Jaunty Judicial Debates

Thomas M. Horan, Moderator
Shaw Fishman Glantz & Towbin, LLC; Wilmington, Del.

Resolved: Parties can contract around the *ASARCO* decision.

Pro: Hon. Rosemary Gambardella
U.S. Bankruptcy Court (D. N.J.); Newark

Con: Hon. Kevin J. Carey
U.S. Bankruptcy Court (D. Del.); Wilmington

Resolved: Structured dismissals are permissible.

Pro: Hon. Cecelia G. Morris
U.S. Bankruptcy Court (S.D.N.Y.); Poughkeepsie

Con: Hon. Robert E. Gerber (ret.)
Joseph Hage Aaronson LLC; New York

Feature

By Robert J. Keach and Brady C. Williamson[1]

The *Boomerang* Effect[2]

Is There a Contract Exception to ASARCO *(and if Not, What Then)?*

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The Supreme Court ruled, in *ASARCO*,[3] that nothing in the Bankruptcy Code created a sufficient exception to the American Rule and that, accordingly, there was no statutory basis to support awarding to retained professionals compensation for the defense of their fee applications, even when successful. The Court thus upended the established approach of most courts. However, given the Court's express and sole reliance on the American Rule as the basis for its decision, some hope arose that the effects of *ASARCO* could be offset by including a provision in retention agreements, and blessed by the bankruptcy courts under § 328 of the Bankruptcy Code, that allowed fees for the defense of fees, at least where the defense was successful. After all, writing for the majority, Justice Thomas described the American Rule such that: "Each litigant pays his own attorneys' fees, win or lose, *unless a statute or contract provides otherwise*."[4] *ASARCO* merely dispensed with the first of these possible exceptions, the statutory one.

Professionals were quick to test the premise, including in retention application requests for the court to bless provisions allowing for fees for defense of fees. The Office of the U.S. Trustee (the "UST") — which had joined the losing side in *ASARCO* and defended, on statutory and policy grounds, fees for defense of fees in some circumstances — quickly objected, arguing that such provisions ran afoul of the Supreme Court's ruling. A recent decision from Delaware, in the *Boomerang Tube* chapter 11 case, has largely sided with the UST, refusing to approve fees for a defense of fees provision.[5] Other Delaware judges are following that decision.[6]

This article will survey the pre-*ASARCO* approach to fees for defense of fees, the Supreme Court's decision, and the arguments for and against the contract exception to that ruling. It will then explore in detail the decision of the Delaware court in *Boomerang Tube* and discuss what, if anything, is left of the contract exception. The article then explores the implications of these decisions for everyday practice, as well as unresolved issues in the wake of these decisions.

The Pre-*ASARCO* Case Law

Prior to the Supreme Court's decision in *ASARCO*, the decisional law was *relatively* settled with respect to whether fees and costs incurred by a professional in defending his or her fee application were compensable: applying the "American Rule," such fees and costs generally were not compensable *unless* the applicant "substantially prevailed" in the defense of a fee application. Almost 10 years ago, Judge **Stuart M. Bernstein**, in reviewing the prevailing case law, reasoned in *Brous*:

> [F]ee litigants, like other litigants, must generally bear their own legal expenses under the "American Rule."
>
> Nevertheless, some courts have awarded the litigation fees and expenses incurred by the successful applicant out of fear that the failure to do so would dilute the fee award, and encourage parties to file frivolous objections. Conversely, other courts have declined to award the fees where the objection was filed in good faith and the objecting party prevailed. At least one court has expressed the concern that allowing the losing applicant to recover its legal fees would encourage meritless fee requests because the applicant could earn more fees opposing objections to its frivolous request.[7]

Other courts, however, took a stricter approach, finding that the fees and costs incurred in defending

1 The authors acknowledge the contributions of **Roma N. Desai** of Bernstein Shur and Jill Bradshaw of Godfrey & Kahn for providing invaluable assistance with this article. Mr. Keach has served as a fee examiner in, among other cases, *In re AMR Corp. (American Airlines)* and *Exide Technologies*. Mr. Williamson and his firm also served as fee examiner and fee committee counsel in a number of cases, including *General Motors*, *Lehman Brothers* and *Energy Future Holdings*. The authors joined fellow fee examiners **Nancy B. Rapoport** (UNLV William S. Boyd School of Law; Las Vegas) and **Robert M. Fishman** (Shaw Fishman Glantz & Towbin LLC; Chicago) in filing an *amicus brief* in the *ASARCO* case that advocated permitting the award of fee defense compensation in limited circumstances.

2 In social psychology, appropriately enough, the "'boomerang effect' refers to the unintended consequences of an attempt to persuade resulting in the adoption of an opposing position instead." Wikipedia, "Boomerang effect (psychology)," *available at* en.wikipedia.org/wiki/Boomerang_effect_(psychology) (last visited on March 7, 2016).

3 *Baker Botts LLP v. ASARCO LLC*, – U.S. –, 135 S. Ct. 2158, 2164 (2015).

4 *Id.* at 2164 (quoting *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252-53, 130 S. Ct. 2149 (2010)) (emphasis added).

5 *See In re Boomerang Tube Inc.*, No. 15-11247 (MFW), 2016 WL 385933 (Bankr. D. Del. Jan. 29, 2016).

6 *See, e.g., In re Samson Resources Corp.*, No. 15-11934 (CSS), Dkt. No. 641 (Bankr. D. Del. Feb. 8, 2016) (Letter from Hon. Christopher S. Sontchi to Counsel); *In re New Gulf Resources LLC*, No. 15-12566 (BLS), Dkt. No. 228 (Bankr. D. Del. Feb. 1, 2016) (Letter from Hon. Brendan Linehan Shannon to Counsel).

7 *In re Brous*, 370 B.R. 563, 572 (Bankr. S.D.N.Y. 2007) (internal citations omitted); *see also In re 14605 Inc.*, No. 05-11910 (MFW), 2007 WL 2745709, at *10 (Bankr. D. Del. Sept. 19, 2007); *In re Worldwide Direct Inc.*, 334 B.R. 108, 109-12 (D. Del. 2005) ("[R]equiring counsel who has successfully defended a fee claim to bear the costs of that defense is no different than cutting counsel's rate or denying compensability on an earlier fee application."); *In re CCT Commc'ns*, No. 07-10210 (SMB), 2010 WL 3386947, at *8-9 (Bankr. S.D.N.Y. Aug. 24, 2010) (duplicating the reasoning of *Brous*, but allowing fees and costs in defending fee application where applicant "substantially prevailed, and denial of the defense costs would dilute its award"); *In re 530 West 28th Street LP*, No. 08-13266 (SMB), 2009 WL 4893287, at *11 (Bankr. S.D.N.Y. Dec. 11, 2009) (following *Brous* and not awarding any portion of fees incurred in defending fee application where

a fee application benefit only the professional and provide no benefit to the estate; accordingly, such courts, albeit a minority, denied categorically the allowance of such fees and the reimbursement of such expenses.[8]

The UST's Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed under 11 U.S.C. § 330 by Attorneys in Larger Chapter 11 Cases (the "UST Large Case Guidelines")[9] took a similar approach to the then-prevailing majority case law. The UST Large Case Guidelines provided that activities that the UST may consider or object to as non-compensable under § 330 review included but were not limited to:

> **Contesting or litigating fee objections:** Whether the fee application seeks compensation for time spent explaining or defending monthly invoices or fee applications that would normally not be compensable outside of bankruptcy. Most are not compensable because professionals typically do not charge clients for time spent explaining or defending a bill. The USTP's position is that *awarding compensation for matters related to a fee application after its initial preparation is generally inappropriate, unless those activities fall within a judicial exception applicable within the district (such as litigating an objection to the application where the applicant substantially prevails)*. Thus, the United States Trustee may object to time spent explaining the fees, negotiating objections, and litigating contested fee matters that are properly characterized as work that is for the benefit of the professional and not the estate.[10]

Thus, most available case law and the UST Large Case Guidelines generally provided, in effect, that time spent defending fee applications would not be compensable unless the party defending the fees substantially prevailed. If the applicant substantially prevailed, however, fees and expenses incurred for the defense of fees were allowable and compensable.

Fee Examiner Practice

As fee examiners, or counsel appointed to fee committees, the authors here also took the position, based on the case law and guidelines, that responding to the fee examiner's inquiries and objections presented the possibility of both compensable and noncompensable time. Given the procedure mandated by most fee examiner orders, **Bob Keach** took the position, before *ASARCO*, that it would be unfair to recommend that all fees incurred in responding to the fee examiner's inquiries and attempting to resolve such inquiries be disallowed. *Routine* involvement in the process should not be penalized. Under Keach's approach, the fee examiner exercises his judgment in this respect on a case-by-case basis, given his direct involvement in the process. However, consistent with both the case law and the applicable guidelines, Keach *generally* recommended that time be treated as compensable when spent (a) preparing an *initial* response to the preliminary report (which response may be detailed); (b) in an *initial* meeting or teleconference with the fee examiner as to a preliminary report; and/or (c) considering a *single* revised resolution proposal or response by the fee examiner following such response, meeting and/or teleconference. Moreover, Keach took the position that a routine response to a preliminary report and participation in the routine process above does not require the retention and use of outside counsel, even as to retained professionals that are not law firms. Accordingly, he generally recommended that retained professionals *not* be reimbursed for outside counsel fees incurred in connection with this process.

Brady Williamson, as the fee examiner in the *Motors Liquidation* case, recommended that some fees be allowed on (at least in part) a formula basis:

> The recommendation embodied in the Fee Examiner's individual reports suggests a pragmatic approach. For experienced firms, it proposes a 50 percent payment for time spent on responding to the Fee Examiner or to the U.S. Trustee or, for that matter, to the Court itself. For less experienced firms, the suggested reduction is less. This approach takes into account the case law, to the extent there is bright line authority in those cases, and tries to account both for sustained objections and stipulations as well as for objections that, though not sustained, are made in good faith — generally in concert, though not jointly, by the U.S. Trustee and the Fee Examiner.[11]

The *ASARCO* Decision

In *ASARCO*, the U.S. Supreme Court held that professional fees incurred in litigating the defense of a fee application are not compensable under § 330. In reaching that conclusion, the Court used the American Rule as a starting point: Each party pays his or her own attorney's fees, win or lose, unless a statute or contract provides otherwise.[12] Historically, with respect to the "statutory" exception to the American Rule, the Court has recognized departures from the American Rule only where there are specific and explicit statutory provisions for the allowance of attorney's fees.[13]

Applying this rule to § 330, the Court found that the language there — "reasonable compensation for actual, necessary services rendered" — permits courts to award fees for work done "to assist the administrator of the estate...."[14] However, "reasonable compensation for actual, necessary services rendered" does not specifically or explicitly autho-

objections to application were made in good faith, the court sustained many of the objections, and determined that "there [was] no reason to deviate from the American Rule under which litigants must bear their own legal expenses"); *In re Ahead Commc'ns Sys. Inc.*, No. 02-30574, 2006 WL 2711752, at *4 (Bankr. D. Conn. Sept. 21, 2006) (collecting cases and holding that: "This court concurs with the courts which have allowed the compensation of attorneys' fees incurred in successfully defending fee applications against objections."); *see also* Bench Decision on Pending Fee Issues, *In re Motors Liquidation Co.*, No. 09-50026 (REG), Dkt. No. 7896 (Bankr. S.D.N.Y. Nov. 23, 2010) (Judge **Robert E. Gerber** adopts holdings of *CCT* and *Brous*).

8 *In re Wireless Telecomm. Inc.*, 449 B.R. 228, 237-38 (Bankr. M.D. Pa. 2011); *In re Parklex Assocs. Inc.*, 435 B.R. 195, 214 (Bankr. S.D.N.Y. 2010) (although Court reluctant to establish *per se* rule); *In re St. Rita's Assocs. Private Placement LP*, 260 B.R. 650, 652 (Bankr. W.D.N.Y. 2001); *cf. Stations Holding Co.*, No. 02-10882 (MFW), 2004 WL 1857116, at *2 (Bankr. D. Del. Aug. 18, 2004) (time spent negotiating compensation is unreasonable as "the purpose of such work is to improve the position of the applicant, not the Debtor or creditor body in general"); *see also In re 415 W. 150 LLC*, No. 12-13141 (SMB), 2013 WL 4603162, at *6 n.2 (Bankr. S.D.N.Y. Aug. 28, 2013) ("[A]n applicant should not be compensated for fixing a defective fee application.").

9 28 C.F.R. Part 58, Appendix B.

10 *Id.* at section B.2.g (emphasis added).

11 Fee Examiner's Summary and Recommendations — Interim Fee Applications Scheduled for Hearing on October 26, 2010 (Including Those Adjourned From September 24, 2010), *In re Motors Liquidation Co.*, No. 09-50026 (REG), Dkt. No. 7448, at 11 (Bankr. S.D.N.Y. Oct. 19, 2010).

12 *See ASARCO*, 135 S. Ct. at 2164.

13 *Id.*

14 *Id.* at 2165.

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rize a shifting of litigation costs from one party to another.[15] Rather, § 330(a)(1) authorizes courts to award attorneys' fees for "work done *in service of* the estate administrator."[16] Time spent litigating a fee application "against the administrator of a bankruptcy estate cannot be fairly described as 'labor performed for' — let alone 'disinterested service to' — that administrator."[17] Since § 330 does not authorize a departure from the American Rule, professionals must bear the cost of defending their own fee applications in litigation.[18]

Justice Breyer, joined by Justices Ginsburg and Kagan, dissented. In contrast to the majority opinion, their rationale started with § 330(a)(3) — finding that bankruptcy courts have broad discretion to determine what constitutes "reasonable compensation" under § 330(a)(3).[19]

Section 330(a)(3) provides, they noted, that a court shall "consider the nature, the extent, and the value of ... services [rendered], taking into account *all relevant factors*."[20] According to the dissent, it is within the bankruptcy court's discretion to consider as "relevant factors" the cost and effort that a professional has reasonably expended to recover professional fees.[21] For example,

> [c]onsider a bankruptcy attorney who earns $50,000 — a fee that reflects her hours, rates, and expertise — but is forced to spend $20,000 defending her fee application against meritless objections. It is within a bankruptcy court's discretion to decide that, taking into account the extensive fee litigation, $50,000 is an insufficient award. The attorney has effectively been paid $30,000, and the bankruptcy court might understandably conclude that such a fee is not "reasonable."[22]

Furthermore, a contrary interpretation "undercuts a basic objective of the statute."[23] In directing bankruptcy courts to consider "whether the compensation is reasonable based on customary compensation charged by comparably skilled practitioners in cases other than" bankruptcy cases, Congress intended high-quality attorneys and other professionals to receive comparable compensation and to ensure that "professionals would remain in the bankruptcy field."[24] In contrast to the relatively straightforward process of billing outside the bankruptcy context, the process by which a bankruptcy professional defends his or her fees may be "so burdensome that additional fees are necessary in order to maintain comparability of compensation."[25] Precisely "to maintain comparable compensation, a court may find it necessary to account for the relatively burdensome fee-defense process required by the Bankruptcy Code. Accounting for this process ensures that a professional is paid 'reasonable compensation.'"[26]

Finally, the dissent finds no distinction between costs of fee preparation — which the majority notes are explicitly provided for under § 330(a)(6) — and costs of defending fee litigation.[27] The majority suggests that preparation of a fee application is a "service" to the estate, because the preparation of a fee application is a specific requirement of the Bankruptcy Code.[28] As the Bankruptcy Code permits a bankruptcy court to award fees only after a hearing, however, the dissent notes that preparation for that hearing and appearing at that hearing would also be compensable as the type of activities that are required by the Bankruptcy Code.[29]

The *Boomerang Tube* Decision

As noted above, it did not take long for practitioners to test the efficacy of a possible contract exception, given the reliance by the *ASARCO* majority on the American Rule. Motions were filed in a series of cases asking courts to bless a form of fees for defense of fees provision in a retention agreement. The first case to reach a decision was *Boomerang Tube*, and it is proving to be a trend-setter.

In *Boomerang Tube*, the bankruptcy court considered whether (a) § 328 authorizes the approval of fee defense provisions; (b) retention agreements for court-approved professionals provide a contractual exception to the American Rule; and (c) fee defense provisions can be approved as a reasonable expense under § 328.[30] Counsel ("committee counsel") to the official committee of unsecured creditors (the "committee") in *Boomerang Tube* sought approval of retention agreements that included an indemnity provision for *any* successful defense of committee counsel's fees. The UST objected to that provision of the retention agreements.[31]

The bankruptcy court held that § 328 does not expressly authorize the approval of fee defense provisions. Utilizing the two-part test in *ASARCO*, which provides that "any statutory departures from the American Rule must be 'specific and explicit' and must 'authorize the award of a reasonable attorney's fee, fees, or litigation costs,' and usually refer to a 'prevailing party' in the context of an 'adversarial action,'" the bankruptcy court determined that, like § 330, the text of § 328 "does not refer to the award of defense fees to a prevailing party."[32] Judge **Mary F. Walrath** found significance in the fact that several other sections of the Bankruptcy Code contained the express language necessary to create an exception to the American Rule, but such language was omitted (presumably on purpose) from §§ 328 and 330.[33]

15 *Id.*
16 *Id.* (emphasis in original).
17 *Id.*
18 *Id.* In support of this conclusion, the majority opinion noted, in contrast, one other section of the Bankruptcy Code that expressly transfers costs of litigation from one party to another. Section 110(i)(1)(C) provides, "[i]f a bankruptcy petition preparer ... commits any act that the court finds to be fraudulent, unfair, or deceptive, on the motion of the debtor, trustee, United States [T]rustee (or the bankruptcy administrator, if any)," the bankruptcy court must "order the bankruptcy petition preparer to pay the debtor ... reasonable attorneys' fees and costs in moving for damages under this subsection." 11 U.S.C. § 110(i)(1)(C).
19 *Id.* at 2169 (Breyer, J. dissenting).
20 *Id.* (emphasis in original).
21 *Id.* at 2170.
22 *Id.*
23 *Id.*
24 *Id.* (quoting 11 U.S.C. § 330(a)(3)(F)).
25 *Id.*
26 *Id.* at 2171.
27 *Id.* at 2173.
28 *Id.*
29 *Id.*
30 *Boomerang Tube*, 2016 WL 385933, at *1.
31 *Id.*
32 *Id.* at *1-2 (quoting *ASARCO*, 135 S. Ct. at 2164).
33 *Id.* at *2 (noting that §§ 110(i)(1)(C), 303(i)(1)(B), 362(k)(1), 526(c)(2), 707(b)(4)(A) and 707(b)(5)(A) all provide for an award of fees and costs to the prevailing party).

In reviewing whether the proposed fee-defense provisions fit within the scope of "reasonable terms and conditions of employment" under § 328, the bankruptcy court determined that the fee defense provisions were not reasonable, by definition, because these conditions to employment "do not involve any services for the Committee."[34] Instead, fee defense only serves to benefit the committee counsel's own interest. Moreover, the bankruptcy court held that *ASARCO*'s holding precludes a finding that § 328 permits fee indemnification provisions even if courts permitted such provisions pre-*ASARCO*.[35]

The bankruptcy court also distinguished *ASARCO*'s holding that § 330 does not provide the express statutory basis for the approval of fee defense provisions from the theory that § 330 flatly prohibits fee defense provisions. This distinction might have been important because it left open the possibility of a contractual exception to the American Rule. The bankruptcy court extended this same distinction to § 328, but noted a catch-22: "any such contract has to be consistent with the other provisions of the Bankruptcy Code."[36] Although the bankruptcy court found that committee counsel's retention agreements are contracts, the court determined as well that the agreements could not create a contractual exception to the American Rule, because the fee-defense provision did not provide for fee shifting among just the parties to the contract. Rather, the provisions would bind a non-party to the contract, the estate, to pay committee counsel's defense costs even if the estate was not the party challenging fees.[37]

Finally, the bankruptcy court concluded that the analysis under § 328 does not differ when outside counsel fees for defense of fees are sought as reasonable *expenses* under § 328. "[S]ection 328 permits only approval of fees or expenses in performing services *for the Committee*"; here, the services, fee defense, would be performed for committee counsel.[38]

Other Delaware courts quickly followed suit. In a letter to counsel in the *Samson Resources* case, Bankruptcy Judge **Christopher S. Sontchi** announced that he would follow Judge Walrath's decision.[39] Bankruptcy Judge **Brendan Linehan Shannon** issued a similar letter to counsel in the *New Gulf Resources* case.[40]

What's Next: Implications of the *Boomerang Tube* Decision

The decision in *Boomerang Tube* — and apparently now the governing rule in at least the Delaware bankruptcy court given its express adoption by other judges in that district — may not definitively answer the question, outside of Delaware, of whether the "contract exception" to the American Rule survives as an option for obtaining fees for the defense of fees in bankruptcy cases. There is, of course, the possibility that other bankruptcy courts will refuse to follow the decision. Courts in the Southern District of New York, where the rule that fees for defense of fees were compensable if the applicant substantially prevailed in opposing an objection was solidly entrenched and widely followed, would be prime candidates for a different view. Given the long history of that practice, and given the argument that *ASARCO* was not policy-based but simply dealt with statutory construction, the theory persists that a fees-for-defense-of-fees provision in a retention agreement is a reasonable term or condition of employment under § 328 and can be approved by a court as such.

The authors agree with the *Boomerang Tube* court that retention agreements for court-approved retained professionals are not mere bilateral agreements, given the necessity of court approval. However, this arguably may not *per se* disqualify such agreements under the contract exception to the American Rule in the event that the court approves retention — and the fees for defense of fees provision — after notice and hearing, especially if the estate fiduciary consents. This issue then, as that court properly identified it, is whether such a provision is a reasonable term of employment. *ASARCO* cannot be read to say that fees for the defense of fees provisions *conflict* with the Bankruptcy Code; it simply holds that the Code does not expressly authorize such fees. The *ASARCO* majority's rejection of policy arguments and market considerations as inadequate to otherwise influence its construction of § 330 does not also mean — as the *Boomerang Tube* court reasoned — that such policy arguments and market considerations are not relevant to a determination of reasonableness. And reasonableness cannot be limited to terms that literally benefit the estate; bonus and fee-enhancement provisions do not benefit the estate. In addition, for the policy reasons cited by the minority, such terms may in fact be beneficial to the estate. One could also justifiably contend that holding that such provisions are not reasonable because of the absence of express statutory authorization suffers from potential circularity and collapses the two exceptions to the American Rule into one. Stay tuned to see if the courts split on this point.

However, the *Boomerang Tube* holding is likely to stick and gain traction. Practitioners and courts will now need to wrestle with virtually no prospect for presumptive compensation for fee defense fees. There is a discernable trend in large chapter 11 cases for the "reorganized debtor — now run by the creditor groups that were opposed by the committee and perhaps even by the management and counsel of the prior debtor-in-possession — to question final fees, either because of a genuine belief that fees run up opposing such creditors were necessarily excessive or for purposes of retribution, or both. If fee defense fees cannot be compensated, this tactic becomes more attractive. However, the real potential harm is in small cases. If a trustee or counsel has to defend a four- or five-figure fee against serious opposition, it does not take long before the net return to the professional approaches zero and, therefore, inequity. Professionals may be forced to capitulate rather than litigate. Defenders of the rule against

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34 *Id.* at *5.
35 *Id.* at *6-7.
36 *Id.* at *3.
37 *Id.* at *4.
38 *Id.* at *8 (emphasis added).
39 *In re Samson Resources Corp.*, No. 15-11934 (CSS), Dkt. No. 641 (Bankr. D. Del. Feb. 8, 2016) (Letter from Hon. Christopher S. Sontchi to Counsel).
40 *In re New Gulf Resources LLC*, No. 15-12566 (BLS), Dkt. No. 228 (Bankr. D. Del. Feb. 1, 2016) (Letter from Hon. Brendan Linehan Shannon to Counsel). The decisions have not discouraged counsel from being creative. For instance, in *New Gulf Resources*, Baker Botts LLP then sought approval of a fee premium that would be waived "barring significant objections" to base fees. In response to Judge Shannon's letter and his invitation for further briefing, Baker Botts takes the position that such fee premium neither runs afoul of *ASARCO* and *Boomerang Tube* nor violates the Bankruptcy Code. Brief in Support of Debtors' Application for Entry of an Order Authorizing the Retention and Employment of Baker Botts LLP as Counsel for the Debtors and Debtors in Possession, *In re New Gulf Resources*, No. 15-12566 (BLS), Dkt. No. 344, at 3-5 (Bankr. D. Del. March 2, 2016). Judge Shannon disagreed and held that the fee-premium "structure proposed by Baker Botts runs afoul of the holdings in *ASARCO* and *Boomerang Tube*." *In re New Gulf Resources LLC*, No. 15-12566 (BLS), Dkt. No. 395 (Bankr. D. Del. March 16, 2016) (Letter from Hon. Brendan Linehan Shannon to Counsel).

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fees for defense of fees will argue that Rule 9011 and 28 U.S.C. § 1927 will provide adequate remedies in cases where the opposition is unjustified. However, experience suggests that courts will be very reluctant to impose sanctions on those grounds in such cases.[41] Moreover, the real danger is that the court will never see the dispute, especially in small cases, where practitioners will take a discount rather than incur potentially noncompensable fees and costs. This may lower fees, but it will not necessarily do so fairly and justly.

The absence of any argument for fees for defense of fees also has implications for fee examiner practice. While, as fee examiners, the authors can follow their usual practices set forth above, others may disagree that the fees incurred in dealing with the fee examiner are compensable — at least to a point — and seek to have them disallowed. Should that become the rule, parties may be reluctant to join requests to appoint fee examiners or fee committees. Expect an effort by some to clarify what is and is not compensable in fee examiner orders.

ASARCO and *Boomerang Tube* will also prevent reimbursement of non-lawyer professionals for outside counsel fees incurred by such professionals in defending fees to the extent such expenses are, as they usually are, subject to being reasonable under § 330.[42] Expect such professionals to try to resist § 330 review of such counsel fees, if such an exception is even permissible after *ASARCO* and *Boomerang Tube*.

Application of *ASARCO* and *Boomerang Tube* in the post-confirmation period may be especially problematic, or at least uncertain. For example, in *AMR Corp.*, the plan contained a provision that fees incurred post-confirmation were not subject to judicial (or fee examiner) review and would be paid by the reorganized debtor in the ordinary course upon submission of fee requests and/or invoices.[43] Such provisions are not uncommon. However, most fees for defense of fees — at least for final fee applications, where the battles will most often occur — will be incurred post-confirmation. After *ASARCO* and *Boomerang Tube*, should courts approve such plan provisions, thus potentially allowing some payment for fees and expenses incurred for defense of fees? In other contexts, courts have been reluctant to approve plan provisions allowing payments otherwise barred by the Bankruptcy Code.[44] This may suggest a need to maintain fee review through the effective date so as to include the period of any fee or expense challenges. Expect provisions like the one in *AMR Corp.* to draw fire.

ABI's Commission to Study the Reform of Chapter 11 has recommended that the Code be amended to allow much more flexibility in compensating estate professionals and to open the door more widely to alternative and case-specific fee structures.

On its face, the *Boomerang Tube* decision is a case about legal fees applying a case about legal fees, and as a result, is of relatively limited interest. But there are broader implications, and the decision falls into a broader trend of preventing bargaining around the Code when third-party rights or considerations (or even optics) of fairness come into play. The most significant sentence in the comprehensive opinion by Judge Walrath may be this one: "The Court nonetheless agrees with the UST's assertion that the parties cannot, by contract, violate another provision of the Code."[45] This assertion may soon be before the U.S. Supreme Court in *Jevic Holding Corp.*, where the U.S. Court of Appeals for the Third Circuit approved a district court and bankruptcy court decision that a "structured dismissal," over the objection of some interested parties but approved by the bankruptcy court, could contain "plan" provisions that violated the absolute priority rule.[46]

In addition, the U.S. District Court for the Southern District of New York reversed the bankruptcy court's decision in *Lehman Brothers* that had approved a plan that, among other things, provided for the payment of the professional fees submitted by individual members of the creditors' committee.[47] The UST argued, successfully on appeal, that the stipulated provision in the plan violated 11 U.S.C. § 503(b)(4), which permits the payment of specific professional fees but "does not cover expenses on the basis of committee membership."[48] Indeed, the district court held that the Code "glaringly exclude[s] professional fee expenses for official committee members."[49] Specifically declining to accept a contrary result in *Adelphia Commc'ns Corp.*,[50] the district court concluded that the Code "cannot remain comprehensive if interested parties and bankruptcy courts in each case are free to tweak the law to fit their preferences."[51] The individual committee members may have an argument for payment

41 An example of the potential danger of *ASARCO* in a small case can be found in *In re Huepenbecker*, No. 12-02269, 2015 Bankr. LEXIS 2352 (Bankr. W.D. Mich. July 13, 2015). The bankruptcy court there noted:

> The court cannot turn a blind eye to the impact that Baker Botts will have on members of the bar whose livelihood depends on approval of fees under § 330. Today's decision… presents a telling example of the hardship to estate professionals (and debtors' counsel in chapter 12 and 13 cases) whose fee petitions draw objection. [Counsel] has spent at least $1,925.00 of his own (non-compensable) time seeking $6,625.00 in fees for [representing] his client. Constrained by *Baker Botts*, the court will approve fees in a reduced amount, totaling only $4,700.00 for the first and second applications. This means that [Counsel] will net only $2,781.00, resulting in an effective rate of approximately $146.00 per hour. The result, though dictated by recent precedent, undermines important policies affecting administration of estates.
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> This calculation suggests that, in some cases, the court and counsel will have to rely more heavily on Fed. R. Bankr. P. 9011, 28 U.S.C. § 1927, and perhaps other authorities to police frivolous or vexatious objections to fee petitions, and ensure that, as a practical matter, "compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title [11]." 11 U.S.C. § 330(a)(3)(F).

Id. at *8-10.

42 *In re River Road Hotel Partners LLC*, 536 B.R. 228, 239-41 (Bankr. N.D. Ill. 2015).

43 *In re AMR Corp.*, 497 B.R. 690 (Bankr. S.D.N.Y. 2013).

44 *In re Lehman Bros. Holdings Inc.*, 508 B.R. 283 (S.D.N.Y. 2014) (barring plan provision that provided for payment of legal fees of individual members of creditors' committee); *see also AMR Corp.*, 497 B.R. at 690 (barring payment, under plan, of severance payment not allowable under § 503 of the Code).

45 *Boomerang Tube*, 2016 WL 385933, at *3.

46 *In re Jevic Holding Corp.*, 787 F.3d 173 (3d Cir. 2015).

47 *Lehman Bros.*, 508 B.R. at 283.

48 *Id.* at 287-88.

49 *Id.* at 290.

50 *In re Adelphia Commc'ns Corp.*, 441 B.R. 6 (Bankr. S.D.N.Y. 2010).

51 *Lehman Bros.*, 508 B.R. at 294.

under the "substantial contribution" provisions of § 503(b), the court concluded, but that requires a separate process and hearing.[52] On that point alone, the district court remanded the dispute to the bankruptcy court, where it remains pending.

Most recently, the Delaware bankruptcy court in *Energy Future Holdings Corp.*, confirming a complex plan of reorganization, made a specific finding that professionals had made a substantial contribution to the proceedings, but that their fees and expenses still required court approval in a separate process, subject again to notice, objection and a hearing.[53] The court concluded that the parties "cannot contract around" the Code by providing for the payment of professional fees and expenses without review by the UST and by the fee committee that had been appointed by the court at the outset of the case.[54]

The Bankruptcy Code does indeed value flexibility, placing a premium on negotiation and consensus.[55] But the Code itself places boundaries that cannot be stipulated or wished away — whether the subject is payments to creditors, executive compensation and benefits, or professional fees. Congress can change those boundaries, but, at least with respect to professional fees and expenses, anyone hoping for that may well be disappointed. Expect this trend to continue.

Ultimately, the situation cries out for a legislative solution. The rule that fees for defense of fees were generally not compensable unless the applicant substantially prevailed created a commendable balance. It precipitated fee reductions where there was a legitimate question about compensability or value, but left room for professionals to combat extortion. The rule should be codified, and sooner rather than later.

ABI's Commission to Study the Reform of Chapter 11[56] has recommended that the Code be amended to allow much more flexibility in compensating estate professionals and to open the door more widely to alternative and case-specific fee structures. Those amendments could also deal with the problems that are created when fee-defense fees are noncompensable, even when the applicant succeeds. abi

52 *Id.* at 295-96.
53 *In re Energy Future Holdings Corp.*, No. 14-10979 (CSS), Dkt. No. 7255 (Bankr. D. Del. Dec. 3, 2015) (Confirmation Hr'g Tr. at 80).
54 *Id.* at 34.
55 *See, e.g., In re Parmalat Sec. Litig.*, 501 F. Supp. 2d 560, 578 (S.D.N.Y. 2007).

56 *Am. Bankr. Inst. Comm'n to Study Reform of Chapter 11, Final Report and Recommendations* at 48-55 (2014), *available at* commission.abi.org/full-report.

American Bankruptcy Institute

Bill on Bankruptcy

Artful drafting cannot evade ASARCO to reimburse counsel for defense of fees.

Delaware Judge Categorically Bars All Counsel from Compensation for Defense of Fees

Bankruptcy Judge Mary F. Walrath in Delaware categorically barred lawyers from circumventing the Supreme Court's opinion in *Baker Botts LLP v. ASARCO LLC* by refusing to approve a retention application requiring the debtor to compensate committee professionals for successfully defending their fees.

In June, the Supreme Court held 6-3 in *ASARCO* that debtors' counsel in bankruptcy cases cannot be paid for successfully defending their fee requests. In Delaware, the reorganization of Boomerang Tube LLC became a test case to decide whether lawyers could sidestep *ASARCO* by incorporating the reimbursement of defense costs into a retention agreement approved up front by a bankruptcy judge.

In a footnote at the very end of her opinion, Judge Walrath in substance said that no form of artful drafting, even by the debtor's lawyers, will pass muster because using estate funds to pay fee defense costs "are not reasonable terms of employment of professionals."

Theoretically, the *Boomerang* decision does not bind the other Delaware bankruptcy judges. However, judges ordinarily discuss important decisions with their brothers and sisters on the bench in the same district. It would therefore be surprising if another Delaware bankruptcy judge reached a different result.

The proposed retention agreement between the Boomerang creditors' committee and its lawyers would have required the debtor to pay the cost of a successful defense of fees. Committee counsel contended that providing for defense costs as a term of employment under Section 328(a) was permissible because *ASARCO* only barred reimbursement in the allowance of fees under Section 330(a). Judge Walrath did not buy that theory and knocked down every other argument proffered by committee counsel.

She barred the use of Section 328 as a vehicle for paying defense costs because it, like Section 330(a), was not a "specific and explicit statute" overriding the American Rule against fee-shifting. Judge Walrath said that while Section 328 does not prohibit defense costs, "it simply does not authorize them."

Next, the committee contended that the engagement agreement fell under the so-called contract exception to the American Rule, allowing parties by contract to agree that the losing side pays everyone's lawyers. The argument was flawed, she said, because the debtor was not a party to the retention agreement. Even if the contract exception applied, Judge Walrath said she could not approve because fee-defense costs would not entail any services for the committee, only benefit the lawyers themselves.

Although *dicta*, Judge Walrath included a footnote at the very end of the opinion announcing she would not approve fee-shifting "in a retention agreement filed by any professional under Section 328(a) — including one retained by the debtor," because they would not be "reasonable terms of employment."

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Bill on Bankruptcy

Having avoided chapter 11 cases, the high court will tackle a major reorganization issue.

Supreme Court Will Review *Jevic* to Rule on Structured Dismissals and Gift Plans

The Supreme Court granted *certiorari* in *Czyzewski v. Jevic Holding Corp.* to decide whether bankruptcy courts are allowed to dismiss chapter 11 cases when property is distributed in a settlement that violates the priorities contained in Section 507 of the Bankruptcy Code.

Although *Jevic* deals with structured dismissals, the high court's decision might also have the effect of allowing or barring so-called gift plans where a secured creditor or buyer makes a payment, supposedly from its own property, that enables a distribution in a chapter 11 plan not in accord with priorities.

Granting *certiorari* was not surprising because there has been a long-standing split of circuits. In *Jevic*, the Third Circuit approved a structured dismissal in May 2015 following the Second Circuit, which had ratified structured dismissals in its 2007 *Iridium* decision.

Conversely, the Fifth Circuit barred structured dismissals in 1984 when it decided *Aweco* and held that the "fair and equitable" test must apply to settlements.

Before acting on the *certiorari* petition, the Supreme Court sought comment from the Solicitor General. In May, the federal government's counsel in the Supreme Court recommended granting review and reversing the Third Circuit.

The *Jevic* petition was on the justices' calendar for review at a conference on June 23. In line with the Court's practice of reviewing petitions at two conferences before granting *certiorari*, the case was reviewed once again at a conference on June 27. The Supreme Court granted the petition on June 28.

Structured dismissals occur when the sale of a company's assets in chapter 11 will not generate enough cash to pay priority claims in full and permit confirmation of a plan. In the unsuccessful reorganization of Jevic Holding Corp., the official unsecured creditors' committee had sued the secured lender and negotiated a settlement calling for the lender to set aside some money for distribution to unsecured creditors following dismissal. The distribution scheme did not follow priorities in Section 507 because wage priority claimants received nothing from the lender through a trust set aside exclusively for lower-ranked general unsecured creditors.

Over the wage claimant's objection, the bankruptcy court's approval of the settlement was upheld in the district court and the Third Circuit. The appeals court's opinion was important

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because the Third Circuit makes law for Delaware, where many of the country's largest chapter 11s are filed.

The Third Circuit's opinion was 2-1, with the dissenter saying that while structured dismissals are permissible, *Jevic* was not a proper case.

Recommending that the Supreme Court review and reverse the Third Circuit, the Solicitor General said that "bankruptcy is not a free-for-all in which parties or bankruptcy courts may dispose of claims and distribute assets as they see fit." He argued that "nothing in the Code authorizes a court to approve a disposition that is essentially a substitute for a plan but does not comply with the priority scheme set forth in Section 507."

There are powerful arguments in support of the Third Circuit's opinion. To begin with, there is nothing in the Bankruptcy Code explicitly saying that priorities govern settlements under Bankruptcy Rule 9019. Proponents of structured dismissals also rely on the notion that the distribution is the lender's own property, not property of the estate, thus making priorities inapplicable.

The position of the Solicitor General came as no surprise because the government lost a similar case called *In re LCI Holding Co.*, in which the Third Circuit sanctioned so-called gift plans that distribute estate property counter to bankruptcy priorities. The *LCI* and *Jevic* cases were argued the same day in January 2015, but before different panels of the Third Circuit. Although it was the primary objector in *LCI*, the government did not pursue a *certiorari* petition.

While the schedule for *Jevic* was not immediately announced, argument in the Supreme Court might take place in December, with an opinion to be issued in the first quarter of 2017.

On Our Watch

Structured Dismissals, or Cases Dismissed Outside of Code's Structure?

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A recent *ABI Journal* article discussed structured dismissals as an option for debtors who sell substantially all of their assets pre-confirmation, leaving them "with no unsecured assets to administer or with insufficient unsecured assets to fund a confirmable plan."[1] The authors describe a structured dismissal as:

> a dismissal coupled with some or all of the following additional provisions in the dismissal order: releases (some more limited than others), protocols for reconciling and paying claims, "gifting" of funds to unsecured creditors and provisions providing for the bankruptcy court's continued retention of jurisdiction over certain post-dismissal matters.[2]

They concluded that structured dismissals could be "the quickest and most cost-effective way to conclude your chapter 11 case."[3] No one disputes that dismissal is appropriate in the right circumstances, including cases where insufficient assets exist to justify continued administration,[4] but the structured dismissals described in the article seem to fall outside the three paths for concluding a chapter 11 case under the Bankruptcy Code—confirming a plan, converting to chapter 7 or dismissing without "bells and whistles"—and may sacrifice critical bankruptcy safeguards included in the traditional statutory options.[5] Thus, properly evaluating structured dismissals requires comparison and contrast with the statutory options.

First, compared to plan confirmation, structured dismissals "end run...the protection granted creditors in chapter 11" and strongly resemble impermissible *sub rosa* plans.[6] Second, unlike chapter 7 liquidation, structured dismissals distribute assets without enforcing priorities, addressing litigation or ensuring accountability for distributing assets. Third, unlike traditional dismissals, structured dismissals fail to reinstate state law creditor remedies.

Plan Confirmation

Updated *Sub Rosa* Plan?

Structured dismissals are typically sought after court approval of asset sales or settlements.[7] Courts treat a proper asset sale or settlement as "a step towards possible confirmation of a plan of reorganization and not an evasion of the plan confirmation process."[8] Courts generally disapprove asset sales or settlements that "short circuit...the Code's carefully crafted scheme for creditor enfranchisement,"[9] including "the safeguards of disclosure, voting, acceptance and confirmation."[10] *Braniff* is the seminal case rejecting an asset sale that predetermined future plan terms, calling it a "*sub rosa* plan."[11] Since *Braniff*, courts have widely adopted the *sub rosa* plan language and analysis, but many now require objecting parties to identify the specific rights or protections denied by the sale or settlement.[12]

Structured dismissals are a new permutation of the *sub rosa* plan. Because structured dismissals are sought separately from the earlier sale or settlement, the sale or settlement itself does not present *sub rosa* plan issues because nothing therein limits disclosure or voting or predetermines plan terms. It is the subsequent structured dismissal that defines or restricts what would otherwise have been in a plan, such as distribution of sale or settlement proceeds, or disenfranchises other creditor rights normally attendant to plan confirmation. This process effectively bifurcates a single *sub rosa* plan. Structured dismissals should be similarly evaluated and disapproved where confirmation safeguards are circumvented.

Alternatively, a well-crafted sale order can avoid *sub rosa* plan bifurcation by precluding a subsequent structured dismissal. The estate does not generally benefit from a debtor in possession (DIP) selling over-encumbered property, and the DIP can abandon it under § 554 as burdensome or of inconsequential value. However, most lenders prefer that the DIP liquidate the collateral in a § 363 sale so that the creditor can reap its attendant benefits. The DIP can and should negotiate for some benefit to the estate for selling over-encumbered property under § 363, including that secured creditors set aside sale proceeds to pay administrative expenses so the case can be administered in accordance with the Code.[13] A sale order can also require the parties to either confirm a plan or convert to chapter 7.

Omitted Confirmation Safeguards

Structured chapter 11 dismissals ignore important chapter 11 safeguards that structured dismissals omit, including voting, acceptance, disclosure and the "fair and equitable" standards, including the absolute-priority rule.[14] Three provisions discussed in the article illustrate the point.

Releases and Exculpations. The article suggested including releases and exculpations in a structured dismis-

1 Norman L. Pernick and G. David Dean, "Structured Chapter 11 Dismissals: A Viable and Growing Alternative after Asset Sales," 29 *Am. Bankr. Inst. J.*, June 2010, at 1, 58-59 (2010).
2 *Id.* at 58.
3 *Id.*
4 11 U.S.C. § 1112(b).
5 *Id.* at 58 (three options are "traditionally chosen").
6 *See Institutional Creditors of Continental Air Lines Inc. v. Continental Air Lines Inc. (In re Continental Air Lines Inc.),* 780 F.2d 1223, 1224 (5th Cir. 1986).
7 *See, e.g., Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983); *Trailer Ferry Protective Comm. for Indep. Stockholders of TMT Trailer Ferry Inc. v. Anderson,* 390 U.S. 414 (1968).
8 *See Motorola Inc. v. Official Comm. of Unsecured Creditors (In re Iridium Operating LLC)*, 478 F.3d 452, 467 (2d Cir. 2007).
9 *PBGC v. Braniff Airways Inc. (In re Braniff Airways Inc.)*, 700 F.2d 935, 940 (5th Cir. 1983).
10 *Lionel*, 722 F.2d at 1071.
11 *Braniff*, 700 F.2d at 949.
12 *Continental Air Lines*, 780 F. 2d at 1228; *In re Gulf Coast Oil Corp.*, 404 B.R. 407, 422 (S.D. Tex. 2009).
13 *See* 11 U.S.C. § 506(c).
14 *See* "Structured Chapter 11 Dismissals," *supra*, n.1 at 57-58.

sal.[15] However, § 1141(d)(3) bars "non-individual" debtor discharges in liquidating plans, just as § 727(a) bars equivalent discharges in chapter 7 liquidation. Thus, any release of a debtor entity in a structured dismissal contravenes the Code.

With respect to nondebtors, even with the procedural and substantive protections afforded by the disclosure statement and plan-confirmation process, courts disagree about the permissibility of nonconsensual releases.[16] Courts consider the released party's contribution to reorganization and the litigation's impact on the ability to reorganize.[17] In a structured dismissal, such justifications are absent because there is no reorganization.

Even in jurisdictions where nonconsensual releases are permitted at confirmation, they should not be permitted in a structured dismissal. A structured dismissal forecloses a creditor's ability to assess and negotiate releases because the creditor has neither the information typically provided through the disclosure statement nor the leverage afforded by plan voting. Disclosure statements must address litigation and release issues.[18] Plan voting and acceptance requirements then provide an opportunity for creditors and shareholders to obtain improved treatment, such as additional contributions from nondebtors seeking releases or the elimination of nondebtor releases as unnecessary or excessive. The Code's protections against improper releases and indemnification are absent in a structured dismissal, and a court should generally deny nonconsensual releases as inconsistent with chapter 11.

Modified Claims-Objection Procedure. The article further recommended including an "expedited, cost-effective way to reconcile claims and distribute funds."[19] The suggested approaches include debtors' unilaterally defining claim amounts in the dismissal motion and requiring creditors to object, requiring creditors to pay costs if they object and filing an omnibus claims objection that binds creditors who do not object.[20] These scenarios impermissibly alter the claim objection process defined in the Code and Federal Rules of Bankruptcy Procedure. "[T]he need for expedition...is not a justification for abandoning proper standards."[21]

15 *Id.* at 57. The scope of the releases may be rather broad and include those "traditional releases seen in a chapter 11 plan." *Id.*

16 *Airadigm Commc'ns v. FCC (In re Airadigm Commc'ns)*, 519 F.3d 640, 655-56 (7th Cir. 2008); *see also In re Continental Airlines*, 228 F.3d 203, 212-13 (3d Cir. 2000); *Bank of New York v. Official Unsecured Creditors' Comm. (In re Pacific Lumber)*, 584 F.3d 229, 252-53 (5th Cir. 2009).

17 *See, e.g., Airadigm*, 519 F.3d at 656.

18 *In re U.S. Brass Corp.*, 194 B.R. 420, 429 (Bankr. E.D. Tex. 1996); *In re Metrocraft Pub. Servs. Inc.*, 39 B.R. 567, 571 (Bankr. S.D. Ga. 1984).

19 "Structured Chapter 11 Dismissals," *supra*, n.1 at 58.

20 *Id.* (omitting citations to unpublished case examples).

21 *TMT Trailer Ferry*, 390 U.S. at 450.

Bankruptcy Rule 3003(b) generally defines the schedule of liabilities as "*prima facie* evidence of the validity and amount" of a creditor's claim, and § 502(a) presumes the validity of a filed claim absent objection.[22] If a party objects to a proof of claim, the issue becomes a contested matter for hearing.[23] *Prima facie* validity for claims and mandatory hearings on claim objections "guard against abuse of the objection process."[24] Although the article posits that modified claim procedures are "cost-effective," in reality, each imposes extra burdens and costs on the creditor and impermissibly undermines protections afforded by the Code and Rules.

Although parties may...look for the "quickest and most cost-effective" exit from chapter 11, the supposed expediency of a structured dismissal should not trump the statutory protections it alters or ignores.

"Gifting." The third structured-dismissal provision discussed is the "carve-out or 'gift' trust."[25] When a debtor files for chapter 11 with substantially all assets encumbered, the secured creditor often seeks to monetize its collateral and reap the benefits of a sale under § 363. Such sales are not unusual, but the deals negotiated to secure sale or settlement approval are often problematic. Although funds allocated for distribution to junior creditors in a structured dismissal may be funded from the proceeds of a lender's collateral, they should rarely be viewed as a "gift."

To have the sale or settlement approved without objection, either the secured creditor or the purchaser sets aside funds for the *sole* benefit of a particular group, usually general unsecured creditors, from proceeds otherwise payable to the secured lender. Because there will be insufficient estate funds after the sale to pay administrative expenses or priority creditors in full, the lender makes a class-skipping "gift" to junior creditors who otherwise would receive no distribution under the Code's priority rules.

22 A creditor that does not comply with the requirements of Rule 3001 does not enjoy *prima facie* validity. *In re Stoecker*, 5 F.3d 1022, 1028 (7th Cir. 1993) (Posner, J.) ("the creditor cannot rest on the proof of claim" if it failed to attach documentation required under Rule).

23 Fed. R. Bankr. P. 3007(a); Fed. R. Bankr. P. 9014.

24 *See* 9 Alan S. Resnick and Henry J. Sommer, *Collier on Bankruptcy*, ¶ 3007.01[1] (15th ed. rev. 2009).

25 *Id.*

"Gifting" in structured dismissals contravenes the Code in several ways. First, the "gift" is typically provided in exchange for consideration, such as a release of claims or settlement of an objection. Because secured creditors do not typically make charitable contributions to their borrowers' junior creditors, the "gift" may actually resolve avoidance, liability or other litigation issues. Thus, the structured dismissal should be adjudicated under the rules governing settlement or plan confirmation.

Second, funds from the sale of a lender's collateral are estate property.[26] Accordingly, whether a senior creditor can "gift" directly to junior creditors—bypassing creditors in the middle—without violating the "absolute-priority rule" is unsettled.[27] When a structured dismissal alters the Code's priorities of distribution, it should be reviewed under the standards for settlement approval or plan confirmation.[28]

Third, "gifts" in structured dismissals pose disclosure problems. Without the disclosure required for plan confirmation, creditors and shareholders can neither assess whether the lender is resolving potential litigation claims nor determine whether the settlement amount is proper.

Conversion to Chapter 7

Chapter 7 incorporates checks and balances that structured dismissals lack, which make liquidation after a sale of substantially all estate assets preferable to a structured dismissal. Because chapter 7 trustees must account for all estate assets,[29] the chapter 7 trustee makes a "final report" addressing the assets liquidated, the claims quantified and the distribution proposed.[30] The trustee then distributes funds in accordance with the "final report" and files a "final account."[31] Structured dismissals may include a post-dismissal distribution, but they lack oversight by a disinterested chapter 7 trustee and the chapter 7 safeguards against error or abuse.

26 *U.S. v. Whiting Pools Inc.*, 462 U.S. 198, 203-4 (1983).

27 The Second and Third Circuits have each held that in chapter 11 cases, "gifting" plans violate the absolute priority rule of 11 U.S.C. §1129(b)(2), without regard to whether the bypassed class would have received a distribution absent the gift. *See In re DBSD North America Inc.*, __ F.3d __, No. 10-1175, 2011 WL 350480 (2d Cir. Feb. 7, 2011); *In re Armstrong World Indus., Inc.*, 432 F.3d 507 (3d Cir. 2005). However, *DBSD* and *Armstrong* leave open the question of whether gifting distributions would also be impermissible in a chapter 7 liquidation. *Cf. Official Unsecured Creditor's Comm. v. Stern (In re SPM Mfg. Corp.)*, 984 F.2d 1305, 1307, 1312 (1st Cir. 1993) (upholding undisputed lienholder's "gift" to unsecured creditors in chapter 7 liquidation).

28 *See Iridium*, 478 F.3d at 467; *see also United States v. AWECO Inc. (In re AWECO Inc.)*, 725 F.2d 293, 298 (5th Cir. 1984).

29 11 U.S.C. § 704(a)(2).

30 11 U.S.C. § 704(a)(9).

31 *Id.*

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Moreover, when a case converts to chapter 7 from chapter 11, chapter 7 administrative expenses have priority over chapter 11 administrative claims.[32] This enables chapter 7 trustees to investigate preference, fraudulent transfer and litigation claims, as well as other possible assets. It also means that chapter 11 professionals will likely receive less and must wait for payment. A structured dismissal may avoid this result, giving the appearance that the chapter 11 professionals may be serving their own interests.

Dismissal and § 349 Unwinding

The article also detailed various statutory grounds supporting dismissal of administratively insolvent cases.[33] However, no one disputes that "cause" exists to convert or dismiss under § 1112; rather, the dispute is whether the cases should be converted, dismissed or dismissed with "bells and whistles" in a structured dismissal.

32 *In re Rittenhouse*, 76 B.R. 610, 611 (Bankr. S.D. Ohio 1987).
33 "Structured Chapter 11 Dismissals," *supra*, n.1 at 56.

If a case should be terminated, it can be dismissed, returning parties to the *status quo* ante and preserving their rights under state law in accordance with § 349. Section 349's purpose is "to undo the bankruptcy case, as far as practicable, and to restore all property rights to the position in which they were found at the commencement of the case."[34] Traditional dismissal typically reinstates receiverships, avoided transfers and avoided liens, and revests property in the debtors.[35] Structured dismissals distribute assets and limit or foreclose a creditor's state law property rights.

Although courts can alter the presumptive effect of § 349(b) for "cause," the "power to override" § 349(b)'s requirements "is used sparingly."[36] "'Cause' under § 349(b) means an acceptable reason. Desire to make an end run around a statute is not an adequate reason... It is not part of the judicial office to seek out creative ways to defeat statutes."[37]

34 H.R. Rep. No. 95-595, at 338 (1977); S. Rep. 95-89, at 48-49 (1978).
35 See 11 U.S.C. § 349(b) (referencing reinstatement of these transactions).
36 See 3 Resnick and Sommer, *Collier on Bankruptcy*, ¶ 349.03[2] (16th ed. rev. 2010).
37 *In re Sadler*, 935 F.2d 918, 921 (7th Cir. 1991).

Conclusion

Chapter 11 is designed to administer estates and allocate rights and obligations through court-approved disclosure statements and plans. Alternatively, the Code provides for liquidation and distribution after conversion to chapter 7 or dismissal in accordance with § 349's reinstatement of state law rights.

The purported need for a structured dismissal is often foreseeable—and thus avoidable—when estates arrive in chapter 11 over-encumbered by liens with a sale of substantially all estate assets the obvious strategy. Although parties may thereafter look for the "quickest and most cost-effective" exit from chapter 11, the supposed expediency of a structured dismissal should not trump the statutory protections it alters or ignores. Cases should be administered according to the structure set forth in the Code and not concluded in a summary manner that is "structured," but flawed. ■

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Structured Chapter 11 Dismissals: A Viable and Growing Alternative after Asset Sales

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In recent years, it has become commonplace for a chapter 11 debtor to utilize bankruptcy to effectuate an orderly sale of all or substantially all of its assets pursuant to § 363 of the Bankruptcy Code, prior to confirmation of a chapter 11 plan. This is especially true in cases where the pre-petition lender is undersecured and the case is administratively insolvent. After a sale of all or substantially all of a debtor's assets, which could be in the form of a going-concern or a liquidation, and absent the agreement of the undersecured creditor, the debtor is typically left with no unsecured assets to administer or with insufficient unsecured assets to fund a confirmable chapter 11 plan.

Norman L. Pernick

Chapter 11 debtors have traditionally chosen among three possible courses of action after a sale of their assets. First, a debtor could proceed with confirmation of a liquidating chapter 11 plan, which requires compliance with §§ 1123 and 1129. The path of a chapter 11 liquidating plan is consequently not available to every debtor, as a liquidating plan requires enough cash to satisfy administrative-expense and priority claims and to fund the chapter 11 plan process. This is a particular challenge in cases involving an undersecured creditor with a blanket lien on all of a debtor's assets, especially without that secured creditor's agreement to fund the often-significant costs of both a liquidating plan and the plan process. Second, a debtor could convert the chapter 11 case to a case under chapter 7 and allow a chapter 7 trustee to distribute a debtor's remaining assets, if any, to creditors and to prosecute any available avoidance actions. Third, a debtor could seek entry of a simple order dismissing the chapter 11 case, returning the parties to their state law rights and remedies.

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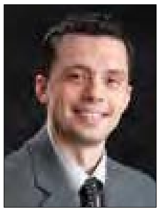

G. David Dean

This article discusses a less common but increasingly used approach known as a "structured" dismissal. A structured dismissal is a dismissal coupled with some or all of the following additional provisions in the dismissal order: releases (some more limited than others), protocols for reconciling and paying claims, "gifting" of funds to unsecured creditors and provisions providing for the bankruptcy court's continued retention of jurisdiction over certain post-dismissal matters.

Although cases involving structured dismissals have not yet resulted in memorandum decisions (published or unpublished), there have been a number of rulings that are useful to understanding how structured dismissals have been presented by parties and viewed by courts. We begin with a discussion of the statutory bases relied on for structured dismissals, what factual showing might be required to obtain a structured dismissal and common provisions approved in structured dismissal orders.[1]

Statutory Framework

Parties requesting approval of structured dismissals rely on § 1112(b) and/or § 305(a)(1) of the Bankruptcy Code. Structured-dismissal motions grounded in either statutory provision are often coupled with a request pursuant to § 105(a) of the Code, which allows a bankruptcy court to enter orders that are "necessary or appropriate to carry out the provisions of" the Code. 11 U.S.C. § 105(a).

Section 1112(b), governing conversion or dismissal of a chapter 11 case, is generally utilized as the statutory basis for a structured dismissal when a debtor has administered its assets and is either administratively insolvent and/or lacks the funding to proceed with confirmation of a liquidating chapter 11 plan.[2] Section 1112(b)(1) provides, in part, that "the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of

1 This article is intended to highlight structured dismissal as a possible option for a debtor to consider following a pre-confirmation "all asset" sale(s). It is not intended to take a position regarding the appropriateness of a structured dismissal in the first instance; the factual showing (if any) required to obtain a structured dismissal before any particular court, or the propriety of any particular provision in a structured-dismissal order.

2 In at least one case, § 305(a)(1) was used as the sole-statutory basis to obtain a structured dismissal, on the grounds that the debtor was likely administratively insolvent and therefore could not confirm a plan. *See In re CSI Inc.*, Case No. 01-12923 (REG) (Bankr. S.D.N.Y. July 24, 2006) [Dkt. No. 284] (Motion). In addition, in *In re KB Toys Inc.*, Case No. 08-13269 (KJC) (Bankr. D. Del. Feb. 16, 2010) [Dkt. No. 993] (Order), the court entered a dismissal order under both §§ 1112(b) and 305(a)(1).

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creditors and the estate, if the movant establishes cause." 11 U.S.C. § 1112(b)(1). Section 1112(b)(4) contains a non-exhaustive list of circumstances justifying "cause" under § 1112(b)(1).

Two primary justifications advanced by proponents of structured dismissals are that there exists "a substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation," and that the debtor is unable to effectuate substantial consummation of a plan. *See id.* at §§ 1112(b)(4)(A), (M).[3] Because § 1112(b)(4)'s list is non-exhaustive, in cases where cause might not fit neatly in one of the stated provisions of § 1112(b)(4), parties argue that a bankruptcy court is not limited to the examples of "cause" listed in § 1112(b)(4).[4] Assuming that "cause" exists, a bankruptcy court is required to convert or dismiss the chapter 11 case, "absent unusual circumstances...that the requested conversion or dismissal is not in the best interest of creditors and the estate." 11 U.S.C. § 1112(b)(1). In the context of structured-dismissal requests, parties assert that the costs of converting to and administering a case under chapter 7, as well as the enhanced provisions in the structured dismissal order, are in the best interest of creditors and the estate and that dismissal is a preferable remedy over conversion.

Section 305 has provided additional statutory support for obtaining a structured dismissal in some cases. Section 305 provides, in part, that the court may dismiss a case under any chapter of the Bankruptcy Code if "the interests of creditors and the debtor would be better served by such dismissal." 11 U.S.C. § 305(a)(1). Although § 305 has historically been used to dismiss involuntary cases, courts have found the statute to be applicable to voluntary cases as well.[5]

Because a dismissal under § 305(a) is not appealable, 11 U.S.C. § 305(c), courts universally recognize that § 305(a) is an "extraordinary remedy," and that "dismissal is appropriate under § 305(a)(1) only where both 'creditors and the debtor' would be 'better served' by a dismissal."[6] Indeed, several courts have noted that, "[g]ranting an abstention motion pursuant to § 305(a)(1) requires more than a simple balancing of harm to the debtor and its creditors; rather, the interests of both the debtor and its creditors must be served by granting the requested relief."[7]

Required Factual Showing

The statutory grounds for dismissal under §§ 1112(b)(2) and 305(a)(1) are relatively straightforward. "Cause" must be established under § 1112(b)(2), and the dismissal must be in the best interest of the debtor and creditors under § 305(a)(1). Given the absence of reported or unreported decisions on the subject, however, the application of these standards in the context of structured dismissals is not so clear.

Before considering the factual record necessary for approval of a structured-dismissal motion, a bankruptcy court may first question the propriety of a structured dismissal as a matter of law. In so doing, a court may take the view that the Code does not authorize a structured dismissal, and that a structured dismissal equates to a *sub rosa* plan. Therefore, such a court might find that the debtor has three choices post-sale: (1) proceed with confirmation of a liquidating chapter 11 plan, (2) convert the case to chapter 7 and allow a chapter 7 trustee to administer the assets or (3) dismiss the case via a simple dismissal order with no "bells and whistles."[8]

If a bankruptcy court finds that structured dismissal is permissible, which most courts considering the issue to date appear to conclude, the next question is what factual showing is necessary to justify entry of a structured dismissal order. Although there are no definitive answers, three factual scenarios describe the circumstances in which most structured dismissals have been approved to date.

The first such case is one in which the debtor's assets have been sold in the chapter 11 case but the debtor is administratively insolvent or is potentially administratively solvent and does not have the means to fund the confirmation process.[9] Proponents of such structured dismissals focus primarily on the argument that "cause" exists under §§ 1112(b)(4)(A) and (M), because the debtor cannot confirm a chapter 11 plan, and that conversion is not in the best interest of creditors due to costs associated with conversion to and administering of a chapter 7 case. In these cases, dismissal primarily is grounded in one of two structures: (1) the debtor proposes to pay administrative and priority creditors a *pro rata* distribution, with no payments to unsecured creditors; or (2) the debtor proposes to pay unsecured creditors without paying administrative and priority creditors in full, through the creation of a trust funded by a "gift" consensually carved out of the undersecured senior lender's recovery as part of a settlement agreement. A "gift" trust settlement could be entered into as part of the sale process and carried over into a dismissal motion, or made part of a consensual motion to dismiss the case. Either way, a carve-out gift trust has served as a vehicle for granting a recovery to subordinate creditors in a way that would likely violate the absolute priority rule in a plan scenario.

The second type of case is one in which the debtor has liquidated all of its assets and potentially could confirm a chapter 11 liquidating plan.[10] In such cases, proponents argue that a structured dismissal is most appropriate because funding the plan process would eliminate or reduce the remaining pot of money available for distribution to pay unsecured creditors. Parties seeking approval of such structured dismissals typically argue that § 1112(b)(4)'s list

3 Prior to the adoption of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), proponents of structured dismissals typically relied on former § 1112(b)(4)(2), which provided that cause included the "inability to effectuate a plan." *See In re Cape May Care Ctr. Inc.*, Case No. 00-41945 (NLW) (Bankr. D. N.J. Dec. 13, 2004) [Dkt. No. 313] (Motion).

4 *See In re Foamex Int'l Inc., et al.*, Case No. 09-10560 (KJC) (Bankr. D. Del. Nov. 18, 2009) [Dkt. No. 712] (Motion).

5 *See, e.g., In re Monitor Single Lift I Ltd.*, 381 B.R. 455, 463 (Bankr. S.D.N.Y. 2008).

6 *Id.* (citing several cases in support of limited application of § 305(a)(1)).

7 *See, e.g., id.* (citations omitted).

8 In *In re BT Holding III LLC*, Case No. 09-11173 (CSS) (Bankr. D. Del. Oct. 5, 2009), the court denied the debtors' and creditors' committee's joint motion for entry of a structured dismissal order on the grounds that it was premature and that no current controversy existed that required a court order. In so ruling, however, the court questioned, in *dicta*, whether any basis existed in the Bankruptcy Code for a dismissal order with "extra bells and whistles," such as the retention of post-dismissal jurisdiction and claims administration procedures. Transcript of Oct. 5 2009 hearing, at 47, lines 1-15.

9 *See Foamex* [Dkt. No. 712] (Motion dated Nov. 19, 2009); *Alternative Distr. Sys. Inc.*, Case No. 09-13099 (PJW) (Bankr. D. Del. Nov. 3, 2009) [Dkt. No. 194] (Motion); *In re Wickes Holdings LLC*, Case No. 08-10212 (KJC) (Bankr. D. Del. 2008) [Dkt. No. 1346] (Motion); *In re Princeton Ski Shop Inc.*, Case No. 07-26206 (MS) (Bankr. D. N.J. Dec. 23, 2008) [Dkt. No. 472] (Motion); *In re New Weathervane Retail Corp.*, Case No. 04-11649 (PJW) (Bankr. D. Del. Aug. 4, 2005) [Dkt. No. 543] (Motion).

10 *See BT Holding* [Dkt. No. 268] (Motion dated July 23, 2009); *In re Dawarhare's of Lexington LLC*, Case No. 08-51381 (JMS) (Bankr. E.D. Ky. Dec. 10, 2008) [Dkt. No. 304] (Motion); *In re Blades Board & Skate LLC*, Case No. 03-48818 (NLW) (Bankr. D. N.J. June 7, 2004) [Dkt. No. 110] (Motion).

of what constitutes "cause" for dismissal is nonexclusive and that the bankruptcy court has broad discretion to approve a structured dismissal, if it is in the best interest of creditors.[11]

The final scenario where structured dismissals are sought is where a debtor's assets have not been fully administered by way of a pre-confirmation sale process, but rather a workout has been achieved. In such cases, proponents have relied on § 305(a)(1) as the primary statutory basis for relief, as opposed to § 1112(b). There is at least one published opinion with this scenario, *In re Colonial Ford Inc.*[12] In that case, the debtor entered into a pre-petition workout that had the effect of restructuring the entire company and resolving multiple litigations. The debtor then filed a voluntary chapter 11 case and the creditors moved for an order of abstention from bankruptcy under § 305(a)(1). The court granted the motion, holding that "[s]ection 305(a)(1) reflects a policy, embodied in several sections of the Code, which favors 'workouts': private, negotiated adjustments of creditor-company relations."[13] The court further noted that such an out-of-court workout would require near universal agreement among the creditors and would need to be adequate to rehabilitate the business outside of bankruptcy.

The more recent case of *In re Magnolia Energy LP*[14] also used § 305(a)(1) as the basis to grant the debtor's motion to dismiss the chapter 11 case. In that case, after the chapter 11 filing, the debtors' indirect equity-holder was able to obtain refinancing that would be used, in part, to pay creditors in full. The order granting the motion provided for payment of all scheduled claims, all professional claims and the establishment of a $300,000 reserve account to pay any other claims that might not have been properly scheduled. The order conditioned dismissal on a subsequent closing, including evidence that the payments contemplated by the order had been made.

The previous two scenarios illustrate cases where structured dismissals were approved even though a chapter 11 plan was at least feasible. Notwithstanding that economic reality, given the apparent growing trend of approved structured dismissals throughout the country, debtors (and their senior secured creditor(s) and the creditors' committees) may more frequently consider structured dismissal as a cheaper and quicker alternative to a liquidating chapter 11 plan. In fact, the efficacy and cost of a liquidating plan and the confirmation process might be questioned altogether, under the appropriate set of facts, if a structured dismissal with satisfactory provisions could be obtained.

Relief Granted in Structured-Dismissal Orders

Orders entered approving structured dismissals in various jurisdictions have proven one thing: A number of courts have been willing to date to sign structured-dismissal orders that arguably go well beyond earlier plain-vanilla dismissal orders, although most have been entered consensually. The absence of reported or unreported decisions makes it difficult to predict how bankruptcy courts might view certain provisions in the future, particularly in contested situations. Consideration of the types of relief granted in various structured-dismissal orders entered since 2004 may provide some guidance. The most frequently used provisions fall into five general categories:

1. *Release and exculpation provisions.* Several structured-dismissal orders contain release provisions, some being broader in scope than others. The scope of releases ranges from the more traditional releases seen in a chapter 11 plan,[15] to releases limited to actions related to the structured-dismissal motion.[16]

2. *Claims reconciliation process and distribution procedures.* Most structured-dismissal orders contain some type of claims-reconciliation process. While exact language of the orders varies, they generally attempt to incorporate an expedited, cost-effective way to reconcile claims and distribute funds to creditors. In some cases, claims are allowed in the amounts submitted in the dismissal motion, in the absence of an objection.[17] In one case, creditors were required to object to amounts stated in the dismissal motion, and pay the costs associated with contesting any such objection.[18] Another case incorporated an *omnibus* claim objection into the dismissal motion, binding creditors who failed to object.[19]

Structured dismissal orders with claim reconciliation procedures typically also contain provisions similar to those contained in chapter 11 plans governing distributions. Such provisions include minimum distribution limitations, check-cashing periods, limitations of the number of distributions to be made and authorization to donate nominal remaining amounts to charity.

3. *Carveouts and "gift" trusts.* As part of negotiating an acceptable sale order, or later a consensual structured dismissal, a debtor's senior secured lender often agrees to carve out a portion of its collateral from the proceeds of sale and "gift" it to a trust. If an estate does not have sufficient funds to pay administrative and priority claims, and therefore cannot confirm a plan, a structured-dismissal order usually is premised on distributing the gift-trust money to a debtor's unsecured creditors.[20] On the other hand, if administrative and priority claims are being paid in full, and a gift trust is not formally established, the remaining assets will simply be set aside for the payment of unsecured creditors after administrative and priority claims are fully satisfied.[21]

4. *Conditions to dismissal.* Most structured-dismissal orders (even some providing for claims reconciliation and distributions after entry of the order) do not contain conditions to dismissal. At least one structured-dismissal order, however, has placed conditions subsequent on dismissal become effective.[22]

5. *Enforceability of prior orders and retention of jurisdiction.* Structured-dismissal orders often provide that, notwithstanding § 349 of the Bankruptcy Code, prior orders of the court survive dismissal.[23] Another common provision appearing in structured-dismissal orders is a provision providing for a bankruptcy court's retention of jurisdiction—usually at least over fee applications and/or implementation of the structured-

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11 In at least one case, the proponent argued that "cause" existed under § 1112(b)(4)(A) because there was nothing left to reorganize post-sale, and that a plan of "reorganization" could not be confirmed. *In re BAG Liquidation Ltd.*, Case No. 08-32096 (SGJ) (Bankr. N.D. Tex. Aug. 14, 2009) [Dkt. No. 672] (Motion).

12 24 B.R. 1014 (Bankr. D. Utah 1982).

13 *Id.* at 1015.

14 Case No. 06-11069 (MFW) (Bankr. D. Del. Feb. 12, 2007) (*Magnolia*) [Dkt. No. 196] (Order).

15 *Cape May* [Dkt. No. 313] (order entered Dec. 23, 2004) (releases approved for debtors, secured lender, official committee, their estates, shareholders, officers and directors and counsel, for everything up to date of dismissal order).

16 *Dawarhare's* [Dkt. No. 304] (order entered Dec. 18, 2008); *In re Harvey Electronics Inc.*, Case No. 07-14051 (ALG) (Bankr. S.D.N.Y. Dec. 16, 2008) [Dkt. No. 177] (Order); *New Weathervane* [Dkt. No. 566] (order entered Sept. 2, 2005).

17 *Wickes* [Dkt. No. 1346] (order entered March 23, 2009); *Blades* [Dkt. No. 126] (order entered June 7, 2004).

18 *New Weathervane* [Dkt. No. 566] (order entered Sept. 2, 2005).

19 *CSI* (Bankr. S.D.N.Y. July 24, 2006) [Dkt. No. 271] (order entered July 24, 2006).

20 *Wickes* [Dkt. No. 1346] (order entered March 23, 2009).

21 *Blades* [Dkt. No. 126] (order entered June 7, 2004).

22 *Magnolia* [Dkt. No. 196] (order entered Feb. 12, 2007) (dismissal not effective until certification of counsel filed evidencing payment of claims).

23 *See, e.g. In re CFM U.S. Corp.*, Case No. 08-10668 (KJC) (Bankr. D. Del. Feb. 1, 2010) [Dkt. No. 1282] (Order); *New Weathervane* [Dkt. No. 566] (order entered Sept. 2, 2005).

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dismissal order.[24] Last, the vast majority of structured-dismissal orders were entered only after notice of the motion to dismiss was provided to all creditors.

Conclusion

Although there are very few reported or unreported decisions approving structured dismissals, there is clearly a trend developing where courts are more frequently entering orders approving structured-dismissal orders containing varying degrees of "bells and whistles," as opposed to "plain vanilla" dismissal orders. Many of those cases involve § 363 sales in chapter 11 of all or substantially all of the debtor's assets in situations of administrative insolvency. In others, a confirmed chapter 11 plan is feasible, but the court instead approves a structured-dismissal order with some of the provisions that one would expect to see in a plan. Whatever the factual scenario, one thing is clear: If you are representing a debtor or an official committee in a chapter 11 case, a structured dismissal along the lines of the cases described in this article may now be the quickest and most cost-effective way to conclude your chapter 11 case. ■

24 *Princeton* [Dkt. No. 546] (order entered Dec. 23, 2008); *Dawarhare's* [Dkt. No. 304] (order entered Dec. 18, 2008); *Harvey* [Dkt. No. 177] (order entered Dec. 15, 2008).