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Liquidating In and Out of Chapter 11

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Selected Key Provisions to Consider in Liquidating Chapter 11 Plans

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This CLE material focuses on certain key chapter 11 plan provisions that may avoid post-confirmation challenges: (1) preserving causes of action for post-confirmation prosecution; (2) preserving and transferring attorney-client privilege; and (3) maintaining trustee reporting and creditor oversight.

I. Preserving and Prosecuting Causes of Action Post-Confirmation

A. Introduction

Chapter 11 cases are often time-consuming, expensive, and in many instances, pressing. Consequently, debtors opt to use a Chapter 11 plan as a means for preserving and prosecuting causes of action held by the bankruptcy estate after confirmation of a plan. A confirmation order is a final order entitled to preclusive effect, *i.e. res judicata*.[2] Therefore, a confirmation order may preclude a debtor from asserting claims or causes of action that could have or should have been brought pre-confirmation.[3] As such, a debtor's failure to safeguard its causes of action may result in those actions being lost forever under various principles of preclusion and estoppel.[4]

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[2] *See, Comty. Bank, N.A. v. Riffle*, 617 F.3d 171, 173 (2d Cir. 2010) (noting that bankruptcy court's order confirming debtor's plan was a final order that may be appealed) and *In re Am. Preferred Prescription, Inc.*, 255 F.3d 87, 92 (2d Cir. 2001) ("The confirmation of a plan in a Chapter 11 proceeding is an event comparable to the entry of a final judgment in an ordinary civil litigation.").

[3] *See, e.g., Fleet Nat'l Bank v. Gray (In re Bankvest Cap. Corp.)*, 375 F.3d 51 (1st Cir. 2004).

[4] Roye Zur, *Preserving Estate Causes of Action for Post-Confirmation Litigation*, 32 CAL. BANKR. J. 427, 427 (2013).

Moreover, when a Chapter 11 plan is confirmed, a debtor loses its debtor-in-possession ("DIP") status and, with it, standing to assert a bankruptcy estate's claims.[5]

B. Split Among the Courts

The Bankruptcy Code authorizes the preservation of causes of action belonging to the bankruptcy estate under 11 U.S.C. § 1123(b)(3), which states that a plan of reorganization "may … provide for … the retention and enforcement by the debtor … or any such claim or interest." Some courts have stated the purpose of § 1123(b)(3) is not to provide notice to potential defendants, but is notice to creditors generally that there are assets yet to be liquidated, which are preserved for prosecution by the reorganized debtor or a post-confirmation trustee.[6] Section 1123(b)(3) is silent, however, with respect to the language necessary to preserve a particular claim or cause of action, which has produced a split in authority.[7]

Some courts have determined that pure "blanket reservations" preserving all of the debtor's causes of action are insufficiently specific to preserve a particular claim.[8]

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[5] *See,* ¶ 75,344 IN RE HARSTAD, Bankr. L. Rep. P 75344, 1993 WL 13937788 (June 30, 1993) ("Because a debtor-in-possession does not have the same role as a trustee and the debtor-in-possession does not survive plan confirmation, the debtor loses its right to bring postconfirmation preference actions, having no standing to either avoid [a] transfer or recover [a] preference."). *See also, In re Ice Cream Liquidation, Inc.*, 319 B.R. 324, 333 (Bankr. D. Conn. 2005) ("[I]f the Plan contains the requisite provision, the Debtor has standing to assert the Section 542(b) Counts. However, if an adequate Plan provision is lacking, the Debtor lacks standing to bring such actions."); *In re Goodman Bros. Steel Drum Co., Inc.*, 247 B.R. 604 (Bankr. E.D.N.Y. 2000) (finding debtor did not lack standing to pursue post-confirmation claims where debtor's disclosure statement gave notice of debtor's intention to file post-confirmation an adversary proceeding against insurer).

[6] *In re Pen Holdings, Inc.*, 316 B.R. 495, 500-01 (Bankr. M.D. Tenn. 2004).

[7] *Id*. at 501.

[8] *See, e.g., Browning v. Levy*, 283 F.3d 761 (6th Cir. 2002) (blanket reservation did not preserve legal malpractice claims) and *D & K Props. Crystal Lake v. Mut. Life. Ins. Co. of N.Y.*, 112 F.3d 257, 250-61 (7th Cir. 1997) ("[a] blanket reservation that seeks to reserve all causes of action reserves nothing").

Below are selected examples of "blanket reservations":

> The Liquidating Supervisor, under the supervision of the Post–Effective Date Committee ... is authorized to investigate, prosecute and, if necessary, litigate, any Cause of Action [the definition of which expressly includes avoidance actions] ... on behalf of the Debtor and shall have standing as an Estate representative to pursue any Causes of Action and Claim objections, whether initially filed by the Debtor or the Liquidating Supervisor....
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> *In re Bankvest Capital Corp.*, 375 F.3d 51, 59 (1st Cir. 2004).

> All claims, rights, defenses, offsets, recoupments, causes of action, actions in equity, or otherwise, whether arising under the Bankruptcy Code or federal, state, or common law, which constitute property of the Estates …
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> *Golding Assocs., L.L.C. v. Donaldson, Lufkin & Jenrette Securities Corp.*, No. 00 Civ. 8688 (WHP), 2004 WL 1119652, at *1 (S.D.N.Y. 2004).

Courts within the Second and Third Circuits have concluded that general provisions or categorical language purporting to preserve all of the debtor's claims may be sufficient to preserve such claims for post-confirmation prosecution. Courts adopting this approach do not require that a plan or disclosure statement identify the prospective defendants or the particular transactions giving rise to claims.[9] These courts reason that Section 1123(b)(3) is intended to allow debtors to confirm a plan without fully investigating and pursuing all claims of the estate.[10]

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[9] *See, e.g., In re Jesup & Lamont, Inc.*, Adv. No. 12-01169 (ALG), 2012 WL 3822135, at *5 (Bankr. S.D.N.Y. Sept. 4, 2012) (denying defendants' argument that debtor's plan required more specificity to preserve causes of actions against particular defendants where plan "specifically provided that all Causes of Action were preserved and transferred to the Liquidating Trust unless '*expressly* waived' ") (citation omitted) (emphasis in original).

[10] *See, Ampace Freightlines, Inc. v. TIC Fin. Sys. (In re Ampace Corp.)*, 279 B.R. 145, 159 (Bankr. D. Del. 2002) ("Indeed, in large chapter 11 cases, the investigation and litigation of all possible avoidance actions to final judgment can take years. To force the debtor to remain in bankruptcy until a final determination of all possible preference actions is made would act as a detriment to both the debtor and it creditors by slowing down the reorganization process").

A representative sample of cases follows:

- *In re Perry H. Koplik & Sons, Inc.*, 357 B.R. 231, 247 (Bankr. S.D.N.Y. 2006) (finding that the plain language of section 1123(b)(3)(B) does not require a plan to specify every claim; rather "section 1123(b)(3)(B) provides that a plan *may* do so") (emphasis in original).

- *Cooper v. Tech Data Corp. (In re Bridgeport Holdings, Inc.)*, 326 B.R. 312 (Bankr. D. Del. 2005) (holding that language preserving "all Causes of Action arising under sections 544 [and] 547 through 551" sufficiently preserved a preference claim, even though the plan did not specifically identify any particular claims).

- *In re Bridgeport Holdings, Inc.*, 326 B.R. 312 (Bankr. D. Del. 2005) (finding that general reservation of claims language in plan sufficed to preserve trustee's right to bring preference claim).

- *In re Ampace Corp.*, 279 B.R. at 160-61 (Where plan preserved "all avoidance actions," and the disclosure statement incorporated the statement of financial affairs, which listed every transfer made during the ninety day period prior to the petition date, ruling that debtor's language was adequate to preserve a preference claim: "[I]n my opinion, 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.") (emphasis in original).

- *But see*, *BPP Illinois, LLC v. Royal Bank of Scotland Grp., PLC*, No. 13-CV0638 (JMF), 2015 WL 6143702, at *6 (S.D.N.Y. Oct. 19, 2015) ("[A] debtor may not … rely on a general retention clause to preserve undisclosed causes of action known to him when he filed for bankruptcy"), *citing D & K Props.*, 112 F.3d at 261 (7th Cir.1997) ("A blanket reservation that seeks to reserve all causes of action reserves nothing.").

C. Additional Methods of Preserving Causes of Action in a Chapter 11 Plan

Although plan provisions are the preferred way of preserving estate causes of action, disclosure statements, schedules, and statements of financial affairs may provide additional support.[11] This proposition is supported by the rule that a confirmed plan includes "all

[11] *See, In re I. Appel Corp.,* 300 B.R. 564, 566 (S.D.N.Y. 2003) (summary order): The debtor's disclosure statement apprised creditors that the debtor was "investigating certain pre-petition acts or omissions of [the defendants] which may give rise to claims by the Debtor against [them.]." *See also, Coney Island Land Co., LLC v. Domino's Pizza LLC*, 15-CV-4746 (ARR) (PK), 2017 WL 213016, at *5 (E.D.N.Y. Jan. 18, 2017) (finding debtor's disclosure of claim against Domino's in footnote of debtor's monthly operating reports was insufficient to preserve claim, but noting "to

documents which were confirmed together to form the contract."[12] When read together with the disclosure statement, the sweeping reservation of rights in a plan "adequately disclose[s] to … creditors" that claims against them "[are] being explored and that any such claims, if pursued, would not be part of the bankruptcy estate."[13]

D. Standing to Assert Third Party Claims

Bankruptcy Code § 1123(b)(3) allows a debtor to preserve estate claims, but it does not address whether a debtor can retain and pursue claims owned by creditors. In *Caplin v. Marine Midland Grace Trust Co.*, the Supreme Court held that in the absence of an assignment, a debtor cannot pursue claims belonging to creditors because those claims are not part of the bankruptcy estate.[14] *Caplin* held that under Chapter X of the Bankruptcy Act, a trustee lacks standing to assert claims on behalf of a bondholder creditor.[15] The Court found nothing in the Bankruptcy Act enabling a trustee to assert third party claims on behalf of creditors.[16]

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preserve its cause of action, [the debtor] needed to list it 'in the schedule of assets filed with the bankruptcy court' ") (citation omitted).

[12] *Goldin Assocs., L.L.C. v. Donaldson, Lufkin & Jenrette Sec. Corp.*, No. 00 CIV.8688 (WHP), 2004 WL 1119652, at *3 (S.D.N.Y. May 20, 2004) (considering whether a debtor can preserve post-confirmation claims in a plan or disclosure statement) (citation omitted).

[13] *In re I. Appell Corp.*, 104 Fed. App'x 199, 200-01 (2d Cir. 2004); *see also, Goldin Assocs., LLC v. Donaldson, Lufkin & Jenrette Securities Corp.*, No. 00 Civ. 8688 (WHP), 2004 WL 1119652, at *3 (S.D.N.Y. May 20, 2004), *citing In re Kelley*, 199 B.R. 698, 705 (9th Cir. BAP 1996) ("[I]f the debtor fails to mention the cause of action in either his schedules, disclosure statement, *or* plan, then he will be precluded from asserting it postconfirmation.") (emphasis added).

[14] 406 U.S. 416 (1972).

[15] *Id*. at 434.

[16] *Id*. at 428-29.

Caplin is still good law under the Bankruptcy Code[17] and its holding has been examined in the context of post-confirmation trusts and whether the trust may assert claims on behalf of creditors. More recent cases in the Second and Third Circuits have distinguished *Caplin* in cases where creditors have formally assigned their claims to a liquidation trust created in a plan of reorganization.[18] Moreover, *Caplin* does not extinguish a liquidation trustee's authority to pursue those assigned claims.[19]

E. Practitioner Tips

Based on the discrepancy among courts' requirements regarding the specificity of language required to preserve pre-confirmation actions belonging to the debtor's estate, counsel should be as specific as practicable when drafting preservation language in a plan. Even if claims are

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[17] *See, In re Tribune Co.*, 464 B.R. 126, 192-93 (Bankr. D. Del. 2011) (distinguishing *Caplin* ruling from creditor assigned claims); *In re I.G. Servs., Ltd.*, Adv. No. 04-5041-C, 2008 WL 783551, at *4 (Bankr. W.D. Tex. March 19, 2008) (citing *E.F. Hutton & Co., Inc.)*; *E.F. Hutton & Co., Inc. v. Hadley*, 901 F.2d 979, 985-86 (11th Cir. 1990) (holding *Caplin* remains the law under the Bankruptcy Code where "Congress considered and rejected a provision that expressly would have overruled *Caplin*")).

[18] *See, e.g. In re Tribune Co.*, 464 B.R. at 193

> I … conclude that [a] Plan's establishment of [a] [c]reditors' [t]rust and procedure for assignment of creditors' claims is not inconsistent with *Caplin*. [A] [p]lan's claim assignment procedure is voluntary because it allows creditors to 'opt out.' The possibility of inconsistent results is no greater than if the creditors pursued their separate claims individually. Moreover, [a] [c]reditors' [t]rustee is not acting as a representative of the Debtors or their estates …

(citations omitted). *See also, Grede v. Bank of N.Y. Mellon*, 598 F.3d 899, 90-02 (7th Cir. 2010) (*Caplin* does not apply to plan-created litigation trust) and *Semi-Tech Litig., LLC v. Bankers Trust Co.*, 272 F.Supp.2d 319, 323-24 (S.D.N.Y. 2003) (distinguishing *Caplin* where creditors assigned their claims to liquidation trust).

[19] *In re Tribune Co.*, 464 B.R. at 193.

described in the disclosure statement, those claims should also be addressed in the plan as well (or an exhibit) because the court may consider the plan to take priority over other documents.

Below is an example of a litigation preservation provision:

> 14.10 Retention of Causes of Action/Reservation of Rights. … nothing contained in this Plan or the Confirmation Order shall be deemed to be a waiver or relinquishment or any rights, claims or Causes of Action, rights of setoff, or other legal or equitable defenses that the Debtors had immediately prior to the Effective Date on behalf of the Estates or of themselves in accordance with any provision of the Bankruptcy Code or any applicable non-bankruptcy law. The Post-Effective Date Estates and the Trusts, as applicable, shall have, retain, reserve, and be entitled to assert all such claims, Causes of Action, rights of setoff, or other legal or equitable defenses as fully as if the Chapter 11 Cases had not been commenced, and all of the Debtors' legal and/or equitable rights respecting any Claim left unimpaired, may be asserted after the Confirmation Date to the same extent as if the Chapter 11 Cases had not been commenced …
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> *In re LandAmerica Fin. Grp., Inc., et. al.*, No. 08-35994 (Bankr. E.D. Va. 2008), ECF. No. 3203 (Order Confirming Joint Chapter 11 Plan and LandAmerica Financial Group, Inc. and It's Affiliated Debtors with Respect to LandAmerica Onestop. Inc.)

II. Preserving Attorney-Client Privilege Post-Confirmation

A. Introduction

Attorney-client privilege has proven a complicated area of bankruptcy because of its various moving pieces, including shifting corporate entities, changes in interests, and changes in management. This can result in surprise to both the debtor and the debtor's counsel whose privileged communications and work-product protection may be waived or invaded by a bankruptcy trustee. Plan provisions maintaining attorney-client privilege post-confirmation may alleviate some of these challenges.

B. General Principles Pertaining to Legal Privileges

Attorney-client privilege may be asserted to protect from compelled disclosure communications between attorneys and clients.[20] For the privilege to apply, there must be "(1)

[20] *In re Teleglobe Commc'ns Corp. (In re Teleglobe Commc'ns Corp.)*, 493 F.3d 345, 359 (3d Cir. 2007).

communication (2) made between privileged persons (3) for the purpose of obtaining legal assistance for the client."[21] A communication must be made in confidence to be privileged.[22] Therefore, if "persons other than the client, its attorney or their agents are present, the communication is not made in confidence."[23] Further, "if a client subsequently shares a privileged communication with a third party, then it is no longer confidential."[24]

Work-product protections shield from production documents and other tangible items prepared in anticipation of trial.[25] To determine whether a document was prepared in anticipation of litigation, courts consider two questions: (1) subjectively, "whether the party actually thought it was threatened with litigation" and (2) objectively "whether that belief was reasonable."[26]

C. Pre-Filing Corporate Family Issues Affecting the Assertion of Privilege Post-Filing

Post-petition, a divergence of interest between a parent company and its subsidiaries may result in disputes between corporate family members regarding the discoverability of communications. For example, a debtor subsidiary may have causes of actions it seeks to bring against the non-debtor parent company.[27] This issue was best illustrated in *In re Teleglobe*

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[21] *Id*.

[22] *Id*. at 361.

[23] *Id*.

[24] *Id*.

[25] *See, AIU Ins. Co. v. TIG Ins. Co.*, No. 07 Civ. 7052 (SHS) (HBP), 2009 WL 1953039, at *7 (S.D.N.Y. July 8, 2009) (citing *Matter of Grand Jury Subpoenas Dated Oct. 22, 1991, and Nov. 1, 1991*, 959 F.2d 1158, 1166 (2d Cir. 1992) (stating the work-product doctrine protects an attorney's selection and compilation of documents because disclosure of this process would reveal the opposing attorney's thinking or strategy)).

[26] *Gulf Islands Leasing, Inc. v. Bombardier Capital, Inc.*, 215 F.R.D. 466, 475 (S.D.N.Y. 2003).

[27] *See generally, Teleglobe*.

Commc'ns Corp.[28] In *Teleglobe*, the Third Circuit was faced with a dispute between a debtor-subsidiary and non-debtor/parent over documents created by attorneys who had contemporaneously represented the entire corporate family. The Third Circuit examined the question of which communications with counsel are entitled to protection.[29] In *Teleglobe*, the debtor-subsidiary sued its parent company on various legal theories. In the litigation, the debtor sought production of privileged documents created by an attorney for the parent company based on the common interests between the parent and debtors.[30]

The court examined the common interest doctrine, which is an exception to the general rule that voluntary disclosure of confidential communication to a third party waives privilege.[31] The common interest doctrine protects "all communications shared within a proper 'community of interest.' "[32] To demonstrate that a proper community of interest exists, the interests "must be 'identical, not similar, and be legal, not solely commercial.' "[33] Moreover, to show that members of a community are "allied in common legal cause," the party claiming the privilege must show

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[28] *See Teleglobe*, *supra* note 20.

[29] *Id*. at 360.

[30] *See generally, Teleglobe*.

[31] *See, Delaware Display Grp. LLC v. Lenovo Grp. Ltd., Lenovo Holding Co., Inc.*, Civ. A. Nos. 13-2108-RGA, 13-2109-RGA, 13-2112-RGA, 2016 WL 720997, at *4-5 (D. Del. Feb. 23, 2016) (citing *Teleglobe*).

[32] *Teleglobe*, 493 F.3d at 364.

[33] *Leader Techs*, 719 F.Supp.2d 373, 376 (D. Del. 2010).

"that the disclosures would not have been made but for the sake of securing, advancing, or supplying legal representation."[34]

The court in *Teleglobe* engaged in a lengthy analysis of joint representation and whether a corporate family may be considered a "single client."[35] Because a parent company may centralize its legal services to the entire corporate group, the court in Teleglobe found it important to consider how the disclosure rule affects sharing of information among corporate affiliates.[36] Teleglobe's parent company, Bell Canada Enterprises, Inc. ("BCE") urged that the corporate family is a single client for purposes of privilege and the privilege is held exclusively by the parent.[37] The Third Circuit rejected the concept of a corporate family as a single entity because it "fails to respect the corporate form."[38] Further, the court stated that joint representation arises only "when common attorneys are affirmatively doing legal work for both entities on a matter of common interest" because a "broader rule would" permit a subsidiary to "access all of its former parent's privileged communications."[39]

In sum, the *Teleglobe* court concluded that a debtor-subsidiary could only compel production of privileged documents if the parent company and debtor were "jointly represented by the same attorneys on a matter of common interest that is the subject matter of those

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[34] *Delaware Display*, 2016 WL 720977, at *4 (citing *In re Regents of the Univ. of Cal.*, 101 F.3d 1386, 1389 (Fed. Cir. 1996)).

[35] *Teleglobe*, 493 F.3d at 353.

[36] *Id*. at 370.

[37] *Id*.

[38] *Id*. at 371.

[39] *Teleglobe*, 493 F.3d at 379; *see also, Kirby v. Kirby*, No. 8604, 1987 WL 14862 (Del. Ch. July 29, 1987) (examining joint client representation in context of directors and officers).

documents."[40] The lesson from *Teleglobe* is that in-house counsel should proceed with caution when representing both a parent and subsidiary corporation as the principle of joint representation may authorize a later trustee, acting on behalf of a subsidiary corporation, to compel the production of privileged communications between the parent company and in-house counsel. On the other hand, *Teleglobe* may enable a bankruptcy trustee or debtor to obtain documents subject to a joint interest that can be very helpful in advancing a claim against a non-debtor affiliate.

D. Post-filing Privilege Issues

i. The Bankruptcy Trustee's Access to Debtor's Privileges

Another frequent attorney-client privilege concern arising in chapter 11 involves relationships among a trustee, a debtor, and a creditor's committee. In the pre-confirmation portion of a chapter 11 case, the DIP owns the debtor's legal pre-bankruptcy privilege; however, as the bankruptcy case progresses, that ownership may change.[41] When a trustee is appointed, he takes control of the debtor's assets, including control of attorney-client privilege.[42]

In *Weintraub*, the Supreme Court analyzed the passage of control of the attorney-client privilege in a bankruptcy case:[43]

> In light of the lack of direct guidance from the Code, we turn to consider the roles played by the various actors of a corporation in bankruptcy to determine which is most analogous to the role played by the management of a solvent corporation. *See*

[40] *Teleglobe*, 493 F.3d at 379.

[41] *See,* ¶ 75,344 IN RE HARSTAD, Bankr. L. Rep. P 75344, *supra* note 5.

[42] *See, In re Adelphia Commc'ns Corp.*, 336 B.R. 610, 662 (S.D.N.Y. 2006) (noting any trustee appointed in the debtor's case could waive the debtor's privilege and could share new privileged information and/or work product with the ad hoc committee of noteholders of the debtor-holding company).

[43] *Commodity Futures Trading Com. v. Weintraub*, 471 U.S. 343 (1985).

> *Butner v. United States*, 440 U.S. 48, 55 (1979). Because the attorney-client privilege is controlled, outside of bankruptcy, by a corporation's management, the actor whose duties most closely resemble those of management should control the privilege in bankruptcy, unless such a result interferes with policies underlying the bankruptcy laws.[44]

For a solvent corporation, the power to waive attorney-client privilege is controlled by the solvent corporation's management.[45] Therefore, "the actor whose duties most closely resemble those of management should control the privilege in bankruptcy."[46] In a chapter 7 bankruptcy, the corporation's attorney-client privilege is controlled by the trustee, who controls all corporate property and is directed to investigate the debtor's financial affairs to recover, where appropriate, on behalf of the estate, fraudulent or preferential transfers of the debtor's property.[47] Although *Weintraub* involved a chapter 7 debtor, its analysis and conclusion have been applied in chapter 11 cases involving a trustee also. A representative sample of cases applying *Weintraub* outside of chapter 7 follows:

- *In re China Medical Tech., Inc.*, 539 B.R. 643, 653 (S.D.N.Y. 2015) (examining privilege under *Weintraub* in a Chapter 15 proceeding and concluding attorney-client privilege possessed by foreign debtor's audit committee passed to trustee upon his appointment, but work-product protection belonged to audit committee's counsel). The court in *In re China* addressed the question of whether the audit committee's ability to retain independent counsel and conduct internal investigations that implicate corporate management should override the statutory obligation of a trustee in bankruptcy to maximize the value of the estate by conducting investigations into the corporation's pre-bankruptcy affairs. *Id*. at 654. Relying on *Weintraub*, the court concluded that the same considerations that weighed in favor of the trustee in *Weintraub* weighed in favor of the trustee in that case. *Id*. at 655. The Court reasoned that the prepetition interests of an audit committee are aligned with the interests of a trustee or liquidator in bankruptcy; therefore, *Weintraub* applied.

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[44] *Id*. at 351-52.

[45] *Id*. at 348.

[46] *Id*. at 351; *see also, In re China Medical Tech., Inc.*, 539 B.R. 643, 653 (S.D.N.Y. 2015) (quoting *Weintraub*).

[47] *Weintraub*, 471 U.S. at 352.

- *Rahl v. Bande (In re Flag Telecom Holdings Ltd. Sec. Litig.)*, No. 02-CV-3400 (WCC), 2009 U.S. Dist. LEXIS 124061, at *25 (S.D.N.Y. Jan. 14, 2009) (holding that control over attorney-client privilege pertaining to securities litigation against debtor's former directors and officers was transferred to litigation trustee pursuing action).

- *In re Food Management Grp., LLC*, 380 B.R. 677, 709 (Bankr. S.D.N.Y. 2008) ("Upon the appointment of a chapter 11 trustee the power to control the attorney-client privilege passes to the trustee.") (citing *Weintraub*).

ii. Liquidation/Litigation Trust Privileges

Liquidation and litigation trusts are common facets of liquidating Chapter 11 plans. The entry into a liquidating trust agreement results in the appointment of a liquidating trustee. The trust agreement typically contains provisions assigning and conveying to the trustee any and all assets of the debtor that the trust agreement acts to convey, including causes of action. One role of the liquidating trustee is to pursue unliquidated causes of action. This has led to liquidation trustees invoking and waiving privileges formerly held by the DIP and the official committee of unsecured creditors.[48]

In re Hechinger serves as an example of the privilege tug-a-war that can occur between a liquidating trustee and the debtor's former directors, officers, and shareholders.[49] In *Hechinger*, the liquidating trustee under the confirmed and effective chapter 11 plan of liquidation of the official committee of unsecured creditors brought an adversary proceeding against the debtor's former directors and officers and sought to compel from their former counsel production of privileged pre-bankruptcy communications between corporate counsel and the former directors

[48] *See, e.g., Osherow v. Vann (In re Hardwood P-G, Inc.)*, 403 B.R. 445, 461 (Bankr. W.D. Tex. 2009) (finding upon confirmation of plan that provided for creation of liquidation trust, the trustee is "now the holder of the privilege of both the debtors and the Committee and may thus assert such privilege …").

[49] *Official Committee of Unsecured Creditors of Hechinger Inv. Co. of Del. v. Fleet Retail Fin. Group (In re Hechinger Inv. Co. of Del., Inc.)*, 285 B.R. 601 (D. Del. 2002).

and officers. The debtor's former directors and officers, as well as the law firm that previously represented them, argued that although attorney-client privilege is held by the trustee, the documents requested by the trustee concerned the representation of the former directors and officers before the debtor merged to form a new corporation.[50] Relying on New York law, the law firm argued that "attorney-client privilege regarding pre-merger representations concerting the merger transaction does not pass to the buyer, but remains with the former shareholders of the seller."[51] The trustee countered that former directors and officers have no continuing right to assert privilege over the debtor's documents and refuted the law firm's argument that a joint representation or joint defense privilege applied.[52]

Relying on *Weintraub*, the trustee asserted that the liquidating trust controlled the right to assert or waive privilege with respect to the privileged documents.[53] The directors and officers countered that, under *Weintraub,* only a trustee "succeeding to the management of a Chapter 11 debtor had the right to waive the attorney-client privilege with respect to pre-petition communications," implying that the trustee was not a successor of the debtor, but rather a successor of the official committee of unsecured creditors, whose liquidation plan created the liquidation trust.[54] The court concluded that the liquidation trust controlled the privilege because all of the debtor's assets and privileges were transferred to the trust, and the joint defense

[50] *Id*. at 608.

[51] *Id*. (citation omitted).

[52] *Id*. at 607.

[53] *Id*. at 606.

[54] *Id*. at 608.

privilege did not apply.[55] Moreover, the court dismissed the law firm's argument that attorney-client privilege regarding pre-merger representations concerning the merger transaction did not pass to the buyer.[56] The court found that "absent the parties' acknowledgement in the merger documents, the privilege transferred would have included the pre-merger information."[57]

E. Practitioner Tips

As *Weintraub*, *Hechinger*, and *Teleglobe* teach, an in-house or outside attorney should be aware of all common and joint clients and anticipate when those interests may diverge. Additionally, where there is a common or joint interest, counsel should enter into a written agreement that identifies specifically the parties and the extent of their common or joint legal interests.[58] While the mere assertion of a common or joint legal interest in a written agreement cannot alone create such an interest,[59] it can be relevant to demonstrating actual cooperation toward a common legal goal. In addition, such an agreement may address the preservation and joint ownership of the relevant privileges.

The transfer and preservation of privilege should also be addressed in a plan. Below are certain representative privilege provisions from Chapter 11 cases:

> Successor; Preservation of Privilege. The Liquidation Trust shall be the successor to the Debtor and/or the Equity Committee for the purposes of §§ 1123, 1129, 1142 and 1145 of the Bankruptcy Code and with respect to all Causes of Action and other litigation-related matters. In connection

[55] *Id*. at 611-13.

[56] *Id*. at 612.

[57] *Id*.

[58] Frank A. Oswald and Lauren L. Peacock, *Legislative Update, Litigator's Perspective: The Common-Interest Doctrine: Preserving Privilege Post-Petition*, 34-6 American Bankruptcy Institute Journal 34, 73 (June 2015).

[59] *See, In re Rivastigmine Patent Litig.,* No. 05 MD 1661 (HB/JCF), 2005 WL 2319005, at *4 (S.D.N.Y. Sept. 22, 2005).

with the rights, Claims, and Causes of Action that constitute the Trust Assets, any attorney-client privilege, work-product privilege, or other privilege or immunity attaching to any documents or communications (whether written, or oral) transferred to the Liquidation Trust shall vest in the Liquidation Trust and its representatives, and the Debtor, the members of the Equity Committee, and the Liquidation Trustee are authorized and directed to take all necessary actions to effectuate the transfer of such privileges. The Liquidation Trustee and the Oversight Board shall be deemed to have a joint and common interest and, as such, communications among the Liquidation Trustee and the Oversight Board shall be protected from disclosure. The Liquidation Trustee may waive its attorney-client privilege with respect to any Cause of Action or other litigation-related matter, or portion thereof, in the Liquidation Trustee's discretion, subject to the approval of the Oversight Board.

In re CDC Liquidation Trust, No. 11-79079 (Bankr. N.D. Ga. 2011), Liquidation Trust Agreement.

Preservation of Privilege: In connection with the rights, claims, and causes of action that constitute the Liquidating Trust Assets, any attorney-client privilege, work-product privilege, or other privilege or immunity attaching to any documents or communications (whether written or oral) transferred to the Liquidating Trust shall vest in the Liquidating Trust and its representatives, and the Debtor and the Trustees are authorized to take all necessary actions to effectuate the transfer of such privileges.

In re First Regional Bancorp, No. 2:12-bk-31372-ER (Bankr. C.D. 2015), Second Amended Chapter 11 Liquidating Plan.

III. Reporting and Oversight Rights

A. Introduction

The extent of authority of a bankruptcy court and the United States Trustee ("U.S. Trustee") to continue monitoring a bankruptcy case after confirmation of a plan is a question of debate among courts. Some chapter 11 plans include retention clauses purporting to authorize the bankruptcy court to retain jurisdiction over various matters post-confirmation. Moreover, chapter 11 plans and trust agreements typically specify the roles and responsibilities of U.S. Trustees and oversight committees.

B. Post-Confirmation Bankruptcy Court Oversight

A bankruptcy court's jurisdiction over bankruptcy cases is set forth in 28 U.S.C. §§ 1334

and 157, which gives district courts jurisdiction over bankruptcy matters, which they refer to bankruptcy courts in standing orders of referral.[60] It is generally accepted that the subject matter jurisdiction of a bankruptcy court in a bankruptcy narrows after plan confirmation, although the precise extent is unclear.[61] For example, the Third Circuit determined that a bankruptcy court lacked post-confirmation jurisdiction over accounting malpractice claims asserted by a litigation trust established under the debtor's confirmed Chapter 11 plan.[62] The court reasoned that the malpractice claims would only have an incidental effect on the reorganized debtor and would not interfere with the implementation of the reorganized plan.[63]

Chapter 11 plans should provide for the bankruptcy court's retention of jurisdiction after confirmation. However, courts differ over the efficacy of such retention of jurisdiction clauses. The Third and Ninth Circuits have held that retention clauses providing for bankruptcy

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[60] *See, Standing Order of Reference Re: Title 11*, United States Bankruptcy Court Southern District of New York (2012), http://www.nysd.uscourts.gov/rules/StandingOrder_OrderReference_12mc32.pdf; *Amended Standing Order of Reference Re: Title 11*, United States Bankruptcy Court for the District of Delaware (2012), http://www.ded.uscourts.gov/sites/default/files/general-orders/AmendedTitle11Order_2-29-12_0.pdf.

[61] *See, In re General Media, Inc.*, 335 B.R. 66, 73 (Bankr. S.D.N.Y. 2005) ("all courts that have addressed the question have ruled that once confirmation occurs, the bankruptcy court's jurisdiction shrinks"). *But see, In re Boston Regional Medical Center, Inc.*, 410 F.3d 100, 107 (1st Cir. 2005) (holding that post-confirmation jurisdiction does not shrink in liquidating Chapter 11 cases).

[62] *See, In re In re Resorts International, Inc.*, 372 F.3d 154, 166-67 (3d Cir. 2004). *See also, In re Kassover*, 448 BR. 625, 633 fn. 71 (S.D.N.Y. 2011) ("Bankruptcy courts plainly lack jurisdiction over post-confirmation litigation where the case has been fully administered and all of the recovery will go to the reorganized debtor rather than to the creditors.") (quoting *In re General Media, Inc.*, 335 B.R. 66, 75 (Bankr. S.D.N.Y. 2005)); *In re The Fairchild Corp.*, 452 B.R. 525, 531 (Bankr. D. Del. 2011) ("claims based on pre-petition conduct that were asserted post-confirmation, but could have been brought prior to confirmation lack a nexus sufficient to confer jurisdiction upon the bankruptcy court").

[63] *In re In re Resorts International, Inc.*, 372 F.3d at 169.

jurisdiction post-confirmation are valid where there is a "close nexus to the bankruptcy plan or proceeding."[64] As the Third Circuit noted, "a close nexus to a bankruptcy plan or proceeding is particularly relevant to situations involving continuing trusts, like litigation trusts, where the plan has been confirmed, but former creditors are relegated to the trust *res* for payment on account of their claims."[65] The Second Circuit also limits the court's post-confirmation jurisdiction to that provided by Congress by noting that "a bankruptcy court cannot, through confirmation of a reorganization plan, expand its own jurisdiction."[66]

Below is an example of a plan provision reserving the bankruptcy court's jurisdiction post-confirmation:

> Retention of Jurisdiction. The Court shall retain jurisdiction over the Chapter 11 Case (a) pursuant to and for the purposes of section 105(a), 1127 and 1142 of the Bankruptcy Code, and (b) as set forth in Article XV of the Plan, which is incorporated herein by reference as if set forth in extensor. As set forth in the Confirmation Bench Decision, this Court shall retain exclusive jurisdiction to consider any claims concerning the Covered Matters.
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> *In re Adelphia Commc'ns. Corp., et al.*, at ECF No. 12952.
>
> Article XV. Retention of Jurisdiction. Pursuant to sections 105(a) and 1142 of the Bankruptcy Code, the Bankruptcy Court shall retain and shall have exclusive jurisdiction over any matter (a) arising under the Bankruptcy Code, (b) arising in or related to the Chapter 11 Cases or the Plan, or (c) that relates to the following: (i) [t]o hear and determine any and all motions or applications pending on the [c]onfirmation [d]ate … (ii) [t]o determine any and all adversary proceedings, applications, motions, and contested or litigated matters ... (v) [t]o consider any modifications to the [p]lan and/or [p]lan documents …(xiv) [t]o enter an order or final decree closing a Chapter 11 case …
>
> *In re Adelphia Commc'ns. Corp., et al.*, at ECF No. 11832-2, Fifth Amended Joint Chapter 11 Plan for Adelphia Communications Corporation and Certain of Its Affiliated Debtors, Article XV, Retention of Jurisdiction.

[64] *See, id*. at 166-67; *In re Pegasus Gold Corp.*, 394 F.3d 1189, 1194 (9th Cir. 2005) (same).

[65] *In re Resorts International, Inc.*, 372 F.3d at 167.

[66] *See, e.g., U.S. v. Bond*, 762 F.3d 255, 261 (2d Cir. 2014) (citing *In re Resorts International*).

C. Post-Confirmation U.S. Trustee Oversight

As with the bankruptcy court, U.S. Trustee oversight may substantially decrease after the Plan becomes effective. It is important therefore that a Chapter 11 plan and/or liquidating trust agreement also provides for the retention of trustee oversight post-confirmation. Pursuant to 28 U.S.C. § 586 and 11 U.S.C. § 704(8), the U.S. Trustee established its Operating Guidelines and Reporting Requirements for Chapter 11 DIPs and Chapter 11 trustees, which may be applied post-confirmation.[67] Reporting requirements are part of the checks and balances in the oversight of a trust.[68] Reporting requirements for U.S. Trustees after confirmation of a plan or upon commencement of a trust vary by jurisdiction.[69] Typically, operating reports are submitted monthly after the petition is filed and until a plan is confirmed.[70]

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[67] *See,* Operating Guidelines and Reporting Requirements of the United States Trustee for Chapter 11 Debtors in Possession and Chapter 11 Trustees, U.S. Department of Justice. *See, e.g., In re Dallas Stars, L.P.*, No. 11-12935(PJW), 2011 WL 5829885, at *31 (Bankr. D. Del. 2011), approving debtor's disclosure statement, stating:

> *Waiver of Filings*. Any requirement under section 521 of the Bankruptcy Code or Bankruptcy Rule 1007 obligating the Debtors to file any list, schedule, or statement with the Court or the Office of the U.S. Trustee (except for monthly operating reports or any other post-confirmation reporting obligation to the U.S. Trustee), is hereby waived as to any such list, schedule, or statement not filed as of the Confirmation Date.

See also, In re Genesis Health Ventures, Inc., 280 B.R. 95, 99 (D. Del. 2002) (concluding that "each individual debtor must satisfy the United States Trustee requirements for reporting and payment of quarterly fees" post-confirmation).

[68] *See,* Legally Defining Management of the Liquidation Trust, *supra* note 59 at 112.

[69] *See,* Legally Defining Management of the Liquidation Trust, *supra* note 59 at 115.

[70] *See,* Office of the United States' Operating Guidelines and Reporting Requirements For Debtors in Possession and Trustees. *See also, In re Adamo*, No. 14-73640-las, 2016 WL 859349, at * 9 (E.D.N.Y. March 4, 2016); *In re Bedford Commc'ns., Inc.*, No. 10-10902 (SMB), 2010 WL 2881414, at *6 (S.D.N.Y. April 19, 2010).

Practitioners should note that U.S. Trustee fees continue post-confirmation until the bankruptcy case is closed.[71] Therefore, the trust's governing documents should specify the party responsible for post-confirmation U.S. Trustee quarterly fee payments.[72] Failure to do so may lead to unnecessary litigation.[73]

Below is an example of a plan provision specifying U.S. Trustee reporting requirements:

> Quarterly Filings with Bankruptcy Court and U.S. Trustee. From the Effective Date until a Final Decree is entered, the Liquidation Trustee shall, within 45 days of the end of each calendar quarter, file with the Bankruptcy Court and submit to the U.S. Trustee quarterly reports setting forth all receipts and disbursements of the Liquidation Trust as required by the U.S. Trustee guidelines.
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> *In re CDC Liquidation Trust*, No. 11-79079 (Bankr. N.D. Ga. 2011), Liquidation Trust Agreement.

D. Post-Confirmation Creditor Oversight

Typically, liquidating trustees operate with the oversight of a governing or oversight committee.[74] Bankruptcy plan documents (disclosure statement, plan, trust agreement, and confirmation order) frequently contain provisions authorizing the appointment of an oversight committee, which is often comprised of an odd-numbered subset of members of the official committee of unsecured creditors. The oversight committee's role is to provide advice (and in

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[71] *See, In re Aquatic Dev. Grp., Inc.*, 352 F.3d 671, 674 (2d Cir. 2003) (noting that the current version of 28 U.S.C. § 1930(a)(6) requiring quarterly fees to U.S. Trustee "requires debtors to pay fees to the United States Trustee 'for each quarter … until the case is converted or dismissed.' "); *In re Genesis Health Ventures, Inc.*, 280 B.R. 95, 99 (Bankr. D. Del. 2002) (granting the U.S. Trustee's motion to compel post-confirmation reporting and payment of quarterly fees by each debtor).

[72] *See,* Legally Defining Management of the Liquidation Trust, *supra* note 59 at 112.

[73] *See, e.g., In re CSC Indus., Inc.,* 226 B.R. 402, 406 (Bankr. N.D. Ohio 1998) (questioning whether a liquidation trust was required to pay U.S. Trustee post-confirmation quarterly fees where the trust did not specify the party responsible for payment).

[74] *See,* Legally Defining Management of the Liquidation Trust, *supra* note 59 at 115.

some cases, consent) to the liquidating trustee regarding the performance of the liquidating trustee's duties.

An oversight committee usually monitors the trust's operations. In addition to responsibilities regarding the post-confirmation trust's assets and beneficiaries, the liquidating trustee is often tasked with winding up the debtor and the bankruptcy estate.[75] Those tasks may include updating books and records, paying allowed administrative and priority claims, providing reports to the U.S. Trustee, filing tax returns, filing corporate dissolution papers, and winding up payroll and benefit plans.[76] The need for an oversight committee depends on the case; however, the oversight committee's power and obligations should be clearly stated in the trust agreement and plan to avoid later confusion or uncertainty.[77]

Below are examples of Chapter 11 plan provisions establishing the duties and powers of a liquidating trustee, subject to the consultation and approval of the Liquidating Trust Oversight Committee:

> The Liquidating Trustee shall have the rights and powers set forth in the Liquidating Trust Agreement . . . [s]ubject to the terms of the Liquidating Trust Agreement, which includes, among other things, limitations of the Liquidating Trustee's discretion to take certain action without consultation or approval of the Liquidating Trust Oversight Committee or, in some circumstances, the Court …
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> *Health Diagnostic Lab., Inc., et al.*, No. 15-32919-KRH (Bankr. E.D. Va. 2015), ECF No. 1095 (Order Confirming Debtors' Plan of Liquidation under Chapter 11 of the Bankruptcy Code) (Bankr. E.D. Va. 2015).

> Quarterly Reporting. The Liquidating Trustee (i) shall report to the Liquidating Trust Oversight Committee on at least a quarterly basis … as to the status of all material matters affecting the

[75] *Id*. at 109; *see also, In re Consolidated Pioneer Mortg. Entities*, 264 F.3d 803 (9th Cir. 2001) (finding liquidating corporation created under confirmed plan had a fiduciary duty to account to investors and delay in doing so constituted cause to convert case to Chapter 7)

[76] *See,* Legally Defining Management of the Liquidation Trust, *supra* note 59 at 109-110.

[77] *Id*. at 114.

Liquidating Trust; and (ii) shall provide to the Liquidating Trust Oversight Committee within thirty (30) days after the end of the first full month following the Effective Date, and within twenty (20) days after the end of each quarter thereafter …

In re Health Diagnostic Lab., Inc., et al., No. 15-32919-KRH, at 1095 (Order Confirming Debtors' Plan of Liquidation under Chapter 11 of the Bankruptcy Code), Ex. C (Liquidating Trust Agreement).

Oversight Board. The Liquidation Trustee must regularly consult with and seek approval from the Oversight Board regarding the prosecution and/or settlement of Causes of Action …

In re CDC Liquidation Trust, No. 11-79079, Liquidation Trust Agreement (Bankr. N.D. Ga. 2011).

E. Practitioner Tips

As the trust and liquidating trustee retain control and management of a corporation's finances, employees, and operations post-confirmation, it is important for the oversight committee, appointed by the trust, to monitor these activities. The trust agreement and incorporating plan should provide for the retention of jurisdiction and continued compliance with U.S. Trustee's reporting and payment requirements, and oversight committee governance, ensuring that a checks and balances system is maintained and that the liquidating trustee complies with all applicable laws.