# Drafting Primer: How to Draft a Plan and Disclosure Statement

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**Drafting Disclosure Statements and Plans: Overlooked Mistakes, Key Omissions, and Ways to Avoid Delays and Problems with Your Confirmation Process, or the Impermissible Impairment of Creditor Rights**

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# Drafting Disclosure Statements and Plans: Overlooked Mistakes, Key Omissions, and Ways to Avoid Delays and Problems with Your Confirmation Process, or the Impermissible Impairment of Creditor Rights

## Introduction.

The following are a panoply of drafting considerations – some procedural, many of them substantive, that should be considered by any plan drafter (in this paper, a "***Plan Proponent***"). Moreover, from a creditor's perspective, there are any number of disclosure statement and plan provisions which may seem innocuous, but which impermissibly impair creditor's rights. We urge all readers to have a copy of this paper handy, whether drafting a plan and disclosure statement, or reading it to determine how the rights of your creditor client will be affected.

## Part I: Matters Specific to Disclosure Statements.

### *1. Properly Determine the Time of Filing to Match Your Hearing.*

Bankruptcy Rule 2002(b)(1) requires a Plan Proponent to provide **twenty-eight days' notice** of not only the hearing to consider a disclosure statement, but also the objection deadline with respect to the disclosure statement. Fed. R. Bankr. P. 2002(b)(1); *see also* Fed. R. Bankr. P. 3017(a) ("Except as provided in Rule 3017.1 [applicable to small business cases], after a disclosure statement is filed in accordance with Rule 3016(b), the court shall hold a hearing **on at least 28 days' notice** to the debtor, creditors, equity security holders and other parties in interest as provided in Rule 2002 to consider the disclosure statement and any objections or modifications thereto.") (emphasis added).

In addition, where service of the notice of disclosure statement hearing is by mail, three days are added to any applicable deadlines. Fed. R. Bankr. P. 9006(f) ("When there is a right or requirement to act or undertake some proceedings within a prescribed period after service **and that service is by mail** or under Rule 5(b)(2)(D), (E), or (F) F.R.Civ.P., three days are added after the prescribed period would otherwise expire under Rule 9006(a).") (emphasis added). Thus, as most creditors and shareholders will be served by mail, the Plan Proponent must build in three additional days' notice.[1]

- ***Plan Proponent Takeaway***: Seek a hearing at least 35 days after the filing and service of your plan and disclosure statement and notice of disclosure statement hearing. This satisfies Bankruptcy Rules 2002(b) and 3017(a), and provides you with sufficient time to react to objections and revise language to satisfy disclosure objections.

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[1] Note that Bankruptcy Rule 9006 was recently amended, however, so that any party served by electronic means no longer has the three additional days' notice of any deadline. *See* Laurie Dahl Rea, "*2015-2016 Federal Civil and Bankruptcy Rules Changes*," Northern District of Texas Bankruptcy Bench/Bar Conference, at pp. 6, 8 (2016) located at http://www.txnb.uscourts.gov/sites/txnb/files/basic/Rules_Changes.pdf.

- ***Creditor Takeaway***: If a Plan Proponent provides less than thirty-one days' notice of the deadline to file objections to a disclosure statement, include in your objection that the hearing was not properly noticed, and the disclosure statement hearing must be continued, or re-noticed to all creditors providing adequate time for parties to file objections.

2. *Be Prepared to Disclose More About Liquidating Trustees, Plan Administrators, or the Like.*

Liquidating plans can be a favorable way to wrap up a bankruptcy case, freeing the debtor from many of the filing, procedural, and disclosure burdens of the Bankruptcy Code, and simplifying the wind-down process. In *In re Affordable Med Scrubs, LLC*,[2] Judge Whipple of the U.S. Bankruptcy Court for the Northern District of Ohio provided some much needed guidance on needed disclosures on the murky ways in which liquidating trustees are selected, what claims liquidating trustees will pursue, and on what post-confirmation plan oversight committees will do.

*Affordable Med Scrubs* speaks a lot about required transparency in plans and disclosure statements,[3] but at a minimum, a Plan Proponent should strongly consider the following when first filing a disclosure statement:

- **There Should be a Full Disclosure under Bankruptcy Rules 2014 and 2016**. While a disclosure statement often states who the liquidating trustee / plan administrator will be, it rarely contains any disclosure as to how such parties were selected, nor such parties' "connections" to the debtor, the debtor's professionals, key creditors or creditors' committee counsel, or other parties in interest in the case. The *Affordable Med Scrubs* case rejected the disclosure statement on these grounds; we are in favor of requiring such disclosures about a proposed liquidating trustee or plan administrator, in order to add some transparency to the often murky process of how such critical post-confirmation roles were doled out.

- **The Same Disclosure Must be Made About any "Plan Oversight Committee":** See above – the same rules should apply to all of the members of any Plan Oversight Committees or other parties involved in supervising post-confirmation actions. It is common for the Creditors' Committee or a subset of the Creditors' Committee to be appointed as the Plan Oversight Committee.

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[2] Case No. 15-33448, Bankr. N.D. Ohio, Order Disapproving Disclosure Statement, Docket No. 267 (July 5, 2016).

[3] More about this case can be found at Mark Duedall, "*Some Much Needed Transparency Required on Liquidating Trustees, Liquidating Trusts, Plan Documents, and Other Post-Confirmation Matters*," The Bankruptcy Cave Blog (2016), located at http://bankruptcycave.com/some-much-needed-transparency-required-on-liquidating-trustees-liquidating-trusts-plan-documents-and-other-post-confirmation-matters.

- **The Liquidating Trust Agreement and Other Key Documents Should be Filed with the Disclosure Statement, Not on the Eve of Confirmation:** It is increasingly annoying to have a massive dump of "plan documents" filed 5-10 days before confirmation. (We are told that this is something the Office of the United States Trustee is increasingly objecting to, as well.) The *Affordable Med Scrubs* court was not pleased with the failure of the parties to file the proposed Liquidating Trust agreement with the disclosure statement. This is particularly important as such agreement often has key terms on the authority of the liquidating trustee, fees to be paid to the liquidating trustee and his or her professionals, and other items about which creditors should be aware (some or all of which, such as post-confirmation professional fees, may be shielded from future court or creditor scrutiny altogether, which is very dangerous).

*3. Highlight in the Disclosure Statement any Plan Injunctions that Go Beyond the Code.*

*See* Part III.1, *supra*, to ensure that the Plan Proponent includes in the disclosure statement the required highlighting of any plan injunctions (and the entities subject to those injunctions) that go beyond the terms of the Bankruptcy Code.

*4. Timing of the Section 1111(b) Election.*

If you represent a creditor which is considering making the election under 11 U.S.C. § 1111(b), remember that the deadline to do so is prior to the end of the hearing on the disclosure statement, unless the bankruptcy court sets a later time. Fed. R. Bankr. P. 3014.

- ***Creditor Takeaway***: As soon as a disclosure statement is filed, start getting your client to think seriously about the pros and cons of the Section 1111(b) election, so you can be ready to make it (or decide not to) by the conclusion of the disclosure statement hearing.[4] If that is not enough time – such as if discovery on plan issues may change your strategy – then get a motion on file to extend the time for you to make the Section 1111(b) election.

**Part II: Matters Specific to Plans.**

*1. As with Disclosure Statements, Properly Determine the Time of Filing to Match Your Hearing*

As with disclosure statements (*see* Part I.1, *supra*) Bankruptcy Rule 2002(b)(2) requires a Plan Proponent to provide **twenty-eight days' notice** of not only the hearing to consider confirmation

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[4] For an outstanding (and readable) summary of the mind-numbingly dense Section 1111(b) election, plus the strategic considerations / pros and cons for both the debtor and the secured creditor, *see* Franklind Lea, Tactical Financial Consulting, LLC, "Quick Reference Sheet: Understanding the § 1111(b) Election," American Bankruptcy Institute (2013) located at http://nebula.wsimg.com/717e3c590c7578d339f90cd1117f2032?AccessKeyId=91A6443C7A36 7C57DF51&disposition=0&alloworigin=1.

of a plan, but also the objection deadline with respect to the plan. Fed. R. Bankr. P. 2002(b)(2); *see also* Fed. R. Bankr. P. 3017(d) ("In addition, notice of the time fixed for filing objections and the hearing on confirmation shall be mailed to all creditors and equity security holders **in accordance with Rule 2002(b)** . . . ) (emphasis added).

- ***Plan Proponent Takeaway***: As with the disclosure statement seek a hearing at least 35 days after the filing and service of your plan and disclosure statement and notice of disclosure statement hearing. This satisfies Bankruptcy Rules 2002(b) and 3017(a), and provides you with sufficient time to react to objections and revise language to satisfy disclosure objections.

- ***Creditor Takeaway***: If a Plan Proponent provides less than thirty-one days' notice of the deadline to file objections to a disclosure statement, include in your objection that the hearing was not properly noticed, and the disclosure statement hearing must be continued, or re-noticed to all creditors providing adequate time for parties to file objections.

*2. Add Post-Petition Creditors to Your Notice List.*

An operating Chapter 11 debtor is not static – it continues to do business, including with parties with which it may not have done business pre-petition. Yet there are many plan provisions (including, most importantly, the discharge) which will apply to all creditors as of the effective date of the plan, **not** just creditors that existed as of the petition date. *See, e.g.*, 11 U.S.C. § 1141(d)(1) ("Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan - (A) discharges the debtor from any debt that arose **before the date of such confirmation**, . . . ) (emphasis added); 11 U.S.C. § 524(a) (describing operation of discharge, including by reference to Section 1141).

Likewise, a plan (or confirmation order) will often contain an administrative claims bar date or the Plan Proponent may file a separate motion to set an administrative claims bar date. If these documents are not served up on holders of administrative claims which were **not** on the list of creditors filed at the commencement of the case, then such administrative claimants will likely not be bound by the plan, or be subject to the administrative claims bar date.

This applies as well to preservation of claims in a disclosure statement or plan. It does not serve the Plan Proponent well to preserve claims against post-petition creditors (such as claims for voidable post-petition transfers under 11 U.S.C. § 549, or other causes of action) if such parties do not receive a copy of the plan and disclosure statement. *See* Part III.5, *supra*.

- ***Plan Proponent Takeaway***: It is not easy to determine which parties the debtor only started to do business with post-petition. Speak to the debtor's CFO. Consider having a paralegal or secretary go through the monthly operating reports and find creditors which were paid post-petition, but which are not on the creditor matrix filed at the start of the case. **Don't save this work for the end of the case**.

- ***Creditor Takeaway***: If you represent an administrative creditor, neither you nor your client may have gotten notice of the plan or the administrative claims bar date. Check the affidavits of service of the disclosure statement, the plan, the notice of hearing on both of them, and of the confirmation order and/or the order setting an administrative claims bar date. If neither you nor your client is on those lists, then be ready to argue that nothing in the plan or any related orders binds your client.

*3. Add a Specific Provision in the Plan to the Effect That All Contract and Leases Not Assumed By the Plan are Rejected as of the Effective Date (or Vice-Versa).*

It is very hard to schedule every executory contract and unexpired lease, and if the Plan Proponent tries to include a specific schedule of assumed contracts and leases, and then **also** a specific schedule of rejected contracts and leases, the chances will be good that something will be omitted from both of those schedules. Make sure the plan contains a "bucket" clause pertaining to executory contracts and unexpired leases, providing that all such contracts and leases not expressly scheduled for assumption (or rejection) are assumed (or rejected, if that is what the Debtor wants) as of the effective date of the plan.

*4. Include Provisions relating to Minimum Distributions and the Result of Not Timely Negotiating Distribution Checks (But Creditors Should be Wary as to How it Works).*

There are several technical takeaways here, all of which are quite simple to draft and include in a plan, and most of which, if the Plan Proponent leaves them out, will cause hassle and money to fix later.

- If a plan calls for periodic distributions, the Plan Proponent should provide a threshold amount for the issuance of a distribution. For example, the plan may provide that distributions do not have to be made if the amount is less than $25.00, unless the distribution represents the final distribution. The costs of issuing lots of small checks can be substantial, and the calls from creditors or accounting departments wondering why they received $2.80 will be annoying, to you and to them.

- In addition, the plan should contain a provision which provides that no future distributions need to be made if a payee fails to timely negotiate a distribution check. This will prevent accounting issues and the continual issuance of distribution checks that are not going to be cashed. However, fairness dictates that any distribution check above a certain amount that is not negotiated deserves a letter and other means of contact from the plan administrator or liquidating agent. It is not too much to ask for the plan administrator or liquidating agent to make a call or two in order to track down a better address or get ahold of someone, before all future distributions are forfeit.

- Be aware of what the plan provides about *de minimis* distributions which are not made, or future distributions that are forfeit due to non-negotiated checks. Do the funds revert to the reorganized debtor (unfair, and creates bad incentives on the part of the reorganized debtor) or the secured lender (even more unfair)? Absent compelling reasons, the plan

should specifically provide that any distributions which are *de minimis* or forfeited due to non-negotiation, must return to the pool for the next distribution.

- The Plan should also contain a provision for any final unclaimed property – such as final distributions checks that, for some reason, are not negotiated. New proposed local rules from the Bankruptcy Court for the Southern District of New York require such a plan provision.[5] These proposed local rules also state that any final remaining *de minimis* assets may be donated to a specified not-for-profit, non-religious charity, upon motion by the plan administrator (or similar appointee) and after notice and a hearing.[6]

*5. Specifically List all Claims Reserved Under the Plan.*

Section 1123(b)(3)(B) of the Code provides that:

> (b) *Subject to subsection (a) of this section, a plan may—*
>
> (1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;
>
> (2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;
>
> **(3) provide for—**
>
> (A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or
>
> **(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest.**

11 U.S.C. § 1123(b)(3)(B) (emphases added).

However, the plan must specifically identify and preserve such causes of action. *See, e.g.*, *Dynasty Oil & Gas, LLC v. Citizens Bank (In re United Operating, LLC)*, 540 F.3d 351, 355 (5th Cir. 2008) (standing to bring claims post-confirmation preserved only if the plan expressly provides for the "retention and enforcement [of claims]" and "the [p]lan expressly retains the right to pursue such actions.")

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[5] See Proposed Local Rule 3011-1, Bankr. S.D.N.Y, located at http://www.nysb.uscourts.gov/sites/default/files/LocalRules2016_ForPublicComment.pdf.

[6] As strong ABI proponent Chris Ward has reminded us, the ABI Endowment is an ideal charity for any leftover plan distributions or other assets that are unclaimed under a plan! *See* https://twitter.com/PolsinelliDE/status/780817353986699264.

The language in the plan must be "specific and unequivocal." *Dynasty Oil*, 540 F.3d at 355; *Harstad v. First Am. Bank*, 39 F.3d 898, 902–03 (8th Cir. 1994). A blanket reservation is inadequate to preserve causes of action that are not identified specifically. *Dynasty Oil*, 540 F.3d 351, 356 (5th Cir. 2008).[7] *See also Browning v. Levey*, 283 F.3d 761 (6th Cir. 2002); *D & K Properties Crystal Lake*, 112 F.3d 257 (7th Cir. 1997); *Harstad v. First American Bank*, 39 F.3d 898, 902 (8th Cir. 1994); *Kelley v. South Bay Bank (In re Kelley)*, 199 B.R. 698 (9th Cir. BAP 1996).[8]

However, if the plan only identifies the claims generally, specific disclosure in the disclosure statement may be sufficient. *Katz v. I.A. All. Corp. (In re I. Appel Corp.)*, 300 B.R. 564, 570 (S.D.N.Y. 2003), *aff'd*, 2004 WL 1496858, at *1 (2d Cir. 2004).

*6. Post-Confirmation Jurisdiction.*

Plan Proponents generally include a section that defines the post-confirmation jurisdiction of the bankruptcy court, *e.g.* to resolve disputes regarding the operation and interpretation of the Plan and Confirmation Order, to determine and enter order and judgments with respect to any claims, or causes of action held by the post-confirmation debtor or liquidating trustee and to determine and enter orders and judgments with such other matters and for such purposes as may be provided in the Plan and Confirmation Order. However, all Plan Proponents need to be aware of a generally more stringent (and stingy) approach to limited post-confirmation jurisdiction, even where a plan purports to preserve post-confirmation jurisdiction over matters that will arise after the plan is confirmed. Here are two examples, from opposite coasts:

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[7] For a very good discussion of the *Dynasty Oil* case and other courts' approach to the requirements for specific vs. general language reserving claims in a plan and disclosure statement, *see* Susan E. Trent, "*Plan Drafting Requirements Pursuant to § 1123 (b)(3)(B) Tackled*," February 2013 ABI Journal.

[8] It is still the law in some circuits that a general reservation of claims in the plan is sufficient. *See Kmart Corp. v. Intercraft Co. (In re Kmart Corp.),* 310 B.R. 107, 124 (Bankr. N.D. Ill 2004); *JPMorgan Trust Co. v. Mid-America Pipeline Co.,* 413 F. Supp. 2d 1244, 1249 (D. Kan. 2005); *Fleet National Bank v. Gray (In re Bankvest Capital Corp.)*, 375 F.3d 51 (1st Cir. 2004). However, even these cases are somewhat confusing in terms of how much "specificity" a "general reservation" should be (as these terms seem to be mutually exclusive). *See In re Ampace Corp.*, 279 B.R. 145, 160 (Bankr. D. Del. 2002) (finding that "a general reservation in a plan of reorganization indicating the type or category of claims to be preserved should be sufficiently specific to provide creditors with notice that their claims may be challenged post-confirmation"). Other courts have taken a more middle ground approach, based on the nuances of the language of the Plan and the procedural history of the bankruptcy case. *See Elk Horn Coal Co., LLC v. Conveyor Mfg. & Supply, Inc. (In re Pen Holdings)*, 316 B.R. 495, 504 (Bankr. M.D. Tenn. 1994).

- In *SCI Real Estate Investments, LLC*,[9] Judge Saltzman of the U.S. Bankruptcy Court for the Central District of California, citing among other cases *Hartford Underwriters Inc., Co. v. Union Planters Banks N.A.,* 530 U.S. 1,6, 8 (2000), held that the bankruptcy court had no post-confirmation jurisdiction to approve the sale of assets of a liquidating trust because the assets transferred into the liquidating trust pursuant to the Plan and were no longer property of the estate. **This ruling was despite that the Plan gave the liquidating trustee the right to sell assets post-confirmation and that the Plan provided that the court retained jurisdiction over the Plan.**

- In *Gavin/Solmonese, LLC v. Shyamsundar (In re AmCad Holdings, LLC)*,[10] a plan created a liquidation trust which was assigned certain estate assets, including causes of action. Five months after confirmation, the Liquidation Trustee brought an adversary proceeding against some prior managers and officers of the debtor, including three counts asserting defendants breaches of fiduciary duty. The defendants moved to dismiss the fiduciary claims for lack of subject matter jurisdiction. The Liquidation Trustee asserted the Court had jurisdiction over the breach of fiduciary claims under the plan's provisions for retention of post-confirmation jurisdiction over "Causes of Action", which were defined in a very broad and inclusive (but annoyingly general) manner. The plan had no specific retention of claims for breach of fiduciary duty. In dismissing the fiduciary claims, the Court noted that its post-confirmation jurisdiction over non-core but related matters was narrow, and limited to matters that had a close nexus to the plan. The Court reasoned that while a Chapter 11 plan that retains jurisdiction over a specific cause of action generally satisfies this nexus, a wholesale assignment of causes of action to the post-confirmation trust did not.[11]

In short, Plan Proponents need to be keenly aware of how they draft their post-confirmation jurisdiction clauses. And even a broad reservation of post-confirmation jurisdiction to the Bankruptcy Court may still be challenged. *See Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 164 (7th Cir. 1994) (the bankruptcy court cannot write its own "jurisdictional ticket.").

*7. Think Hard About Satisfying § 1129(a)(9)(A).*

Section 1129(a)(9)(A) of the Bankruptcy Code requires that administrative claimants receive "on the effective date of the plan . . . cash equal to the allowed amount of such claim." 11 U.S.C. §

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9 Case No. 11-15975, Bankr. C.D. Cal., Tentative Ruling and Bench Ruling (June 18, 2014).

10 Adv. Proc. No. 15-51979, Bankr. D. Del, Opinion and Order of Dismissal (June 15, 2016) (Walrath, J.).

11 More about this case can be found at James Maloney, "*Losing Both Ways: Debtor Diligence in the Identification of Claims*," The Bankruptcy Cave Blog (2016), located at http://bankruptcycave.com/losing-both-ways-debtor-diligence-in-the-identification-of-claims/#1228494-v2-Blog_Jim_Maloney_on_GM_and_AmCad_Cases.docx.

1129(a)(9)(A). However, often certain administrative claims are not fully liquidated when confirmation is being pursued.

- ***Creditor Takeaway 1***: If your client holds an administrative claim that is not yet liquidated, or disputed, consider filing a plan objection requiring funds to be reserved for the full amount of your administrative claim.[12] *See In re Mcorp Fin., Inc.*, 160 B.R. 941, 963 (S.D. Tex. 1993) (confirming plan, but only after finding there would be sufficient funds in the administrative claims reserve for all likely administrative claims); *In re Wiston XXIV L.P.*, 153 B.R. 322, 328 (Bankr. D. Kan. 1993) (where the debtor did not establish an ability to pay an administrative claim that *may* arise for use of cash collateral under 507(b) and 361, the court held that the debtor's plan violated Section 1129(a)(9)(A) and Section 1129(a)(11) of the Bankruptcy Code); *In re Vermont Stove Co.*, 69 B.R. 87, 89-90 (Bankr. D. Vt. 1987) (emphasizing that Section 1129(a)(9) does not compel the holder of a priority claim to accept anything less than full cash payment); *In re Oak Partners, Ltd.*, Case No. 89-00948, 1992 Bankr. LEXIS 784, at *9 (Bankr. N. D. Ga. Mar. 6, 1992); *cf. In re ACE-Texas, Inc.*, 217 B.R. 719 (Bankr D. Del. 1998) (in a dispute as to whether the debtor would have to pay interest at the default rate to two oversecured creditors under Section 506(b) of the Bankruptcy Code, the plan established a claim reserve containing the **full amount** of default interest at issue, plus three years' worth of **additional** default interest on that interest, in the event the litigation took that long, **plus** attorney's fees for the oversecured creditors, in the event they were to succeed in their arguments on default interest).

- ***Creditor Takeaway 2***: Plan Proponents will often try to impose a "cap" on the total amount of administrative claims for which the post-confirmation debtor is liable. In our experience, this is often done to preclude professional fees, such as where the Plan Proponent is a creditor and it wishes to limit the fees of the debtor's counsel or its financial advisor. Such caps are impermissible. Whatever the allowed administrative claims are, the post-confirmation debtor must pay them in full. *In re TCI 2 Holdings, LLC*, 428 B.R. 117, 174 (Bankr. D.N.J. 2010) ("The Code does not permit a plan to cap the amount to be paid toward administrative expenses without the consent of the claimants." (citing cases).

- ***Plan Proponent Takeaway***: If the debtor's exit financing shows ample liquidity to cover all unliquidated and disputed administrative claims, then you can likely successfully oppose this request for a specific reserve. *Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944 (2d Cir. 1993). However, be ready to offer evidence of the estimated amount of the unliquidated and disputed administrative claims, so that the court can make specific findings that the exit financing will be sufficient in light of the expected amount of administrative claims. *See generally Bittner v. Borne Chemical Co.,* 691 F.2d 134, 136 & n.2 (3d Cir. 1982) (a lower court must show the method it used to estimate a claim, and make factual findings to support its estimation); *cf. In*

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[12] A sample objection of this kind can be obtained by contacting Mark Duedall, one of the authors (contact information at the front of this article).

*re Forty-Eight Insulations, Inc.,* 115 F.3d 1294 (7th Cir. 1997) (interpreting a confirmed plan to allow a liquidating trustee to establish reserves for disputed or estimated claims, but holding that the trustee must have a reasoned basis to support his decision on the proper reserve amount).

*8. Be Careful About Any Provisions that Speak to the Termination of the Stay.*

By operation of the Bankruptcy Code, the automatic stay ends when a plan becomes effective and the discharge is in place. 11 U.S.C. § 362(c)(2)(C) ("the stay of any other act under subsection (a) of this section continues until the earliest of . . . the time a discharge is granted"). In other words, be very careful about any plan provisions which speak to how the stay expires, or whether it will continue. The Code provides all the mechanism you need to bring the stay to an end. Monkeying around with this can have unintended effects.

That being said, if there are any special or specific injunctions that were entered during the case, think about whether you want them to remain in place. To that end, consider adding the following provision to your plan:

> **Term of Injunctions or Stays.** Unless otherwise expressly provided herein or in a Final Order, all injunctions or stays arising entered during the Chapter 11 Cases under section 105 or 362 of the Bankruptcy Code, or otherwise (other than the automatic stay of section 362 of the bankruptcy Code), shall remain in full force and effect until the closing of the Chapter 11 Cases.

*9. Be Careful of the Definition of a "Final Order."*

Many plans contain, inexplicably, a definition of a "final order" that requires an order to be no longer subject to appeal, reconsideration, or subject to a petition for *certiorari*. This is very dangerous.

- ***Plan Proponent Takeaway***: If the Plan Proponent expects that anyone will object to professional fees, this could be a real problem. If professional fees are allowed, resulting in the fees (or any holdback accrued during the case) being approved by court order, those fees still cannot be paid if the objecting party takes an appeal. That is, most plans provide that allowed claims or allowed professional fees can be paid upon entry of a "Final Order." **But if the definition of a "Final Order" requires that the subject order no longer be subject to appeal, then the claim or fees at issues may not be able to be paid for months or even years** – as long as the appeal or appeals remain pending.

- ***Creditor Takeaway***: Likewise, if you think your client may have a claim to which there will be an objection, a restrictive definition of a "Final Order," requiring the order to no longer be subject to appeal, could delay payment to your client for an excessively long period of time, even after successful allowance of the claim by the Bankruptcy Court.

*10. Know Your Jurisdiction.*

With respect to every point in this paper, and every other point covered by the plan, know your jurisdiction. Courts vary widely on permissible plan provisions, and including provisions in your plan that do not pass muster under applicable local law will draw immediate objection, and will make the Court and other parties far more suspicious and critical of your drafting.

## Part III: The Discharge and Plan Injunctions.

*1. Providing Notice of (and Emphasizing) the Terms of Any Plan Injunctions, in the Disclosure Statement, the Plan, and in the Notice of Confirmation Hearing.*

Bankruptcy Rule 3016(c) requires that any injunction against conduct not otherwise enjoined under the Code that is contained within a plan and disclosure statement must describe in specific and conspicuous language (bold, italic or underlined texts) any acts to be enjoined **and the entities subject to the injunction**. Fed. R. Bankr. P. 3016(c). Specifically:

- ***Plan Proponent Takeaway 1***: This does not just apply to third party injunctions, but also standard exculpation clauses. *See SE Property Holdings, LLC v. Seaside Engineering & Surveying, Inc. (In re Seaside Engineering & Surveying, Inc.)*, 2015 WL 1061718, at *4 (11th Cir. Mar. 12, 2015) (applying the Sixth Circuit's stringent *In re Dow Corning Corp.,* 280 F.3d, 648 (6th Cir. 2002) seven-factor test for determining whether to approve a standard plan exculpation clause that would enjoin a non-consenting creditor's claim against a non-debtor).

- ***Plan Proponent Takeaway 2***: Make sure both the **plan and the disclosure statement** use appropriate highlighting of any injunctions that extends beyond what the Bankruptcy Code specifically permits.

- ***Plan Proponent Takeaway 3***: Do not think that a Plan Proponent can comply with these rules simply by highlighting the specific plan discharge, injunction, and exculpation provisions. Instead the Plan Proponent must draft language that **describes** the injunctive provisions, and **identifies** the various entities that will be subject to the injunctions. Fed. R. Bankr. P. 2002(c)(3). Take a few minutes and draft additional language for your documents that describe how these provisions work, what they are intended to enjoin, and the types of parties that are to be enjoined.

- ***Plan Proponent Takeaway 4***: Make sure your **notice of confirmation hearing also** contains the requisite language and a description of any injunction that is not otherwise

provided for in the Bankruptcy Code, and **identifies** the entities subject to an injunction. Fed. R. Bankr. P. 2002(c)(3). Bankruptcy Rule 2002(c)(3) provides as follows:

> (3) *Notice of Hearing on Confirmation When Plan Provides for an Injunction*. If a plan provides for an injunction against conduct not otherwise enjoined under the Code, the notice required under Rule 2002(b)(2) [that is, the notice of deadline to file objections and of the confirmation hearing] shall:
>
> (A) include in conspicuous language (bold, italic, or underlined text) a statement that the plan proposes an injunction;
>
> (B) describe briefly the nature of the injunction; and
>
> (C) identify the entities that would be subject to the injunction.

- ***Plan Proponent Takeaway 5***: Don't forget to provide that same notice to parties that are **not** creditors or equity security holders. Fed. R. Bankr. P. 3017(f). Bankruptcy Rule 3017(f) provides as follows:

> (f) NOTICE AND TRANSMISSION OF DOCUMENTS TO ENTITIES SUBJECT TO AN INJUNCTION UNDER A PLAN. If a plan provides for an injunction against conduct not otherwise enjoined under the Code **and an entity that would be subject to the injunction is not a creditor or equity security holder**, at the hearing held under Rule 3017(a), the court shall consider procedures for providing the entity with:
>
> (1) at least 28 days' notice of the time fixed for filing objections and the hearing on confirmation of the plan containing the information described in Rule 2002(c)(3); and
>
> (2) to the extent feasible, a copy of the plan and disclosure statement.

In short, stop and **seriously think about <u>every entity</u> that may wish to pursue a claim against any party that you wish to protect with a plan injunction** – government entities? Future claimants? Co-Defendants in litigation that have not yet asserted any cross claims? – and consider a way to provide them with notice of the plan, the objection deadline for the plan, and a copy of the plan and disclosure statement.

- ***Plan Proponent Takeaway 6***: As noted above (*see* Part II.6, *supra*), bankruptcy courts are becoming far more restrictive in their view of post-confirmation. For that reason as well, a Plan Proponent needs to think very seriously about the likelihood that another court, lacking the context or knowledge about the case, will be interpreting the terms of a plan injunction. For that reason, all Plan Proponents should draft any plan injunction very carefully, and consult one or more colleagues about the selected language, parties to include or exclude, and other matters that can help (or hurt) with scope and clarity.

- ***Creditor Takeaway***: If the Plan Proponent fails to comply with these provisions, consider whether it is strategically better to file a motion to continue the confirmation hearing (as creditors will not have received proper notice of the injunctions or their scope).

*2. Using the Discharge to Eliminate Creditor Setoff Rights, Defenses, and the Like.*

This one is a real trap for creditors. A plan's discharge provision, and the plan injunction, will almost always, **completely impermissibly**, seek to eliminate rights of setoff and recoupment. Setoff and recoupment rights survive bankruptcy. *See United States v. Continental Airlines (In re Continental Airlines)*, 134 F.3d 536, 541 (3d Cir. 1998) (where rights of setoff timely asserted by the creditor, such rights will be enforceable post-confirmation despite a debtor's discharge under plan); *Carolco Television Inc. v. National Broadcasting Co. (In re De Laurentiis Entertainment Group Inc.)*, 963 F.2d 1269, 1276, (9th Cir. 1992) ("We conclude that section 553 must take precedence over section 1141."); *see also Haizlett v. United States (In re Haizlett)*, 261 B.R. 393 (Bankr W.D. Pa. 2000) (citing cases); *cf. Folger Adam Security. Inc. v. DeMatteis/MacGregor, JV*, 209 F.3d 252, 261 (3d. Cir. 2000) ("[W]e have likewise held that the right of recoupment is a defense, not a claim.").

Likewise, if your client has a counterclaim to a claim the debtor is asserting against your client (which is often the case if the debtor has sued your client, or has indicated that it may sue your client in the future), then this counterclaim can give rise to a right of setoff or recoupment.

- ***Creditor Takeaway 1***: If your client has any rights of setoff or recoupment, you must ensure the plan does not discharge or otherwise limit those rights, and if the plan contains such limits, then you need to file an objection to such plan provisions.[13]

- ***Creditor Takeaway 2***: Recall that **the discharge applies to all claims that arose <u>prior to confirmation</u>, not just pre-petition claims**. *See* 11 U.S.C. § 1141(d)(1)(A) ("Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—(A) discharges the debtor from any debt that arose **before the date of such confirmation** . . . ") (emphasis added). Thus, be particularly mindful of any post-confirmation setoff or recoupment rights that may have arisen.

- ***Creditor Takeaway 3***: Be aware of this especially if your client has an on-going business relationship with the debtor (such as a supplier or other vendor) that calls for periodic rebates, chargebacks, or other monetary rights that your client can assert against the debtor, or use to setoff amounts that it owes the debtor (such as when **your client is being supplied with goods or services by the debtor**). Often, your client will be entitled to a year-end rebate or reduction in the amount it owes to the debtor. But if the plan's discharge and injunction provisions preclude setoff or recoupment rights as of the

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[13] A sample objection of this kind can be obtained by contacting Mark Duedall, one of the authors (contact information at the front of this article).

confirmation date, your client could be waiving those valuable monetary rights through improperly drafted discharge provisions.

*3. Do Not Include a Discharge Provision in a Liquidating Plan.*

A liquidating debtor does not obtain a discharge. 11 U.S.C. § 1141(d)(3) ("The confirmation of a plan does not discharge a debtor if — (A) the plan provides for the liquidation of all or substantially all of the property of the estate; (B) the debtor does not engage in business after consummation of the plan; and (C) the debtor would be denied a discharge under section 727(a) [that is, if the debtor is not an individual]."). The Plan Proponent should never include a discharge provision in a liquidating plan – the Office of the United States Trustee will likely object, and most bankruptcy judges will catch this error as well. Worse, the court may start to wonder what other improper provisions the Plan Proponent may have included, and the plan will obtain even more court scrutiny.

## Part IV: General Matters of Drafting.

Most of the items below are matters of form and not essential, but these rules, if followed with make your documents better, and will save you substantial time (and save your clients substantial money) during the process. Other of these rules will prevent your document from looking sloppy. Finally, other of the rules below will prevent opposing counsel from learning things they should not learn (such as how many versions a document has gone through). Follow these rules, and learn the word processing techniques necessary to implement them (or train your secretary to do so).[14]

*1. Do Not Use a Confirmed Plan from Another Case as Your Form or Starting Point, Unless You Were the Primary Drafter of that Document.*

When a Plan Proponent starts drafting from another party's plan, **the following mistakes are virtually certain to occur**:

- The Plan Proponent has now implicitly adopted whatever language compromises were reached in order to resolve objections or issues in that prior plan. Most of those probably have nothing to do with the case at bar.

- Worse, the Plan Proponent that starts from another confirmed plan that contains language that may be far too beneficial to one creditor group or another.

- If the prior plan is from another jurisdiction, it likely contains provisions that will not pass muster in the jurisdiction of the existing case.

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[14] Many of these rules apply to all types of documents, and can be used to improve drafting and appearance of anything else you may prepare in a bankruptcy case.

In short, start with a plan **you** have worked on before. Ideally, one in which you have played a substantial drafting role, but if not, it is still better to start with a plan that you are already familiar with. And go back to the originally filed version of that plan – the final one will have too much compromised language. After that, think critically about each plan provision, especially the defined terms which can include (or exclude) many effects of the substantive plan provisions.

*2. Check Your Defined Terms Before Filing.*

It is sloppy, and can give a hint to opposing counsel of prior structures or plan constructs, to include defined terms in a plan that are not used in the plan. Prior to filing a plan, use the word processing "search" function to look for each term you define in the Plan. If it is not used, remove the definition. Likewise, with your disclosure statement.

*3. Leave the Version Number Off Your Documents.*

Most law firm word processing systems will include a version number after your document number. **Never** include the version number on any document filed with the Court, or circulated to other counsel. Neither the public nor opposing counsel has any business knowing how many versions the document went through. However, if you are circulating an interim draft, either to your side or to opposing counsel, and a reference point is needed to distinguish the document from prior versions, then you should add a header, such as "***[Your Law Firm Name] Draft – 9/19/2016***."

*4. Avoid MS Word's "Track Changes" Function, Except for Minor Changes.*

MS Word's track changes function is very handy for small changes, but very risky for wholesale markups. It can be hard to tell who made the changes (someone on your side of the drafting table, or someone on the other side). Things become highly confusing when successive drafters make changes to the items that are tracked – very quickly, no one can figure out who made a revision, or who removed or altered that revision, and the integrity of the document will be very much in risk.

If making any more than a few changes, make them in a new version, in clean, and send the other side the clean and redline version.

*5. Run Your Own Redline – You Cannot Trust the Other Side Not to Have Made Other Changes.*

This one is unfortunate, but your authors assure you that is happens. Specifically, the other side can send you a new clean and redline. However, they may have made changes to the document in its current version, surreptitiously hoping that you will not notice those since they do not appear in the redline they send back to you.

In short, the other side can make changes to your document that you do not realize. The only way to protect against this is by taking the clean they send you, and running a redline of that against your last clean document. This should always be done – there is no other way to be sure of what changes are in the document.

*6. Use Automatic Numbering and Automatic Cross-References.*

Always use the automatic paragraph and section numbering features. Use of these features will avoid mistaken cross-references (which can create ambiguities, and can cause an embarrassing conversation with your client about typographical errors and their effect). Use of these features will also save you a great deal of time (and save the client a great deal of money) as your documents undergo changes – especially those critical, last minute changes that are made when everyone is in a rush. Likewise with automatic cross-references – most secretaries can do this quite easily given a few hours with the document, and once the automatic cross-references are done correctly, they rarely (if ever) require any further attention.

If for some reason you are not using automatic numbering and automatic cross-references, but you need to add (or remove) a section just before filing, take a tip from your corporate colleagues. Either (i) replace the language to be removed with "Reserved," leaving the section in place so that your cross-references do not need to be re-checked, or (ii) if adding a new section or numbered definition, call it Section 4.5A, or Definition 82A, such that you are not adding a new section that will through off your cross-references.

*7. Clearly Mark Open Items in any Draft.*

Help your reader (which is often a colleague, or a client) as he or she goes through drafts. [15] Any open items, blanks, sections that require attention, or the like should be by putting matters in [[**double** brackets and highlighted]]. For instance:

- At the time of default, the Debtor owed [[$17.34 million]] on the Note.
- [[Need to verify timeline with the client.]]

[15] "[T]he reader [is] in serious trouble most of the time, a man floundering in a swamp, and it [is] the duty of anyone attempting to write English to drain this swamp quickly and get his man up on dry ground, or at least throw him a rope." William Strunk Jr. and E.B. White, "*The Elements of Style*," at p. 7 (1979).

*8. Include "Notes to Draft."*

When a reader is reviewing your draft, he or she cannot be inside your head, and will not know what your thinking was at the time of drafting. Likewise, don't count on your memory (or the post-it notes strewn around your desk) to recall how a section of the plan or disclosure statement may require further consideration, or how such provisions may interact with other sections of the document. Wherever necessary or in any way helpful, include, **in the body of the document**, notes such as this:

- [[Note to Draft from [Your Name]: this section may need to be re-worked depending on how we revise the plan injunctions.]]
- [[Note to Draft from [Your Name]: this section was taken from the 3Q 2015 10-Q, which various people have said may have been wrong.]]

MS Word has a feature in which you can add notes in the margin, which some believe is not as good, as it can be hard to print the document out actually showing those notes, and the feature can sometimes be unclear as to who has included that note.

*9. Customize the Footer on Your Signature Pages.*

Do not have a client (or any other party) sign a page for you to affix to the plan or disclosure statement (or any other document, for that matter). It is far too easy, when disaster later happens, for the signing party to state that s/he did not know what s/he was signing, or s/he did not know you were affixing it to a given document. A Plan Proponent can also get in serious trouble simply "taking" a signature page for a prior version of the document and affixing it to the next version. At a minimum, put a custom footer on your signature page (your secretary will know exactly how to do this) stating what it is, such as "Signature Page to Third Amended Plan of Reorganization."