CHAPTER 11 "COLD" TOPICS: REVISITING UNDER-UTILIZED, MISUNDERSTOOD, AND OVERLOOKED PROVISIONS OF THE BANKRUPTCY CODE, RULES, AND RELATED NON-BANKRUPTCY LAW

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INTRODUCTION

Most commercial bankruptcy lawyers have a firm understanding of the substantive and procedural matters that frequently arise in chapter 11 cases. It can be helpful, however, to revisit infrequently used provisions of the United States Bankruptcy Code (the "Code")—like the section 1111(b) election—to better understand when the utilization of such provisions might aid (or impede) a chapter 11 case. Similarly, a reexamination of how certain Code provisions—like section 301—intersect with applicable non-bankruptcy law can aid attorneys for debtors, creditors, and equity security holders in representing their clients' respective interests. Moreover, in our experience both as business bankruptcy lawyers and as bankruptcy judges, certain provisions of the Code, the Federal Rules of Bankruptcy Procedure (the "Rules"), and related non-bankruptcy law are simply misunderstood or overlooked.

This paper (subjectively organized by what we find most interesting) addresses the following topics: (i) who can initiate a chapter 11 case on behalf of an entity (starting at page 1); (ii) the section 1111(b) election—what it is and why it matters (page 7); (iii) section 506(c) surcharge in a nutshell (page 12); (iv) insider creditors beware—an overview of recharacterization and section 510 equitable subordination (page 21); (v) section 331—the ins and outs of interim compensation (page 24); (vi) burden shifting under section 1112(b) (page 32); and (vii) (sometimes) overlooked timeframes, deadlines, and requirements (page 34). Although many of these topics are far from being "hot," we hope you find the discussion useful.

I. Authority to Initiate Chapter 11 Proceedings on Behalf of Non-Individual Debtors

Pursuant to 11 U.S.C. § 301, a "voluntary case" under title 11 is commenced by the filing of a "petition under such chapter by an entity that may be a debtor" thereunder.[2] When a non-individual debtor files for bankruptcy, an individual who is authorized to act on behalf of the entity must sign and submit Official Form 202 for any document requiring a declaration under Rules 1008 and 9011 stating, under penalty of perjury, the individual's position or relationship to the debtor.[3]

Although, section "301(a) requires the petitioner to qualify as a 'debtor' under the chapter of the Code pursuant to which the petition is filed," and the petition must be signed by an individual authorized to act on behalf of the entity, the Code does not otherwise set forth specific requirements regarding the requisite authority required to file and verify a voluntary petition on behalf of a non-individual debtor.[4] Instead, to determine whether a voluntary bankruptcy petition has been authorized on behalf of a non-individual debtor, courts must turn to applicable state law and the documents governing the entity.

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[2] 11 U.S.C. § 301(a).
[3] Official Form 202.
[4] 2 COLLIER ON BANKRUPTCY ¶ 301.04[1] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).

A. Corporations

It is well settled that "[t]he source of authority to file a voluntary petition on behalf of a corporation is . . . derived from applicable state law, the corporation's certificate of incorporation and the corporation's bylaws."[5] In the case of *Price v. Gurney*, stockholders filed a chapter X petition under the Bankruptcy Act on behalf of a corporation. The District Court granted the debtor's motion to dismiss on the grounds that the board of directors had not authorized the filing, but the Sixth Circuit reversed.[6]

On appeal to the Supreme Court, the stockholders argued that the board of directors had been unlawfully elected and had breached their duty of trust by refusing to assert a defense the corporation had against a foreclosure action. The Supreme Court explained that the stockholders were not authorized to file a voluntary petition on behalf of the corporation, writing, in part, as follows:

> [T]he initiation of the proceedings, like the run of corporate activities, is left to the corporation itself, i.e. to those who have the power of management.
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> . . .
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> The [trial court] . . . . must of course determine whether they are filed by those who have authority so to act. In absence of federal incorporation, that authority finds its source in local law. If the [trial court] finds that those who purport to act on behalf of the corporation have not been granted authority by local law to institute the proceedings, it has no alternative but to dismiss the petition.[7]

B. Limited Liability Companies

"While corporations and LLCs are different legal entities, LLCs are generally treated as corporations under the Bankruptcy Code."[8] Accordingly, an examination of the law of the state in which the LLC is organized, "including both the applicable statutes and the terms" of the LLC's governing documents, "is necessary to determine who the owners of the Debtor were at the time the petition was filed, and, consequently, whether the petition was sufficiently authorized."[9]

For instance, in the case of *In re Mid-South Business Associates, LLC*, the bankruptcy court held, under Mississippi law and pursuant to the terms of the LLC's Operating Agreement, that the

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[5] *Id.* at ¶ 301.04[2][b].
[6] *Price v. Gurney*, 324 U.S. 100 (1945).
[7] *Id.* at 105-06.
[8] *In re Mid-South Bus. Assocs., LLC*, 555 B.R. 565, 571 (Bankr. N.D. Miss. 2016) (Woodard, J).
[9] *Id.*

debtor's managing member filed a petition on behalf of the LLC without sufficient corporate authority. State law required the bankruptcy court to "accept the plain meaning of [the LLC's Operating Agreement] as the intent of the parties where no ambiguity exist[ed]."[10] While the state's Limited Liability Act "serve[d] to fill in any gaps in the Operating Agreement," the bankruptcy court explained that the plain meaning of the LLC's Operating Agreement was otherwise generally controlling.[11] According to the terms of the Operating Agreement, the general manager was vested with the right to manage the business operations of the debtor in the ordinary course of business, but various matters outside the ordinary course of business could only be accomplished upon a two-thirds majority vote of the membership. Because a decision to file bankruptcy is outside the ordinary course of business, the general manager was not authorized to file for bankruptcy without a membership vote pursuant to the plain terms of the Operating Agreement.[12] Accordingly, the bankruptcy court lacked subject matter jurisdiction over the case and had "no alternative but to dismiss [the] case."[13]

C. Partnerships

For partnerships section 303(b)(3) of the Code provides that a petition filed "by fewer than all of the general partners in [the] partnership" is treated as an involuntary petition.[14] If an involuntary petition is filed against a partnership, Rule 1004 requires the petitioning partners or other petitioners to promptly serve the involuntary petition upon the non-petitioning general partners who maintain an ongoing liability to the partnership.[15] Rule 1004 further requires the bankruptcy clerk to issue a summons for service promptly on each non-petitioning general partner.[16]

D. Validity of Bankruptcy Blocking Provisions - Golden Shares

The Fifth Circuit recently granted leave for direct appeal in the case of *In re Franchise Services of North America, Inc.*, after the bankruptcy court dismissed a corporation's chapter 11 petition and upheld the validity of a blocking provision (or "golden share") given to an equity holder of the debtor.[17] On January 17, 2018, the bankruptcy court certified the following questions to the Fifth Circuit:

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[10] *Id.*
[11] *Id.*
[12] *Id.* at 577.
[13] *Id.* at 579.
[14] 11 U.S.C. § 303(b)(3)(A).
[15] FED. R. BANKR. P. 1004.
[16] *Id.*
[17] *In re Franchise Servs. of N. Am., Inc.*, Case No. 18-90006 (5th Cir. Feb. 8, 2018) (granting expedited consideration of the appeal).

(1) Is a provision, typically called a blocking provision or a golden share, which gives a party (whether a creditor or an equity holder) the ability to prevent a corporation from filing bankruptcy valid and enforceable or is the provision contrary to federal public policy?

(2) If a party is both a creditor and an equity holder of the debtor and holds a blocking provision or a golden share, is the blocking provision or golden share valid and enforceable or is the provision contrary to federal public policy?

(3) Under Delaware law, may a certificate of incorporation contain a blocking provision/golden share? If the answer to that question is yes, does Delaware law impose on the holder of the provision a fiduciary duty to exercise such provision in the best interest of the corporation?[18]

The case came before the bankruptcy court on motion filed by a creditor to dismiss the debtor's chapter 11 case as having been filed without proper corporate authority and upon joinder filed by an equity holder controlled by the creditor. The debtor was incorporated in 1998 and is in the business of renting automobiles, servicing 25 airport markets in 10 different states.

The underlying controversy in the case stemmed from a multi-step M&A transaction pursuant to which the debtor ultimately acquired Advantage Rent-A-Car ("Advantage") from Hertz. In 2012, Macquarie Capital (USA) Inc. ("Macquarie"), an investment bank located in New York, formed Boketo LLC ("Boketo") under Delaware law to facilitate the debtor's acquisition of Advantage. Boketo, which is 100% indirectly owned by Macquarie, invested $15 million in the debtor to facilitate the acquisition. In exchange for the $15 million investment, Boketo was given a 49.76% minority interest in the debtor in the form of Series A Preferred Stock, becoming the debtor's largest single shareholder. On appeal, the debtor asserts that Boketo "exists only on paper in the Macquarie office in New York."[19]

On May 2, 2013, with the closing of the Advantage acquisition and merger of Adreca Holdings Corporation, an affiliate of Macquarie, into the debtor, the debtor was re-domiciled as a Delaware Corporation. Section 4(j) of debtor's Certificate of Incorporation prohibits the corporation from seeking bankruptcy relief without the consent of Series A Preferred stockholders. "The 49.76% stock interest held by Boketo is the only 'Series A Preferred Stock' in [the debtor]."[20]

[18] *In re Franchise Servs. of N. Am., Inc.*, No. 1702316EE, 2018 WL 485959, at *5 (Bankr. S.D. Miss. Jan. 17, 2018) (Ellington, J.).
[19] Brief of Appellant, *Franchise Servs. of N. Am., Inc.*, No. 18-60093, 2018 WL 1378469, at *6 (Mar. 16, 2018).
[20] *Id*.

As a result of the M&A transaction, the debtor agreed to pay Macquarie transaction fees totaling $3 million. The debtor's "value collapsed only six months after the transaction closed when the subsidiary which held the Advantage assets, Simply Wheelz, [filed] bankruptcy in November 2013 and all of its assets were sold."[21] The debtor blamed Macquarie for its collapse, arguing that the line of credit negotiated by Macquarie was "impossible" for the debtor to meet and, further, that an agreement negotiated by Macquarie for the lease of Hertz vehicles resulted in "catastrophic" losses.[22] The debtor's collapse resulted in multiple lawsuits, including an action filed by the debtor against Macquarie asserting claims for breach of duty and misrepresentation and a lawsuit filed by Macquarie against the debtor seeking payment of the transaction fees.[23]

On June 26, 2017, the debtor filed a chapter 11 petition in the Southern District of Mississippi after its Board of Directors adopted a resolution to file bankruptcy. Macquarie first moved to dismiss the case on August 10, 2017, arguing that "the case was filed without the proper corporate authority, and therefore, the Court lacked jurisdiction to hear the case."[24] On August 31, 2017, Boketo filed a two page Joinder, fully adopting the motion filed by Macquarie.[25] It was undisputed that Boketo never approved nor consented to allow the debtor to seek bankruptcy relief as required under section 4(j) of the debtor's Certificate of Incorporation.[26]

The bankruptcy court rejected the debtor's argument that the Motion to Dismiss and Joinder were barred by waiver, estoppel, and/or laches because the movants waited 66 days after the petition date to seek relief. Adopting the reasoning expressed in the case of *In re Mid-South Business Associates, LLC*, the bankruptcy court concluded that "objections to subject matter jurisdiction may be made at any time, and may even be raised and decided by the Court on its own motion if the parties overlook or elect not to press such an objection."[27] Accordingly, the bankruptcy court explained that it would lack "jurisdiction over the case" if the petition was filed "without sufficient corporate authority."[28] To determine whether the debtor lacked corporate authority to file, the bankruptcy court had to decide whether the blocking provision contained in section 4(j) of the debtor's Certificate of Incorporation was valid. Section 4(j) provides, in relevant part, as follows:

> [T]he Corporation shall not and, in the case of clause (2) below, shall not permit any subsidiary to, directly or indirectly (whether through merger, consolidation, amendment to this Certificate of Incorporation or otherwise), do any of the following without first obtaining the written consent or affirmative vote of (i) the

[21] *Id.* at *4.
[22] *Id.* at *5.
[23] *Id.*
[24] *In re Franchise Servs. of North Am., Inc.*, 2018 WL 485959, at *10.
[25] *Id.* at *11.
[26] *Id.*
[27] *Id.*
[28] *Id.* at *12.

> holders of a majority of the shares of Series A Preferred Stock then outstanding, voting separately as a class (a "Preferred Majority"), and (ii) the holders of a majority of the shares of Common Stock then outstanding, voting separately as a class:
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> . . . .
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> (2) effect any Liquidation Event.[29]

Such provisions are commonly referred to as "golden shares or blocking provisions."[30] The bankruptcy court explained that golden share provisions are a "relatively new" invention of the credit industry created to avoid absolute prohibitions against filing which will likely be deemed void as a matter of public policy.[31] Given the recent invention of such provisions, the parties only found seven cases addressing golden shares, each of which "begin[s] with the premise that waiving or contracting away the right to file for relief under the bankruptcy code is contrary to federal public policy."[32]

The bankruptcy court analyzed each of the seven cases and concluded that blocking provisions held by an equity holder should be upheld as valid, but if held by a creditor, such provisions are void as a matter of public policy. *See In re Global Sys., LLC*, 391 B.R. 193 (Bankr. S.D. Ga. 2007) (Davis, J.) (finding that a lender which had been granted an equity interest in an LLC, as well as the right to veto the LLC's decision to file bankruptcy, could enforce the blocking restriction in its capacity as an equity holder); *In re Bay Club Partners-472, LLC*, 2014 WL 1796688 (Bankr. D. Or. May 6, 2014) (Dunn, J.) (finding bankruptcy waiver unenforceable as a matter of public policy where debtor agreed to add the provision in favor of a creditor that financed the LLC's purchase of an apartment complex); *In re Lake Mich. Beach Pottawattamie Resort, LLC*, 547 B.R. 899 (Bankr. N.D. Ill. 2016) (Barnes, J.) (finding blocking provision given to a creditor invalid); *In re Intervention Energy Holdings, LLC*, 553 B.R. 258 (Bankr. D. Del. 2016) (Carey, J.) (finding blocking provision void as tantamount to an "absolute waiver" where the debtor agreed to give a creditor one share in order to make the creditor a common member of the LLC after defaulting on a $200 million loan); *In re Tara Retail Grp., LLC*, 2017 WL 1788428 (Bankr. N.D. W.Va. May 4, 2017) (Flatley, J.), *appeal dism'd*, 2017 WL 2837015 (N.D. W.Va. June 30, 2017) (finding that a blocking provision which required an independent director's approval did not violate public policy, but the independent director's continued silence regarding filing ratified the petition); *In re Squire Court Partners Ltd. P'ship*, 574 B.R. 701 (Bankr. E.D. Ark. 2017) (Holmes, J.) (blocking provision held by limited partners was valid because the limited partners were owners, not creditors of the debtor); *In re Lexington Hosp. Grp., LLC*, 2017 WL 4118117 (Bankr.

[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id*. at *13.

E.D. Ky. Sept. 15, 2017) (Schaaf, J.) (denying motion to dismiss where blocking provision was given to an independent manager who was in reality "not a truly independent decision maker").

After discussing each case, the Mississippi bankruptcy court concluded that a blocking provision that is held by a creditor violates "public policy because as a condition for supplying credit to a debtor, the creditor [is] attempting to limit the debtor's right to file bankruptcy."[33] However, if the party holds "two hats" in the case, as both a lender and equity holder, the party retains an "unquestioned right to prevent, by withholding consent, a voluntary bankruptcy case."[34]

In the case before the bankruptcy court, Macquarie was a creditor holding a $3 million claim against the debtor for arrangement and advisory fees. Accordingly, to the extent Macquarie claimed to hold a golden share or blocking provision, the bankruptcy court concluded that the provision was "void as a matter of public policy."[35] However, to the extent Boketo, a wholly owned subsidiary of Macquarie, asserted the golden share as a substantial equity holder, the bankruptcy court determined that section 4(j) was valid, enforceable, and not contrary to public policy.

On May 2, 2018, the Fifth Circuit heard oral arguments on the expedited direct appeal.

II. The Section 1111(b) Election

Section 1111(b) is one of the more complex provisions of the Code, rooted in the difficulty faced by bankruptcy courts in valuing secured creditors' collateral and the potential for inequitable results (such as valuing property during a time when property values are depressed, which may unfairly preserve future appreciation solely for the benefit of the debtor).[36] It includes an optional provision by which an undersecured creditor can avoid bifurcation of its claim under section 506(a) of the Code and "be paid in full in the plan (although not necessarily with interest)."[37]

A. Section 1111(b)(1) – The Conversion of Non-recourse Claims

There are two subparts to section 1111(b). The first, section 1111(b)(1), automatically converts a non-recourse claim (i.e., a claim enforceable only against the collateral for the claim) that is secured by estate property into a recourse claim (i.e., a claim that is enforceable against the

[33] *Id.* at *16.
[34] *Id.* at *13.
[35] *Id.* at *16.
[36] *See In re Pine Gate Assocs., Ltd.*, No. B75-4345A, 1977 WL 373413 (N.D. Ga. Mar. 4, 1977) (Norton, J.), *vacated as moot*, 1977 WL 373414 (N.D. Ga. Sept. 16, 1977); S. Rep. 95-989, at 65 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5851; *see also* Edwards et al., *Recent Developments in Chapter 11*, 2013 NORTON ANN. SURV. OF BANKR. LAW 37, n.71 (2013) ("Section 1111(b) of the Bankruptcy Code was enacted in response to *Pine Gate*.").
[37] M. Jonathan Hayes & Roksana D. Moradi, *The Section 1111(b) Election: A Primer*, 31 CAL. BANKR. J. 755, 755 (2011).

debtor) for purposes of claim allowance. [38] This conversion entitles an undersecured creditor holding a non-recourse claim to an allowed nonpriority unsecured claim (to the extent its total claim exceeds the value of its collateral), as well as a vote on the debtor's plan in respect of such unsecured claim.[39] Essentially, section "1111(b) provides the lienholder the benefit it would otherwise obtain from its non[-]recourse loan bargain"—i.e., "either full payment (or at least a claim against the estate for the full amount of the debt and the ability to vote on the plan to the extent of its claim), or the right to foreclose and bid on the property at public auction."[40]

Certain things can occur to return an undersecured claim to non-recourse status. First, if the creditor makes the section 1111(b)(2) election discussed below, the claim will return to non-recourse status.[41] Second, if the estate property securing the claim is sold under section 363 of the Code or under a plan, the claim will revert to non-recourse status, and the creditor will not be allowed an unsecured deficiency claim.[42] Moreover, some courts have held that a senior creditor's foreclosure sale deprives a junior creditor of the right to a deficiency claim under section 1111(b)(1).[43] Similarly, courts have concluded that a debtor's abandonment of collateral under a plan deprives a non-recourse creditor of the preferred status granted by section 1111(b)(1).[44]

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[38] 11 U.S.C. § 1111(b) provides:

> (1)(A) A claim secured by a lien on property of the estate shall be allowed or disallowed under section 502 of this title the same as if the holder of such claim had recourse against the debtor on account of such claim, whether or not such holder has such recourse, unless—
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> (i) the class of which such claim is a part elects, by at least two-thirds in amount and more than half in number of allowed claims of such class, application of paragraph (2) of this subsection; or
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> (ii) such holder does not have such recourse and such property is sold under section 363 of this title or is to be sold under the plan.
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> (B) A class of claims may not elect application of paragraph (2) of this subsection if—
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> (i) the interest on account of such claims of the holders of such claims in such property is of inconsequential value; or
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> (ii) the holder of a claim of such class has recourse against the debtor on account of such claim and such property is sold under section 363 of this title or is to be sold under the plan.
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> (2) If such an election is made, then notwithstanding section 506(a) of this title, such claim is a secured claim to the extent that such claim is allowed.

[39] *See In re Montgomery Ward, LLC*, 634 F.3d 732, 739-40 (3d Cir. 2011) ("Section 1111(b)'s language and purpose indicate that the recourse transformation is for distribution purposes only. It does not change the nature or terms of a creditor's security interest.").

[40] *In re 680 Fifth Ave. Associates*, 29 F.3d 95, 97–98 (2d Cir. 1994).

[41] *See* 11 U.S.C. § 1111(b)(1)(A)(i); *see also* 5 NORTON BANKR. L. & PRAC. 3d § 102:1.

[42] *See* 11 U.S.C. § 1111(b)(1)(A)(ii).

[43] *See, e.g., In re Salamon*, 854 F.3d 632, 637 (9th Cir. 2017) ("[I]f a creditor's claim, for any reason, ceases to be secured by a lien on property of the estate, the creditor can no longer transform a non-recourse claim into a recourse claim.").

[44] *See, e.g., Matter of DRW Prop. Co. 82*, 57 B.R. 987, 993 (Bankr. N.D. Tex. 1986).

B. Section 1111(b)(2) – The Election

Whether a claim secured by a lien on estate property is recourse or non-recourse, if the claim is undersecured, the creditor can elect to waive its right to an allowed unsecured claim and instead elect to treat its claim as "a secured claim to the extent that such claim is allowed."[45] There are some limitations on a secured creditor's right to make the 1111(b)(2) election. Specifically, if the creditor's interest in the subject estate property is of inconsequential value (e.g., there is little or no equity in the property above the senior liens), or the debt is recourse and the property is sold under section 363 or to be sold under the Plan, the creditor cannot make the section 1111(b)(2) election.[46] The first exception "is based on the principle that a creditor who is a secured creditor in name only should not be allowed to elevate form over substance, and should be treated as an unsecured creditor."[47] The rationale for the second exception is similar to that underlying the section 1111(b)(1)(A)(ii) exception to recourse treatment of non-recourse claims:

> Specifically, if property is sold under § 363, the secured creditor has the opportunity to credit bid at the sale pursuant to Code § 363(k), up to the full amount of its claim. By credit bidding, the recourse secured creditor can drive up third parties' bids, or acquire the property (and any opportunity for future appreciation) for itself. At the closing of the sale, the recourse creditor retains its recourse deficiency claim against the debtor.[48]

Where a debtor seeks to cram down a plan (under section 1129(b)(2)(A)) in which the debtor will retain an undersecured creditor's collateral, making the 1111(b)(2) election entitles the creditor to retain its lien to the extent of the allowed amount of its entire *claim* and to receive deferred cash payments that both (a) total at least the allowed amount of the creditor's entire *claim* and (b) have a present value, as of the effective date of the plan, of at least the value of the creditor's *interest* in the estate's interest in its collateral.[49] An apparent majority of courts interpret section 1129(b)(2)(A) as allowing interest payments to a creditor making the section 1111(b) election to serve double duty—providing the creditor the present value of its collateral and reducing the total allowed amount of the creditor's claim.[50] The creditor is not entitled to interest on the entirety of

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[45] *See* 11 U.S.C. § 1111(b)(1), (2); *see also In re Waterways Barge P'ship*, 104 B.R. 776, 782 (Bankr. N.D. Miss. 1989) (Houston, J.); 5 NORTON BANKR. L. & PRAC. 3d § 102:5.
[46] *See* 11 U.S.C. § 1111(b)(1)(B).
[47] 5 NORTON BANKR. L. & PRAC. 3d § 102:8.
[48] *See id.* § 102:9.
[49] 11 U.S.C. § 1129(b)(2)(A).
[50] *See, e.g., In re Pamplico Hwy. Dev., LLC*, 468 B.R. 783, 791-92 (Bankr. D.S.C. 2012) (holding "interest payments may serve a dual purpose of satisfying the total allowed claim of the creditor and providing present value to the creditor" and explaining "there are two ways a debtor can ensure that a creditor will receive payments totaling its allowed claim and that its lien will remain in place until full payment has been received: (1) the debtor may specifically provide in the note for payment of an § 1111(b) premium in the event of a sale or prepayment, which is calculated as the difference between the total allowed claim and the outstanding principal balance remaining due on the note plus the payments made to date, or (2) the debtor may provide for a note in the face amount of the electing creditor's

its claim; otherwise, "every undersecured creditor would make the [section 1111(b)] election, and [section] 506(a) would be meaningless."[51] Accordingly, whether the section 1111(b) election will yield a larger payout than bifurcating the claim into secured and unsecured portions will depend on the proposed cramdown interest rate, plan length, dividend to unsecureds, etc.

Consider the following simple example. The debtor files a plan that proposes to bifurcate an undersecured creditor's $200,000 claim into a $100,000 unsecured claim and a $100,000 secured claim and to pay the secured claim with interest at the annual rate of 6.5 percent over a period of ten years, with monthly principal and interest payments of $1,135.48 that will total $136,257.57 at the end of the ten-year period. Even if the court concludes that the proposed treatment provides the creditor with the present value of its lien, if the creditor makes the section 1111(b) election, the debtor will have to pay at least an additional $63,742.43 to the creditor in respect of its claim to satisfy the requirements of section 1129(b)(2)(A). Of course, if the plan proposes to pay nonpriority unsecured creditors in full (i.e., to pay the creditor $136,257.57 on its secured claim and $100,000 on its unsecured claim), making the section 1111(b) election likely would reduce the total cash payments to the creditor under the plan. On the other hand, if the plan proposes de minimis disbursements to nonpriority unsecureds, making the section 1111(b) election would yield a higher payout to the undersecured creditor and preserve the value of the creditor's lien to a greater extent.

Ultimately, the benefits of making the section 1111(b) can be significant, particularly where the plan proposes little or no distribution to unsecured creditors (allowing the creditor to receive a larger distribution) or the creditor's collateral is subject to market fluctuations (allowing the creditor to capture post-confirmation appreciation).[52]

C. Other Strategic Considerations Relevant to the Section 1111(b)(2) Election

There are a variety of strategic considerations to take into account when determining whether or not to make the section 1111(b)(2) election. For instance, the section 1129(a)(7) "best

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allowed claim but with a below market interest rate such that the present value of the note would still only be the present value of the collateral") (citation omitted) (Waites, J.); *IPC Atlanta Ltd. P'ship v. Fed. Home Loan Mortg. Corp. (In re IPC Atlanta Ltd. P'ship)*, 163 B.R. 396, 398-400 (Bankr. N.D. Ga. 1994) (Drake, J.); *In re Bloomingdale Partners*, 155 B.R. 961, 974 (Bankr. N.D. Ill. 1993) (Barliant, J.) (holding "the same payments under the plan must satisfy two requirements: (1) the simple, arithmetic total of the stream of payments must at least equal the total claim, and (2) those payments must have a present value equal to the value of the collateral").

[51] *See* Hayes, *supra* note 37, at 760.

[52] *See Gen. Elec. Credit Equities, Inc. v. Brice Rd. Devs., LLC (In re Brice Rd. Devs., LLC)*, 392 B.R. 274, 287 (B.A.P. 6th Cir. 2008) (citing *First Fed. Bank of Cal. v. Weinstein (In re Weinstein)*, 227 B.R. 284 (B.A.P. 9th Cir. 1998)); *In re Weinstein*, 392 B.R. at 295, n.12 ("By making the election, the creditor guards against such an opportunistic sale because it retains a lien on the collateral equal to the full amount of its claim, albeit without interest. . . . Similarly, an electing creditor benefits if there is an appreciation in the value of the collateral and the debtor defaults on its plan payments."); 5 NORTON BANKR. L. & PRAC. 3d § 102:2.

interest of creditors" test does not apply to claims for which the 1111(b)(2) election is made.[53] Instead, holders of such claims need only receive or retain under the plan property that has a value equal to the value of the holder's interest in the estate's interest in the creditor's collateral.[54] Also, by electing to waive its unsecured claim and be treated as fully secured under section 1111(b)(2), an undersecured creditor gives up its right to vote on the plan as an unsecured creditor[55] and, therefore, gives up its negotiating power under the absolute priority rule of section 1129(b)(2)(B).[56]

While some leverage may be lost, other leverage may be gained by making the section 1111(b) election. For instance, the electing creditor may be able to block confirmation of the debtor's proposed plan if making the section 1111(b)(2) election necessitates a plan amendment that renders the plan unfeasible under section 1129(a)(11).[57] Of course, an electing creditor must also consider that, once its election is made, the debtor may choose to amend its plan to surrender or sell the collateral if the property will not generate sufficient cash flow to pay the "fully secured" claim or to avoid fights over plan confirmation.

D. Timing the Section 1111(b) Election

Rule 3014 provides that creditors must elect section 1111(b) claim treatment prior to the conclusion of the hearing on the disclosure statement or within such *later* time as the court may fix.[58] The rationale for this timeframe is that it allows the secured creditor to "know the prospects of its treatment under the plan before it can intelligently determine its rights under section 1111(b)."[59]

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[53] *See* 11 U.S.C. § 1129(a)(7)(A), (B). The "best interest of creditors" test requires that each creditor receive at least as much under the plan as it would in a liquidation of the debtor in chapter 7. *See In re 431 W. Ponce De Leon, LLC*, 515 B.R. 660, 674 (Bankr. N.D. Ga. 2014) (Ellis-Monro, J.).

[54] 11 U.S.C. § 1129(a)(7)(B).

[55] *See 128 Inc., W. Edge II, Inc. v. Premium Mortg., Inc.*, No. 8:16-cv-32-T-17, 2016 WL 4402824, at *4 (M.D. Fla. Aug. 16, 2016) (Kovachevich, J.); *see also* 5 NORTON BANKR. L. & PRAC. 3d § 102:5.

[56] *See* 11 U.S.C. § 1129(b)(2)(B)(ii). The absolute priority rule provides that, if nonpriority unsecured creditors will not be paid in full, equity holders are not permitted to keep their equity interests absent a substantial and essential contribution to the plan. *See generally Matter of Homestead Partners, Ltd.*, 197 B.R. 706, 710-14 (Bankr. N.D. Ga. 1996) (Drake, J.).

[57] *See* Daniel Keating, *RadLAX Revisited: A Routine Case of Statutory Interpretation or a Sub Rosa Preservation of Bankruptcy Law's Great Compromise?*, 20 AM. BANKR. INST. L. REV. 465, 477 (2012) ("[T]he creditor might make the section 1111(b) election as a way to force the debtor either to give the creditor a larger total payout in the plan than the present-value test would require, or to propose a plan that was so long as to fail the feasibility requirement for plan confirmation."); *see also In re Mallard Pond Ltd.*, 217 B.R. 782, 785 (Bankr. M.D. Tenn. 1997) (Trauger, J.) ("The [section] 1111(b) electing creditor . . . gains a statutorily granted advantage because the longer the proposed plan, the more difficult it is for the debtor to prove feasibility.").

[58] FED. R. BANKR. P. 3014. Unless the section 1111(b) election is made at the disclosure statement hearing, it must be made in writing and signed. *Id.*

[59] FED. R. BANKR. P. 3014 advisory committee's note (1983).

In cases where the debtor proposed a material modification or alteration of a plan after an undersecured creditor made the section 1111(b) election, courts have construed Rule 3014 as permitting the creditor to change its section 1111(b) election.[60] Courts also have permitted undersecured creditors to withdraw section 1111(b) elections where the disclosure statement contained material misstatements.[61]

Creditors making the section 1111(b) election must recognize, however, that there is not an unfettered right to withdraw a section 1111(b) election and should fully evaluate the consequences of the election before making it.[62] Notably, whether a modification made to a plan is "material" can be a somewhat subjective inquiry. If the modification is not "tantamount to filing a different plan," the court may disallow withdrawal of the election.[63] Further, by making the election before the disclosure statement hearing concludes, a secured creditor may not have the benefit of a judicial determination of the collateral's fair market value to factor in to its election analysis.[64] Additionally, if multiple secured claims are included in the same class, the class must elect, by two-thirds in amount and more than half in number, application of section 1111(b)(2).[65] Creditors faced with such difficulties should consider requesting additional time to make the section 1111(b) election.

III. Surcharge

Pursuant to 11 U.S.C. § 506(c), the trustee may recover from a secured creditor's collateral the reasonable and necessary expenses incurred by the estate in connection with preserving, or disposing of, property to the extent that the expenditures benefit the secured creditor. The payment of such "expenses out of a creditor's secured property is known as a 'surcharge.'"[66]

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[60] *Id.*; *see also 128 Inc.*, 2016 WL 4402824, at *4 (permitting a creditor to withdraw its section 1111(b) election where the debtor filed amended plans that materially altered the proposed claim treatment by proposing to surrender the creditor's collateral in full satisfaction of the claims and made no allowance for the creditor's unsecured deficiency); *In re IPC Atlanta Ltd. P'ship*, 142 B.R. at 554.

[61] *See, e.g.*, *In re Scarsdale Realty Partners*, 232 B.R. 300, 302 (Bankr. S.D.N.Y. 1999) (Hardin, J.) ("Indeed, denying the right to withdraw a section 1111(b) election made in reliance on materially defective disclosure would be as counter-intuitive as permitting withdrawal of the election after the rest of the creditor body has relied on the election.").

[62] *See, e.g., In re Keller*, 47 B.R. 725, 730 (Bankr. N.D. Iowa 1985) ("Once a class of secured creditors has elected treatment under § 1111(b) it cannot thereafter 'unelect' with respect to the particular plan proposed at the time the election was made.")

[63] *Id*.

[64] Courts still wrestle with the appropriate method for valuing an undersecured creditor's collateral. *See, e.g., Matter of Houston Reg'l Sports Network*, 886 F.3d 523, 528-32 (5th Cir. 2018) (finding that the bankruptcy court erred by valuing the collateral as of the petition date because existing precedent gave the bankruptcy court flexibility to select the appropriate valuation date).

[65] 11 U.S.C. § 1111(b)(1)(A)(i).

[66] *In re Wrightwood Guest Ranch*, LLC, Nos. ED CV 17-895, ED CV 17-947, 2018 WL 1033218, at *2 (C.D. Cal. 2018) (Fitzgerald, J.).

As a general rule, "post-petition administrative expenses and the general costs of reorganizing in bankruptcy cannot be charged against secured collateral."[67] Such administrative expenses and costs must instead "be borne out of the unencumbered assets of the estate."[68] Section 506(c) provides a narrow "exception to this general rule where the trustee (or debtor-in-possession) expends funds to preserve or dispose of property securing the debt."[69]

Although the Bankruptcy Act did not provide a method for surcharging collateral, Congress enacted section 506(c) to codify pre-Code case law under the Bankruptcy Act applying equitable principles which permitted the trustee to surcharge "the reasonable, necessary costs and expenses of preserving, or disposing of, the property" when the value of the property was "greater than the sum of the claims secured by a lien on that property."[70]

Section 506(c), as amended by BAPCPA to include the payment of ad valorem taxes, now provides as follows:

> (c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim, including the payment of all ad valorem property taxes with respect to the property.[71]

The underlying purpose of the exception is to ensure that a secured creditor pays for the benefit that it received from the trustee's expenditures preserving or disposing of the secured creditor's collateral, thereby preventing a windfall to the secured creditor.[72]

After any surcharge awarded under section 506(c), an oversecured creditor is entitled to add interest on its claim, plus any reasonable fees, costs, or charges to the allowed amount of its secured claim, pursuant to section 506(b) which provides as follows:

> (b) To the extent that an allowed secured claim is secured by property the value of which, **after any recovery under subsection (c) of this section**, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.[73]

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[67] *Felt Mfg. Co., Inc. Liquidating Trust v. CapitalSource Fin., LLC (In re Felt Mfg. Co., Inc.)*, 402 B.R. 502, 509-10 (Bankr. D. N.H. 2009) (Deasy, J.).
[68] *Southwest Secs., FSB, v. Segner (In re Domistyle, Inc.)*, 811 F.3d 691, 695 (5th Cir 2015).
[69] *In re Felt Mfg. Co., Inc.*, 402 B.R. at 510.
[70] 4 COLLIER ON BANKRUPTCY ¶ 506.LH[3] (*quoting* H.R. Rep. No. 595, 95th Cong. 1st Sess. 356-57 (1977)).
[71] 11 U.S.C. § 506(c).
[72] *First Servs. Grp., Inc. v. O'Connell (In re Ceron)*, 412 B.R. 41, 48 (Bankr. E.D.N.Y. 2009) (Stong, J.).
[73] 11 U.S.C. § 506(b) (emphasis added).

Accordingly, the costs recoverable under section 506(c) have priority with respect to the proceeds of the collateral over "postpetition interest, fees, costs and charges, as well as other amounts, owing to the holder of the secured claim."[74]

To surcharge collateral under section 506(c), the trustee bears the burden of proving the following:

(1) The expenditures sought to be recovered were necessary to preserve, or to dispose of, the collateral;

(2) The amounts expended were reasonable; and

(3) The secured creditor benefited from the expenses.[75]

A. Necessary Expenses

To determine whether an expense is "necessary," courts have held that the expense "must (1) have been incurred to preserve or dispose of the secured creditor's collateral and (2) must have been necessary under the circumstances."[76] "An expense is not 'necessary' if it bears no relation to the collateral or was not essential to preserve or increase the value of the collateral."[77] Expenses that may qualify as necessary "include appraisal fees, auctioneer fees, advertising costs, moving expenses, storage charges, payroll of employees directly and solely involved with the disposition of the subject property, maintenance and repair costs, and marketing costs."[78]

The trustee may also seek to surcharge the collateral of a secured creditor that has a lien on virtually all of the debtor's assets for the payment of professional fees and expenses incurred to preserve the "debtor's continued operations [or] preserve or enhance the value of the secured creditor's collateral."[79] In the case of *In re Felt Manufacturing Company, Inc.*, the liquidating trustee under the debtor's chapter 11 plan filed an adversary proceeding to surcharge collateral of a creditor that had provided postpetition financing to the debtor, seeking payment for professional fees rendered from the petition date through the date the chapter 11 trustee was appointed.

On a motion to dismiss for failure to state a claim for which relief could be granted, the secured creditor argued, in part, that the liquidating trustee failed to demonstrate that the

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[74] 4 COLLIER ON BANKRUPTCY ¶ 506.05[2]; *see also Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A*, 530 U.S. 1 (2000) (explaining that section 506(c) "constitutes an important exception to the rule that secured claims are superior to administrative claims").
[75] *See In re Domistyle, Inc.*, 811 F.3d at 695.
[76] *In re Felt Mfg. Co., Inc.*, 402 B.R. at 523.
[77] *Id*.
[78] 4 COLLIER ON BANKRUPTCY ¶ 506.05[4].
[79] *Id*.

professional fees were necessary and reasonable.[80] The bankruptcy court denied the motion to dismiss, finding that the complaint stated a plausible entitlement to surcharge for professional fees and expenses incurred during the initial weeks of the bankruptcy case where the debtor's business was in crisis after its CEO resigned following reports of financial misreporting. The professional fees of the turnaround management firm hired to stabilize and maintain the debtor's business "were material in preserving the assets of the estate" because the firm ran the debtor's day-to-day operations, managed finances, met with trade vendors and key customers, developed budgets, and provided financial reports to the secured creditor and to the creditor's committee.[81] Likewise, the professional fees and expenses of debtor's counsel were necessary to preserve the going concern value of the debtor's business where counsel filed numerous first day motions, negotiated the terms of cash collateral with the secured creditor, drafted press releases to ensure continued operations, worked to formulate a sales process, and communicated with the secured creditor regarding the selection of an investment bank to facilitate the sale.[82]

B. Reasonableness

Courts generally measure the reasonableness of expenditures "against a benchmark of the amount of costs and expenses that the secured creditor would have incurred by foreclosing on the property on its own behalf."[83] For example, in the case of *In re Toy King Distributors, Inc.*, the bankruptcy court determined that the movant failed to carry its burden of proof where the movant failed to present any evidence of specific costs and expenses that the secured creditor would have incurred had it foreclosed its security interest in inventory. Without this essential evidence, the bankruptcy court could not reach the issue of reasonableness.[84]

When the surcharge is composed of professional fees, the reasonableness of the fees are considered under the "lodestar method."[85] For example, in the case of *In re Felt Manufacturing Company, Inc.*, discussed above, the bankruptcy court found that professional fees and expenses for services rendered to stabilize the Debtor's business which were incurred during the initial weeks of the bankruptcy case did not appear outside the normal range under the lodestar method.[86]

A determination of reasonableness is a fact specific determination which must be proven by sufficient evidence. For instance, in the case of *In re Tollenaar Holsteins*, the bankruptcy court was persuaded that the trustee had identified and quantified reasonable and necessary expenses incurred to secure a dairy farm during the time period after the farm closed operations until the

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[80] *In re Felt Mfg. Co., Inc.*, 402 B.R. at 523-24.
[81] *Id.* at 524.
[82] *Id.*
[83] *Id.* at 523.
[84] *Official Comm. of Unsecured Creditors of Toy King Distribs., Inc. v. Liberty Savings Bank, FSB (In re Toy King Distribs., Inc.)*, 256 B.R. 1, 194 (Bankr. M.D. Fla. 2000) (Corcoran, J.)
[85] *In re Felt Mfg. Co., Inc.*, 402 B.R at 523.
[86] *Id.* at 524.

state court receiver took possession of the property. The expenses were both necessary and reasonable to secure the "property from vandalism, to comply with environmental monitoring regulations . . . , and to prevent a loss of value if the property became pasture land rather than a licensed dairy."[87]

C. Benefit Required

To support a claim for surcharge, the trustee must also show that the expenditures were made "primarily" for the benefit of the creditor and that the creditor "directly" benefited from the expenditure. In the Fifth Circuit case of *In re Domistyle, Inc.*, the chapter 11 trustee sought to abandon real property to the secured creditor and to surcharge expenses incurred in maintaining and preserving the property from the petition date until the trustee abandoned the property, during which period the trustee had actively marketed the property.[88]

The secured creditor held a $3.69 million first lien on the debtor's primary assets, an industrial building located on 17 acres in Laredo, Texas, which had been appraised at $6 million. The confirmed liquidating plan gave the liquidating trust a period of time to sell the property at a price sufficient to cover the priming lien and obligated the trust to maintain insurance and to maintain the property as a "reasonably prudent owner."[89] During the time the liquidating trustee marketed the property, he paid security expenses and utilities, repaired the roof and electrical system, maintained the landscaping, and paid insurance premiums. Following an evidentiary hearing, the bankruptcy court granted the surcharge against the property.

On direct appeal to the Fifth Circuit, the secured creditor argued that the trustee failed to prove that it benefited from the expenditures. The secured creditor first asserted that section 506(c) is limited to expenses incurred with a "specific and exclusive intent to benefit the secured creditor."[90] Relying upon the Fifth Circuit's case of *In re Delta Towers,* in which the Court of Appeals required the claimant to "incur the expenses *primarily* for the benefit of the secured creditor," the secured creditor argued that the expenses were not incurred primarily for its benefit because the trustee maintained the property with the intent to benefit both the secured creditor and the estate with the expectation of selling the property at a price sufficient to pay not only the secured creditor's lien, but junior liens and unsecured creditors as well.[91]

The Fifth Circuit rejected this argument, holding that surcharge was available for pre-abandonment expenses related to preserving and preparing the property for sale despite the

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[87] *In re Tollenaar Holsteins*, 538 B.R. 830, 835 (Bankr. E.D. Cal. 2015) (Jamie, J.).
[88] *In re Domistyle, Inc.*, 811 F.3d at 695.
[89] *Id.* at 693-94.
[90] *Id.* at 696.
[91] *New Orleans Public Serv., Inc. v. First Fed. Sav. & Loan Assoc. (In re Delta Towers, Ltd.)*, 924 F.2d 74, 77 (5th Cir. 1991).

liquidating trustee's initial plan to sell it at a price above the secured creditor's lien with the balance going to junior and unsecured creditors. Section 506(c) does not include an express requirement that the money is "spent with any particular beneficiary in mind."[92] Applying a backward-looking approach, the Fifth Circuit sought instead to determine whether the secured creditor in fact benefited from the expenses incurred. The Court of Appeals explained that "[t]he rationale for this 'hindsight' approach is to prevent unjust enrichment: 'a secured creditor should not reap the benefit of actions taken to preserve the secured creditor's collateral without shouldering the cost.'"[93]

Although the Fifth Circuit recognized that an expense must be incurred primarily for the benefit of a secured creditor for purposes of section 506(c), the court explained that the inquiry is "particularly case specific" and rejected the "argument that *primarily* means *solely* . . . ."[94] Under the particular circumstances of this case, the Fifth Circuit concluded that the "necessary direct relationship between the expenses and the collateral" was obvious where "all of the surcharged expenses related only to preserving the value of the Property and preparing it for sale."[95] Each dollar expended by the trustee preserved at least one dollar of value for the secured creditor.

D. Express or Implied Consent

In addition to the objective test discussed above, which requires the trustee to "satisfy the [section] 506(c) elements by demonstrating reasonable and necessary expenses that provided a quantifiable benefit to the secured creditor," some courts have adopted a "subjective test under which the surcharge claimant may establish the secured creditor 'consented to' or 'caused' the expenses to be surcharged."[96] For example, in the case *In re Tollenaar Holsteins,* discussed above, the bankruptcy court determined that secured creditors holding liens on substantially all of the debtors' assets, who knew that the jointly administered estates were insolvent, impliedly consented to surcharge for expenses that the trustee and the trustee's professionals incurred in the administration of the estates.[97]

The debtors operated dairy farms in California and Oklahoma. At the commencement of the case, each served as debtors-in-possession and continued to operate their dairies. Because the secured creditors would not consent to the use of cash collateral, the bankruptcy court ordered the appointment of a chapter 11 trustee. In addition to expenses that produced a direct and quantifiable benefit to the secured creditors, the chapter 11 trustee argued that the secured creditors consented to a surcharge for the fees and expenses incurred by the trustee and the trustee's professionals. The secured creditors, "having milked the proverbial cow dry" with their "collateral now having been

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[92] *In re Domistyle, Inc.*, 811 F.3d at 696.
[93] *Id.*
[94] *Id.* at 698 (emphasis in original).
[95] *Id.*
[96] *In re Tollenaar Holsteins*, 538 B.R. at 834.
[97] *Id.* at 830.

either liquidated or recovered," opposed the surcharge motion arguing that the chapter 11 trustee had failed to satisfy both the objective inquiry under section 506(c), as well as subjective inquiry based on consent.[98]

Based upon the circumstances of the case, the bankruptcy court was persuaded that the secured creditors consented to a surcharge of their collateral for expenses of the trustee and the trustee's professionals incurred in the administratively insolvent cases. Although consent will not be implied from a secured creditor's "limited cooperation with a trustee, even under a consensual cash collateral order," the bankruptcy court concluded that the secured creditors' involvement in the case extended well beyond mere cooperation.[99] Not only did the secured creditors file motions seeking the appointment of a trustee to safeguard and liquidate their collateral, the secured creditors also restricted the trustee's use of cash collateral for purposes which were only beneficial to them and worked closely with the trustee to preserve and liquidate the collateral.

E. Standing

In *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, the Supreme Court ruled that, by use of the phrase "the trustee may" in section 506(c), Congress granted exclusive authority to the trustee or debtor-in-possession to bring an action under section 506(c).[100] Thus, an administrative claimant lacked standing to seek payment of its claim from property encumbered by the bank's collateral for unpaid postpetition workers' compensation premiums.

Union Planters Bank (the "bank") held a security interest on virtually all of the debtor's property which included several restaurants and service stations, as well as an advertising firm, securing a debt of more than $4 million. After the debtor filed its chapter 11 petition, the bank agreed to lend the debtor an additional $300,000 to finance the reorganization. The bankruptcy court entered a financing order authorizing the debtor to use the loan proceeds and cash collateral to pay expenses, including workers' compensation insurance. Unaware that the debtor was in bankruptcy, Hartford provided workers' compensation insurance to the debtor. After the debtor converted to Chapter 7, the debtor owed Hartford $50,000 in unpaid premiums which the insurer sought to surcharge to the bank as there were no unencumbered funds from which to pay the premiums.

The Supreme Court discussed the meaning of the phrase "the trustee may" as it appears in section 506(c) which provides, in relevant part, that "*[t]he trustee may* recover from property securing an allowed secured claim the . . . costs and expenses of preserving, or disposing of, such property . . . ."[101] Applying standard principles of statutory construction, the Supreme Court began

[98] *Id.* at 834.
[99] *Id.* at 838.
[100] *See Hartford Underwriters Ins. Co.*, 530 U.S. at 6.
[101] 11 U.S.C. § 506(c).

its analysis "with the understanding that Congress 'says in a statute what it means and means in a statute what it says there.'"[102] As previously noted when construing another provision of section 506, the Supreme Court stated that when statutory language is plain, "the sole function of the courts" is to enforce the statue according to its terms "at least where the disposition required by the text is not absurd."[103] Finding that the statute was quite plain in specifying who may use section 506(c), and finding that the sole party named, the trustee, has a unique role in the bankruptcy process, made it entirely plausible that Congress intended to limit standing under section 506(c) to the trustee, as well as the debtor-in-possession as expressly empowered under 11 U.S.C. § 1107 to exercise the rights and powers of a trustee.

The Supreme Court left open the issue of derivative standing, stating that the issue was not before the Court because Hartford did not ask the chapter 7 trustee to pursue payment under section 506(c) and had not sought derivative standing, but instead asserted an independent right to use section 506(c).[104]

F. Section 506(c) Waiver

Courts generally enforce provisions contained in postpetition financing orders pursuant to which a debtor-in-possession or trustee has waived its right under section 506(c) to assert a surcharge claim for any costs and expenses incurred in connection with the preservation of collateral.[105] For example, the following section 506(c) waiver provision contained in an order authorizing postpetition financing and interim use of cash collateral was recently approved by a Delaware bankruptcy court:

> ***Bankruptcy Code Section 506(c) Waiver***. Each Debtor represents that the DIP Budget contains all expenses that are reasonable and necessary for the operation of their businesses and the preservation of the Prepetition Collateral and Postpetition Collateral through the period for which the DIP Budget runs, and therefore includes all items potentially chargeable to Prepetition Agents, Prepetition Lenders, DIP Agents or DIP Lenders under Bankruptcy Code section 506(c) as of the date hereof. Without limiting the Carve–Out, upon the entry of the Final Order, the Debtors ***shall irrevocably waive and shall be prohibited from asserting any surcharge claim, under section 506(c) of the Bankruptcy Code or otherwise***, for any costs and expenses incurred in connection with the preservation, protection or enhancement of, or realization by the DIP Parties or the Prepetition Secured Parties upon the Postpetition Collateral or the Prepetition Collateral (as applicable) and no costs or expenses of administration that have been or may be incurred in any of the

[102] *Hartford Underwriters Ins. Co.*, 530 U.S. at 6.
[103] *Id.* at 6.
[104] *Id.* at 13.
[105] 4 COLLIER ON BANKRUPTCY ¶ 506.05[12].

> Cases at any time shall be charged against the DIP Agents, any of the DIP Lenders, the Prepetition Secured Parties or any of their respective claims or liens (including any claims or liens granted pursuant to this Interim Order). ***The Prepetition Secured Parties and the DIP Parties acknowledge and agree that they do not consent to any costs or expenses of administration which have been or may be incurred in the Cases***, whether in connection with or on account of the preservation and/or disposition of any Prepetition Collateral or Postpetition Collateral, as applicable, or otherwise, or which otherwise could be chargeable to the Prepetition Secured Parties, the DIP Lenders, the DIP Agents, the Postpetition Collateral, or the Prepetition Collateral, pursuant to sections 105, 506(c), 552 of the Bankruptcy Code or otherwise, may be chargeable, without the prior written consent of such parties, and no such consent shall be implied from any action, inaction, or acquiescence by such parties.[106]

Such provisions may not, however, constitute an absolute waiver depending on the circumstances of the case. In the case of *In re Felt Manufacturing Company, Inc.*, previously discussed, the bankruptcy court, interpreting its own order, held that language in a postpetition financing order pursuant to which the chapter 11 trustee waived the ability to surcharge for a specific period of time did not waive the liquidating trustee's right to assert surcharge prior to the date specified in the financing order.

While it was undisputed that the liquidating trustee succeeded to the chapter 11 trustee's rights under the liquidating plan, the secured creditor argued that the chapter 11 trustee waived his own right to pursue section 506(c) claims under the postpetition financing order which provided, in part, that in no event would "any costs or expenses of administration incurred since November 1, 2005 be imposed upon the [Defendant] or any of the Collateral pursuant to section . . . 506(c) . . . without the prior written consent of the [Defendant], and no such consent shall be implied . . . ."[107]

The liquidating trustee sought to surcharge for costs and expenses rendered from the petition date, September 16, 2005, through the date the bankruptcy court appointed the chapter 11 trustee on October 28, 2005. Although the bankruptcy court found that the chapter 11 trustee agreed to a section 506(c) waiver, the court concluded that the terms of the waiver only applied to surcharges for services after November 1, 2005. The right to surcharge for costs incurred prior to that date, during which the debtor was in crisis, was preserved. Standing in the shoes of the chapter 11 trustee, the liquidating trustee was the proper party to invoke section 506(c) for the costs incurred during the relevant time period.

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[106] *In re Nuverra Envtl. Sols., Inc.*, No. 17-10949, 2017 WL 5479394, at *22-23 (Bankr. D. Del. 2017) (Carey, J.) (emphasis added).
[107] *In re Felt Mfg. Co., Inc.*, 402 B.R. at 510.

IV. Recharacterization and Equitable Subordination

Recharacterization and equitable subordination are related, but distinct, equitable remedies. Bankruptcy courts have the authority to recharacterize claims when the circumstances show that the purported claim is actually an equity contribution.[108] Recharacterization prevents an equity investor from labeling its contribution as a "loan," thereby subverting the Code's priority system by guaranteeing the investor a higher priority and larger recovery when the debtor files for bankruptcy.[109] The court's ability to recharacterize claims ensures that creditors receive a higher priority in bankruptcy than those with an equity interest, consistent with the Code's mandate.[110]

To determine whether recharacterization is appropriate, the court looks to "whether a transaction created a debt or equity relationship from the outset."[111] In making this determination, bankruptcy courts look to "the actual manner, not the form, in which the parties intended to structure a specific advance."[112] To determine whether to classify an advance as a loan or equity contribution, the Eleventh Circuit considers numerous factors, including:

(1) The names given to the certificates evidencing the indebtedness;

(2) The presence or absence of a fixed maturity date;

(3) The source of payments;

(4) The right to enforce payment of principal and interest;

(5) Participation in management flowing as a result;

(6) The status of the contribution in relation to regular corporate creditors;

(7) The intent of the parties;

(8) "Thin" or adequate capitalization;

(9) Identity of interest between creditor and stockholder;

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[108] *See Carn v. Heesung PMTech Corp.*, 579 B.R. 282, 303 (M.D. Ala. 2017) (Moorer, J.) (citing *Bayer Corp. v. Masco Tech, Inc. (In re AutoStyle Plastics, Inc.)*, 269 F.3d 726, 747-48 (6th Cir. 2001)).
[109] *Carn*, 579 B.R. at 303.
[110] *Id*.
[111] *Id.* (citing *In re Cold Harbor Assocs., L.P.*, 204 B.R. 904, 915 (Bankr. E.D. Va. 1997) (Shelley, J.)).
[112] *Carn*, 579 B.R. at 303. Relatedly, the court is not required to accept a party's characterization of a contested transaction. *Id.* at 303-04 (citing *Celotex Corp. v. Hillsborough Holdings Corp. (In re Hillsborough Holdings Corp.)*, 176 B.R. 223, 248 (M.D. Fla. 1994) (Nimmons, J.)).

(10) Source of interest payments;

(11) The ability of the corporation to obtain loans from outside lending institutions;

(12) The extent to which the advance was used to acquire capital assets; and

(13) The failure of the debtor to repay on the due date or to seek a postponement.[113]

No single factor is dispositive, and the weight assigned to specific factors may vary depending upon the circumstances.[114]

When an insider makes a loan to a potential debtor, it is important to formally document the loan, agree on market loan terms as if negotiating them with a non-insider lender, and avoid terms that prioritize the insider's repayment (e.g., contingencies on the obligation to repay, redemption provisions, provisions granting voting power to the instrument holder, etc.).[115] Most of the time, when a court recharacterizes a loan as equity, it is because "the purported loan documentation did not comport with the formalities typical of debt instruments, the lender did not take any action to enforce his rights as a lender, or both."[116] Recharacterization claims may be brought as claim objections, plan objections, or adversary proceedings.[117]

In addition to recharacterizing claims, bankruptcy courts may equitably subordinate claims under Code section 510(c).[118] While the recharacterization inquiry examines the substance of the transaction—whether a debt actually exists—the equitable subordination decision rests on an

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[113] *Lane v. U.S. (In re Lane)*, 742 F.2d 1311, 1314-15 (11th Cir. 1984).

[114] *Carn*, 579 B.R. at 304 (quoting *Menotte v. NLC Holding Corp. (In re First NLC Fin. Servs., LLC)*, 396 B.R. 562, 568 (Bankr. S.D. Fla. 2008) (Hyman, C.J.)).

[115] *See, e.g.*, *Ellinger v. U.S.*, 470 F.3d 1325, 1334-35 (11th Cir. 2006) (affirming the district court's recharacterization where the transfers "lacked the traditional indicia of debt," including a lack of promissory notes evidencing the debt, no fixed maturity date, and no mutually agreed repayment schedule or right to enforce payment); *Carn*, 579 B.R. at 304-05 (denying dismissal of a recharacterization claim where the trustee alleged that there were no documents evidencing the loan, no fixed maturity date, the insider's participation in management increased with the amount of the advances, and the debtor could not have obtained similar loans from outside lending institutions); *see also In re Rhea*, Nos. 97-112470, 94-12571, 1997 WL 416334, at *9 (Bankr. S.D. Ala. 1997) (Mahoney, J.) (recharacterizing loans as capital infusions where the insiders failed to list the purported advances on tax returns, did not pay interest or provide security for several of the notes, and the debtor's financial situation made future repayment unlikely).

[116] *See Weisfelner v. Blavatnik (In re Lyondell Chem. Co.)*, 544 B.R. 75, 104 (Bankr. S.D.N.Y.) (Gerber, J.).

[117] *See* James H.M. Sprayregen et al., *Recharacterization of Debt to Equity: An Overview, Update, and Practical Guide to an Evolving Doctrine*, 2004 NORTON ANN. SURVEY OF BANKR. L. 1, 29-30 (2004).

[118] Parties may agree to contractual subordination provisions, which are enforceable in bankruptcy to the same extent they are enforceable under applicable nonbankruptcy law. *See* 11 U.S.C. § 510(a). Similarly, claims "arising from recission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, for damages arising from the purchase or sale of such security, or for reimbursement or contribution . . . on account of such a claim" are subordinated to all senior or equivalent claims represented by that security. *Id.* § 510(b).

assessment of the creditor's behavior—whether a legitimate creditor engaged in inequitable conduct.[119] Equitable subordination claims are typically brought via an adversary proceeding.[120]

Under section 510(c), the bankruptcy court may, after notice and a hearing, "(1) . . . subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim . . . ; or (2) order that any lien securing such a subordinated claim be transferred to the estate." In the Eleventh Circuit, equitable subordination is proper where:

(1) The claimant has engaged in inequitable conduct;

(2) The conduct has injured creditors or given unfair advantage to the claimant; and

(3) Subordination of the claim is not inconsistent with the Bankruptcy Code.[121]

The fundamental aim of equitable subordination is to "undo or offset any inequality in the claim position of a creditor that will produce injustice or unfairness to other creditors."[122]

The remedy of equitable subordination goes only as far as is necessary to offset the injury or damage suffered by the creditor on account of the inequitable conduct, and, as such, the remedy is remedial, not penal, in nature.[123] Accordingly, the court determines the nature and extent of the harm suffered by the affected creditors to determine an equitable subordination remedy in proportion to the injury.[124]

Notably, the burden and sufficiency of proof varies, depending upon whether the claim sought to be subordinated is held by an insider or fiduciary of the debtor.[125] Where the movant seeks to subordinate a claim held by an insider or fiduciary, the movant must present material evidence of unfair conduct.[126] Once the movant meets his burden, the burden shifts to the claimant to prove the fairness of his transactions with the debtor.[127] Where the movant seeks to subordinate

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[119] *See Carn*, 579 B.R. at 303.
[120] 4 COLLIER ON BANKRUPTCY ¶ 510.01; *see* Sprayregen *supra* note 117.
[121] *Estes v. N&D Props., Inc. (In re N&D Props., Inc.)*, 799 F.2d 726, 731 (11th Cir. 1986) (citing *Benjamin v. Diamond (Matter of Mobile Steel Co.)*, 563 F.2d 692, 700-02 (5th Cir. 1977)).
[122] *Official Comm. of Unsecured Creditors of Toy King Distribs., Inc. v. Liberty Savings Bank, FSB (In re Toy King Distribs., Inc.)*, 256 B.R. 1, 205-06 (Bankr. M.D. Fla. 2000) (Corcoran, J.).
[123] *See Carn*, 579 B.R. at 303; *In re Toy King Distribs.*, 256 B.R. at 206.
[124] *See In re Toy King Distribs.*, 256 B.R. at 206.
[125] *See McDaniel v. Suntrust Bank (In re McDaniel)*, 523 B.R. 895, 905 (Bankr. M.D. Ga. 2014) (Laney, J.) (citing *In re N&D Props., Inc.*, 799 F.2d at 731).
[126] *In re McDaniel*, 523 B.R. at 905.
[127] *Id*.

a claim that is not held by an insider or fiduciary, the movant must prove, with particularity, more egregious conduct, such as fraud, spoiliation, or overreaching to justify equitable subordination.[128]

Equitable subordination claims often are brought to address actions taken by corporate insiders or fiduciaries to improve their positions in anticipation of a bankruptcy filing.[129] Where the doctrine has been applied to subordinate non-insider, non-fiduciary claims, the creditor usually has engaged in very "egregious conduct," such as making a misrepresentation on which other creditors relied to their detriment by extending additional credit to the debtor.[130]

V. 11 U.S.C. § 331 - Interim Compensation

Pursuant to 11 U.S.C. § 331, professionals may apply to the bankruptcy court for interim compensation or reimbursement of expenses as provided under section 330 of the Code. Section 331 of the Code provides as follows:

> A trustee, an examiner, a debtor's attorney, or any professional person employed under section 327 or 1103 of this title **may apply to the court not more than once every 120 days after an order for relief in a case under this title, or more often if the court permits**, for such compensation for services rendered before the date of such an application or reimbursement for expenses incurred before such date as is provided under section 330 of this title. After notice and a hearing, the court may allow and disburse to such applicant such compensation or reimbursement.[131]

Under the Bankruptcy Act, the allowance of compensation was generally determined at the end of a case based upon "the results achieved, the contribution of the applicant, the total amount available for distribution and the burden that the allowances of compensation might impose upon the particular estate."[132] Although some courts had allowed the practice of interim compensation under the Bankruptcy Act to alleviate the financial burden imposed upon professionals required to finance cases without receiving compensation until the very end of a case, the practice had been controversial.[133] Congress enacted section 331 to explicitly authorize the practice, making the

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[128] *Id*.

[129] *See, e.g., In re Toy King Distribs.*, 256 B.R. at 198-207(subordinating claims of insider creditors where the creditors charged excessive interest and guaranty fees to the debtor, misrepresented the obligations owed to the insiders to induce trade creditors to advance additional credit, and received preferential repayments on a priority basis in advance of trade creditors).

[130] *See, e.g., First Nat'l Bank of Gatlinburg v. Charles Blalock & Sons, Inc. (In re Just for the Fun of It of Tenn., Inc.)*, 7 B.R. 166, 180-81 (Bankr. E.D. Tenn. 1980) (Bare, J.). Notably, a non-insider, non-fiduciary may exercise its contractual rights, for instance, a right of recoupment, without engaging in the type of inequitable conduct that forms the basis for equitable subordination. *See U.S. Abatement Corp. v. Mobil Exploration & Producing U.S., Inc. (Matter of U.S. Abatement Corp.)*, 39 F.3d 556, 562 (5th Cir. 1994).

[131] 11 U.S.C. § 331 (emphasis added).

[132] 3 COLLIER ON BANKRUPTCY ¶ 331.LH.

[133] C. APP. COLLIER ON BANKRUPTCY, at App. Pt. 4(d)(i).

allowance "system-wide in order to make bankruptcy practice more attractive to qualified professionals."[134] Legislative history reflects that Congress sought to "remove any doubt that officers of the estate may apply for, and the court may approve, compensation and reimbursement during the case instead of being required to wait until the end of the case . . . ."[135]

Bankruptcy courts measure the terms of a professional's engagement utilizing a standard of "reasonableness" as required by 11 U.S.C. §§ 329 and 330. Pursuant to section 330(a), the bankruptcy court may award professionals "reasonable compensation for actual, necessary services rendered" and "reimbursement for actual, necessary expenses."[136] "Under [section] 329(b), if the compensation exceeds the reasonable value of the services provided, the court may deny compensation to the debtor's attorney, cancel an agreement to pay compensation, or order the return of compensation previously paid."[137]

Although courts typically do not become involved in a case until a dispute arises in general civil litigation, "it is generally accepted that a bankruptcy court has a duty to review fee applications, interim and final, and to reduce or disallow fee requests even if no party in interest, or the United States Trustee, objects."[138] Indeed, the Third Circuit has suggested that the integrity of the bankruptcy system is at stake when it comes to the bankruptcy court's performance of its duty to review fee applications *sua sponte*, stating as follows:

> The public expects, and has a right to expect, that an order of a court is a judge's certification that the result is proper and justified under the law . . . . Nothing better serves to allay [public perceptions that high professional fees unduly drive up bankruptcy costs] than the recognition that a bankruptcy judge, before a fee application is approved, is obliged to [review it carefully] and find it personally acceptable, irrespective of the (always welcomed) observation of the [United States Trustee] or other interested parties.[139]

A. Procedures for Interim Compensation and Reimbursement of Professionals

Professionals seeking either interim or final compensation for services rendered or reimbursement of expenses must file a comprehensive statement of the services rendered, time

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[134] 3 COLLIER ON BANKRUPTCY ¶ 331.01.
[135] C. APP. COLLIER ON BANKRUPTCY, at App. Pt. 4(d)(i).
[136] 11 U.S.C. § 330(a).
[137] 3 COLLIER ON BANKRUPTCY ¶ 329.01.
[138] *Id.* ¶ 331.08[4]; *see also In re The Kitchen Lady, Inc.*, 144 B.R. 544, 546 (Bankr. M.D. Fla. 1992) (Corcoran, J.) (stating that "it is fundamental that the court has an independent duty to review fee applications for reasonableness and to allow only reasonable compensation for actual, necessary services rendered . . . pursuant to Section 330(a)(1) of the Bankruptcy Code and F.R.B.P. 2016(a)").
[139] *In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 841 (3d Cir. 1994).

expended and expenses incurred, and the amount requested pursuant to Rule 2016(a), which provides as follows:

> **(a) Application for compensation or reimbursement**
> An entity seeking **interim or final** compensation for services, or reimbursement of necessary expenses, from the estate shall file **an application setting forth a detailed statement** of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other entity. Unless the case is a chapter 9 municipality case, the applicant shall transmit to the United States trustee a copy of the application.[140]

In addition, many bankruptcy courts have adopted local rules imposing additional disclosure requirements with which professionals must comply. In the Northern District of Alabama, Local Rule 2016(a) requires each application for interim or final compensation in a chapter 11 case to include a cover sheet which includes the following information:

(1) The name of the applicant;

(2) The date the application for employment was filed;

(3) The date of the order authorizing employment and the authorized terms and conditions of employment, if any;

(4) To whom the services were provided;

(5) The period for which compensation is sought;

[140] FED. R. BANKR. P. 2016(a) (emphasis added).

(6) The amount of compensation and expenses sought;

(7) A designation of whether the application is final or interim, and if an interim application, designate whether it is a second, third, etc. application;

(8) If not the first application filed in the case by the applicant, a disclosure of the dates, periods, compensation, and expenses allowed for each of the prior applications;

(9) The aggregate amount of compensation and expenses allowed to date; and

(10) The aggregate amount of compensation and expenses paid to date.[141]

With the exception of interim applications for an amount less than $25,000, each application must also include a narrative summary, setting forth, among other things: (i) the general nature of the work performed, (ii) a description of the individuals who performed the services for which compensation is sought, and (iii) a discussion of the twelve factors first enunciated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).[142]

B. Notice of Hearing and Content of Notice Required

In the Northern District of Alabama, an interim application for compensation must be served upon the trustee, the Bankruptcy Administrator, the debtor, and any committee appointed in the case.[143] If the amount requested exceeds $1,000, Rule 2002(a)(6) requires at least 21 days' notice of a hearing on the request for interim compensation or reimbursement of expenses.[144] Rule 2002(c)(2) further provides that the notice required by subdivision (a)(6) must "identify the applicant and the amounts requested."[145]

C. Special Procedures Required When Interim Compensation Is Sought More Frequently Than Every 120 Days

Section 331 provides that a professional employed under sections 327 or 1103 of the Code may apply for interim compensation for services rendered or reimbursement of expenses once every 120 days, or more often if the court otherwise permits. Professionals seeking to establish monthly interim compensation procedures must file a motion to approve such procedures. Interim

[141] Northern District of Alabama, Bankruptcy Local Rule 2016(b).
[142] Local Rule 2016(c).
[143] Local Rule 2016(k).
[144] FED. R. BANKR. P. 2002(a)(6).
[145] FED. R. BANKR. P. 2002(c)(2).

compensation procedure motions should generally be filed at the beginning of a case and will typically include the following components:

(1) The filing or mailing of monthly fee statements that set forth the amount of fees and expenses billed by the Professionals to the debtor in the previous month;

(2) The establishment of a limited notice list (which generally includes the debtor, U.S. Trustee [or Bankruptcy Administrator], the members of the committee appointed in the case, counsel for the Committee, and often the lead post-petition lender and their counsel, who receive copies for professionals' monthly billings ("Notice List"));

(3) A period of time (generally between 15-25 days) during which any Notice Party has the right to object to some or a portion of the monthly fees and expenses requested by a Professional in a case;

(4) A procedure for objecting to the monthly fees and expenses of a Professional, including a period for resolution of the dispute and for filing objections with the court;

(5) Provisions for the payment of undisputed fees and expenses to Professionals less a holdback amount of between 10% and 25% of the undisputed fees requested by the Professional;

(6) The timing of the filing of formal interim fee applications by case Professionals; and

(7) Procedures relating to the disgorgement of any fees paid that are not ultimately approved by the court.[146]

Although there is a split of opinion regarding whether section 331 permits payment of interim professional fees before the bankruptcy court has actually approved the fees, a number of courts permit professionals to receive interim payments on a monthly basis, subject to quarterly review pursuant to section 331. In the case of *In re Mariner Post-Acute Network, Inc.*, the Delaware bankruptcy court approved a monthly compensation procedure pursuant to section 331 under which the debtors were authorized to make monthly conditional interim payments of 80%

[146] James D. Sweet et al., *Fair Pay for Honest Work: Bankruptcy Compensation and Ethics*, 020504 ABI-CLE 503 (2004).

of requested fees without prior court approval, subject to later review and disgorgement.[147] The United States trustee opposed the procedure, arguing that section 331 required a formal fee application to be filed which must be reviewed and approved by the bankruptcy court before any fees are paid. The bankruptcy court overruled the objection and approved the monthly interim compensation procedure.

First, the bankruptcy court recognized that the Code specifically provides that "where 'a notice and a hearing' is required by the Code, only 'such notice and opportunity for a hearing as is appropriate in the particular circumstances' is required" pursuant to 11 U.S.C. § 102(1)(A).[148] The bankruptcy court concluded that the proposed monthly interim compensation procedure provided notice and opportunity for a hearing, by allowing a party to object upon receipt of the monthly fee statement and, further, by requiring interim fee applications to be filed on a quarterly basis.

Second, while recognizing that there is a split of opinion on the issue, the bankruptcy court adopted the reasoning expressed in the leading case of *In re Knudsen Corp.,* 84 B.R. 668 (9th Cir. 1998) in which the Ninth Circuit BAP permitted professionals to receive conditional interim payments, subject to later review and disgorgement. The analysis in *Knudsen* began with section 328 of the Code which provides, as follows:

> The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, **on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis.** Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to be improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.[149]

Knudsen analogized the conditional monthly payment of professional fees to rolling retainer agreements, permitted under section 328, pursuant to which professionals are allowed to receive monthly payments, but the fees are not allowed until "a formal fee application is filed, parties have had the opportunity to object, the court has reviewed the application and the fees have

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[147] *In re Mariner Post-Acute Network, Inc.,* 257 B.R. 723 (Bankr. D. Del. 2000) (Walwrath, J.); *see also In re Knudsen Corp.*, 84 B.R. 668 (B.A.P. 9th Cir. 1988) (finding that bankruptcy courts, under appropriate conditions, may authorize a fee payment and application procedure permitting periodic payments to professionals without prior court approval). *But see In re Commercial Fin. Servs., Inc.,* 231 B.R. 351 (Bankr. N.D. Okla. 1999) (Tchaikovsky, J.) (finding that the Code does not authorize the payment of professionals prior to allowance).

[148] *See In re Mariner Post-Acute Network, Inc.,* 257 B.R. at 728.

[149] 11 U.S.C. § 328(a) (emphasis added).

been approved."[150] The *Mariner* court agreed with the rationale and conclusion of *Knudsen*, further explaining:

> The phrase 'without prior Court approval' refers only to the specific monthly payment. Before any monies are paid to any professional, the Court must approve the procedure which allows professionals to receive a conditional payment. Even then those payments are conditional and the Court retains the right to later disallow payment of those fees or expenses during its review of the formal fee application and, consequently, the Court may order disgorgement of any fees which were improperly received . . . . [T]he Court always retains the power to modify such a procedure if it later proves unworkable or improvident.[151]

Accordingly, "[g]iven the holdback of 20% of the fees requested, the requirement of quarterly fee applications for review by the Court, and the probability that [the] case [would] last for a substantial time," the bankruptcy court approved the compensation procedure.[152]

A number of bankruptcy courts have established interim compensation procedures by Administrative Order pursuant to which monthly interim compensation is permitted in complex chapter 11 cases. For example, in the Northern District of Texas, the bankruptcy court's Standing Order concerning guidelines for compensation and expense reimbursement of professionals provides as follows:

> In a complex case, the bankruptcy court may, upon request, consider at the outset of the case approval of an interim compensation mechanism for estate professionals that would enable professionals on a monthly basis to be paid up to 80% of their compensation for services rendered and reimbursed up to 100% of their actual and necessary out of pocket expenses. In connection with such a procedure, if approved in a particular complex case, professionals shall be required to circulate monthly billing statements to the US Trustee and other primary parties in interest, and the Debtor in Possession or Trustee will be authorized to pay the applicable percentage of such bill not disputed or contested by a party in interest.[153]

Likewise, the Bankruptcy Court for the Southern District of New York has a Standing Order Establishing Procedures for Monthly Compensation and Reimbursement of Expenses of Professionals which enables professionals to be compensated on a monthly basis with a 20%

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[150] *In re Mariner Post-Acute Network, Inc.*, 257 B.R. at 730.
[151] *Id.* at 731.
[152] *Id.* at 731-32.
[153] *See* General Order No. 00-7, Standing Order Concerning Guidelines for Compensation and Expense Reimbursement of Professionals, for Early Disposition of Assets in Chapter 11 Cases, and for Motions and Order Pertaining to Use of Cash Collateral and Post-Petition Financing.

holdback.[154] The Southern District of New York requires interim fee applications to be filed and served with the court approximately every 120 days, but no more than every 150 days. "Any professional who fails to file an application seeking approval of compensation and expenses previously paid . . . when due shall (1) be ineligible to receive further monthly payments of fees or expenses . . . until further order of the Court, and (2) may be required to disgorge any fees paid since retention or the last fee application, whichever is later[.]"[155]

While many courts have approved special interim compensation procedures allowing payment more frequently than every 120 days, it is critical to recognize that interim compensation procedures must first be approved by the bankruptcy court and proper notice must be provided to all parties requiring notice. See, for example, the case of *In re Tri-State Plant Food, Inc.,* in which the bankruptcy court, upon order to show cause, ordered the disgorgement of fees paid to various chapter 11 professionals who failed to disclose their intention to bill and receive payments on a monthly basis.[156] Citing *Knudsen*, discussed above, the professionals argued that prior court approval was not required. As an additional defense, the professionals argued that it had been local custom "for many years . . . that applications for payment of fees were made only at the close of the case . . . [that] debtors' counsel would bill the debtor directly and receive payment while the case was pending . . . [and] that any amounts paid to counsel [would] be repaid to the estate if not awarded by the Court."[157]

The bankruptcy court did not share counsel's understanding of local custom. Further, while the bankruptcy court recognized that there is a split of opinion regarding the payment of conditional monthly interim payments, the court explained that in cases approving such procedures "the professionals sought authority to receive monthly payments in advance."[158] Here, there were no interim compensation procedures in place "at all because [the] Court was not aware that professional fees were being paid."[159] Accordingly, the bankruptcy court required the professionals to immediately disgorge any fees received without court approval and explained that sanctions would be considered in conjunction with future applications for payment of the professional fees.

D. Interim Compensation is not Final

Interim fee allowances are subject to re-examination and disgorgement during the final hearing on application for compensation, pursuant to section 330(a)(5) which provides as follows:

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[154] *See* Order Pursuant to 11 U.S.C. §§ 105(a) and 331 Establishing Procedures for Monthly Compensation and Reimbursement of Expenses of Professionals, *available at* http://www.nysb.uscourts.gov/sites/default/files/2016-1-c-procedures.pdf.
[155] *Id.*
[156] *In re Tri-State Plant Food, Inc.*, 273 B.R. 250 (Bankr. M.D. Ala. 2002) (Sawyer, J.)
[157] *Id.* at 263.
[158] *Id*.
[159] *Id*.

> The court shall reduce the amount of compensation awarded under this section by the amount of any interim compensation awarded under section 331, and, if the amount of such interim compensation exceeds the amount of compensation awarded under this section, may order the return of the excess to the estate.[160]

Section 330(a)(5) permits a bankruptcy court to order disgorgement of interim compensation received pursuant to section 331, to the extent interim compensation exceeds the amount awarded under section 330. Interim compensation is "always 'subject to re-examination and adjustment' and no professional may claim to be unaware of the inherent risk of disgorgement."[161] As explained by one bankruptcy court, "[i]t is a fact of life among bankruptcy professionals, and well-chronicled in existing case law, that professionals employed in bankruptcy cases 'provide services and accept interim compensation at their own peril.'"[162]

VI. Conversion or Dismissal under 11 U.S.C. § 1112(b)

Section 1112(b) generally provides that the bankruptcy court shall dismiss or convert a chapter 11 case "for cause" on the request of a party in interest, and after notice and a hearing. The court is instructed to convert a case to a chapter 7 case or dismiss the case, "whichever is in the best interests of creditors and the estate . . . unless the court determines that the appointment under section 1104(a) of a trustee or examiner is in the best interests of creditors and the estate."[163] This general rule is subject to a rebuttal provision:

> (b)(2) The court may not convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter if the court finds and specifically identifies unusual circumstances establishing that converting or dismissing the case is not in the best interests of creditors and the estate, and the debtor or any other party in interest establishes that—
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> (A) there is a reasonable likelihood that a plan will be confirmed within the timeframes established in sections 1121(e) and 1129(e) of this title, or if such sections do not apply, within a reasonable period of time; and
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> (B) the grounds for converting or dismissing the case include an act or omission of the debtor other than under paragraph (4)(A)—
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> (i) for which there exists a reasonable justification for the act or omission; and

[160] 11 U.S.C. § 330(a)(5).
[161] *In re Rockaway Bedding, Inc.*, 454 B.R. 592, 596 (Bankr. D. New Jersey 2011) (Steckroth, J.).
[162] *Id*.
[163] 11 U.S.C. § 1112(b)(1).

(ii) that will be cured within a reasonable period of time fixed by the court.[164]

The court must hold a hearing on the motion not later than 30 days after its filing, and it must decide the motion not later than 15 days after the hearing, unless the movant consents to a continuance for a specified period or compelling circumstances otherwise prevent the court from meeting these timeframes.[165]

As an initial matter, the request to dismiss or convert must be made by a "party in interest," as defined in the nonexclusive list provided in section 1109, which includes the debtor, the trustee, creditors, creditors' committees, equity security holders, equity security holders' committees, and indenture trustees. The party moving for dismissal or conversion bears the initial burden of proving, by a preponderance of the evidence, that cause exists to convert or dismiss the case,[166] whichever is in the best interest of creditors and the bankruptcy estate.[167]

Once the movant has established cause to dismiss or convert the case by a preponderance of the evidence, the burden of proof shifts to the debtor, who must establish that "unusual circumstances" exist, which justify continuing the case under chapter 11, and that the case does not fit the exceptions outlined in section 1112(b)(2)(A)-(B).[168]

While "cause" is a somewhat "elusive" standard,[169] the statute sets forth a list of 16 illustrative circumstances that constitute "cause" for dismissal, suggesting that a court does not have "unfettered discretion" in determining whether cause exists.[170] If one of the enumerated examples of cause set forth in section 1112(b)(4) is established by the movant by a preponderance of the evidence, the statute provides that the court "shall" dismiss or convert the case, unless a trustee's appointment is warranted or *the debtor* makes the requisite showing under section 1112(b)(2).[171]

In the Eleventh Circuit, filing a petition in bad faith is "cause" for dismissal or conversion.[172] Although an "exact test for determining what conduct constitutes bad-faith" does not exist, "most courts acknowledge that filing a Chapter 11 'without a realistic possibility of an

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[164] *Id*. § 1112(b)(2).
[165] *Id*. § 1112(b)(3).
[166] Section 1112(b)(4) provides a non-exclusive list of examples of "cause" for purposes of this section.
[167] *See In re Brooks*, 488 B.R. 483, 489 (Bankr. N.D. Ga. 2013) (Drake, J.).
[168] *See id*.
[169] *See id.*
[170] 7 COLLIER ON BANKRUPTCY ¶ 1112.04.
[171] 11 U.S.C. § 1112(b)(1), (4).
[172] *See In re Global Energies, LLC*, 763 F.3d 1341, 1345 n. 2 (11th Cir. 2014); *see, e.g., In re Woodruff*, 580 B.R. 291, 298 (Bankr. M.D. Ga. 2018) (Laney, J.) ("A debtor's bad-faith conduct is widely recognized as cause for dismissing a Chapter 11 proceeding.").

effective reorganization' in an attempt to 'delay or frustrate the legitimate efforts [of creditors]' constitutes bad faith. Likewise, when a debtor obscures the estate's interests in assets and refuses to answer questions regarding those assets, his conduct constitutes bad faith and is cause for dismissal."[173]

VII. Overlooked Timeframes, Deadlines, and Requirements

A. 11 U.S.C. § 365 – Assumption and Rejection of Certain Leases

Section 365 of the Code gives the trustee or debtor-in-possession (the "DIP") the ability to assume or reject executory contracts and unexpired leases. With retail bankruptcies on the rise, these negotiations between the debtor and its creditors are central to the debtor's ability to reorganize, and it is important to note the procedural mechanisms by which such elections are made.

For example, the consequence for failing to timely assume a nonresidential real property lease is that the lease is deemed rejected and the landlord is entitled to immediate possession. As a threshold matter, there is not a clear consensus as to whether the determination of nonresidential real property focuses on the use of the property or the character of the lease.[174]

Under section 365(d)(4), where a debtor leases nonresidential real property, the trustee/DIP must choose to assume or reject the lease by the earlier of (A) 120 days after the date of the order for relief and (B) the date of the entry of an order confirming the debtor's plan.[175] If the trustee/DIP fails to assume the lease within the deadline, the lease "shall be deemed rejected, and the trustee/DIP shall immediately surrender that nonresidential real property to the lessor."[176]

The bankruptcy court may extend the 120-day deadline once "for cause," but it may only do so *prior* to the expiration of the 120-day deadline[177] and may only extend for an additional 90

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[173] *In re Woodruff*, 580 B.R. at 298-99 (quoting *In re Albany Partners, Ltd.*, 749 F.2d 670, 674 (11th Cir. 1984)).

[174] *Compare Matter of Terrace Apartments, Ltd.*, 107 B.R. 382, 383-84 (Bankr. N.D. Ga. 1989) (Kahn, J.) (finding a long-term lease providing low-cost housing to military and civilian personnel to be a residential lease) *with In re Southern Motel Assocs., Ltd.*, 81 B.R. 112, 114-15 (Bankr. M.D. Fla. 1987) (Proctor, J.) (finding several motel land leases to be nonresidential leases for purposes of section 365(d)(4)); *see generally* 5 NORTON BANKR. L. & PRAC. 3d § 46:37.

[175] 11 U.S.C. § 365(d)(4).

[176] *Id*. *See In re The Deli Den, LLC*, 425 B.R. 725, 726-27 (Bankr. S.D. Fla. 2010) (Olson, J.) (noting that a majority of courts have held that section 365(d)(4) prevails over contrary state law such that a debtor's failure to assume a nonresidential lease entitles the lessor to immediate possession of the property); *see also Cahaba Forests, LLC v. Hay*, No. 3:11-cv-423, 2012 WL 380126, at *7 (M.D. Ala. Feb. 6, 2012) (Albritton, J.) (finding that the debtor was required by bankruptcy law to immediately surrender possession of the property upon its deemed rejection of a nonresidential lease).

[177] The bankruptcy court may not retroactively extend the deadline to assume or reject a lease where the lease has been deemed rejected pursuant to section 365(d)(4). *See In re Scarborough-St. James Corp.*, 554 B.R. 714, 722-23 (D. Del. 2016) (Andrews, J.).

days.[178] The bankruptcy court may not use its equitable powers under Rule 9006, discussed *infra*, to revive a lease that has been deemed rejected.[179] Where the court grants one extension, any subsequent extensions may be made *only* upon the landlord's prior written consent in each instance.[180]

Until the lease is assumed or rejected, the trustee/DIP must timely perform its obligations under the lease.[181] The court may grant an extension, for cause, of the time for performance of obligations arising within the first 60 days after the order for relief, but it may not extend the time for performance beyond that 60-day window.[182]

Where a trustee/DIP fails to perform its obligations under the lease for the period between the order for relief and the lease's assumption or rejection, the lessor is entitled to administrative expense priority for postpetition rent, without regard to the showing required under 11 U.S.C. § 503(b)(1).[183] In terms of calculating the priority claim, the prevailing approach is to allow claims for the unpaid rent due under the lease at the rate specified in the lease until it is assumed or rejected.[184] Further, a majority of courts hold that a trustee/DIP must continue performance under an unexpired nonresidential lease until the assumption or rejection becomes effective, which is the date the court approves the assumption or rejection (unless the lease is deemed rejected under the statute).[185] Notably, where the debtor is not the lessee, but only a guarantor of the lessee's obligations, the trustee/DIP is not required to continue performance under the terms of the lease pending assumption or rejection.[186]

With respect to personal property leases,[187] the trustee/DIP must timely perform all obligations arising under unexpired leases for a slightly different timeframe—the trustee/DIP must perform obligations that arise during the time period beginning 60 days after the order for relief until the lease is either assumed or rejected.[188] The court may alter the trustee/DIP's obligations or time for performance, after notice and a hearing, "based on the equities of the case."[189] The trustee/DIP bears the burden of showing that it should be relieved from its performance obligations under the personal property lease.[190]

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[178] 11 U.S.C. § 365(d)(4)(B).
[179] *See In re Federated Food Courts, Inc.*, 222 B.R. 396, 397-98 (Bankr. N.D. Ga. 1998) (Bihary, J.).
[180] 11 U.S.C. § 365(d)(4)(B).
[181] *Id.* § 365(d)(3).
[182] *Id.*; *see In re Duckwall-ALCO Stores, Inc.*, 150 B.R. 965, 971 (D. Kan. 1993) (Saffels, J.).
[183] *See In re CHS Elecs., Inc.*, 265 B.R. 339, 341-42 (Bankr. S.D. Fla. 2001) (Mark, C.J.).
[184] *See In re Tobago Bay Trading Co.*, 142 B.R. 528, 533-34 (Bankr. N.D. Ga. 1991) (Cotton, J.).
[185] *Id.* at 532.
[186] *See In re Green*, 504 B.R. 675, 678-80 (Bankr. S.D. Ga. 2014) (Dalis, J.).
[187] Section 365(d)(5) states that "personal property" does not include "personal property leased to an individual primarily for personal, family, or household purposes."
[188] 11 U.S.C. § 365(d)(5). Notably, the provisions related to assumption and rejection of personal property leases are limited to chapter 11 proceedings. *See id.*
[189] *Id*.
[190] *See In re Sylva Corp.*, 519 B.R. 776, 782 (B.A.P. 8th Cir. 2014).

As in the case of nonresidential real property, a lessor of personal property is entitled to administrative expense priority for rent due from 60 days after the order for relief to the effective date of the lease assumption or rejection, according to the rate provided in the lease.[191] Claims for administrative expense priority for lease payments due during the first 60 days after the petition is filed are properly analyzed under section 503(b)(1).[192]

Significantly, these assumption and rejection provisions apply only to "true leases," as opposed to disguised financing transctions.[193] To determine whether a lease is a "true lease," courts look to the "economic substance of the transaction and not its form."[194]

B. 11 U.S.C. § 1121 – Duration of the Exclusivity Period and Requests for Extension

The Code grants chapter 11 debtors the exclusive right to file a plan of reorganization for a certain amount of time after the order for relief. This time period, commonly known as the exclusivity period, provides the honest but unfortunate debtor the exclusive right to propose a plan of organization, while balancing the competing interests of efficiency and expedience that undergird the reorganization process. Specifically, section 1121(b) provides that only the debtor may file a chapter 11 plan for the first 120 days after the order for relief, or the petition date.[195] This exclusivity period is a valuable opportunity for debtors to stabilize operations, negotiate with creditors, and propose a plan without interference from other stakeholders.[196]

For ordinary debtors (i.e., those who are not small business debtors[197]), the exclusivity period may be reduced or extended by the court "for cause," provided that the debtor files a motion to extend the exclusivity period before the current period expires.[198] The Code sets an outside limitation on the exclusivity period, however, in that the court may only extend the exclusivity

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[191] *Id.* at 783; *see generally* 5 NORTON BANKR. L. & PRAC. 3d § 46:59. Section 365(d)(5) expressly overrides the administrative expense provisions of section 503(b)(1).
[192] *In re Sylva Corp.*, 519 B.R. at 783.
[193] *See, e.g., Matter of Memory Lane of Bremen, LLC*, 535 B.R. 901, 905 (Bankr. N.D. Ga. 2015) (Drake, J.) (citing *In re PCH Assocs.*, 804 F.2d 193, 200 (2d Cir. 1986)).
[194] *See, e.g., In re PCH Assocs.*, 804 F.2d at 199-200 ("[W]here the purported 'lease' involves merely a sale of the real estate and the rental payments are, in truth, payments of principal and interest on a secured loan involving the sale of real estate, there is no true lease").
[195] *See also* 11 U.S.C. § 301(b).
[196] *See* 7 COLLIER ON BANKRUPTCY ¶ 1121.03; *see also In re Texaco Inc.*, 81 B.R. 806, 809 (Bankr. S.D.N.Y. 1988) (Schwartzberg, J.).
[197] *See infra*.
[198] 11 U.S.C. § 1121(d)(1).

period for up to 18 months after the date of the order for relief.[199] The party seeking to alter the exclusivity period bears the burden of establishing that cause exists to do so.[200]

The bankruptcy court has discretion to determine whether to extend the exclusivity period, and such determinations are fact-specific.[201] While the court should be sensitive to creditors' concerns regarding delay, the court's analysis is influenced by the following factors:

(1) The size and complexity of the case;

(2) The necessity of sufficient time to negotiate and prepare adequate information;

(3) The existence of good faith progress toward reorganization;

(4) Whether the debtor is paying its debts as they come due;

(5) Whether the debtor has demonstrated reasonable prospects for filing a viable plan;

(6) Whether the debtor has made progress negotiating with creditors;

(7) The length of time the case has been pending;

(8) Whether the debtor is seeking an extension to pressure creditors; and

(9) Whether unresolved contingencies exist.[202]

Bankruptcy courts in the Eleventh Circuit have found cause to extend the exclusivity period where there had been good faith progress toward reorganization, the debtor demonstrated reasonable prospects for filing a viable plan, and the request for an extension was not an effort to improperly pressure creditors.[203]

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[199] *Id*. § 1121(d)(2)(A).
[200] *See* 7 COLLIER ON BANKRUPTCY ¶ 1121.06; *see also Matter of Homestead Partners, Ltd.*, 197 B.R. 706, 720 (Bankr. N.D. Ga. 1996) (Drake, J.).
[201] *See In re Whigham*, Nos. 12-30123, 12-30124, 2012 WL 3877666, at *2 (Bankr. S.D. Ga. Sept. 6, 2012) (Barrett, C.J.).
[202] *In re Whigham*, Nos. 12-30123, 12-30124, 2012 WL 3877666, at *2 (Bankr. S.D. Ga. Sept. 6, 2012) (Barrett, C.J.) (citing *Matter of Friedman's, Inc.*, 336 B.R. 884, 888 (Bankr. S.D. Ga. 2005) (Davis, J.)).
[203] *See In re Whigham*, 2012 WL 3877666, at *2-3; *see also Homestead Partners*, 197 B.R. at 720 (stating that cause exists to extend the exclusivity period where the debtor had made "substantial progress" toward gaining acceptance of its plan, certain creditor holdouts posed a "significant hurdle to timely plan development," and complex legal issues occupied much of the debtor's initial exclusivity period); *Matter of Friedman's*, 336 B.R. at 888-90 (extending the exclusivity period after considering the nine enumerated factors and finding that an extension would benefit the debtor and creditors).

If an ordinary chapter 11 debtor files a plan within the exclusivity period, the debtor receives an additional exclusivity period of up to 180 days after the order for relief to permit the debtor to solicit acceptance of its plan, without competition from other plans, in accordance with sections 1126 and 1129(a).[204] During this extended exclusivity period, no other party may file a competing plan, though the extended exclusivity period terminates if the debtor's plan is not accepted by all impaired classes.[205]

The exclusivity period to solicit plan acceptance may also be extended by the bankruptcy court "for cause," but may not be extended beyond 20 months after the date of the order for relief.[206] To determine whether cause exists to extend the timeframe to solicit plan acceptances, the court undertakes much the same analysis as for a motion to extend the initial 120-day exclusivity period.[207] Some commentators have suggested, however, that section 1121's dual purposes of encouraging negotiation and reducing delay militate in favor of granting extensions of the 180-day plan acceptance exclusivity period more leniently than requests to extend the 120-day plan filing exclusivity period.[208] Such requests must be made before the extended exclusivity period has expired.[209]

For small business debtors,[210] section 1121(e) establishes two important timeframes. First, the exclusivity period for small business debtors runs for the first 180 days after the order of relief, unless that period is extended as provided by section 1121(e)(3), after notice and a hearing, or the court, "for cause," orders otherwise.[211] Second, small business debtors must file the plan and any disclosure statement no later than 300 days after the date of the order of relief.[212]

The court may extend either time period, but only if the small business debtor meets the statutory requirements set forth in section 1121(e)(3). Specifically, under section 1121(e)(3), the bankruptcy court may extend the time periods only if:

> (A) the debtor, after providing notice to parties in interest (including the United States trustee), demonstrates by a preponderance of the evidence that it is

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[204] *See* 11 U.S.C. § 1121(c)(3).
[205] *Id.*
[206] *Id.* § 1121(d)(2)(B).
[207] *See, e.g., In re Sportsman's Link, Inc.*, No. 07-10454, 2007 WL 7023830, at *3 (Bankr. S.D. Ga. Dec. 3, 2007) (Dalis, J.) (considering the enumerated factors and finding that the debtor established cause where the reorganization could not move forward until a motion to assume a lease had been resolved).
[208] *See* 5 NORTON BANKR. L. & PRAC. 3d § 108:3 (2018).
[209] *See* 7 COLLIER ON BANKRUPTCY ¶ 1121.06.
[210] The term "small business debtor" is defined by 11 U.S.C. § 101(51D). Generally, a small business debtor is "engaged in commercial or business activities" and "has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition . . . in an amount not more than $2,000,000 (excluding debts owed to 1 or more affiliates or insiders)." *See id.*
[211] 11 U.S.C. § 1121(e)(1).
[212] *Id.* § 1121(e)(2).

more likely than not that the court will confirm a plan within a reasonable period of time;

(B) a new deadline is imposed at the time the extension is granted; and

(C) the order extending time is signed *before the existing deadline has expired*.[213]

Although courts are split as to whether relief is available where a small business debtor does not meet all three requirements under section 1121(e)(3), bankruptcy courts in the Eleventh Circuit have typically required strict compliance with the statute prior to granting an extension.[214] For example, a court may deny an extension where the debtor did not move for relief, much less obtain an order granting the extension, before the existing exclusivity period expired.[215]

If no party in interest in a small business case files a plan by the 300-day deadline, and the court has not granted an extension, the case may be converted or dismissed under section 1112(b)(4)(J) for cause for failure to file or confirm a plan within the time fixed by the Code or by order of the court. Eleventh Circuit bankruptcy courts have disagreed, however, as to whether the 300-day deadline applies to plans filed by non-debtor parties in interest, and there may be an argument that the 300-day deadline applies only to plans filed by the debtor but does not otherwise bar plan submissions by other parties after that date.[216]

C. Rule 9006 - Enlargement and Reduction of Time

Rule 9006 governs the calculation, enlargement, and reduction of time periods specified by the Code. Subpart (b) permits the court to grant extensions of many (but not all) deadlines, even (in certain circumstances) after the deadlines have lapsed. Similarly, subpart (c) permits the court (within its discretion) to reduce certain time periods "for cause shown," with some exceptions for time periods that may not be shortened under any circumstances.

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[213] 11 U.S.C. § 1121(e)(3)(A)-(C) (emphasis added).

[214] *See In re Caring Heart Home Health Corp.*, 380 B.R. 908, 910-11 (Bankr. S.D. Fla. 2008) (Olson, J.) ("The clear meaning of section 1121(e)(3) requires that the Court may only grant an extension for confirmation of a small business plan under chapter 11 if it complies with all the requirements under this section."); *cf. In re Miss. Sports & Recreation, Inc.*, 483 B.R. 164, 168-69 (Bankr. W.D. Wisc. 2012) (Utschig, J.) (finding that the debtor sufficiently complied with section 1121(e)(3) because creditors received sufficient notice under the particular circumstances of the case).

[215] *See In re Randi's, Inc.*, 474 B.R. 783, 786 (Bankr. S.D. Ga. 2012) (Barrett, C.J.); *In re Caring Heart Home Health*, 380 B.R. at 910.

[216] *Compare In re Randi's*, 474 B.R. at 785-86 ("Once the 300-day time period ends and there is no plan filed by any party in interest, 'cause' for dismissal exists.") *with In re Fla. Coastal Airlines, Inc.*, 361 B.R. 286, 291-92 (Bankr. S.D. Fla. 2007) (Olson, J.) ("[B]ased upon the statutory language used in § 1121(e), . . . the 300-day deadline for the filing of reorganization plans in small business chapter 11 cases applies only to plans filed by the debtor and . . . there is no statutory deadline for the filing of such a reorganization plan by any party in interest other than the debtor.").

Bankruptcy courts are directed to use their powers to "secure the just, speedy, and inexpensive determination of every case and proceeding."[217] To achieve this goal, a court has discretion to determine whether a request to extend or reduce a deadline serves the efficient administration of the case.

Where a party seeks an extension of a deadline and the deadline has not yet passed, Rule 9006(b)(1) permits the request to be made by motion or by informal request. Although possible for an extension to be requested informally, it is advisable to follow the procedure set out in Rule 9013, which states that "a request for an order . . . shall be by written motion." A party requesting an extension must show "cause," or some justification for the request.[218]

Rule 9006(b)(1) also permits the court, within its discretion, to enlarge a time limit "on motion made after the expiration of the specified period . . . where the failure to act was the result of excusable neglect." The movant must show "cause" for the enlargement, as well as a showing that the failure to comply with the initial deadline was the result of "excusable neglect." The Eleventh Circuit generally takes a stricter standard for "excusable neglect," finding that misunderstanding the Rules or miscalculations of the applicable timeframe are not sufficient to justify an enlargement.[219]

The court does not have discretion to enlarge the time periods for certain rules, as provided in Rule 9006(b)(2). As detailed in the appendix, the court may not enlarge the time periods for the following rules for any reason:

- The time for filing a list of the 20 largest creditors under Rule 1007(d).
- The outside time limit for holding the section 341 meeting of creditors, as set forth in Rule 2003(a).
- The 14-day period to file a motion to resolve a dispute involving the election of a chapter 7 trustee or member of a chapter 7 creditors' committee, as set forth in Rule 2003(d).
- The 14-day period to move to amend or make additional findings of fact or amend a judgment, as set forth in Rule 7052(b).

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[217] FED. R. BANKR. P. 1001.
[218] FED. R. BANKR. P. 9006(b)(1).
[219] *See, e.g.*, *In re Rosenberg*, No. 17-12231, 2018 WL 1128952, at *2-3 (11th Cir. Mar. 1, 2018) (per curiam) (finding the movant's legal error in concluding that the relevant timeframe was governed by the Federal Rules of Civil Procedure, not the Federal Rules of Bankruptcy Procedure, was not excusable neglect); *Advanced Estimating Sys., Inc. v. Riney*, 130 F.3d 996, 998 (11th Cir. 1997) (concluding that movant's counsel's mistake in calculating the deadline date was not excusable neglect).

- The 14-day period to move for a new trial, set forth in Rule 9023.

- The times within which a party may move for relief from judgment under Rule 9024.[220]

Just as Rule 9006(b) permits enlargement of certain timeframes, Rule 9006(c)(1) provides that a court, "for cause shown may in its discretion" enter an order reducing the required time period. As with motions to enlarge time, motions to reduce time may also be made informally, though it is best practice to file a written motion if possible. When weighing a motion to reduce time, the court balances the potential prejudice to affected parties against the cause shown to shorten the deadline.[221]

Reductions are not permitted for certain time periods, specified in Rule 9006(c)(2) and discussed further in the appendix. The time periods that may not be reduced are:

- The 21-day period of notice for notice of the time fixed for filing proofs of claim, as set forth in Rule 2002(a)(7).

- The 21-day minimum period after entry of an order for relief to hold the meeting of creditors, as established in Rule 2003(a).

- The 70-day period to file a proof of claim in a chapter 7, 12, or 13 case, as set forth in Rule 3002(c).

- The time set forth to make an election under 11 U.S.C. § 1111(b)(2), as set forth in Rule 3014.

- The 14-day period after the filing of a chapter 13 petition within which to file a chapter 13 plan, and the 21-day notice period of the ability to object to the modification of a chapter 13 plan, as delineated in Rule 3015(b) and (g).

- The periods of time for hearings on motions to use cash collateral or to obtain credit, as set forth in Rules 4001(b)(2) and (c)(2).

- The 30-day period for a dependent of the debtor to claim exemptions under Rule 4003(a).

[220] *See* Rule 9006(b)(2); Appendix.
[221] *See In re Phila. Newspapers, LLC*, 690 F.3d 161, 171-72 (3d Cir. 2012).

- The 60-day period to object to discharge under Rule 4004(a).

- The 60-day period within which to file a complaint regarding the dischargeability of a debt under Rule 4007(c).

- The 60-day period within which a reaffirmation agreement must be filed under Rule 4008(a).

- The 14-day period for filing a notice of appeal under Rule 8002.

- The 14-day period to file objections to proposed findings of fact and conclusions of law under Rule 9033(b).

- The time to file the statements filed in cases concerning individual debtors under Rule 1007(c).[222]

D. Rule 4001 - Service Requirements and Final Hearings

Although many practitioners are familiar with the general contours of Rule 4001, which governs procedures related to motions for stay relief, the debtor's use of cash collateral, or the debtor's requests to obtain credit, these motions or agreements are often delayed or defeated by procedural technicalities, such as the failure to adhere to the rule's service requirements.[223] Where one or more parties has not been properly served with the pending motion or agreement, the court will usually dismiss the matter without prejudice so that the pleading may be refiled and properly served.[224]

For motions made under Rule 4001—motions for relief from stay, motions to use cash collateral, motions for authority to obtain credit, or motions for approval of agreements relating to these matters—most parties serve the motion upon the parties against whom relief is sought, i.e., the debtor, the debtor's counsel, and the trustee.[225] Rule 4001 also requires such motions to be

[222] *See* Rule 9006(c)(2); Appendix.
[223] *See* 9 COLLIER ON BANKRUPTCY ¶ 4001.02 ("Unless all of the specified entities are served properly under [Rule 4001(a)], the court should decline to grant the relief requested.").
[224] *See In re LSSR, LLC*, No. 12-24557, 2013 WL 2350853, at *4 (B.A.P. 9th Cir. May 29, 2013) (affirming the district court's dismissal without prejudice where a creditor improperly served a stay relief motion); 9 COLLIER ON BANKRUPTCY ¶ 4001.02.
[225] *See* FED. R. BANKR. P. 4001(a)(1), (b)(1)(C), (c)(1)(C), (d)(1)(C); 7004(b)(9), (g); 9013. If the motion must be served on a federally insured depository institution, it must be served by certified mail addressed to an officer of the institution, unless certain exceptions apply. *See* FED. R. BANKR. P. 7004(h).

served on any elected or appointed committees, or the authorized agent of such committees.[226] Further, where the case is a chapter 9 or chapter 11 proceeding and no unsecured creditors' committee has been appointed, the motion must be served on the creditors holding the 20 largest unsecured claims, excluding insiders.[227] Additionally, the court may direct that the motion be served on additional entities, such as the United States Trustee or Bankruptcy Administrator, junior lienholders, any secured creditor whose lien may be affected, unsecured creditors, or other parties who might be affected by the proposed relief. [228]

It is also well worth checking the district's local rules, as the Local Rules of the United States Bankruptcy Court, Northern District of Alabama require that motions for stay relief be served on the movant, the debtor, the trustee, any committee appointed in the case, or if no committee is appointed and it is a chapter 9 or 11 case, then on *all* creditors (not just the 20 creditors holding the largest unsecured claims), and other entities as the court may direct.[229] While Rule 4001 does not differentiate between motions for stay relief and motions to extend the stay, the local rules also provide a slightly different list of parties who must be served with motions to extend the stay, including debtor, the trustee, all creditors, and any other entity as the court may direct.[230]

Although Rule 4001 addresses final hearings for other types of motions, it relies on section 362(e)(1) for scheduling the final hearing on a motion for stay relief. Section 362(e)(1) provides that the automatic stay is automatically vacated 30 days after a request for stay relief with respect to actions taken against property of the estate, unless the court, after notice and a hearing, orders the stay to continue in effect pending, or as a result of, a final hearing. The court may continue the stay only if it finds that there is a "reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of [the] final hearing."[231]

The final hearing on the automatic stay must occur within 30 days of the conclusion of a preliminary hearing on relief, unless that period is extended by the parties' consent or by the court for a specific time as required by "compelling circumstances." The Code permits the preliminary hearing to be consolidated with the final hearing, and the Local Rules for the Northern District of Alabama provide that the hearings will be consolidated unless the court orders otherwise.[232]

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[226] *See* 11 U.S.C. § 705 (Creditors' Committee); *id.* § 1102 (Creditors' and Equity Security Holders' Committees); FED. R. BANKR. P. 4001(a)(1), (b)(1)(C), (c)(1)(C), (d)(1)(C).
[227] *See* 11 U.S.C. § 1007(d); *see also* FED. R. BANKR. P. 4001(a), (b)(1)(C), (c)(1)(C), (d)(1)(C).
[228] *See* FED. R. BANKR. P. 4001(a), (b)(1)(C), (c)(1)(C), (d)(1)(C); 9 COLLIER ON BANKRUPTCY ¶ 4001.07; *see generally In re Long*, 564 B.R. 750, 757 (Bankr. S.D. Ala. 2017) (Oldshue, J.) (noting that service of a stay relief motion on the entire creditor matrix met the requirements of Rule 4001(a)); *In re Blumer*, 66 B.R. 109, 113-15 (B.A.P. 9th Cir. 1988) (requiring service of a motion to obtain credit on unsecured creditors).
[229] Northern District of Alabama, Bankruptcy Local Rule 4001-1(b).
[230] Local Rule 4001-1.1(b).
[231] 11 U.S.C. § 362(e)(1).
[232] *See id.*; Local Rule 4001-1.

Notably, these time limits may be waived by a party moving for stay relief.[233] Relief from the automatic stay is one of the fundamental protections afforded to creditors under the Code, and it is necessary to resolve stay litigation in an efficient manner to avoid prejudicing a creditor's rights.[234] As a result, bankruptcy courts in the Eleventh Circuit tend to adhere closely to the time limits set forth in the Code and Rules.[235]

In cases involving an individual debtor, filed under chapter 7, 11, or 13, the automatic stay terminates 60 days after the request for stay relief, unless the court issues a final decision on stay relief before the 60-day deadline, the parties in interest agree to an extended deadline, or the court extends the deadline for a specific time after finding that an extension is "required for good cause."[236]

For motions to use cash collateral or for authority to obtain credit, the court must hold a final hearing on the motion no earlier than 14 days after the motion is served.[237] Recognizing that the debtor may have an emergency need to use cash collateral or obtain credit, the Rules allow for a preliminary hearing before the final hearing date, if the movant so requests.[238] While the court may authorize use of cash collateral or obtaining credit at the preliminary hearing, it may do so only to the extent "necessary to avoid immediate and irreparable harm to the estate pending a final hearing."[239] The parties who received service of the motion must also receive service of any hearings on the motion.[240]

The court may rule on motions to approve agreements related to stay relief, the use of cash collateral, or authority to obtain credit without conducting a hearing, provided there is no objection.[241] If there is an objection to the motion, or if the court determines a hearing is appropriate, the court shall hold the hearing on at least seven days' notice to the objector, the movant, and the parties required to receive service such motions as described in Rule 4001(d)(1)(C).

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[233] *See Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306, 1308 (11th Cir. 1982); *see also In re Griffis*, No. 95-6176-3P1, 1997 WL 92043, at *1 (Bankr. M.D. Fla. Feb. 19, 1997) (Proctor, J.).
[234] *See Matter of Ga. Steel, Inc.*, 19 B.R. 523, 524 (Bankr. M.D. Ga. 1982) (Hershner, J.).
[235] *See id*. ("Because of this overriding need for expeditious treatment, strict adherence to the time limits of the Code and Rules is compelled.").
[236] *See* 11 U.S.C. § 362(e)(2)(B).
[237] *See* FED. R. BANKR. P. 4001(b)(2), (c)(2).
[238] *See id*.
[239] *See id*.
[240] *See* FED. R. BANKR. P. 4001(b)(3), (c)(3).
[241] *See* FED. R. BANKR. P. 4001(d)(3).

APPENDIX
FEDERAL RULE OF BANKRUPTCY PROCEDURE 9006(b) ENLARGEMENT OF TIME AND 9006(c) REDUCTION OF TIME

Rule 9006(b)(2) Enlargement Prohibition:

Rule Reference	Description of Action	Time for Taking Action
1007(d)	In a chapter 9 municipality case or a voluntary chapter 11 reorganization case: 'a list containing the name, address and claim of the creditors that hold the 20 largest unsecured claims, excluding insiders, as prescribed by the appropriate Official Form.'	To be filed with the petition
1007(d)	In an involuntary chapter 11 reorganization case: 'a list containing the name, address and claim of the creditors that hold the 20 largest unsecured claims, excluding insiders, as prescribed by the appropriate Official Form.'	To be filed 'within 2 days after entry of the order for relief under § 303(h) of the Code.'[1]
2003(a), 11 U.S.C. § 341(e)	In a chapter 7 liquidation or a chapter 11 reorganization case: 'a meeting of creditors'	'[T]o be held no fewer than 21 and no more than 40 days after the order for relief' • unless 'on the request of a party in interest and after notice and hearing, for cause [the court] may order that the [] trustee not convene a meeting of

[1] Section 303(h), Title 11 provides as follows:

> (h) If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed. Otherwise, after trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if--
>
> (1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute as to liability or amount; or
>
> (2) within 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

Rule Reference	Description of Action	Time for Taking Action
		creditors or equity security holders if the debtor has filed a plan as to which the debtor solicited acceptances prior to the commencement of the case' • unless 'there is an appeal from or a motion to vacate the order for relief, or if there is a motion to dismiss the case, [then] the [] trustee may set a later date for the meeting' • unless the 'trustee designates a place for the meeting which is not regularly staffed by the [] trustee or an assistant who may preside at the meeting, [then] the meeting may be held not more than 60 days after the order for relief'
2003(a)	In a chapter 12 family farmer debt adjustment case: 'a meeting of creditors'	'[T]o be held no fewer than 21 and no more than 35 days after the order for relief' • unless 'there is an appeal from or a motion to vacate the order for relief, or if there is a motion to dismiss the case, [then] the [] trustee may set a later date for the meeting' • unless the 'trustee designates a place for the meeting which is not regularly staffed by the [] trustee or an assistant who may preside at the meeting, [then] the meeting may be held not more than 60 days after the order for relief'
2003(a)	In a chapter 13 individual's debt adjustment case: 'a meeting of creditors'	'[T]o be held no fewer than 21 and no more than 50 days after the order for relief' • unless 'there is an appeal from or a motion to vacate the order for relief, or if there is a motion to dismiss the case, [then] the [] trustee may set a later date for the meeting' • unless the 'trustee designates a place for the meeting which is not regularly staffed by the []

Rule Reference	Description of Action	Time for Taking Action
		trustee or an assistant who may preside at the meeting, [then] the meeting may be held not more than 60 days after the order for relief'
2003(d)	In a chapter 7 case, the report of election of a trustee or a member of a creditors' committee and resolution of disputes	If the election is not disputed, the 'trustee shall promptly file a report of the election, including the name and address of the person or entity elected and a statement that the election is undisputed' If the election is disputed: • the 'trustee shall promptly file a report stating that the election is disputed, informing the court of the nature of the dispute, and listing the name and address of any candidate elected under any alternative presented by the dispute' • the trustee 'shall mail a copy of the report to any party in interest that has made a request to receive a copy of the report' '[n]o later than the date on which the report is filed' • 'Unless a motion for the resolution of the dispute is filed no later than 14 days after the [] trustee files a report of a disputed election for trustee, the interim trustee shall serve as trustee in the case.'
7052	The filing of 'any motion under subdivision (b) of [Federal Rule of Civil Procedure 52[2]] for amended or additional findings ' in adversary proceedings	'no later than 14 days after entry of judgment'

[2] Federal Rule of Civil Procedure 52(b) as modified by Federal Rule of Bankruptcy Procedure 7052 provides as follows:

> (b) Amended or Additional Findings. On a party's motion filed no later than 28 days after the entry of judgment [or order under Federal Rule of Bankruptcy Procedure 5003(a)], the court may amend its findings--or make additional findings--and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

Rule Reference	Description of Action	Time for Taking Action
9023	The filing of '[a] motion for a new trial or to alter or amend a judgment' or the ordering of a new trial by the court *sua sponte*	'no later than 14 days after entry of judgment'
9024	Federal Rule of Civil Procedure 60[3] applies to bankruptcy cases, except:	'is not subject to the one-year limitation prescribed in Rule 60(c)'

[3] Federal Rule of Civil Procedure 60 Relief From a Judgment or Order provides as follows:

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;
(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
(4) the judgment is void;
(5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) Timing. A motion under Rule 60(b) must be made within a reasonable time--and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.
(2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;
(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or
(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

Rule Reference	Description of Action	Time for Taking Action
	(1) 'a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest'	
	(2) in a chapter 7 liquidation case, 'a complaint to revoke a discharge … may be filed only within the time allowed by § 727(e) of the Code'	§ 727(e) provides that • revocations sought based on fraud of the debtor may be requested within one year after discharge is granted (§ 727(d)(1)) • revocations sought based on debtor's failure to report acquisition or entitlement of property that is property of the estate (§ 727(d)(2)) or the debtor failed to obey a lawful order of the court or to respond to a material question approved by the court or to testify after immunity is granted on invocation of the privilege against self-incrimination or to respond to a material question approved by the court or to testify on a ground other than privilege (§ 727(d)(2) and (a)(6)) may be requested before the later of one year after the granting of the discharge and the date the case is closed
	(3) in a chapter 11, 12, or 13 case, 'a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144, § 1230, or § 1330'	• in a chapter 11, 'before 180 days after the date of the entry of the order of confirmation' (11 U.S.C. § 1144) • in a chapter 12, 'within 180 days after the date of the entry of an order of confirmation under section 1225 of this title' (11 U.S.C. § 1230) • in a chapter 13, 'within 180 days after the date of the entry of an order of confirmation under section 1325 of this title' (11 U.S.C. § 1330)

Rule 9006(b)(3) Enlargement Limitations:

Rule Reference	Description of Action	Time for Taking Action	Conditions on Enlargement
1006(b)(2)	'Prior to the meeting of creditors, the court may order the filing fee paid to the clerk or grant leave to pay in installments and fix the number, amount and dates of payment.'	'The number of installments shall not exceed four, and the final installment shall be payable not later than 120 days after filing the petition.'	'For cause shown, the court may extend the time of any installment, provided the last installment is paid not later than 180 days after filing the petition.'
1007(b)(7), (c)	Filing of statement of completion of financial management course	• In an individual chapter 7 case, 'within 60 days after the first date set for the meeting of creditors under § 341 of the Code' • In an individual chapter 11 or 13 case, 'no later than the date when the last payment was made by the debtor as required by the plan or the filing of a motion for a discharge under § 1141(d)(5)(B) or § 1328(b) of the Code.'	'The court may, at any time and in its discretion, enlarge the time to file the statement required by subdivision [1007] (b)(7).'
1007(b)(7), 11 U.S.C. §1116(3)	In a chapter 11 small business case, trustee or DIP must 'timely file all schedules and statements of financial affairs' (11 U.S.C. §1116(3))	• In a voluntary case, the schedules, statements, and other documents required by Rule 1007(b)(1) (schedules of assets and liabilities, etc.) and 1007(b)(5) (individual debtor statement of monthly income) 'shall be filed with the petition or within 14 days thereafter' - except - • A list of the 20 largest unsecured creditors shall be filed with the petition	'unless the court, after notice and a hearing, grants an extension, which shall not extend such time period to a date later than 30 days after the date of the order for relief, absent extraordinary and compelling circumstances' (11 U.S.C. §1116(3))

Rule Reference	Description of Action	Time for Taking Action	Conditions on Enlargement
		• In an involuntary case, the schedules, statements, and other documents required by Rule 1007(b)(1) (schedules of assets and liabilities, etc.) 'shall be filed by the debtor within 14 days after the entry of the order for relief' - except - • A list of the 20 largest unsecured creditors shall be filed 'by the debtor within 2 days after entry of the order for relief under § 303(h) of the Code'[4] • For both voluntary and involuntary cases, file a supplemental schedule disclosing any interest in property the debtor acquires or becomes entitled to acquire as provided by 11 U.S.C. § 541(a)(5)[5] and any claimed	

[4] Section 303(h), Title 11 provides as follows:

> (h) If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed. Otherwise, after trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if--
>
> (1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute as to liability or amount; or
>
> (2) within 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

[5] Section 541(a)(5), Title 11 provides as follows:

Rule Reference	Description of Action	Time for Taking Action	Conditions on Enlargement
		exemptions 'within 14 days after the information comes to the debtor's knowledge or within such further time the court may allow'	
1017(e)	In an individual debtor's chapter 7 case, or conversion to a case under chapter 11 or 13, a motion to dismiss a case for abuse under § 707(b) (abuse) or (c) (crime victim)	• 'within 60 days after the first date set for the meeting of creditors under § 341(a), unless, on request filed before the time has expired, the court for cause extends the time for filing the motion to dismiss'[6] • 'If the hearing is set on the court's own motion, notice of the hearing shall be served on the debtor no later than 60 days after the first date set for the meeting of creditors under § 341(a).'	the 'trustee (or bankruptcy administrator, if any) shall, not later than 30 days after the date of filing a statement under paragraph (1) [as to whether the debtor's case would be presumed to be an abuse under section 707(b)], either file a motion to dismiss or convert under section 707(b) or file a statement setting forth the reasons the [] trustee (or the bankruptcy administrator, if any) does not consider such a motion to be appropriate' (11 U.S.C. § 704(b)(2))
3002(c)	In a voluntary chapter 7 case, chapter 12 case, or chapter 13 case, filing a proof of claim	'timely filed if it is filed not later than 70 days after the order for relief under that chapter or the date of the order of conversion to a case under chapter 12 or chapter 13'	• 'The court may, for cause, enlarge the time for a governmental unit to file a proof of claim only upon

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date--

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

[6] Section 341(a), Title 11 provides that "[w]ithin a reasonable time after the order for relied in a case under this title, the [] trustee shall convene and preside at a meeting of creditors."

Rule Reference	Description of Action	Time for Taking Action	Conditions on Enlargement
			motion of the governmental unit made before expiration of the period for filing a timely proof of claim.' (R. 3002(c)(1))
	In an involuntary chapter 7 case, filing a proof of claim	'timely filed if it is filed not later than 90 days after the order for relief under that chapter is entered' Exceptions applicable to voluntary and involuntary chapter 7 cases, chapter 12 case, and chapter 13 case: • 'proof of claim filed by a governmental unit, other than for a claim resulting from a tax return filed under § 1308, is timely filed if it is filed not later than 180 days after the date of the order for relief' • 'proof of claim filed by a governmental unit for a claim resulting from a tax return filed under § 1308 is timely filed if it is filed no later than 180 days after the date of the order for relief or 60 days after the date of the filing of the tax return' • 'An unsecured claim which arises in favor of an entity or becomes allowable as a result of a judgment may be filed within 30 days after the judgment becomes final if the judgment is for the recovery of money or property from that entity or denies or avoids the entity's interest in	• 'In the interest of justice and if it will not unduly delay the administration of the case, the court may extend the time for filing a proof of claim by an infant or incompetent person or the representative of either.' (R. 3002(c)(2)) • 'On motion filed by a creditor before or after the expiration of the time to file a proof of claim, the court may extend the time by not more than 60 days from the date of the order granting the motion.' (R. 3002(c)(6))

Rule Reference	Description of Action	Time for Taking Action	Conditions on Enlargement
		property. If the judgment imposes a liability which is not satisfied, or a duty which is not performed within such period or such further time as the court may permit, the claim shall not be allowed.' • 'claim arising from the rejection of an executory contract or unexpired lease of the debtor may be filed within such time as the court may direct' • 'If notice of insufficient assets to pay a dividend was given to creditors under Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall give at least 90 days' notice by mail to creditors of that fact and of the date by which proofs of claim must be filed.' • 'A proof of claim filed by the holder of a claim that is secured by a security interest in the debtor's principal residence is timely filed if: (A) the proof of claim, together with the attachments required by Rule 3001(c)(2)(C), is filed not later than 70 days after the order for relief is entered; and (B) any attachments required by Rule	

Rule Reference	Description of Action	Time for Taking Action	Conditions on Enlargement
		3001(c)(1) and (d) are filed as a supplement to the holder's claim not later than 120 days after the order for relief is entered.'	
4003(b)	'a party in interest may file an objection to the list of property claimed as exempt' The 'trustee may file an objection to a claim of exemption'	'within 30 days after the meeting of creditors held under § 341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later' 'at any time prior to one year after the closing of the case if the debtor fraudulently asserted the claim of exemption'	'The court may, for cause, extend the time for filing objections if, before the time to object expires, a party in interest files a request for an extension.'
	'An objection to a claim of exemption based on § 522(q) [aggregate amount which can be exempted]'	'shall be filed before the closing of the case'	
	An objection to a claim of exemption 'first claimed after a case is reopened'	Such 'an objection shall be filed before the reopened case is closed'	
4004(a), (b)	In 'a chapter 7 case, a complaint, or a motion under § 727(a)(8) or (a)(9)[7] of	'shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a)'	'(1) On motion of any party in interest, after notice and hearing, the court may for cause extend the time

[7] Sections 727(a)(8) and (9), Title 11 provide as follows:

(a) The court shall grant the debtor a discharge, unless--

. . .

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within 8 years before the date of the filing of the petition;

Rule Reference	Description of Action	Time for Taking Action	Conditions on Enlargement
	the Code, objecting to the debtor's discharge'		to object to discharge. Except as provided in subdivision (b)(2), the motion shall be filed before the time has expired.' '(2) A motion to extend the time to object to discharge may be filed after the time for objection has expired and before discharge is granted if (A) the objection is based on facts that, if learned after the discharge, would provide a basis for revocation under § 727(d) of the Code, and (B) the movant did not have knowledge of those facts in time to permit an objection. The motion shall be filed promptly after the movant discovers the facts on which the objection is based.' (R. 4004(b).)
	In 'a chapter 11 case, the complaint [objecting to the debtor's discharge]'	'shall be filed no later than the first date set for the hearing on confirmation'	
	In 'a chapter 13 case, a motion objecting to the debtor's discharge under § 1328(f)'	'shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). At least 28 days' notice of the time so fixed shall be given to the [] trustee and all creditors as provided in Rule 2002(f) and (k) and to the trustee and the trustee's attorney.'	
4007(c)	In a chapter 7, 11, 12, or 13, the filing of a complaint to determine dischargeability of a debt under § 523(c)	'shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a)' and creditors shall receive 'no less than 30 days' notice of the time so fixed in the manner provided in Rule 2002'	'On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.'

(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least--

(A) 100 percent of the allowed unsecured claims in such case; or

(B)(i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort[.]

Rule Reference	Description of Action	Time for Taking Action	Conditions on Enlargement
4008(a)	The filing of a reaffirmation agreement	'no later than 60 days after the first date set for the meeting of creditors under § 341(a) of the Code'	'The court may, at any time and in its discretion, enlarge the time to file a reaffirmation agreement.'
8002	Time for filing the notice of appeal	'within 14 days after entry of the judgment, order, or decree being appealed'	The 'court may extend the time to file a notice of appeal upon a party's motion that is filed: (A) within the time prescribed by this rule; or (B) within 21 days after that time, if the party shows excusable neglect.' -unless- 'the judgment, order, or decree appealed from: (A) grants relief from an automatic stay under § 362, 922, 1201, or 1301 of the Code; (B) authorizes the sale or lease of property or the use of cash collateral under § 363 of the Code; (C) authorizes the obtaining of credit under § 364 of the Code; (D) authorizes the assumption or assignment of an executory contract or unexpired lease under § 365 of the Code; (E) approves a disclosure statement under § 1125 of the Code; or (F) confirms a plan under § 943, 1129, 1225, or 1325 of the Code.' Further, '[n]o extension of time may exceed 21 days after the time prescribed by this rule, or 14 days after the order granting the motion to

Rule Reference	Description of Action	Time for Taking Action	Conditions on Enlargement
			extend time is entered, whichever is later.'
9033(b), (c)	Service and filing of objections to proposed findings of fact and conclusions of law and responses thereto	Objections must be served and filed '[w]ithin 14 days after being served with a copy of the proposed findings of fact and conclusions of law' Responses to objections must be made 'within 14 days after being served with a copy' of the objections	'for cause extend the time for filing objections by any party for a period not to exceed 21 days from the expiration of the time otherwise prescribed by this rule' and any such request 'must be made before the time for filing objections has expired, except that a request made no more than 21 days after the expiration of the time for filing objections may be granted upon a showing of excusable neglect'

Rule 9006(c)(2) Reduction Prohibition:

Rule Reference	Description of Action	Time for Taking Action
1007(c)	Time 'to file the statement required by Rule 1007(b)(7)'[8]	• In an individual chapter 7 case, 'within 60 days after the first date set for the meeting of creditors under § 341 of the Code' • In an individual chapter 11 or 13 case, 'no later than the date when the last payment was made by the debtor as required by the plan or the filing of a motion for a discharge under § 1141(d)(5)(B) or § 1328(b) of the Code'
2002(a)(7)	'the time fixed for filing proofs of claims pursuant to Rule 3003(c)' by the court in chapter 9 and 11 (reorganization) cases	21 days (by mail) to 'the debtor, the trustee, all creditors and indenture trustees'
2003(a)	Holding the meeting of creditors called by the trustee	• In a chapter 7 liquidation or chapter 11 reorganization case, 'no fewer than 21 and no more than 40 days after the order for relief' • In a chapter 12 family farmer debt adjustment case, 'no fewer than 21 and no more than 35 days after the order for relief' • In a chapter 13, 'no fewer than 21 and no more than 50 days after the order for relief' • Unless 'there is an appeal from or a motion to vacate the order for relief, or if there is a motion to dismiss the case, [then] the [] trustee may set a later date for the meeting.' • Unless 'the [] trustee designates a place for the meeting which is not regularly staffed by the [] trustee or an assistant who may preside at the meeting, [then] the

[8] Federal Rule of Bankruptcy Procedure 1007(b)(7) requires that "[a]n individual debtor in a chapter 7 or chapter 13 case shall file a statement of completion of the course, prepared as prescribed by the appropriate Official Form" and that "[a]n individual debtor in a chapter 11 case shall file the statement if § 1141(d)(3) [limiting discharge in chapter 11 cases] applies" "[u]nless an approved provider of an instructional course concerning personal financial management has notified the court that a debtor has completed the course after filing the petition."

Rule Reference	Description of Action	Time for Taking Action
		meeting may be held not more than 60 days after the order for relief.'
3002(c)	In a voluntary chapter 7 case, chapter 12 case, or chapter 13 case, filing a proof of claim	'timely filed if it is filed not later than 70 days after the order for relief under that chapter or the date of the order of conversion to a case under chapter 12 or chapter 13'
	In an involuntary chapter 7 case, filing a proof of claim	'timely filed if it is filed not later than 90 days after the order for relief under that chapter is entered' Exceptions applicable to voluntary and involuntary chapter 7 cases, chapter 12 case, and chapter 13 case: • 'proof of claim filed by a governmental unit, other than for a claim resulting from a tax return filed under § 1308, is timely filed if it is filed not later than 180 days after the date of the order for relief' • 'proof of claim filed by a governmental unit for a claim resulting from a tax return filed under § 1308 is timely filed if it is filed no later than 180 days after the date of the order for relief or 60 days after the date of the filing of the tax return' • 'An unsecured claim which arises in favor of an entity or becomes allowable as a result of a judgment may be filed within 30 days after the judgment becomes final if the judgment is for the recovery of money or property from that entity or denies or avoids the entity's interest in property. If the judgment imposes a liability which is not satisfied, or a duty which is not performed within such period or such further time as the court may permit, the claim shall not be allowed.' • 'claim arising from the rejection of an executory contract or unexpired lease of the debtor may be filed within such time as the court may direct'

Rule Reference	Description of Action	Time for Taking Action
		• 'If notice of insufficient assets to pay a dividend was given to creditors under Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall give at least 90 days' notice by mail to creditors of that fact and of the date by which proofs of claim must be filed'
3014	In a chapter 9 or 11 case, '[a]n election of application of § 1111(b)(2) [allowing claim secured by lien on property secured status] of the Code by a class of secured creditors'	'any time prior to the conclusion of the hearing on the disclosure statement or within such later time as the court may fix' Unless 'the disclosure statement is conditionally approved pursuant to Rule 3017.1 [conditional approval in small business case], and a final hearing on the disclosure statement is not held, [then] the election of application of § 1111(b)(2) may be made not later than the date fixed pursuant to Rule 3017.1(a)(2) or another date the court may fix.'
3015(a), 11 U.S.C. § 1221	In a chapter 12 case, the debtor must file the plan	With the petition or 'not later than 90 days after the order for relief un this chapter, except that the court may extend such period if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable'
3015(b)	In a chapter 13 case, the debtor must file the plan In a conversion to a chapter 13 case, the debtor must file the plan	With the petition or 'within 14 days thereafter, and such time may not be further extended except for cause shown and on notice' 'within 14 days thereafter, and such time may not be further extended except for cause shown and on notice'
3015(f)	An objection to confirmation of a plan must be filed and served	'at least seven days before the date set for the hearing on confirmation, unless the court orders otherwise'

Rule Reference	Description of Action	Time for Taking Action
3015(h)	Time for filing objections to a proposed modification of plan after confirmation Hearing on the proposed modification of plan after confirmation if an objection is filed	'not less than 21 days' notice by mail of the time fixed for filing objections . . . unless the court orders otherwise with respect to creditors who are not affected by the proposed modification ' 'not less than 21 days' notice by mail of the time fixed for filing objections . . . unless the court orders otherwise with respect to creditors who are not affected by the proposed modification'
4001(b)(2)	'[C]ommence a final hearing on a motion for authorization to use cash collateral'	'no earlier than 14 days after service of the motion' • Unless 'the motion so requests, [then] the court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.'
4001(c)(2)	'[C]ommence a final hearing on a motion for authority to obtain credit'	'no earlier than 14 days after service of the motion' • Unless 'the motion so requests, [then] the court may conduct a hearing before such 14-day period expires, but the court may authorize the obtaining of credit only to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing.'
4003(a)	Filing a 'list the property claimed as exempt under § 522 of the Code on the schedule of assets'	To be filed with 'schedule of assets required to be filed by Rule 1007[(b)(1)(A)],' *i.e.*, • In a voluntary case, 'with the petition or within 14 days thereafter' • In an involuntary case, 'within 14 days after the entry of the order for relief' • Unless 'the debtor fails to claim exemptions or file the schedule within the time specified in Rule 1007, [then]

Rule Reference	Description of Action	Time for Taking Action
		a dependent of the debtor may file the list within 30 days thereafter.'
4004(a)	In 'a chapter 7 case, a complaint, or a motion under § 727(a)(8) or (a)(9) of the Code, objecting to the debtor's discharge'[9]	'shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a)'
	In 'a chapter 11 case, the complaint [objecting to the debtor's discharge]'	'shall be filed no later than the first date set for the hearing on confirmation'
	In 'a chapter 13 case, a motion objecting to the debtor's discharge under § 1328(f)'	'shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). At least 28 days' notice of the time so fixed shall be given to the [] trustee and all creditors as provided in Rule 2002(f) and (k) and to the trustee and the trustee's attorney.'
4007(c)	In a chapter 7, 11, 12, or 13, the filing of a complaint to determine dischargeability of a debt under § 523(c)	'shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a)' and creditors shall receive 'no less than 30 days' notice of the time so fixed in the manner provided in Rule 2002'
4008(a)	The filing of a reaffirmation agreement	'no later than 60 days after the first date set for the meeting of creditors under § 341(a) of the Code'
8002	Time for filing the notice of appeal	'within 14 days after entry of the judgment, order, or decree being appealed'
9033(b)	Service and filing of objections to proposed findings of fact and conclusions of law and responses thereto	Objections must be served and filed '[w]ithin 14 days after being served with a copy of the proposed findings of fact and conclusions of law' Responses to objections must be made 'within 14 days after being served with a copy' of the objections

[9] *See* note 8, *supra*.