. at 1021 (noting that an effective date is acceptable if it "is linked to the happening of a particular event and is no later than is reasonably necessary to accomplish a legitimate purpose such as the determination of administrative expenses or the resolution of objections to claims"); Krueger, 66 B.R. at 465 (implying that effective date may be deferred for a limited interval essential to conduct a liquidation); In re Rolling Green Country Club, 26 B.R. 729, 734-35, 9 Bankr. Ct. Dec. (CRR) 1195, Bankr. L. Rep. (CCH) P 68939 (Bankr. D. Minn. 1982) (confirming alternate plan, but approving of an effective date defined as when liquidation proceeds became sufficient to make payments required under the plan).

21. See, e.g., Refco Plan, at § 9.2; Conformed Joint Plan of Reorganization of US Airways, Inc. and its Affiliated Debtors and Debtors-in-Possession, at § 12.2, In re US Airways, Inc., Case No. 04-13819 (Bankr. E.D. Va. Sept. 16, 2005); see also Wonder Corp. of America, 70 B.R. at 1020 (occurrence of the effective date on the date of confirmation, or shortly thereafter, is "conceptually attractive, [but] in the real world of bankruptcy reorganization, it may not be attainable.").

22. See 9 Collier on Bankruptcy, ¶ 3022.01 (15th ed. rev. 2006); Norton Bankr. L. & Prac. 2d § 92:37.

23. Fed. R. Bankr. P. 3022.

24. Advisory Committee Note (1991) to Fed. R. Bankr. P. 3022, reprinted in 9 Collier on Bankruptcy, App. 3022[2] (15th ed. rev. 2006); 9 Norton Bankr. L. & Prac. 2d Fed. R. Bankr. P. 3022.

25. Advisory Committee Note (1991) to Fed. R. Bankr. P. 3022, reprinted in 9 Collier on Bankruptcy, App. 3022[2] (15th ed. rev. 2006); 9 Norton Bankr. L. & Prac. 2d Fed. R. Bankr. P. 3022.

26. In re Malden Mills Industries, Inc., 47 Bankr. Ct. Dec. (CRR) 181, 2007 WL 140818, at *3 n. 5 (Bankr. D. Mass. 2007) (stating that a court can reopen a closed case sua sponte) (citing 3 Collier on Bankruptcy ¶ 350.03[8] (15th ed. rev. 2006); Advisory Committee Note (1991) to Fed. R. Bankr. P. 3022, reprinted in 9 Collier on Bankruptcy, App. 3022[2] (15th ed. rev. 2006); 9 Norton Bankr. L. & Prac. 2d Fed. R. Bankr. P. 3022.

27. See 11 U.S.C.A. § 350(b); Fed. R. Bankr. P. 5010; In re Crocker, 2007 WL 93223, at * 2 (B.A.P. 1st Cir. 2007) ("It is well settled that the decision to reopen a case is within the sound discretion of the bankruptcy court. 'This discretion depends upon the circumstances of the individual case and accords with the equitable nature of all bankruptcy proceedings.'") (citing In re McGuire, 299 B.R. 53, 55, 12 A.L.R. Fed. 2d 841 (Bankr. D. R.I. 2003) and quoting Matter of Case, 937 F.2d 1014, 1018, 21 Bankr. Ct. Dec. (CRR) 1610, 25 Collier Bankr. Cas. 2d (MB) 368, Bankr. L. Rep. (CCH) P 74206, 20 Fed. R. Serv. 3d 881 (5th Cir. 1991)); In re Jordan Mfg. Co., Inc., 138 B.R. 30, 35 (Bankr. C.D. Ill. 1992); Advisory Committee Note (1991) to Fed. R. Bankr. P. 3022, reprinted in 9 Collier on Bankruptcy, App. 3022[2] (15th ed. rev. 2006); 9 Norton Bankr. L. & Prac. 2d Fed. R. Bankr. P. 3022.

28. E.g., In re Montgomery Ward Holding Corp., 306 B.R. 489 (Bankr. D. Del. 2004) (quoting In re W.R.M.J. Johnson Fruit Farm, Inc., 107 B.R. 18, 19 (Bankr. W.D. N.Y. 1989) (quoting U.S. v. Redmond, 36 B.R. 932, 934, 10 Collier Bankr. Cas. 2d (MB) 1428, Bankr. L. Rep. (CCH) P 69832 (D. Kan. 1984))); see also In re T.S.P. Industries, Inc., 117 B.R. 375, 377, 20 Bankr. Ct. Dec. (CRR) 1401 (Bankr. N.D. Ill. 1990) (upon confirmation, the "debtor is…no longer a debtor in possession and the bankruptcy estate ceases to exist unless the plan provides otherwise"). In re W.R.M.J. Johnson Fruit Farm, Inc., 107 B.R. 18, 19 (Bankr. W.D. N.Y. 1989), citing U.S. v. Redmond, 36 B.R. 932, 934, 10 Collier Bankr. Cas. 2d (MB) 1428, Bankr. L. Rep. (CCH) P 69832 (D. Kan. 1984). See also In re T.S.P. Industries, Inc., 117 B.R. 375, 377, 20 Bankr. Ct. Dec. (CRR)

1401 (Bankr. N.D. Ill. 1990) (the "debtor is no longer a debtor in possession and the bankruptcy estate ceases to exist unless the plan provides otherwise").

29. See, e.g., In re Troutman Enterprises, Inc., 253 B.R. 1, 5, 36 Bankr. Ct. Dec. (CRR) 207, 44 Collier Bankr. Cas. 2d (MB) 1719, Bankr. L. Rep. (CCH) P 78286, 2000 FED App. 0008P (B.A.P. 6th Cir. 2000), decision vacated, 286 F.3d 359, 39 Bankr. Ct. Dec. (CRR) 66, 47 Collier Bankr. Cas. 2d (MB) 1620, 2002 FED App. 0092P (6th Cir. 2002) (vacating BAP decision on basis of standing and not reaching substantive issues of law); In re K & M Printing, Inc., 210 B.R. 583, 585, 31 Bankr. Ct. Dec. (CRR) 247, Bankr. L. Rep. (CCH) P 77513 (Bankr. D. Ariz. 1997); T.S.P., 117 B.R. at 377 (noting that postconfirmation conversion would not cause property to revest into Chapter 7 estate, unless so provided by plan); T.S.P., 117 B.R. at 377; see also The Effect of Confirmation of a Chapter 11 Plan of Reorganization, 22 Bankr. L. Letter, No. 1 (Jan. 2002) at 5-8 (discussing cases on both sides of the unsettled issue).

30. See T.S.P., 117 B.R. at 378.

31. See T.S.P., 117 B.R. at 378.

32. K&M Printing, 210 B.R. at 585.

33. See, e.g., In re Consolidated Pioneer Mortg. Entities, 264 F.3d 803, 38 Bankr. Ct. Dec. (CRR) 94, 46 Collier Bankr. Cas. 2d (MB) 1125, Bankr. L. Rep. (CCH) P 78504 (9th Cir. 2001); In re RJW Lumber Co., 262 B.R. 91 (Bankr. N.D. Cal. 2001).

34. The substance of pre-BAPCPA subsections 1112(b)(7) and (8) has been recodified by BAPCPA as new subsections 1112(b)(4)(M) and (N).

35. See Consolidated Pioneer, 264 F.3d at 807 n.2. See also The Effect of Postconfirmation Conversion to Chapter 7, 22 Bankr. Law Letter, No. 1 (January 2002) at 6.

36. See Consolidated Pioneer, 264 F.3d at 807 n.2; see also Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n, 997 F.2d 581, 589-590, 29 Collier Bankr. Cas. 2d (MB) 470, Bankr. L. Rep. (CCH) P 75331, 1993-1 Trade Cas. (CCH) P 70285 (9th Cir. 1993) (postconfirmation, assets remained part of the estate due to unusual plan provisions providing that the debtor's business would be operated subject to bankruptcy court jurisdiction postconfirmation and that debtor did not receive a discharge upon confirmation but contemplated a discharge in the future).

37. See Consolidated Pioneer, 264 F3d at 807-08; see also In re Smith, 201 B.R. 267, 274 (D. Nev. 1996), aff'd, 141 F.3d 1179 (9th Cir. 1998) (reasoning of T.S.P. "would virtually eliminate the power of courts to convert confirmed plans," as provided in section 1112(b)); RJW Lumber, 262 B.R. at 93.

38. Bankruptcy claims have been estimated to constitute "a market of at least $300 billion." Joseph Rebello, Ruling on Claims Trading Spurs Fears of Broad Harm to U.S. Capital Markets, The Daily Bankruptcy Review at 11 (Aug. 18, 2006).

39. There tend to be two types of investors in distressed debt: (i) passive investors seeking to exploit inefficiencies in the market for relatively quick trading profits, and (ii) those longer-term investors that seek to acquire enough of the debtor to have influence in the restructuring process and see their competitive advantage, at least in part, as coming from their ability to influence the restructuring process. David M. Toll, Judge Deals Blow to Distressed-Debt Market, Daily Bankruptcy Review 12 (Apr. 13, 2006). It is largely (though not wholly) the former that seek to speed up a restructuring.

40. See Debtors' Motion for Order Authorizing the Partial Repaymernt of Principal of Secured Trade Debt, at ¶ 15, In re Musicland Holding Corp., Case No. 06-10064 (SMB) (Bankr. S.D.N.Y. Jul 24, 2006) (the repayment of some of the secured debt owed to sophisticated institutions like UBS "would benefit the holders in that their acceptable investment risk level would likely allow them to earn more than the investment return…[from the] low risk bank deposits acceptable to the U.S. Trustee."); cf. In re Conroe Forge & Mfg. Corp., 82 B.R. 781, 785-787, 17 Bankr. Ct. Dec. (CRR) 138, 18 Collier Bankr. Cas. 2d (MB) 577 (Bankr. W.D. Pa. 1988) (Undersecured creditor sought distribution of proceeds from sale of collateral on basis that "it would

receive a much greater return if it is paid the proceeds now and is able to use them in the ordinary course of its business" rather than receiving distributions with interest after confirmation. Court denied this request as unnecessary to adequately protect creditor and noted that "if distribution is made to creditors in a liquidating Chapter 11 before confirmation of a plan there will be little incentive for parties in interest to prosecute the case in an expeditious manner much less to perform the work required to issue and obtain approval of a disclosure statement and plan.") (citations omitted).

41. Novikoff & Jacobs, SK092 ALI-ABA at 659.

42. Novikoff & Jacobs, SK092 ALI-ABA at 659.

43. Novikoff & Jacobs, SK092 ALI-ABA at 659; see, e.g., In re Coral Petroleum, Inc., 249 B.R. 721, 725, 44 Collier Bankr. Cas. 2d (MB) 524 (Bankr. S.D. Tex. 2000) (The liquidating trustee had not filed a final report to close bankruptcy case some 12 years after the plan had been confirmed.)

44. James H.M. Sprayregen, Jonathan P. Friedland, and Roger J. Higgins, Chapter 11: Not Perfect but Better than the Alternative, 14 J. Bankr. L. & Prac. 3 (November/December 2005).

45. Linda F. Cantor, Post-Confirmation Issues, 090805 ABI-CLE 195, at § I.C.1.a. (2005).

46. Cantor, 090805 ABI-CLE 195, at § I.C.1.a.

47. Cantor, 090805 ABI-CLE 195, at § I.C.1.a.

48. See Debtors' Second Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, at Art. VII.B., In re Foamex Int'l, Inc., Case No. 05-12685 (PJW) (Bankr. D. Del. Nov. 27, 2006) (permitting common and preferred equity holders to participate in $150 million rights offering to in connection with emergence from Chapter 11); First Amended Joint Chapter 11 Plan for Reorganizing Debtors at Art. VII, In re ATA Holdings Corp., Case No. 04-19866 (Bankr. S.D. Ind. Dec. 14, 2005) (permitting "accredited investors" among unsecured creditors to participate in rights offering for up to 20.31% of equity in reorganized debtor in case where unsecured creditors were projected to receive recovery of 0.51% to 0.71%).

49. See First Amended Plan of Liquidation of C8 Airlines, Inc. F/K/A Chicago Express Airlines, Inc., at Introduction and §§ 3.2 and 5.6, In re ATA Holdings Corp., Case No. 04-19866 (Bankr. S.D. Ind. Mar. 30, 2006) (in case expected to be administratively insolvent, the former parent of debtor and predominant administrative creditor agreed to distribution to general unsecured creditors of the lesser of (i) $1 million and (ii) one-half of the amounts, net, of attorney's fees and other professionals' fees and expenses recovered through the prosecution of avoidance actions).

50. See Novikoff & Jacobs, SK092 ALI-ABA at 658.

51. See Novikoff & Jacobs, SK092 ALI-ABA at 658; see also James Gallagher, Creditor Trusts: Maximizing Creditor Recoveries, 25-APR Am. Bankr. Inst. J. 24 (2006) (use of "the trust allows the employment of just one set of professionals to continue the wind-down of the remaining assets of the debtor [as opposed to]…three or more groups").

52. Jeffrey Ayres, Liquidating Trust Structure is Key to Maximizing Payouts, J. Corp. Renewal at 32 (Oct. 2006).

53. Simon Friedman & Russell Kestenbaum, Fixed and Contingent Claims in Bankruptcy—Liquidating Trusts and Partnerships, 733 PLI/Tax 251, 264 (2006).

54. The term "grantor trust" is used in the Internal Revenue Code to describe any trust over which the grantor or other owner retains the power to control or direct the trust's income or assets. If a trust is a grantor trust, then the grantor is treated as the owner of the assets, the trust is disregarded as a separate tax entity, and all income is taxed to the grantor. In other words, a trust could be both a "liquidating trust" and a "grantor trust."

55. Friedman & Kestenbaum, 733 PLI/Tax at 264.

56. Novikoff & Jacobs, SK092 ALI-ABA at 656; Friedman & Kestenbaum, 733 PLI/Tax at 265 (citing Rev. Rul. 80-150, 1980-1 C.B. 316; Rev. Rul. 72-137, 1972-1 C.B. 101.). A liquidat-

ing trust can be either a "complex trust" or a "simple trust." The difference is that a complex trust maintains income and expense at the trust level and income tax consequences are paid at the trust level, whereas in a simple trust, all income and expenses, along with the associated tax consequences are passed through to the beneficiaries. See Kevin J. Hamernik, Small Business Bankruptcies, Plans of Liquidation and Tax Considerations, AIRA Journal at 5, 12 n. 2 (April/May 2006). PCLVs taking the form of a liquidating trust are generally simple trusts.

57. Rev. Proc. 94-45, 1994-2 C.B. 648 (citing Rev. Rul. 63-245, 1963-2 C.B. 144).

58. Friedman & Kestenbaum, 733 PLI/Tax at 265.

59. Friedman & Kestenbaum, 733 PLI/Tax at 265 (quoting Treas. Reg. section 301.7701-3(b)(i)).

60. 7Friedman & Kestenbaum, 33 PLI/Tax at 265.

61. The great danger of characterization as a business entity is the possibility that the trust will then be construed and treated as a corporation, with the unwanted consequence that it will be subject to double taxation. The establishment of the "check the box" rules in Treasury Regulation section 301.7701-3 has substantially reduced this possibility. Friedman & Kestenbaum, 733 PLI/Tax at 265.

62. Friedman & Kestenbaum, 733 PLI/Tax at 265.

63. Friedman & Kestenbaum, 733 PLI/Tax at 265 (citing Rev. Rul. 80-150, 1980-1 C.B. 316; Rev. Rul. 72-137, 1972-1 C.B. 101).

64. Friedman & Kestenbaum, 733 PLI/Tax at 265.

65. Friedman & Kestenbaum, 733 PLI/Tax at 265 (Treas. Reg. section 301.7701-4(d)).

66. Friedman & Kestenbaum, 733 PLI/Tax at 265.

67. Friedman & Kestenbaum, 733 PLI/Tax at 265.

68. 1982-2 C.B. 847. According to Friedman & Kestenbaum, 733 PLI/Tax at 266-67, Revenue Procedure 82-58 provides that a trust may be qualified as a liquidating trust if:

(1) The trust is organized for the primary purpose of liquidating the assets transferred to it with no objective to continue or engage in the conduct of a trade or business and its governing instrument so provides.

(2) The trust instrument contains a fixed or determinable termination date that is generally not more than three years from the date of creation of the trust and that is reasonable based on all the facts and circumstances.

(3) In the case of a trust created incident to a corporate liquidation, (a) the trustee is selected by the shareholders of record or a court of competent jurisdiction, and (b) if the trust is to hold assets for unlocated shareholders, due notice has been given to the shareholders in accordance with local law.

(4) The investment powers of the trustee are limited to powers to invest in demand and time deposits in banks or savings institutions, or temporary investments such as short-term certificates of deposit or Treasury bills.

(5) The trust does not receive transfers of any listed stocks or securities, any readily marketable assets, or any operating assets of a going business, and does not receive or retain cash exceeding a reasonable amount to meet claims and contingent liabilities.

(6) The trust does not receive transfers of any unlisted stock of a single issuer that represents 80 percent or more of the stock of that issuer and does not receive transfers of any general or limited partnership interests.

(7) The trust is required to distribute at least annually to known shareholders any proceeds from the sale of assets or income from investments. The trust may retain a reasonable amount of proceeds or income to meet claims and contingent liabilities.

(8) There is a representation that the trustee will make continuing efforts to dispose of the trust assets, make timely distributions, and not unduly prolong the duration of the trust.

69. 1994-2 C.B. 684.

70. Friedman & Kestenbaum, 733 PLI/Tax at 267.

71. Friedman & Kestenbaum, 733 PLI/Tax at 269.

72. This summary of Revenue Procedure 94-45 is quoted verbatim from Friedman & Kestenbaum, 733 PLI/Tax at 267-69.

73. Friedman & Kestenbaum, 733 PLI/Tax at 270.

74. Friedman & Kestenbaum, 733 PLI/Tax at 270.

75. See Friedman & Kestenbaum, 733 PLI/Tax 270.

76. See Friedman & Kestenbaum, 733 PLI/Tax 270-71 ("The practical answer seems to be that one can rely on Revenue Procedure 94-45 outside the bankruptcy context most comfortably in situations in which there is a surrogate for the bankruptcy court, for example a proceeding in state court or in a foreign bankruptcy court, and in which the requirements of the revenue procedure other than those that refer to a bankruptcy court are clearly met. There may, however, be considerable risk in following the revenue procedure in a situation where creditors are engaging in aggressive tax planning.").

77. Friedman & Kestenbaum, 733 PLI/Tax at 271.

78. Friedman & Kestenbaum, 733 PLI/Tax at 271, 282 (also discussing possibility and impact if the debtor retains ownership of the illiquid assets for tax purposes).

79. Friedman & Kestenbaum, 733 PLI/Tax at 272.

80. Friedman & Kestenbaum, 733 PLI/Tax at 290.

81. Friedman & Kestenbaum, 733 PLI/Tax at 290.

82. The use of a partnership as a PCLV is impractical in most larger cases, if for no other reason than the desire to come within the most common and easiest to apply safe harbor from the application of the publicly traded partnership rules, as discussed further in notes 86 through 89, infra, and related text.

83. See Friedman & Kestenbaum, 733 PLI/Tax at 251. Due to the potential for application of the "publicly traded partnership rules" (as discussed below), the partnership should not have more than 100 beneficial owners to qualify for the best known safe harbor. Friedman & Kestenbaum, 733 PLI/Tax at 273-74. In addition, this safe harbor looks through flow-through entities when determining the number of beneficial owners. See Treas. Reg. § 1.7704-1(h)(3).

84. Friedman & Kestenbaum, 733 PLI/Tax at 272.

85. Friedman & Kestenbaum, 733 PLI/Tax at 272-73.

86. Friedman & Kestenbaum, 733 PLI/Tax at 273.

87. Friedman & Kestenbaum, 733 PLI/Tax at 273.

88. Friedman & Kestenbaum, 733 PLI/Tax at 273. Under section 7704(c) of the Internal Revenue Code, a partnership that would be treated as a "publicly traded partnership" will be taxed as a corporation unless, beginning in the first year of being a "publicly traded corporation," 90% or more of the partnership's gross income consists of "qualifying income." See Friedman & Kestenbaum, 733 PLI/Tax at 273 n. 37. Section 7704(d) of the Internal Revenue Code defines "qualifying income" as interest, dividends, real property rents, gain from the sale or disposition of real property, and some gains from the sale or disposition of capital assets.

89. Partnership interests are considered to be traded on an "established securities market" if they are traded on a national exchange, some foreign or local exchanges, or an interdealer quotation system. Friedman & Kestenbaum, 733 PLI/Tax at 273 (citing Treas. Reg. section 1.7704-1(b)).

90. Friedman & Kestenbaum, 733 PLI/Tax at 273 (citing section 7701(b) of the Internal Revenue Code and Treas. Reg. section 1.7704-1(a)(1)). A partnership's interests are "readily tradable on a secondary market" if "taking into account all the facts and circumstances, the partners are readily able to buy, sell, or exchange their partnership interests in a manner that is comparable, economically, to trading on an established securities market." 7Friedman & Kestenbaum, 33 PLI/Tax at 273 (quoting Treas. Reg. section 17704-1(c)(1)). There are several safe harbors that may be applicable in avoiding a finding that partnership interests are "readily tradable." Friedman & Kestenbaum, 733 PLI/Tax at 273. The most common of these safe harbors provides that "partnership interests will not be considered readily tradable on a secondary market if (i) all partnership interests were issued in transactions not required to be registered under the Securities Act of 1933 and (ii) the partnership does not have more than 100 partners at any time during the partnership's tax year." Friedman & Kestenbaum, 733 PLI/Tax at 273-74 (citing Treas. Reg. section 1.7704-1(h)) (noting that the safe harbor includes an antiabuse rule that looks flow-through entities, such as partnerships, grantor trusts, and limited liability companies, in determining the number of beneficial holders).

91. Friedman & Kestenbaum, 733 PLI/Tax at 274.

92. Friedman & Kestenbaum, 733 PLI/Tax at 274 n. 42 (noting that one reason for preferring the latter structure is that there may be state transfer taxes imposed on a transfer of assets that would not be imposed on a transfer of partnership interests).

93. Friedman & Kestenbaum, 733 PLI/Tax at 274 (in other words, the transfer would be viewed as transfer of the assets from the debtor to the creditors who then contribute these assets to the partnership in exchange for partnership interests.).

94. Friedman & Kestenbaum, 733 PLI/Tax at 274.

95. Friedman & Kestenbaum, 733 PLI/Tax at 275.

96. See Friedman & Kestenbaum, 733 PLI/Tax at 276-280.

97. Friedman & Kestenbaum, 733 PLI/Tax at 290.

98. Friedman & Kestenbaum, 733 PLI/Tax at 290.

99. Friedman & Kestenbaum, 733 PLI/Tax at 281.

100. Friedman & Kestenbaum, 733 PLI/Tax at 281.

101. An LLC has been used as a PCLV in at least a few cases. See, e.g., First Amended Joint Liquidating Plan of Reorganization of US Office Products Company and its Subsidiary Debtors, at § 8.5, In re US Office Prods. Co., Case No. 01-646 (Bankr. D. Del. Nov. 5, 2001) (providing that an LLC will act as PCLV for debtors' assets and causes of action); Third Amended Joint Plan of Liquidation of (1) Borden Chemicals and Plastics Operating Limited Partnership and BCP Finance Corp. and (2) BCP Management, Inc., at Arts. V.B., V.C., In re Borden Chemicals and Plastics Operating Limited Partnership, Case No. 01-1268 (PJW) (Bankr. D. Del. Dec. 5, 2002) (providing that two LLCs will act as PCLVs for debtors' assets and causes of action).

102. Novikoff & Jacobs, SK092 ALI-ABA at 656.

103. In re Consolidated Pioneer Mortg. Entities, 264 F.3d 803, 38 Bankr. Ct. Dec. (CRR) 94, 46 Collier Bankr. Cas. 2d (MB) 1125, Bankr. L. Rep. (CCH) P 78504 (9th Cir. 2001); In re AB Liquidating Corp., 416 F.3d 961, 44 Bankr. Ct. Dec. (CRR) 278, 54 Collier Bankr. Cas. 2d (MB) 955, Bankr. L. Rep. (CCH) P 80321 (9th Cir. 2005).

104. Gallagher, 25-APR Am. Bankr. Inst. J. at 64 (noting that, postconfirmation, "many of the reporting requirements to the U.S. Trustee's Office are eliminated").

105. See 11 U.S.C.A. § 307.

106. 28 U.S.C.A. § 1930(a)(6); see In re CSC Industries, Inc., 226 B.R. 402, 406 (Bankr. N.D. Ohio 1998) (finding that liquidating trust was responsible for payment of postconfirmation U.S. Trustee fees based on language in the plan requiring the trust to "pay all charges incurred after the effective date for expenses, disbursements and related services"); see also U.S. Trustee v. Pettibone Corp., 251 B.R. 335, 344, Bankr. L. Rep. (CCH) P 78242 (N.D. Ill. 2000) (holding reorga-

nized debtor responsible for postconfirmation U.S. Trustee fees because, inter alia, liquidating trustee likely did not have authority to pay such fees under the plan).

107. See Order to File Post-Confirmation Reports and Setting Status Hearing, In re Three-Five Systems, Inc., Case No. 2:05-bk-17104-RTB (Bankr. D. Az. Sept. 5, 2006) (ordering debtor to file postconfirmation reports, pursuant to section 1106(a)(7), as directed by the U.S. Trustee until the entry of a final decree).

108. See Consolidated Pioneer, 264 F.3d 803 (ordering postconfirmation conversion of Chapter 11 case to Chapter 7 upon motion of U.S. Trustee on basis of extremely poor disclosure and administration of liquidation corporation without analyzing U.S. Trustee's oversight responsibilities, if any, for liquidation corporation).

109. Further, depending on the case (and the management), the retention of a member of prior management as a WDO "may be inconsistent with the interests of creditors, equity security holders, and public policy if it directly or indirectly perpetuates incompetence, lack of discretion, inexperience, or affiliations with groups inimical to the best interests of the debtor" and not permissible under section 1129(a)(5). See In re Beyond.com Corp., 289 B.R. 138, 145, 50 Collier Bankr. Cas. 2d (MB) 471 (Bankr. N.D. Cal. 2003) (not permitting member of prior management to serve as WDO) (citing In re Polytherm Industries, Inc., 33 B.R. 823, 829, 11 Bankr. Ct. Dec. (CRR) 47, 9 Collier Bankr. Cas. 2d (MB) 758, Bankr. L. Rep. (CCH) P 69448 (W.D. Wis. 1983).

110. Cantor, 090805 ABI-CLE 195, at § I.A.3. (noting politics in plan implementation and desire by some debtors and their management to maintain control of process by administering it themselves).

111. See Third Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, at § I.B.69., In re Teligent, Inc., Case No. 01-12974 (SMB) (Bankr. S.D.N.Y. Sept. 5, 2002) (permitting the creditors committee to "appoint[ ]" the Unsecured Claim Estate Representative); Second Amended Disclosure Statement for the Second Amended Joint Liquidating Plan of Reorganization of the Debtors and the Official Committee of Unsecured Creditors Pursuant to Chapter 11 of the United States Bankruptcy Code, at Art. V.F.2., In re Trans World Airlines, Inc., Case No. 01-00056 (PJW) (Bankr. D. Del. Jan. 16, 2002) (providing that "the Debtors, in consultation with the [creditors' committee], shall designate an individual to be appointed as Plan Administrator").

112. Cantor, 090805 ABI-CLE 195, at § I.B.1.

113. See Gallagher, 25-Apr Am. Bankr. Inst. J. at 24.

114. Cantor, 090805 ABI-CLE 195, at §§ I.B.2, 3 & 6; Novikoff & Jacobs, SK 092 ALI-ABAat 656-57 (citing Wesley Vines & Vernon O. Teofan, The Preservation and Prosecution of Avoidance Actions Post-Confirmation, 12 Bankr. Dev. J. 735 (1996)).

115. Cantor, 090805 ABI-CLE 195, at § I.B.3.

116. Cantor, 090805 ABI-CLE 195, at § I.B.2.

117. See, e.g., Enron Plan, at § 42.13. But see In re Coral Petroleum, Inc., 249 B.R. 721, 723-24, 44 Collier Bankr. Cas. 2d (MB) 524 (Bankr. S.D. Tex. 2000) (stating that the plan required bankruptcy court approval of professional fess, using the "standards…generally applicable under Bankruptcy Code §§ 327 and 330 for fees paid to professionals"). At least one court has held that, as part of the confirmation process, the projected expenses for, inter alia, professional fees after the effective date are subject to section 1129(a)(4). Beyond.com, 289 B.R. at 144 (finding that disclosure statement did not contain sufficient information, under section 1129(a)(4), regarding the estimated cost of liquidation where debtor had not determined which litigation to pursue post-effective date so as to be able to estimate professional fees).

118. See Order to File Post-Confirmation Reports and Setting Status Hearing, In re Three-Five Systems, Inc., Case No. 2:05-bk-17104-RTB (Bankr. D. Az. Sept. 5, 2006).

119. Beyond.com, 289 B.R. at 144-45 (criticizing debtor for lack of disclosure under section 1129(a)(5)).

120. See Beyond.com, 289 B.R. at 144 (citations omitted).

121. The members of this committee often come from the unsecured creditors' committee or, in cases, where a bank group is the beneficiary of the liquidating trust, the agent is likely to provide oversight of the liquidating trustee.

122. See Ayres, J. Corp. Renewal at 34.

123. See Ayres, J. Corp. Renewal at 36. In order to minimize the likelihood of a disqualification of the WDO's professionals, the PCLV governing documents can provide that a professional will not be disqualified from representing the PCLV solely because its was retained in the bankruptcy by the debtor, creditors' committee, or a member of the creditors' committee, inter alia. See, e.g., Enron Plan Supplement, at Sched. E, § 3.5(j).

124. Ayres, J. Corp. Renewal at 34.

125. Ayres, J. Corp. Renewal at 34; see, e.g., Notice of Filing Final Executed Plan Exhibit K (Kmart Creditor Trust Agreement), at § 9.1, In re Kmart Corp., Case No. 02-B02474 (Bankr. N.D. Il. Mar. 28, 2003).

126. Ayres, J. Corp. Renewal at 34..

127. Ayres, J. Corp. Renewal at 34..

128. Consolidated Pioneer, 264 F.3d at 805-06 (discussing PCLV that refused to provide significant information regarding liquidation process for almost five years).

129. See Notice of Filing of Certificate of Publication, at Ex. 2, In re Adler, Coleman Clearing Corp., Case No. 95-8203 (REG) (Bankr. S.D.N.Y. Dec. 21, 2006) (publication notice by trustee to customers and creditors that distributions to various claimants, including, inter alia, Verizon Communications Inc., JP Morgan Services, Inc., and affiliates of AT&T Inc. and Merrill Lynch & Co., had been returned as undeliverable and would be treated as "unclaimed property" unless claimant contacted trustee within 45 days.).

130. See, e.g., Safety-Kleen Creditor Trust website, http://safetykleencreditortrust.com/ (last visited Jan. 5, 2007); Hayes Lemmerz Creditor Trust website, http://www.hlicreditortrust.com/ (last visited Jan. 5, 2007).

131. Carrianne Basler & Michelle Campbell, Everything Your Disbursing Agent Wants You to Know Beyond "How Much" and "When," 25-Oct Am. Bankr. Inst. J. 28, 73 (2006)); see Paul Steven Singerman & Jonathan T. Brand, "Doing Good" in Chapter 11 Liquidating Plans, 25-Jan Am. Bankr. Inst. J. 48 (2007) (discussing unclaimed funds and suggesting inclusion of plan provision to donate unclaimed funds to charity).

132. Basler & Campbell, 25-Oct Am. Bankr. Inst. J. at 73; see, e.g., 11 U.S.C.A. § 347(b).

133. Basler & Campbell, 25-Oct Am. Bankr. Inst. J. at 73.

134. Basler & Campbell, 25-Oct Am. Bankr. Inst. J. at 74.

135. Basler & Campbell, 25-Oct Am. Bankr. Inst. J. at 74.

136. Ayres, J. Corp. Renewal at 36.

137. Ayres, J. Corp. Renewal at 36.

138. See Cantor, 090805 ABI-CLE 195, at § I.B.7.

139. In contrast, section VII.E., infra, discusses situations where a PCLV might be bound by an arbitration provision in the documents under which the claim arose.

140. Basler & Campbell, 25-Oct Am. Bankr. Inst. J. at 28.

141. Basler & Campbell, 25-Oct Am. Bankr. Inst. J. at 28; see, e.g., First Amended Joint Plan of Reorganization of Kmart Corp. and its Affiliated Debtors and Debtors-in-Possession (the Kmart Plan), at § 9.8(a), In re Kmart Corp., Case No. 02-02474 (Bankr. N.D. Il. Feb. 25, 2003)

142. Basler & Campbell, 25-Oct Am. Bankr. Inst. J. at 28.

143. See Basler & Campbell, 25-Oct Am. Bankr. Inst. J. at 28 (providing an example of such protective language).

144. Basler & Campbell, 25-Oct Am. Bankr. Inst. J. at 28 .

145. Basler & Campbell, 25-Oct Am. Bankr. Inst. J. at 28 (discussing the drawbacks of quarter and year distribution dates); see, e.g., Kmart Plan, at § 11.5 (trustee of Kmart Creditor Trust not required to make semiannual distribution to beneficiaries if the amount available for distribution was not sufficient, in the discretion of the trustee (after consultation with the oversight committee), to "economically distribute" such funds). Generally, a plan will also include a de minimis distribution provision that provides that distributions need not be made if they are below a certain level. Particularly if the estimated percentage of recovery on claims is low, the de minimis distribution provision should be keyed to the amount of the recovery to be distributed rather than the amount of allowed claims in respect to which the distribution would be made. See Basler & Campbell, 25-Oct Am. Bankr. Inst. J. at 74; see, e.g., Kmart Trust, at § 9.8(d) (providing that disbursing agent is not required to make interim distributions to beneficiaries where the amount to be distributed to the specific beneficiary would be less than $50).

146. Basler & Campbell, 25-Oct Am. Bankr. Inst. J. at 28; see, e.g., Kmart Plan, at § 11.5 (providing that distributions by the Kmart Creditor Trust shall be made on at least a semi-annual basis but without specifying a particular date).

147. Basler & Campbell, 25-Oct Am. Bankr. Inst. J. at 73; see, e.g., Kmart Plan, at § 11.5. If the PCLV desires treatment as a liquidating trust, the liquidating trustee should remember that Revenue Procedure 94-45 requires that the liquidating trust distribute all net income plus all net proceeds of asset sales to its beneficiaries on at least an annual basis, provided that the trust may retain the amount of funds reasonably necessary to maintain the value of the trust's assets and to meet any claims and contingent liabilities. See Rev. Proc. 94-45, 1994-2 C.B. 684.

148. Basler & Campbell, 25-Oct Am. Bankr. Inst. J. at 73.

149. See Refco Plan at § 5.7(g) (contemplating that a deal may be negotiated with one or more third-parties to offer to purchase all of the beneficial interests in the litigation trust); Refco Plan. at Ex. F, § 2.10 (providing trustee with authority, subject to oversight committee, to negotiate with third parties one or more offers to purchase the interests in the litigation trust from the beneficial holders).

150. See Refco Plan at § 5.7(c); Enron Plan Supplement, at Sched. A, § 2.4.

151. Stephen G. Moyer, Distressed Debt Analysis: Strategies for Speculative Investors, 364 (2005).

152. E.g., Stephen G. Moyer, Distressed Debt Analysis: Strategies for Speculative Investors, 364-65 (2005).

153. Stephen G. Moyer, Distressed Debt Analysis: Strategies for Speculative Investors, 364-65 (2005).

154. See, e.g., Order Confirming the First Amended Joint Liquidating Plan of Reorganization of US Office Products Company and its Subsidiary Debtors, at ¶ 2(b), In re US Office Products Co., Case No. 01-646 (PJW) (Bankr. D. Del. Dec. 13, 2001) (modifying section 8.5 of the plan to prohibit transfers of PCLV interests that would cause PCLV to become subject to the Exchange Act and/or the Investment Company Act). In other cases, the PCLV appear resigned to the potential application of the Exchange Act and/or the Investment Company Act. See Enron Plan Supplement, at Sched. A, § 2.4 (providing for compliance with Exchange Act and Investment Company Act disclosure regimes).

155. See Refco Plan, at § 5.7(c) (establishing multiple classes of interestholders); see also Debtors' Second Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code Proposed by the Debtors and Hilco Capital, LP, at §§ 6.03, 6.13, 7.3, 8.03, 8.11, In re Harvard Indus., Inc., Case No. 02-50584 (KCF) (Bankr. D.N.J. Dec. 23, 2003) (using multiple trusts to achieve the same results that Refco achieves through multiple classes of interestholders).

156. The status of the trust as a "liquidating trust" under the Internal Revenue Code will be at risk if the liquidation of the trust is "unreasonably prolonged or if the liquidating purpose becomes so obscured by business activities that the declared purpose of liquidation is lost or abandoned." Rev. Proc. 94-45, 1994-2 C.B. 684. The initial duration of the liquidating trust is often set at five years (see I.R.S. Priv. Ltr. Rul. 05-09-019 (Mar. 5, 2005), available at 2005 WL 504665),

however, in at least one case, the IRS has permitted an initial duration of 10 years. See I.R.S. Priv. Ltr. Rul. 04-07-002 (Feb. 13, 2004), available at 2004 WL 276506 (in this case, the trust required a long duration because certain litigation against the trust could not be resolved until after litigation by the trust against a third party was resolved).

157. See Novikoff & Jacobs, SK092 ALI-ABA at 657 (citation omitted); see also TWA Plan, at Art. VIII, § K.

158. Goldin v. Bartholow, 166 F.3d 710, 714 (5th Cir. 1999) (noting that district court denied liquidating trustee's request to extend trust termination date under the plan).

159. See Goldin, 166 F.3d at 717 ("We find the imposition of further time for liquidation-winding-up-inconsistent with its terms. It is specifically designed to effect liquidation and distribution as soon as practical, and termination expressly occurs on the *earlier* of substantial final distribution or a set date. There is thus not the inevitable period following termination when the administrative function of distribution is carried out that is found in the cases cited by [the liquidating trustee]."). In some cases, the governing documents of a PCLV have incorporated a "wind up" period to provide a buffer and avoid some of the problems faced in Goldin. See Refco Plan, at Ex. F, §10.2.

160. In addition to the publicly traded partnership rules discussed in notes 86 through 89, supra, and related text.

161. Rome, Business Workouts Manual § 9:32 (2d ed.); see generally Holywell Corp. v. Smith, 503 U.S. 47, 112 S. Ct. 1021, 117 L. Ed. 2d 196, 22 Bankr. Ct. Dec. (CRR) 1028, 26 Collier Bankr. Cas. 2d (MB) 1, Bankr. L. Rep. (CCH) P 74435A, 92-1 U.S. Tax Cas. (CCH) P 50110, 69 A.F.T.R.2d 92-682 (1992); John D. Howard, The Taxation of Liquidating Trusts, Escrows and Settlement Funds in Chapter 11 Bankruptcy Cases, 64 Am. Bankr. L. J. 403 (1990).

162. Rome, Business Workouts Manual § 9:32 (2d ed.).

163. Rev. Proc. 94-45 sets forth the conditions that generally must be met in order for an entity to be classified as a liquidating trust. See Rev. Proc. 94-45, 1994-2 C.B. 684.

164. See Enron Plan Supplement, at Sched. A, § 3.13 ("[T]he Litigation Trustee shall not (i) be authorized to engage in any trade or business, (ii) take such actions inconsistent with the orderly liquidation of the assets of the Litigation Trust as are required or contemplated by applicable law, the Plan and [the Litigation] Trust Agreement or (iii) be authorized to engage in any investments or activities inconsistent with the treatment of the Litigation Trust as a liquidating trust within the meaning of Treasury Regulation Section 301.7701-4(d) and in accordance with Rev. Proc. 94-45, 1994-2 C.B. 684."), available at Plan Supplement to the Fifth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code. The limitations on a liquidating trustee's authority, however, must be modified depending on the assets making up the trust. See Prisma Trust Agreement, at § 3.6 ("the Trustee shall not and shall be authorized to engage in any trade or business, except to the extent reasonably necessary to, and consistent with, the liquidation of this Trust and the Plan"), available at Enron Plan Supplement, Sched. C.

165. See TWA Plan, at Art. VIII, § J.1. ("the Plan Administrator shall file returns for the Post Confirmation Estate as a grantor trust pursuant to Treasury Regulation Section 1.671-4(a).")

166. See TWA Plan, at Art. VIII, § I (limiting plan administrator's investment authority to "only those investments that a liquidating trust, within the meaning of Treasury Regulation Section 301.7701-4(d) may be permitted to hold, pursuant to the Treasury Regulations, or any modification in the IRS guidelines, whether set forth in IRS rulings, other IRS pronouncements or otherwise"); Enron Plan Supplement, at § 3.12(m) (limiting Litigation Trustee's investment powers to "such investments that are consistent with the Litigation Trust's status as a liquidating trust within the meaning of Treasury Regulation Section 301.7701-4(d) and in accordance with Rev. Proc. 94-45, 1994-2 C.B. 684").

167. See TWA Plan, at Art. VIII, § K (conditioning extension of term of postconfirmation Estate upon "Plan Administrator receiv[ing] an opinion of counsel or a favorable ruling from the

IRS that any further extension would not adversely affect the state of the Post Confirmation Estate as a grantor trust for federal income tax purposes").

168. See, e.g., Notice of Filing of Operating Agreement of USOP Liquidating LLC in Accordance with Debtors' Disclosure Statement with Respect to First Amended Joint Liquidating Plan of Reorganization of US Office Prods. Co. and its Subsidiary Debtors, at Ex. A., § 7.1, In re US Office Prods. Co., Case No. 01-646 (PJW) (Bankr. D. Del. Dec. 3, 2001).

169. See, e.g., Notice of Filing of Operating Agreement of USOP Liquidating LLC in Accordance with Debtors' Disclosure Statement with Respect to First Amended Joint Liquidating Plan of Reorganization of US Office Prods. Co. and its Subsidiary Debtors, at Ex. A., § 8.4(c), In re US Office Prods. Co., Case No. 01-646 (PJW) (Bankr. D. Del. Dec. 3, 2001).

170. See, e.g., Amended Plan Supplement of Borden Chemicals and Plastics Operating Limited Partnership and BCP Finance Corp. to the Third Amended Joint Plan of Liquidation of (1) BCP and BCP Finance and (2) BCP Management, Inc., at Ex. V.B.1., § 9.01, In re Borden Chemicals and Plastics Operating Limited Partnership, Case No. 01-1268 (PJW) (Bankr. D. Del. Jan. 31, 2003). As a disputed ownership fund, the LLC would be taxed as a C corporation, pursuant to Treasury Regulation section 1.468B-9(c) unless all of the assets are passive investment assets (e.g., cash, stock and debt obligations), in which case it will be taxed as a "qualified settlement fund" under Treasury Regulation section 1.486B-9. Treas. Reg. § 1.468B-9.

171. See, e.g., Notice of Filing of Operating Agreement of USOP Liquidating LLC in Accordance with Debtors' Disclosure Statement with Respect to First Amended Joint Liquidating Plan of Reorganization of US Office Prods. Co. and its Subsidiary Debtors, at Ex. A., § 7.1, In re US Office Prods. Co., Case No. 01-646 (PJW) (Bankr. D. Del. Dec. 3, 2001).

172. See Howard, 64 Am. Bankr. L. J. at 404.

173. See, e.g., Enron Plan Supplement, at Sched. E, §§ 3.5(q) and (r) and 5.3 (permitting trustee, subject o approval of oversight committee, to sell the corpus of trust, which consisted of common stock in Portland General Electric, Inc.).

174. See, e.g., Refco Plan, at Ex. F, § 1.6 (providing for litigation trust to incur financing that is non-recourse to debtors and other parties or retain certain amounts otherwise distributable to creditors for initial financing); Notice of Filing Final Plan Exhibit K (Kmart Creditor Trust Agreement), at §§ 3.1 and 3.2, In re Kmart Corp., Case No. 02-B02474 (Bankr. N.D. Il. Mar. 28, 2003) (providing for debtors/reorganized debtors to provide initial deposit to fund trust and, under certain circumstances, additional deposits).

175. Prior to BAPCPA, this provision was designated as section 1146(c).

176. See State of Maryland v. Antonelli Creditors' Liquidating Trust, 123 F.3d 777, 783-86 (4th Cir. 1997)

177. See TWA Plan, at Art. VIII, § I.

178. See Novikoff & Jacobs, SK092 ALI-ABA at 641.

179. 28 U.S.C.A. § 1334(b).

180. 28 U.S.C.A. § 157(a).

181. See, e.g., Local Rules of U.S.D.C., Northern Dist. of IL, LR 40.3.1(a); Standing Order of Referral of Cases to Bankruptcy Court Judges of the District Court for the Southern District of New York, (Bankr. S.D.N.Y. July 19, 1984) (Ward, Acting C.J.).

182. 28 U.S.C.A. § 157(b).

183. See, e.g., In re Mailman Steam Carpet Cleaning Corp., 212 F.3d 632, 636, 36 Bankr. Ct. Dec. (CRR) 32 (1st Cir. 2000) (citing Palmacci v. Umpierrez, 121 F.3d 781, 785 (1st Cir. 1997).

184. Pacor, Inc. v. Higgins, 743 F.2d 984, 994, 12 Bankr. Ct. Dec. (CRR) 285, Bankr. L. Rep. (CCH) P 70002 (3d Cir. 1984) (emphasis in original).

185. Pacor, 743 F.2d at 994.

186. See In re Resorts Intern., Inc., 372 F.3d 154, 164, 43 Bankr. Ct. Dec. (CRR) 46 (3d Cir. 2004); In re General Media, Inc., 335 B.R. 66, 73, 45 Bankr. Ct. Dec. (CRR) 271 (Bankr. S.D. N.Y. 2005) ("all courts that have addressed the question have ruled that once confirmation occurs, the bankruptcy court's jurisdiction shrinks"). But see In re Boston Regional Medical Center, Inc., 410 F.3d 100, 107, 44 Bankr. Ct. Dec. (CRR) 243 (1st Cir. 2005) (holding that postconfirmation jurisdiction does not shrink in liquidating Chapter 11 cases.).

187. See Novikoff & Jacobs, SK 092 ALI-ABA at 639-45.

188. Resorts Intern., 372 F.3d at 166-67.

189. In re Pegasus Gold Corp., 394 F.3d 1189, 1194, 44 Bankr. Ct. Dec. (CRR) 36, 53 Collier Bankr. Cas. 2d (MB) 705, Bankr. L. Rep. (CCH) P 80229 (9th Cir. 2005).

190. Compare T.S.P., 117 B.R. at 377-78, with Boston Regional Medical Center,, 410 F.3d at 107 (holding that postconfirmation jurisdiction is undiminished in liquidating Chapter 11s), and Coral Petroleum, 249 B.R. at 729-30 ("'The bankruptcy court must be able to assure itself and the creditors who rely on the process that court-approved managers of the debtor's estate are performing their work, conscientiously and cost-effectively'") (quoting In re Southmark Corp., 163 F.3d 925, 931, 33 Bankr. Ct. Dec. (CRR) 948, Bankr. L. Rep. (CCH) P 77874 (5th Cir. 1999)).

191. Pegasus, 394 F.3d at 1194.

192. See Official Committee of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery, 330 F.3d 548, 41 Bankr. Ct. Dec. (CRR) 98, Bankr. L. Rep. (CCH) P 78861 (3d Cir. 2003).

193. See Novikoff & Jacobs, SK 092 ALI-ABA at 657.

194. Premium Escrow, 342 B.R. at 400 (quoting Railworks Corp., 325 B.R. at 715).

195. See In re Kmart Corp., 310 B.R. 107, 120, 43 Bankr. Ct. Dec. (CRR) 19, 52 Collier Bankr. Cas. 2d (MB) 52 (Bankr. N.D. Ill. 2004); Railworks Corp., 325 B.R. at 716 (citing Fleet Nat'l Bank v. Gray (In re Bankvest), 375 F.3d 51 (1st Cir. 2004) and discussing various court decisions and the specificity required to retain claims and causes of action); see also Jay M. Goffman, Mark A. McDermott, and Michael W. Perl, Confirmation Issues—Selected Topics, 061006 ABI-CLE 79 (October 6, 2006) at 19; Novikoff & Jacobs, SK 092 ALI-ABA at 641-42 (collecting cases).

196. Kmart, 310 B.R. at 124.

197. Kmart, 310 B.R. at 124 (citing Matter of P.A. Bergner & Co., 140 F.3d 1111, 32 Bankr. Ct. Dec. (CRR) 536, Bankr. L. Rep. (CCH) P 77688, 35 U.C.C. Rep. Serv. 2d 373 (7th Cir. 1998)).

198. Kmart, 310 B.R. at 121 (citing In re USN Communications, Inc., 280 B.R. 573, 591 (Bankr. D. Del. 2002); In re Ampace Corp., 279 B.R. 145, 156-62, 48 Collier Bankr. Cas. 2d (MB) 1343 (Bankr. D. Del. 2002)).

199. Kmart, 310 B.R. at 120 (quoting In re Harstad, 155 B.R. 500, 509, 24 Bankr. Ct. Dec. (CRR) 678, Bankr. L. Rep. (CCH) P 75344 (Bankr. D. Minn. 1993), order aff'd, 1994 WL 526013 (D. Minn. 1994), judgment aff'd, 39 F.3d 898, 26 Bankr. Ct. Dec. (CRR) 310, 32 Collier Bankr. Cas. 2d (MB) 542, Bankr. L. Rep. (CCH) P 76185 (8th Cir. 1994)); In re Paramount Plastics, Inc., 172 B.R. 331, 335, 25 Bankr. Ct. Dec. (CRR) 1739, 31 Collier Bankr. Cas. 2d (MB) 1460 (Bankr. W.D. Wash. 1994).

200. See, e.g., In re AstroPower Liquidating Trust, 335 B.R. 309, 323-24, 45 Bankr. Ct. Dec. (CRR) 228 (Bankr. D. Del. 2005); see also In re Almac's, Inc., 202 B.R. 648 (D.R.I. 1996) (holding that litigation trustee was precluded from pursuing breach of fiduciary duty claims because the terms of the plan transferred only avoidance causes of action to the litigation trust).

201. See Rahl v. Bande, 328 B.R. 387, 399 (S.D. N.Y. 2005) (finding that trustee had no standing to pursue malpractice claims against debtor's prepetition auditors because the plan reserved only claims against the debtor's "current or former directors and officers" for the trustee); In re EXDS, Inc., 352 B.R. 731, 736, 47 Bankr. Ct. Dec. (CRR) 63 (Bankr. D. Del. 2006).

202. Premium Escrow, 342 B.R. at 400 (citing McFarland v. Leyh (In re Tex. Gen. Petroleum Corp.), 52 F.3d 1330, 1335 (5th Cir. 1995)).

203. Premium Escrow, 342 B.R. at 400 (quoting In re Sweetwater, 884 F.2d 1323, 1327, 19 Bankr. Ct. Dec. (CRR) 1232, 21 Collier Bankr. Cas. 2d (MB) 1034, Bankr. L. Rep. (CCH) P 73093 (10th Cir. 1989)).

204. See, e.g., Official Committee of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery, 330 F.3d 548, 41 Bankr. Ct. Dec. (CRR) 98, Bankr. L. Rep. (CCH) P 78861 (3d Cir. 2003).

205. See 11 U.S.C.A. § 1123(b)(3); Goffman, McDermott & Perl, 061006 ABI-CLE 79 at 19-20. But see Robert M. Quinn, Not so Fast, Mr. Liquidating Trustee, 22-APR Am. Bankr. Inst. J. 28 (2003).

206. Premium Escrow, 342 B.R. at 400 (quoting Guttman v. Martin (In re Railworks), 325 B.R. 709, 715 (Bankr. D. Md. 2005)).

207. Premium Escrow, 342 B.R. at 399.

208. Matter of Texas General Petroleum Corp., 52 F.3d 1330, 27 Bankr. Ct. Dec. (CRR) 399, Bankr. L. Rep. (CCH) P 76512 (5th Cir. 1995); In re Sweetwater, 884 F.2d 1323, 1327, 19 Bankr. Ct. Dec. (CRR) 1232, 21 Collier Bankr. Cas. 2d (MB) 1034, Bankr. L. Rep. (CCH) P 73093 (10th Cir. 1989); In re Chase & Sanborn Corp., 813 F.2d 1177, 1180, Bankr. L. Rep. (CCH) P 71753 (11th Cir. 1987); In re Enron Corp., No. 03-4181, 2004 Bankr. LEXIS 2117, at *9-10 (Bankr. S.D. Tex. Dec. 1, 2004); In re Kroh Bros. Development Co., 101 B.R. 1000, 1005 (W.D. Mo. 1989). But see In re Morning Treat Coffee Co., Inc., 77 B.R. 62, 65, 17 Collier Bankr. Cas. 2d (MB) 1260 (Bankr. M.D. La. 1987) (stating in dicta that the right to pursue avoidance actions could not be sold by the debtor but noting that a cause of action can be retained and pursued postconfirmation by a representative of the estate).

209. Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 120 S. Ct. 1942, 147 L. Ed. 2d 1, 36 Bankr. Ct. Dec. (CRR) 38, 43 Collier Bankr. Cas. 2d (MB) 861, Bankr. L. Rep. (CCH) P 78183 (2000).

210. Actions available to the trustee would also be available to the debtor-in-possession pursuant to section 1107(a). See 11 U.S.C.A. § 1107(a) (providing that debtor-in-possession has substantially all of the rights, powers, functions, and duties of a trustee).

211. Hartford, 530 U.S. at 7, 11 (2000) (holding, in a Chapter 7 case, that an administrative claimant does not have an individual right to use section 506(c) of the Bankruptcy Code to surcharge collateral); see also 11 U.S.C.A. § 1107).

212. Novikoff & Jacobs, SK092 ALI-ABA at 657.

213. The Supreme Court limited its decision in Hartford to avoid addressing the validity of "derivative standing" by which creditors committees or creditors' have been permitted to bring causes of action on behalf of the debtor's estate. Hartford, 530 U.S. at 13, n. 5:

> We do not address whether a bankruptcy court can allow other interested parties to act in the trustee's stead in pursuing recovery under § 506(c). Amici American Insurance Association and National Union Fire Insurance Co. draw our attention to the practice of some courts of allowing creditors or creditors' committees a derivative right to bring avoidance actions when the trustee refuses to do so, even though the applicable Code provisions (see 11 U.S.C.A. §§ 544, 545, 547(b), 548(a) and 549(a)) mention only the trustee. See, e.g., In re Gibson Group Inc., 66 F.3d 1436, 1438 (6th Cir. 1995). Whatever the validity of that practice, it has no analogous application here, since the petitioner did not ask the trustee to pursue payment under § 506(c) and did not seek permission from the bankruptcy court to take such action in the trustee's stead. The petitioner asserted an independent right to use § 506(c), which is what we reject today. Cf. Matter of Xonics Photochemical, Inc., 841 F.2d 198, 202-03, 17 Bankr. Ct. Dec. (CRR) 606, 18 Collier Bankr. Cas. 2d (MB) 711, Bankr. L. Rep. (CCH) P 72211 (7th Cir. 1988) (holding that creditor had no right to bring

avoidance action independently, but noting that it might have been able to seek to bring derivative suit).

214. See generally Quinn, 22-APR Am. Bankr. Inst. J. 28 (2003).

215. See Goffman, McDermott & Perl, 061006 ABI-CLE 79 at 22.

216. See Goffman, McDermott & Perl, 061006 ABI-CLE 79 at 22.

217. Ernst & Young LLP v. Cohen (In re Friedman's Inc.), Case No. 406CV024, slip op. at 6-7 (S.D. Ga. June 21, 2006), appeal dismissed, Case No. 06-13676-II (11th Cir. Aug. 14, 2006).

218. Ernst & Young LLP v. Cohen (In re Friedman's Inc.), Case No. 406CV024, slip op. at 7 (citing In re Daisytek, Inc., 323 B.R. 180, 185-86, 44 Bankr. Ct. Dec. (CRR) 169 (N.D. Tex. 2005); In re Express One Intern., Inc., 217 B.R. 215 (Bankr. E.D. Tex. 1998); In re Bennett Funding Group, Inc., 203 B.R. 24, 28, 37 Collier Bankr. Cas. 2d (MB) 184 (Bankr. N.D. N.Y. 1996).

219. Ernst & Young LLP v. Cohen (In re Friedman's Inc.), Case No. 406CV024, slip op. at 6.

220. See Goldin v. Bartholow, 166 F.3d 710, 719 (5th Cir. 1999) (holding that liquidating trustee's appeal of adverse summary judgment ruling became moot when trust expired and court refused to extend trust).

221. Goldin, 166 F.3d at 720.

222. Goldin, 166 F.3d at 719-20.

223. PHP Liquidating, LLC v. Robbins, 291 B.R. 592, 596-97 (D. Del. 2003), aff'd, 128 Fed. Appx. 839 (3d Cir. 2005) (also holding that assigning creditors did not a remedy under Delaware law).

224. In re Bennett Funding Group, Inc., 336 F.3d 94, 99-100, 41 Bankr. Ct. Dec. (CRR) 155, 50 Collier Bankr. Cas. 2d (MB) 1115, Bankr. L. Rep. (CCH) P 78889 (2d Cir. 2003) (quoting Shearson Lehman Hutton v. Wagoner, 944 F.2d 114, 118 (2d Cir. 1991)).

225. Williams Electronics Games, Inc. v. Garrity, 366 F.3d 569, 574, R.I.C.O. Bus. Disp. Guide (CCH) P 10669, 2004-1 Trade Cas. (CCH) P 74390 (7th Cir. 2004).

226. See Bennett Funding, 336 F.3d at 100.

227. Bennett Funding, 336 F.3d at 100 (affirming summary judgment against trustee who sued debtor's law firm and auditors for "failing to report to directors and officers" that insider was perpetrating Ponzi scheme).

228. See Goffman, McDermott & Perl, 061006 ABI-CLE 79 at 22.

229. See, e.g., Michael D. Sousa, A Morass of Federal Policy: Enforcing Arbitration Agreements in Bankruptcy Proceedings, 15 J. Bankr. L. & Prac. 3 Art. 2 (June 2006); Ali M.M. Mojdehi, Arbitration Issues in Bankruptcy Cases, 859 PLI/Comm 587 (Jan. 2004); Joseph D. Becker, Bankruptcy Courts and Arbitration: A Question of Competence, 7 Am. Rev. Int'l Arb. 259 (1996); Fred Neufeld, Enforcement of Contractual Arbitration Agreements Under the Bankruptcy Code, 65 Am. Bank. L.J. 525 (1991).

230. See Goffman, McDermott & Perl, 061006 ABI-CLE 79 at 22.

231. 9 U.S.C.A. §§ 1 et seq.

232. 9 U.S.C.A. § 2.

233. See In re U.S. Lines, Inc., 197 F.3d 631, 641, 35 Bankr. Ct. Dec. (CRR) 187, 2000 A.M.C. 784 (2d Cir. 1999); Matter of National Gypsum Co., 118 F.3d 1056, 31 Bankr. Ct. Dec. (CRR) 237, 38 Collier Bankr. Cas. 2d (MB) 722 (5th Cir. 1997); see also See Goffman & McDermott, 061006 ABI-CLE 79 at 23.

234. See In re Gandy, 299 F.3d 489, 495, 48 Collier Bankr. Cas. 2d (MB) 895, Bankr. L. Rep. (CCH) P 78709 (5th Cir. 2002).

235. 9 U.S.C. A. § 16l; National Gypsum, 118 F.3d at 1061.

236. See Goffman, McDermott & Perl, 061006 ABI-CLE 79 at 23.

237. In re AstroPower Liquidating Trust, 335 B.R. 309, 326, 45 Bankr. Ct. Dec. (CRR) 228 (Bankr. D. Del. 2005) (citing Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1154 (3d Cir. 1989)).

238. Ernst & Young LLP v. Baker O'Neal Holdings, Inc., 304 F.3d 753, 756, 40 Bankr. Ct. Dec. (CRR) 76 (7th Cir. 2002).

239. Baker O'Neal, 304 F.3d at 756.

240. Baker O'Neal, 304 F.3d at 756-57.

241. See Cleberg v. J.P. Morgan Trust Company, N.A. (In re Farmland Indus.), Case No. 02-50557, Adv. Pro. 05-4099, slip. op. at 5, 10 (Bankr. W.D. Mo. Oct. 11, 2005) (interpreting K.S.A. § 17-6305, which is expressly based on D.G.C.L. § 145); Senior Tour Players 207 Management Co. LLC v. Golftown 207 Holding Co., LLC, 853 A.2d 124, 128 (Del. Ch. 2004) ("this court has consistently held that advancement and indemnification, although obviously related, are 'distinct types of legal rights' and the right to advancement is not ordinarily dependant upon a determination that the party in question will ultimately be entitled to be indemnified."); Reddy v. Electronic Data Systems Corp., 2002 WL 1358761, at *5 (Del. Ch. 2002) ("It is highly problematic to make the advancement right of such official dependant on the motivation ascribed to their conduct by the suing parties. To do so would be to largely vitiate the protections offered by § 145 and contractual advancement rights."). But see Advanced Min. Systems, Inc. v. Fricke, 623 A.2d 82, 83-85 (Del. Ch. 1992); see also VonFeldt v. Stifel Financial Corp., 714 A.2d 79, 86 (Del. 1998); Havens v. Attar, 22 Del. J. Corp. L. 1230, 1997 WL 55957, at *12 (Del. Ch. 1997) (both following Advanced Mining Sys. with approval).

242. In re Adelphia Communications Corp., 322 B.R. 509, 526-27 (Bankr. S.D. N.Y. 2005).

243. Adelphia Communications,322 B.R. at 527.

244. In re Hechinger Investment Co. of Delaware, 285 B.R. 601, 610-11 (D. Del. 2002) (holding that corporate Chapter 11 debtor's attorney-client privilege was controlled only by liquidating trustee under confirmed plan, to which debtor's assets had been transferred pursuant to plan, and could not be asserted by debtor's officers and directors and also stating the corporate debtor's former officers and directors lost the right to assert the attorney-client privilege with respect to the corporate debtor's documents because the right passed to a liquidating trust).

245. See 11 U.S.C.A. § 1127(b).

246. 11 U.S.C.A. § 1127(b).

247. 11 U.S.C. A. § 1142(b); see also In re Terex Corp., 984 F.2d 170, 172, 23 Bankr. Ct. Dec. (CRR) 1560 (6th Cir. 1993) ("we review the interpretation of the Plan with full deference"). But seeIn re U.S. Brass Corp., 301 F.3d 296, 305, 39 Bankr. Ct. Dec. (CRR) 251, 48 Collier Bankr. Cas. 2d (MB) 1173, Bankr. L. Rep. (CCH) P 78704 (5th Cir. 2002) (holding, however, that a party could not seek a modification that is "clothed" as a clarification).

248. In re Gurney's Inn Corp. Liquidating Trust, 215 B.R. 659, 669, 31 Bankr. Ct. Dec. (CRR) 1020, 39 Collier Bankr. Cas. 2d (MB) 325 (Bankr. E.D. N.Y. 1997); In re Hemex Liquidation Trust, 129 B.R. 91 (Bankr. W.D. La. 1991); In re Cooper Properties Liquidating Trust, Inc., 61 B.R. 531, 536 (Bankr. W.D. Tenn. 1986); Matter of Captran Creditors Trust, 53 B.R. 741 (Bankr. M.D. Fla. 1985); In re Tru Block Concrete Products, Inc., 27 B.R. 486, 490-92, 10 Bankr. Ct. Dec. (CRR) 106, Bankr. L. Rep. (CCH) P 69166 (Bankr. S.D. Cal. 1983).

249. Compare Gurney's Inn, 215 B.R. at 669 ("The [t]rustees shall not at any time…enter into or engage in any business…irrespective of whether the conduct of any such business activities is deemed…necessary or proper for the conservation and protection of the [t]rust [e]state.") and Hemex Liquidation, 129 B.R. at 97 ("Debtor has in its own words no 'routine business;' it was formed solely to change the nomenclature of its predecessor, suspend its operations, qualify for favored tax treatment regarding the transfer, and provide a vehicle for carrying out the contract of sale.") with Cooper Properties, 61 B.R. at 536 ("the trustee is authorized, inter alia, to sell or rent the real property, to collect rents and accounts receivable and to ascertain claimants and debts of

the trust and to pay same. In essence, the trust is carrying on the winding up of affairs of its grantor corporation and may be said to be for all practical purposes an association with the powers and privileges of a private corporation.") and Captran Creditors Trust, 53 B.R. at 744 (Trust found eligible to be a debtor where, although the "normal indicia of doing business are missing…the activities of the original trustees were clearly business activities." While "not created for the purpose of generating a profit in the normal sense, the fact that the trustees were managing the assets in order to maximize the payoff to the creditors is sufficient to warrant" business trust finding.) and Tru Block Concrete, 27 B.R. at 490, 492 (The trust was established as a successor to the corporation, as grantor, to ascertain and pay claims against the corporation and essentially "wind up" the corporation's affairs. The court compared the trust to a "dissolving corporation" (which is a proper debtor under the Code) and found the two to be so similar that the shareholders who had elected to form the trust could reverse that election and thus be possessed with a "proper debtor," i.e., a dissolving corporation. Therefore, it would be form over substance to deny the trust bankruptcy protection.).

250. For instance, many liquidating trust agreements limit the liquidating trustee's ability to engage in or carry on a business in seeking to ensure the liquidating trust is taxed like a liquidating trust under Treas. Reg. section 301-7701-4(d). Depending on the nature of the liquidating trust and its intended, the strictness of this restriction can vary. Compare Enron Plan Supplement, at Sched. A, § 3.13(a) ("the Litigation Trustee shall not…be authorized to engage in any trade or business") with Enron Plan Supplement, at Sched. C, § 3.6(a) ("the Trustee shall not and shall be authorized to engage in any trade or business, except to the extent reasonably necessary to, and consistent with, the liquidation of this Trust and the Plan.").