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*37 THE SUB ROSA PLAN OF REORGANIZATION: SIDE-STEPPING CREDITOR PROTECTIONS IN CHAPTER 11

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I.Introduction

The first mention of a plan sub rosa [1] was in an opinion by the Fifth Circuit Court of Appeals, issued in the early 1980s, in the case of Pension Benefit Guaranty Corp. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.). [2] A sub rosa plan has also been referred to as a “de facto plan” [3] or a “creeping plan of reorganization.” [4] Essentially, the concern regarding a plan sub rosa arises when a debtor in bankruptcy seeks to enter into a transaction outside of a plan of reorganization that could have a significant effect upon the bankruptcy case and the bankruptcy estate. Some courts and practitioners believe that these transactions should be prohibited by the courts because they will have “the practical effect of dictating some of the terms of any future reorganization plan” of the debtor and will “short circuit the requirements of chapter 11 for confirmation of a reorganization plan.” [5]

***38** Although a relatively unused doctrine, a plan sub rosa creates a genuine threat, and courts should recognize that certain transactions ought to be voted on by creditors and not merely approved under the court's discretionary powers. However, at the same time, when the effect of a transaction is not significant, the courts are entitled to, and should, exercise their right to approve, or disapprove, these transactions. An especially fine line has been drawn by Congress in allowing asset sales preconfirmation, especially considering that the courts generally permit a debtor to sell all of its assets prior to filing a plan and disclosure statement. [6] For these reasons, courts must carefully balance their discretion to approve certain transactions with the need to subject certain others to the plan process.

Generally, case law exhibits objections to three types of transactions as plans sub rosa: sales of property of the estate [7] outside the ordinary course of business, [8] leases, [9] and settlement agreements. [10] Most courts that have fielded such attacks have rejected them because they determined that the transaction at issue was not severe enough and did not have enough of an impact on the bankruptcy case and the debtor's estate to be denied approval on this ground. [11] Many courts that have addressed the issue have used the facts of Braniff as the standard for comparison to determine whether a transaction is, in effect, a sub rosa plan. [12] These courts have refused to extend the doctrine to other types of transactions [13] or to less extreme circumstances. [14] Some other decisions do not appear to reference any objective standard by which to measure the allegations; instead, the courts determined the issue on pure discretion. [15]

***39** This Article argues that, at the very least, the case law on sub rosa plans is inconsistent and without any clear legal standard. This is not to say that the case law is generally contradictory. To the contrary, courts apply the doctrine with an apparent understanding of the purpose behind the theory; however, their approach and analysis does not present any clear method of analysis for later courts and practitioners. This Article further argues that the concerns behind the objections regarding sub rosa plans are valid in light of the history and structure of chapter 11 of the Bankruptcy Code.[16] Lastly, the Article suggests a method of analysis that synthesizes the existing case law into a coherent whole that is easy to examine and apply.

Part II of this Article looks at the structure of the Bankruptcy Code and the protections it offers to chapter 11 debtors as they relate to the concerns regarding sub rosa plans. Later Parts review the case law regarding plans sub rosa, including both a detailed analysis of decisions regarding each type of transaction and alternate theories of analysis. Finally, using the language and intentions behind chapter 11 of the Bankruptcy Code, the Article recommends a structure with which to view the case law, and that synthesis will provide a clear, coherent statement of the law as it does, and should, exist.

II. Chapter 11 Protections

Chapter 11 contains the primary reorganization provisions of the Bankruptcy Code and the only reorganization provisions available for corporate or partnership debtors.[17] The provisions of chapter 11 are broken up into four subchapters.[18] A sub rosa plan is ***40** a transaction or agreement that allegedly sidesteps the protections of the reorganization process as those protections are embodied in the plan confirmation process. For this reason, only Subchapter II[19] is fully relevant to the scope of this Article because it deals with the formation and confirmation of a plan of reorganization.

Generally, the plan provisions of chapter 11 of the Bankruptcy Code are designed to compel the debtor to negotiate with its creditors and other interest-holders to formulate a plan of reorganization that is acceptable to all interested parties.[20] When the debtor cannot obtain the requisite assent[21] to its proposed plan of reorganization, the Bankruptcy Code allows the debtor to "cram-down" the plan over the objections of nonaccepting classes of creditors and interest-holders.[22] However, before the debtor may cram-down its proposed plan over these objections, the debtor must comply with certain statutory guidelines that govern priorities of payment and require a degree of fairness.[23] Specifically, the debtor cannot discriminate unfairly between the classes.[24] The debtor must pay any dissenting class in full before any class junior to that dissenting class receives any property at all, and the plan must otherwise be "fair and equitable."[25]

***41** The requirement for paying senior classes before paying junior classes is known as the absolute priority rule. Under a cram-down plan, this rule requires that a class of dissenting secured creditors must be paid in full before unsecured creditors are paid.[26] Further, dissenting unsecured creditors must be paid in full before equity security holders may receive any property under the plan.[27] Similarly, subordinated bondholders can not receive property pursuant to the plan unless dissenting senior debt is paid in full.[28] The absolute priority rule also extends to priorities of payment among different classes of equity.[29]

In addition to the special protections that dissenting classes of creditors receive, all creditors are meant to benefit from the protections accorded by the confirmation process for a plan of reorganization under § 1129 of the Bankruptcy Code.[30] Section 1129(a) is a laundry list of thirteen requirements that the debtor must satisfy before the bankruptcy court can confirm its plan.[31] Cram-down of a plan, as discussed supra, is only a substitute for one of these thirteen requirements: the requirement of assent of all classes of creditors.[32] Of the remaining twelve protections, the most significant[33] are the following: (1) the right of impaired creditors to vote upon the proposed plan[34] following receipt of a disclosure ***42** statement,[35] (2) the good faith requirement,[36] (3) the best interests of the creditors test,[37] and (4) the feasibility requirement.[38]

The right to be heard at the confirmation hearing is also an important right attendant to the chapter 11 confirmation process.[39] However, this right is sufficiently protected by the required notice under the use, sale, or lease provisions of § 363(b) and Bankruptcy Rule 4001, as well as under Bankruptcy Rule 9019, which governs settlements, Rule 2002 governing notice to parties in interest generally,[40] and the Due Process Clause of the United States Constitution.[41] With proper notice, a party can appear and object to the proposed transaction or settlement, including making an objection that the proposed transaction is a de facto plan of reorganization.

The right of impaired classes to vote upon a plan, as discussed supra, is a critical aspect of the plan process. It directs the energies of the parties towards seeking mutually acceptable solutions to the obstacles that might otherwise hinder a successful reorganization.[42] To facilitate a fair voting process, the debtor must prepare and distribute to voters a disclosure statement that contains "adequate information . . . [which] would enable a [[[voter] to make an informed judgment about the plan."[43] Purportedly, with this ***43** document in hand, a creditor, interest holder, or other party entitled to vote can make an intelligent decision regarding whether it is in their best interest to support the proposed plan.

The good faith requirement is embodied in § 1129(a)(3) of the Bankruptcy Code. That subsection requires that "[t]he plan has been proposed in good faith and not by any means forbidden by law."[44] There is ample case law in this area discussing whether the debtor has acted in such a way that is consistent with the purpose and objectives of the Bankruptcy Code and the reorganization provisions of chapter 11.[45]

The best interests of the creditors test is contained in § 1129(a)(7) of the Bankruptcy Code. In a nutshell,[46] § 1129(a)(7) requires that any single creditor with an impaired claim who votes to reject the plan must receive under the plan the amount it would receive if the debtor were liquidated under chapter 7, even if that creditor's claim falls within an accepting class. If a class of secured creditors elects the application of § 1111(b)(2),[47] then they are ***44** entitled to receive property of a value not less than the value of their interest in the estate's interest in the property that secures the creditor's lien. In practice, § 1129(a)(7) requires each proposed plan of reorganization to contain a liquidation analysis that provides the projected distribution to creditors under a complete liquidation of the debtor's assets and demonstrates that the creditor does no worse under the plan.

Section 1129(a)(11) contains what is known as the "feasibility" requirement. Derived from case law on the application of the word "feasible" in chapter X of the Bankruptcy Act,[48] § 1129(a)(11) requires that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan."[49] This subsection is designed to prevent successive bankruptcy filings, colloquially referred to as a "Chapter 22." This is highly significant because the effect of confirmation of a plan of reorganization is to eliminate all debt except as it is laid out in the plan.[50] For example, if a confirmed plan issues a new note to bondholders that only pays ten percent of their claim over a period of several years, then, if the debtor files a subsequent chapter 11 bankruptcy case, the bondholders may only file a claim for the unpaid amount of the new note, not for the unpaid amount of the original claim. Further, the bondholders will probably be asked to reduce their claim even further under the proposed plan in the second case. The feasibility requirement is designed to protect against this scenario so that creditors who take part in the plan process are not later forced to ***45** accept even worse terms than those to which they originally negotiated and agreed.

The culmination and effect of these multiple requirements function to protect creditors. The voting requirement helps to involve all parties in interest in the formation of a plan. The disclosure statement provides them with the necessary information to intelligently participate in the voting process. The acceptance requirements force a debtor to negotiate with its creditors if it wants to successfully reorganize through chapter 11. The best interests of the creditors test insures that a debtor is only allowed the privilege of reorganization when it intends to provide its creditors with at least as good, if not better, a return than they would have received under a straight liquidation in chapter 7. Finally, the feasibility requirement is designed to prevent abuse of the protections and benefits under chapter 11 and the rest of the Bankruptcy Code.

The plan process is essentially one of fairness that invites the participation, through negotiation and voting, of all creditors and interest holders. A sub rosa plan is a transaction or agreement that commits such a substantial part of the debtor's assets that, if the transaction were allowed, the terms of a plan of reorganization would be severely limited, if not completely predetermined. As the Braniff court stated, a sub rosa plan has “the practical effect of dictating some of the terms of any future reorganization plan” of the debtor and will “short circuit the requirements of chapter 11 for confirmation of a reorganization plan.”[51] For these reasons, the issues raised by sub rosa objections are valid, and courts should not casually examine these issues and decide them without seriously contemplating whether the debtor is side-stepping creditor protections that are required by Congress under the plan provisions of chapter 11 of the Bankruptcy Code.

III. Braniff and Its Progeny

A. The Braniff Case

The transaction at issue in Braniff, referred to by the Fifth Circuit as the “PSA Transaction,” involved the sale of all of the assets ***46** of the debtor.[52] The debtor, a well-known commercial airline, sought to sell its assets, including airplanes, terminal leases, and landing slots, to another airline in exchange for travel scrip, unsecured notes, and profit sharing in the new airline.[53] The PSA Transaction required that the travel scrip be used in the debtor's reorganization, and the scrip could only be issued to former employees, shareholders, or, to a much lesser extent, unsecured creditors.[54] The terms of the PSA Transaction also dictated that secured creditors must vote their deficiency claim in favor of any proposed plan that the unsecured creditors' committee supported.[55] Further, the debtor and its officers, directors, and secured creditors were to receive a release of all claims by all parties.[56]

The Fifth Circuit Court of Appeals, in reviewing the approval of the PSA Transaction by the district court and the bankruptcy court, held that the transaction could not be authorized under § 363(b)[57] of the Bankruptcy Code.[58] The court believed that the transaction was, in essence, a reorganization which did not “scale the hurdles erected in chapter 11,” such as disclosure, voting, and plan confirmation requirements.[59] In oft-quoted language, the court stated “[t]he debtor and the Bankruptcy Court should not be able to short circuit the requirements of chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan sub rosa in connection with a sale of assets.”[60]

In reaching its holding, the court identified three specific factors that led to its decision. First, disposing of nearly all of the debtor's assets in exchange for travel scrip, use of which had certain restrictions, not only “changed the composition of Braniff's assets . . . [but] had the practical effect of dictating some of the terms of any future reorganization plan.”[61] Second, restricting ***47** creditor's voting is not within the scope of a § 363(b) order and prevents creditors from exercising their right to vote on a plan as contemplated by chapter 11.[62] Lastly, the release and disposition of all claims was also found to be outside the scope of § 363(b).[63] These three factors-(1) effectively dictating the terms of any future reorganization plan, (2) placing restrictions on creditor voting for a reorganization plan, and (3) altering creditors rights-became the factors that many other courts would later rely on in analyzing transactions challenged as de facto plans of reorganization.

B. The Lionel Case

Shortly after the Braniff opinion was issued, the Second Circuit had occasion to consider a different § 363(b) transaction. In Committee of Equity Security Holders v. Lionel Corp. (In re Lionel Corp.),[64] the court attempted to balance the conflict between the strictures of chapter 11, as considered by the Braniff court, with the notice and hearing provisions of § 363(b).[65] Although the Second Circuit used a different analysis, it is a significant case to compare with the Braniff decision. The Braniff case involved a far more disruptive transaction than the one at issue in Lionel.

The debtors in Lionel sought to sell their principal asset-an eighty-two percent equity stake in a profitable corporation-prior to confirmation.[66] The Equity Holders' Committee opposed the sale because they claimed that it side-stepped creditor protections in chapter 11.[67] The Second Circuit determined that, under the Bankruptcy Code, an emergency should not be required before a sale of assets should be permitted and that the protections under chapter 11 were sufficient.[68] The court further stated, however, that:

Resolving the apparent conflict between Chapter 11 and § 363(b) does not require an all or nothing approach. Every sale under § 363(b) does not automatically short-circuit or side-step Chapter 11; nor are these two statutory provisions to be read as ***48** mutually exclusive. Instead, if a bankruptcy judge is to administer a business reorganization successfully under the Code, then-like the related yet independent tasks performed in modern production techniques to ensure good results-some play for the operation of both § 363(b) and Chapter 11 must be allowed for.[69] Finally, the court refused to approve the transaction because the debtor did not advance any business justification for it, other than the appeasement of the debtor's major creditors.[70] The court pointed out that the debtor only filed the application because the unsecured creditor's committee was pushing the sale and noted that time was not of the essence because the prospective purchasers would remain interested.[71] Further, the stock was stable and not subject to volatility.[72] Therefore, the transaction could wait until a reorganization plan was formulated.

The Lionel "business justification" test has become the preeminent standard for applications to sell assets outside the ordinary course of business pursuant to § 363(b) of the Bankruptcy Code. As the Lionel court pointed out, not every transaction side-steps creditor protections in chapter 11; however, despite the reasoning in Lionel, there needs to be a higher standard in reviewing these transactions. The bankruptcy court should not merely rubber-stamp its approval in reliance on the debtor's business judgment.

C. The Continental Case

The Fifth Circuit revisited the sub rosa question several times following Braniff,[73] but none as significant as its opinion in the case of Institutional Creditors of Continental Air Lines, Inc. v. Continental Air Lines, Inc. (In re Continental Air Lines, Inc.).[74] The Continental court quite appropriately phrased the issue before it as follows: "[t]he issue in this case is how far a debtor-in-possession can stretch the ***49** bankruptcy laws to undertake transactions outside a plan of reorganization."[75] In Continental, the debtor sought authority to lease two new airplanes, alleging that the additional aircraft would strengthen their Pacific routes.[76] In affirming the decision of the bankruptcy court, the district court found that the transaction at issue in Continental was not as severe as in the Braniff case.[77] It also determined that the proposed lease agreements were within the bounds of § 363(b); therefore, the district court approved the transaction even though it was not submitted to a creditor's vote.[78]

On appeal, the Fifth Circuit decided that the debtor had an adequate business justification for entering into the lease agreement; however, it still vacated the decision and remanded the case for further consideration.[79] The court held:

[W]hen an objector to a proposed transaction under § 363(b) claims that it is being denied certain protection because approval is sought pursuant to § 363(b) instead of as part of a reorganization plan, the objector must specify exactly what protection is being denied. If the court concludes that there has in actuality been such a denial, it may then consider fashioning appropriate protective measures modeled on those which would attend a reorganization plan.[80] The Continental court further reasoned that "the bankruptcy court may have lacked statutory authority to authorize the leases if the [objectors] could have defeated a plan of reorganization containing the leases or may have had to condition certain terms of any lease."[81] In short, a transaction that cannot be approved as part of a plan should not be approved outside of a plan.

The Fifth Circuit's holding in Continental refined the method of approaching an allegation that a transaction is a creeping plan of reorganization. First, it placed the burden on the objecting party to identify the actual protection that would be lost if the court approved the transaction. Second, it allowed for the lower courts to remedy any problem by "fashioning appropriate protective ***50** measures modeled on those which would attend a reorganization plan"[82] without having to completely prohibit the transaction or delay its consummation. Therefore, the lower court will not have to substitute its business judgment in situations in which there is some concern that creditors may not be treated fairly. The Court may approve the transaction, with modifications to provide any necessary protections. Third, the Fifth Circuit enumerated one situation-when a plan containing the transaction could not be confirmed-in which it implied that the court should classify the transaction as a de facto plan and deny its approval. This entire approach is useful because it clarifies a sub rosa objection for the court, and it allows the court to create a remedy that maintains creditors' rights without forcing it to stymie the debtor's attempts to conduct its bankruptcy in the manner it sees fit, including the pursuit of a good business opportunity in a timely manner.

Under the rationale of the district court in Continental, for transactions challenged as sub rosa plans, the required notice under the use, sale, or lease provisions of section 363(b) and Bankruptcy Rules 2002, 4001, and 9019 is an adequate substitute for the voting requirements contained in chapter 11.[83] If this were a completely accurate statement, however, then Congress would have prefaced plan confirmation merely on notice and an opportunity for a hearing instead of enacting complex disclosure and voting provisions. By using the Fifth Circuit's approach, however, a valid ***51** middle ground is obtained. A creditor may object that a transaction is, in effect, a de facto plan. Upon this objection, the creditor is entitled to its full due process protections, its proverbial "day in court." Once before the court, the creditor may present its argument, and the court has the opportunity to decide whether the transaction crosses the line such that the hearing is not sufficient protection for all creditors' interests. At this point, it may require the debtor to seek approval of the transaction through a formal plan of reorganization, or it may fashion its own remedy that seeks to ensure those same protections without interfering with the debtor's business decisions. A bankruptcy judge is more likely to give a sub rosa objection ample consideration when the judge is not bound by a single remedy-total denial of the application. Although the Continental approach places an added burden, albeit a small one, on the objecting party, the objector should be rewarded with closer scrutiny of the transaction to which it objects and, theoretically, greater sensitivity to its concerns.

D. Other § 363(b) Cases

Despite the holding in Braniff, or perhaps due to the harsh facts thereunder, subsequent courts to consider sub rosa objections to asset sales, or other transactions, pursuant to § 363(b), have generally permitted the sales.[84] These courts have relied upon the business justification standard of Lionel in approving the sales.[85] Although shortchanging the doctrine behind the Braniff and Continental cases, these opinions were correct because the transactions were not particularly severe.[86] Further, many of the courts[87] were not altogether ignorant of the concept behind the holdings in Braniff and Continental. For example, in approving an application to sell two of six buildings in an office park, the ***52** bankruptcy court in In re Terrace Gardens Park Partnership [88] found that the Lionel test was satisfied, and that the objector did not satisfy the burden imposed in Continental. [89]

However, in a case involving a lease of the debtor's assets, the court in In re Copy Crafters Quickprint, Inc. [90] refused to approve the postpetition lease of the debtor's assets nunc pro tunc, which was "packaged as part of a sale which is the centerpiece of the proposed plan." [91] In Copy Crafters, the debtor leased its assets to another company only six days after filing bankruptcy. [92] The debtor proposed a plan that would sell the assets to the lessee's principal, who was also the debtor's former employee. [93] In reaching its decision, the bankruptcy court reasoned that "[t]he approval of this lease will effectively put the Court's imprimatur on the sale and confirm the Plan long before the hurdles of Chapter 11 are overcome. In encompassing the sole asset of the Debtor, this proposed lease 'boot-straps' the sale and 'short-circuits' the Chapter 11." [94]

Another bankruptcy court, in the case of In re Work Recovery, Inc., [95] used a six-factor test to determine whether to approve the sale of a chapter 11 debtor's real property. [96] The first four factors were taken from elements that the Lionel court identified as relevant to determining whether there was adequate business justification for a transaction. [97] The remaining two factors were derived from the facts of the Braniff case, specifically, whether the proposed transaction dictates the terms of a future plan or renders creditors' rights under the rest of chapter 11 meaningless. [98] However, the court's opinion did not address the decision in Continental.

***53** Other cases distinguished Braniff on its facts without looking to the underlying reasons for the holding. In the case of In re Naron & Wagner, Chartered, [99] the bankruptcy court addressed the sub rosa objection and rejected it because the debtor was liquidating its assets instead of reorganizing, and the transaction did not restructure creditors' rights. [100] The court failed to note that, in essence, Braniff was also a chapter 11 liquidation. Further, as discussed infra, the court identified too closely with the facts in Braniff instead of the concerns behind the decision. [101] Since the debtor in Naron & Wagner sought to sell all of its assets, the court should have looked closer at the transaction before deciding that it had the authority to approve it. Even Lionel rejects the notion that "§ 363(b) grants the bankruptcy judge carte blanche." [102] The In re San Jacinto Glass Industries [103] court also approved a sale of assets under the business justification test, and similarly distinguished Braniff on its facts. [104] Neither the Naron & Wagner nor the San Jacinto court addressed the Continental opinion or its allocation of the burden of proof. Another bankruptcy court did not mention Braniff at all, despite the sub rosa objection being raised. [105]

There are also a few cases in which the sub rosa objection was raised to a proposed use, as opposed to a sale, of estate assets. [106] In each of these cases, the court approved the transaction, primarily ***54** because its gravity fell far short of the oppressiveness in Braniff; however, each court did give fair consideration to the objection. [107]

E. Settlement Cases

The primary area where the applicability of the sub rosa doctrine has been debated by the Courts regards settlement agreements. [108] Several courts, including the Eighth Circuit Court of Appeals, [109] appear to disfavor such use, [110] while one court has rejected that use outright. [111] However, in light of a more recent decision by the Fifth Circuit Court of Appeals [112] -the same court that decided Braniff years earlier-it should be clear that the doctrine applies to objections to applications to approve a settlement or compromise under Bankruptcy Rule 9019. [113]

In 1997, the Fifth Circuit Court of Appeals decided the case of Official Committee of Unsecured Creditors v. Cajun Electrical Power Cooperative., Inc. (In re Cajun Electrical Power Cooperation, Inc.).[114] In that opinion, the court considered and rejected the objection that a proposed settlement of claims between the chapter 11 debtor and its two largest creditors was a sub rosa plan of reorganization.[115] In reaching that decision, the Cajun Electrical court reasoned that a lawsuit may be settled pursuant to § 363(b), but "section 363(b) does not authorize . . . a settlement if the result amounts to a sub ***55** rosa plan of reorganization."[116] The court then considered the facts in Braniff and the particular defects in the transaction in that case, and, upon comparison, determined that the settlement at issue did not "alter creditors' rights, dispose of assets, and release claims" to the extent that the Braniff transaction had.[117]

Like any other major preconfirmation transaction, a settlement can have highly significant ramifications upon creditors and their interests.[118] One court provided the following summary:

The applicable statutory and/or judicial standards being met, the proposed transaction will not, however, be approved as a "creeping" or de facto plan if timely objection is made that the transaction, either in fact or in effect, encroaches on a right afforded creditors or equity holders in the Chapter 11 plan process, particularized by the objector. A transaction which would effect a lock-up of the terms of a plan will not be permitted. On the other hand, where a transaction would free assets for distribution, and circumvent no Chapter 11 right, it may be approved as a necessary step toward, or building block of, a plan of reorganization.[119]

Therefore, similar to a sale of assets under § 363(b), the bankruptcy court has a dual set of standards to consider. Upon an appropriate objection,[120] it must not only consider the appropriate standards under Bankruptcy Rule 9019, but also whether the transaction encroaches on creditor protections in chapter 11.

F. Transactions in Contemplation of a Plan or Postconfirmation

As should be obvious by now, a transaction that is contingent on plan confirmation, or is pursuant to a confirmed plan, will not violate the precepts of Braniff, Continental, or any subsequent case that this Article examines. Since these cases, and this Article, are concerned with the potential loss of creditor protections that chapter 11 provides as a part of the plan confirmation process, any ***56** transaction contingent on, or pursuant to, a plan of reorganization cannot be a plan sub rosa.

Therefore, a settlement agreement whose terms are contingent on the confirmation and consummation of a particular plan of reorganization does not violate the Braniff standards.[121] This is true even though the parties to the settlement will vote in favor of that plan of reorganization. This does not dictate any plan terms because these parties have bargained for the settlement and the plan, and they will jointly present the entire package to the remaining creditors as part of the confirmation process. This also does not restrict creditor voting because only the parties to the settlement are implicated.

When a chapter 11 trustee is appointed to administer a liquidation plan, a sale of assets pursuant to that power cannot be a plan sub rosa.[122] This is true no matter how large the scope of the transaction because all parties in interest have already had a full and fair chance to complain during the plan confirmation. Their interests have been adequately protected under the confirmation process. The only redress they should be permitted from the bankruptcy court is if the trustee acts in excess of his granted powers.

Finally, an asset sale motion that was filed before the proposed plan was filed cannot be a de facto plan when the plan is confirmed before the asset sale is approved.[123] As with the previous cases, there can be no concern that creditors have been denied certain protections inherent in the chapter 11 plan process when there has been a confirmed plan. The debtor and its creditors and interest holders are bound by the terms of a confirmed plan, [124] and the bankruptcy court should only disapprove postconfirmation transactions that are in violation of the terms of the plan.

G. Transactions Disapproved under the Theory of the Sub Rosa Doctrine

In the following cases, the reviewing courts disapproved of the transaction before it upon careful consideration of the implications ***57** upon the chapter 11 process. Although not all of these cases fit squarely into the type of objection that is focused on in this Article, they do address the same concerns regarding the balance between the plan protections of chapter 11 and other provisions in the Bankruptcy Code.

In Washington-St. Tammany Electrical Cooperative, Inc., [125] the district court reviewed a motion to extend the debtor's exclusivity period to solicit acceptances of a proposed plan of reorganization. [126] The district court held that the bankruptcy court had abused its discretion by granting a third extension, which was far longer than that requested by the debtor. [127] In sum, with the third extension the bankruptcy court permitted the exclusivity period to be extended for sixteen months. [128] In reaching its decision, the district court stated that “[t]he decision on this motion will effectively determine the terms of an acceptable reorganization plan. The bankruptcy judge and the debtor should not be able to ‘short circuit the requirements of chapter 11 for confirmation of a reorganization plan’ in this fashion.” [129]

In In re Quality Beverage Co., [130] the bankruptcy court held that a far-reaching agreement should not be approved because there was insufficient business justification to distribute estate assets as provided for in the agreement and significant creditors were not adequately represented during the drafting of the agreement. [131] Specifically, the agreement (1) provided for the resolution of several controversies, including a fee application and objections to claims, (2) valued and determined the secured claim and priority status of the claims of the major bank creditor, (3) provided that the case would be converted to chapter 7, (4) required creditors to assign their claims to the bank as a condition of receiving distribution of certain escrowed funds, and (5) provided for the waiver of any claim for which payment on distribution was not negotiated within ninety days. [132] In disapproving of this agreement, ***58** the court stated that “[n]either the Committee nor the Chapter 11 Trustee should be permitted to bind [other] creditors without the disclosure, claims allowance, and voting safeguards of plan confirmation in Chapter 11.” [133]

The case of In re Copy Crafters Quickprint, Inc., [134] as discussed supra, [135] involved a debtor that entered chapter 11 and leased all its assets to a former employee. [136] The debtor continued to receive certain payments from the business after the bankruptcy filing. [137] As part of the debtor's proposed plan of reorganization, the former employee would purchase the business. [138] In light of these facts, the court refused to retroactively validate the lease and converted the case to chapter 7, [139] reasoning that to approve the lease would give the proposed plan the court's stamp of approval before the debtor had overcome the obstacles set up by Congress in enacting chapter 11. [140]

The bankruptcy court in In re Public Service Company [141] was faced with a debtor utility that, along with other utilities, owned the Seabrook nuclear power plant project. [142] The debtor sought permission from the court to restructure so that the management and operational control of Seabrook would be transferred to a new corporation. [143] After full consideration, the court refused to approve the transaction based on the record before it and the wide-ranging effect of the transaction. [144]

In In re Conroe Forge & Manufacturing Corp.,[145] the bankruptcy court considered the request of the debtor's secured creditor for immediate distribution of the proceeds of a preconfirmation sale of equipment on which the secured creditor had a lien.[146] While ***59** noting that such a request should only be granted in extraordinary circumstances, the court was further persuaded by the Braniff case.[147] As part of its reasoning for refusing the request for distribution outside and prior to a confirmed plan, the court stated:

If distribution is made to creditors in a liquidating Chapter 11 before confirmation of a plan there will be little incentive for parties in interest to prosecute the case in an expeditious manner much less to perform the work required to issue and obtain approval of a disclosure statement and plan. . . . In addition, if distribution of assets occurs before confirmation, there will exist no means by which a plan may be implemented. Such a course would violate § 1123(a)(5).[148]

The court further expressed its concern that other creditors would not have the opportunity to examine the liquidating plan and disclosure statement "in accordance with the policy and the spirit of chapter 11 of the Bankruptcy Code."[149]

Finally, in In re DRW Property Co. 82,[150] a motion for substantive consolidation was found to dictate the terms of a future reorganization plan "which might not otherwise be approved by their creditors through the voting process."[151] This implicates concern regarding disenfranchisement of creditor voting.[152] The DRW court refused to approve the debtors' motion to be substantively consolidated with 109 related nondebtor partnerships.[153] The court believed that without compelling equitable reasons, substantive consolidation should not occur outside a plan of reorganization because it "deprive[s] the creditors of their right to vote on a plan involving a radical restructuring of their rights [and] preclude[s] the possibility of alternate methods of reorganization."[154]

*60 IV. Analysis And Synthesis

As summarized by one court, "major pre-confirmation transactions, such as use, sale or lease of estate property under section 363(b), settlement, abandonment of property under section 554, or a transaction out of the ordinary course of business under section 1108, raise the concern that the scheme of chapter 11 will be distorted."[155] Despite this concern, most courts merely apply the Lionel business justification test for most preconfirmation transactions. However, "[i]rrespective of the existence of business justification for a pre-confirmation transaction, the terms or effect of such a transaction may nevertheless threaten to subvert the protections of Chapter 11."[156] Congress could not have intended for the extensive disclosure requirements under § 1125 to be superseded by mere notice and the remaining chapter 11 protections reduced to the "business justification" test.[157] For this reason, a bankruptcy court, in considering any significant preconfirmation transaction, should first determine whether approving the transaction prior to confirmation would circumvent chapter 11 safeguards before it addresses the merits of the application.

In applying the sub rosa doctrine, there should be more consistency in its application. This, of course, is beneficial to all parties as well as the bankruptcy court because it introduces a degree of certainty into the proceedings. Debtors will not have to waste resources in pursuing transactions that they can anticipate will only be approved in the context of a plan of reorganization. In this regard, it is necessary to propose certain standards to be followed.

While there are many relevant factors that have come out of Braniff and later cases, it is also clear that many courts will not apply the doctrine because the Braniff facts are so easy to distinguish.[158] However, as stated many times throughout this Article, Congress enacted the numerous provisions in chapter 11 as protections for the rights of creditors and equity holders.[159]

Therefore, the ***61** concepts and reasoning behind Braniff must be extracted from the facts of the case itself. It is also important to examine the facts of other cases in which courts have disapproved of preconfirmation transactions because they were either deemed sub rosa plans or implicated similar concerns. [160]

The Braniff court determined that the debtor's proposed transaction was overreaching because it did the following things: (1) dictated the terms of any future reorganization plan, (2) disenfranchised creditor voting in the plan process, (3) altered creditors rights, (4) disposed of highly significant assets, sometimes referred to as "crown jewels," [161] and (5) released claims against the debtor. [162] It is far more useful to look at these factors rather than the specific facts of Braniff. For example, in considering whether a transaction dictates the terms of a future reorganization plan, the bankruptcy court should not compare the transaction to the transaction in Braniff. Instead, it should ask "whether the proposed transaction might improperly and indirectly lock the estate into any particular plan mode prematurely, and without the protection afforded by the procedures surrounding a disclosure statement and confirmation hearing, in a plan of reorganization." [163] Further, the level of scrutiny should be proportional to the extent that the transaction gets closer "to the heart of the reorganization plan process in terms of channeling that process toward any particular plan option." [164] This should be true no matter how good a business decision the transaction might be, or how many assets are freed up by a settlement. These might be smart decisions outside of bankruptcy; however, the bankruptcy court has a duty to creditors, interest holders, and other parties in interest to monitor a debtor's bankruptcy more closely.

Disenfranchisement of creditor voting [165] would certainly be found when a transaction could not be approved if contained in a plan of reorganization and subject to the full protections of chapter ***62** 11. [166] Further, when this type of disenfranchisement exists, the transaction should be absolutely barred. Approval in this situation would clearly "short-circuit" chapter 11 safeguards and allow the debtor to side-step creditor protections. A debtor cannot be allowed to consummate a transaction which could never be approved under the plan provisions of chapter 11. This would be tantamount to a bankruptcy court confirming a plan of reorganization that did not satisfy the requirements of § 1129.

While courts should look to the Braniff factors, the adjudicating court need not find that all factors are present. However, the presence of either or both of the first two elements, relating to the plan and voting, should strongly affect the court's decision because of the direct connection to the actual protections that Congress has created and enacted in the various statutory provisions in chapter 11. The last three factors should be considered contributing factors. Except in extreme circumstances, the existence of any of these contributing factors alone should not be sufficient to cause the disapproval of a transaction. Instead, the court should cite a contributing factor as cause towards requiring the debtor to satisfy a heavier burden under the Lionel "business justification" test.

The facts of each case must be judged individually. However, to ease the burden on courts, especially considering that many or most transactions will not be severe enough to fall under the sub rosa doctrine, the Continental burden of proof should be applied, and the objector should be required to specify exactly what protection is being denied. [167] Continental also permits a court to construct a middle-of-the-road remedy that provides protection to parties in interest without wholly denying the proposed transaction and substituting its business judgment for that of the debtor. [168] This approach could also be used to entice, or even compel, negotiations between the debtor and the objector, for mutual resolution of the issue. This would be a favorable approach because negotiation between the parties is an important goal in chapter 11. [169]

As discussed, [170] since the Braniff, Lionel, and Continental opinions were issued, there have been six written opinions that have ***63** disapproved of preconfirmation transactions based on the sub rosa doctrine. [171] These cases can be a basis for comparison, as long as the court does not use their particular facts as a means to distinguish and to avoid its duty to analyze the merits of the sub rosa objection. The cases should only serve as a basis for the further expansion of the sub rosa doctrine. Chapter 11 and the rest of the Bankruptcy Code require a careful balancing act, and the balance has been tipped too far in favor of Lionel. Chapter 11 cases should be governed by chapter 11 provisions, and not by chapter 3 or elsewhere.

V. Conclusion

The sub rosa doctrine is a valuable doctrine to the extent that it looks to the balance between chapter 11 and the remainder of the Bankruptcy Code. Courts and practitioners would be well-advised to examine this balance carefully so that debtors, well-meaning or not, do not take advantage of the system. Congress set up specific creditor protections that courts are bound to follow; however, other provisions that give the court discretion, (i.e., §§ 105(a) and 363(b)), may be abused by debtors. The bankruptcy court should not allow a debtor to accomplish through these discretionary provisions what chapter 11 would otherwise prohibit. Notice that what suffices for Due Process may not suffice under the disclosure provisions of chapter 11. Significant transactions that greatly affect creditors' rights and limit the possible options for plan formulation should be forced to be tested under the disclosure, voting, and other requirements of chapter 11. In this way, no statutory ***64** provision will be compromised, and creditor protections will not be "short-circuited" and rendered meaningless.

Footnotes

[a1] Mr. Sloane is an attorney with the New York City office of Weil, Gotshal & Manges LLP. The views expressed herein are not necessarily those of Weil, Gotshal & Manges LLP. The author would like to thank Phyllis Sambuco for her assistance in researching this Article.

[1] The phrase sub rosa is defined as "[c]onfidential, secret, not for publication." Black's Law Dictionary 1427 (6th ed. 1990). It is a Latin phrase which, literally translated, means "under the rose." Webster's Third New Int'l Dictionary 2278 (Unabridged 1981). Its meaning is derived from "the ancient custom of hanging a rose over the council table to indicate that all present were sworn to secrecy and [was probably] connected with the legend that Cupid gave a rose to the god of silence Harpocrates to keep him from revealing the indiscretions of Venus." Id.

[2] 700 F.2d 935 (5th Cir. 1983).

[3] See, e.g., In re Lion Capital Group, 49 B.R. 163, 175 (Bankr. S.D.N.Y. 1985).

[4] See, e.g., Institutional Creditors of Continental Air Lines, Inc. v. Continental Air Lines, Inc. (In re Continental Air Lines, Inc.), 780 F.2d 1223, 1227 (5th Cir. 1986).

[5] Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.), 700 F.2d 935, 940 (5th Cir. 1983).

[6] See In re WFDR, Inc., 10 B.R. 109 (Bankr. N.D. Ga. 1981).

[7] See 11 U.S.C. § 541 (1994).

[8] See id. § 363(b).

[9] See id.

[10] As these affect the debtor's bankruptcy estate, settlement agreements are subject to the approval of the bankruptcy court. See id.

[11] See discussion infra Part III.

[12] See infra notes 52-63 and accompanying text.

[13] See infra notes 109-111 and accompanying text. Braniff involved a § 363(b) sale. 700 F.2d at 939.

[14] See infra notes 99-104 and accompanying text.

[15] See infra note 105 and accompanying text.

[16] The Bankruptcy Code is the common name for Title 11 of the United States Code, as amended. The Bankruptcy Code is codified at 11 U.S.C. §§ 101-1330. Chapter 11 of the Bankruptcy Code is codified at 11 U.S.C. §§ 1101-1174.

[17] Chapter 12 and 13 also contain reorganization provisions, but they are limited to certain types of debtors. “Only a family farmer with regular annual income may be a debtor under chapter 12 of this title.” 11 U.S.C. § 109(f) (1994). A “family farmer with regular annual income” is defined in § 101(18) and (19). See id. § 101(18), (19). “Only an individual with regular income” and debts under a certain preset statutory amount, other than a stockbroker or commodity broker, “may be a debtor under chapter 13 of this title.” See id. §§101(30), 109(e).

[18] These subchapters are as follows: Subchapter I-Officers and Administration, 11 U.S.C. §§ 1101-1114; Subchapter II-The Plan, 11 U.S.C. §§ 1121-1129; Subchapter III-Postconfirmation Matters, 11 U.S.C. §§ 1141-1146; and Subchapter IV-Railroad Reorganization, 11 U.S.C. §§ 1161-1174. This Article discusses only the first three. The railroad reorganization provisions are not involved in any of the reported case law involving sub rosa plans, and the effect that these provisions might have on the issues raised in this Article is outside the scope of this discussion.

[19] See id. §§ 1121-29.

[20] See In re Crowthers McCall Pattern, Inc., 114 B.R. 877, 881 (Bankr. S.D.N.Y. 1990). One method by which a debtor can obtain confirmation of a plan of reorganization is by persuading each class of creditors to vote in favor of the proposed plan. See 11 U.S.C. §1129(8).

[21] Only creditors whose claims are “impaired,” as that term is defined by § 1124 of the Bankruptcy Code, are entitled to accept or reject a plan. See 11 U.S.C. § 1126. Creditors whose claims are not impaired are conclusively presumed to vote in favor of the plan. See id. §1126(f).

[22] The standards governing a “cram-down,” as it is referred to, are laid out in § 1129(b) of the Bankruptcy Code.

[23] See id. § 1129(b).

[24] The phrase “discriminate unfairly” is a term of art used in § 1129(b)(1). Generally, it is meant to preserve “just treatment of a dissenting class from the class's own perspective.” H.R. Rep. No. 95-595, at 417 (1977), reprinted in 1976 U.S.C.C.A.N. 5463, 6373. This means that a class must receive at least what it would receive if all classes of its equal rank received an equivalent distribution.

[25] The “fair and equitable” requirement of § 1129(b) is not limited to an evaluation of whether the plan meets the absolute priority rule of § 1129(b)(2). See Federal Sav. & Loan Ins. Corp. v. D & F Constr., Inc. (In re D&F Constr., Inc.), 865 F.2d 673 (5th Cir. 1989).

[26] Secured creditors are also entitled to retain their lien, either in the original property or on the proceeds of the sale of such property, and to receive full payment on the value of their secured claim. See 11 U.S.C. § 1129(b)(1), (2)(A).

[27] See id. § 1129(b)(1), (2)(B).

[28] See id. However, “from the perspective of trade creditors holding unsecured claims, claims of senior and subordinated debentures may be entitled to share on an equal basis with the trade claims.” H.R. Rep. No. 95-595, at 413-18 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6369-74.

[29] See 11 U.S.C. § 1129(b)(2)(C).

[30] Id. § 1129.

[31] Id. § 1129(a).

[32] Id. § 1129(a)(8). Technically, § 1129(a)(8) only requires that each impaired class accept the plan. However, since a creditor whose claim is not impaired is conclusively presumed to accept the plan, this distinction is irrelevant.

[33] See In re Crowthers McCall Pattern, Inc., 114 B.R. 877, 881 (Bankr. S.D.N.Y. 1990). The significance of the many requirements of § 1129(a) will vary from case to case. For the purposes of this Article, the most significant provisions are those that will be the most relevant to, and have the greatest effect on all chapter 11 cases. This generalization is not meant to take away from the significance of provisions such as § 1129(a)(13) that requires the continuation of certain retiree benefits.

[34] See 11 U.S.C. §§ 1126, 1129(a)(8), (10).

[35] See id. § 1125.

[36] See id. § 1129(a)(3).

[37] See id. § 1129(a)(7).

[38] See id. § 1129(a)(11).

[39] See Crowthers, 114 B.R. at 881.

[40] See In re Copy Crafters Quickprint, Inc., 92 B.R. 973, 983 (Bankr. N.D.N.Y. 1988).

[41] U.S. Const. amend. V.

[42] See supra notes 20-22 and accompanying text.

[43] 11 U.S.C. § 1126(a). Section 1125 of the Bankruptcy Code more fully states:
(a)In this section -
(1)“adequate information” means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan; and
(2)“investor typical of holders of claims or interests of the relevant class” means investor having-
(A)a claim or interest of the relevant class;
(B)such a relationship with the debtor as the holders of other claims or interests of such class generally have; and
(C)such ability to obtain such information from sources other than the disclosure required by this section as holders of claims or interests in such class generally have.
11 U.S.C. § 1125(a).

[44] Id. § 1129(a)(3).

[45] See, e.g., In re Briscoe Enters., Ltd. II, 994 F.2d 1160, 1167 (5th Cir. 1993).

[46] Section 1129(a)(7) states, in full:
With respect to each impaired class of claims or interests -
(A) each holder of a claim or interest of such class -
(i) has accepted the plan; or
(ii) will receive or retain under the plan on account, of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or
(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.
11 U.S.C. § 1129(a)(7).

[47] Section 1111(b) states:
(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 -
(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
(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.
(B) A class of claims may not elect application of paragraph (2) of this subsection if
(i) the interest on account of such claims of the holders of such claims in such property is of inconsequential value; or
(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.
(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.
Id. § 1111(b). The implications of this statutory provision are outside the scope of this Article.

[48] The Bankruptcy Act of 1898, as amended, was the statutory predecessor to the Bankruptcy Code.

[49] 11 U.S.C. § 1129(a)(11).

[50] See id. § 1141.

[51] Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.), 700 F.2d 935, 940 (5th Cir. 1983).

[52] Id. at 938-39.

[53] See id. at 939.

[54] See id.

[55] See id. at 940.

[56] See id. at 939-40.

[57] Section 363(b) states, in pertinent part: “[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1) (1994).

[58] See Braniff, 700 F.2d at 940.

[59] Id.

[60] Id.

[61] Id. at 939-40.

[62] See id. at 940.

[63] See id.

[64] 722 F.2d 1063 (2d Cir. 1983).

[65] Id. at 1066

[66] Id. at 1065.

[67] See id. at 1066.

[68] See id. at 1070-71.

[69] Id. at 1071.

[70] See id.

[71] See id.

[72] See id.

[73] See Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop., Inc. (In re Cajun Elec. Power Coop., Inc.), 119 F.3d 349 (5th Cir. 1997); Institutional Creditors of Continental Air Lines, Inc. v. Continental Air Lines, Inc. (In re Continental Air Lines, Inc.), 780 F.2d 1223 (5th Cir. 1986); Richmond Leasing Co. v. Capital Bank, 762 F.2d 1303 (5th Cir. 1985).

[74] 780 F.2d 1223 (5th Cir. 1986).

[75] Id. at 1224.

[76] Id. at 1224-25.

[77] Id. at 1225.

[78] See id.

[79] See id. at 1227-28.

[80] Id. at 1228.

[81] Id.

[82] Id.

[83] See In re Naron & Wagner, Chartered, 88 B.R. 85, 89 (Bankr. D. Md. 1988). In Naron & Wagner, the Court stated:

For a chapter 11 preconfirmation sale of all or substantially all of a debtor's assets, appropriate notice should be a functional substitute for the adequate information which would be contained in a disclosure statement concerning the proposed transaction.... In order for notice to provide appropriate... information... the notice should: 1) place all parties in interest on notice that the Debtor is liquidating its business under chapter 11; 2) disclose accurately the full terms of the sale, including the identity of the purchaser; 3) explain the effect of the sale as terminating Debtor's ability to continue in business, and 4) explain why the proposed price is reasonable and why the sale before confirmation is in the best interests of the estate.

Id. If the Naron & Wagner court had been evaluating appropriate notice under the Due Process Clause of the United States Constitution, this analysis would be right on target. Although the court may have been right that this detailed notice would be an adequate substitute for a disclosure statement, it did not explain why such notice would serve the same functions as the voting requirements and other plan confirmation protections. See also In re Copy Crafters Quickprint, Inc., 92 B.R. 973 (Bankr. N.D.N.Y. 1988).

[84] See In re Work Recovery, Inc., 202 B.R. 301 (Bankr. D. Ariz. 1996); In re Brethren Care of South Bend, Inc., 98 B.R. 927 (Bankr. N.D. Ind. 1989); In re Terrace Gardens Park Partnership, 96 B.R. 707 (Bankr. W.D. Tex. 1989); In re San Jacinto Glass Indus., 93 B.R. 934 (Bankr. S.D. Tex. 1988); Naron & Wagner, 88 B.R. at 89.

[85] See Work Recovery, 202 B.R. at 303; Brethren Care, 98 B.R. at 933; Terrace Gardens, 96 B.R. at 714; San Jacinto, 93 B.R. at 944; Naron & Wagner, 88 B.R. at 88.

[86] But see Naron & Wagner, 88 B.R. at 85 (approving sale of all of the debtor's assets pursuant to section 363(b) of the Bankruptcy Code).

[87] The court in Brethen Care only considered the Lionel opinion and did not address the sub rosa objection except to specify that it had been made. 98 B.R. at 931.

[88] 96 B.R. 707 (Bankr. W.D. Tex. 1989).

[89] Id. at 714.

[90] 92 B.R. 973 (Bankr. N.D.N.Y. 1988).

[91] Id. at 983.

[92] Id. at 975.

[93] See id. at 983.

[94] Id.

[95] 202 B.R. 301 (Bankr. D. Ariz. 1996).

[96] Id. at 304.

[97] See id.; s ee also Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1071 (2d Cir. 1983) (listing relevant factors that a bankruptcy judge might consider in deciding applications to approve sales of assets outside of the ordinary course of business pursuant to § 363(b) of the Bankruptcy Code.)

[98] See Work Recovery, 202 B.R. at 304.

[99] 88 B.R. 85 (Bankr. D. Md. 1988).

[100] Id. at 88.

[101] See discussion infra Part IV.

[102] 722 F.2d at 1069.

[103] 93 B.R. 934 (Bankr. S.D. Tex. 1988).

[104] Id. The San Jacinto court did note, however, that the objection was partially mooted because the objector had not objected to two previous, and larger, asset sales. Id. at 942.

[105] See In re Brethren Care of South Bend, Inc., 98 B.R. 927 (Bankr. N.D. Ind. 1989). The Brethren Care court merely mentioned the sub rosa objection in approving the sale of a retirement and nursing care facility, as well as nearly all other assets, under the standards set forth in Lionel. Id.

[106] See Richmond Leasing Co. v. Capital Bank, N.A., 762 F.2d 1303 (5th Cir. 1985) (approving the assumption of a lease that was amended post-petition wherein the debtor leased railroad cars); Resolution Trust Corp. v. Official Unsecured Creditors Comm. (In re Defender Drug Stores, Inc.), 145 B.R. 312 (B.A.P. 9th Cir. 1992) (allowing payment of an enhancement fee to postpetition lender for forbearance of collection of postpetition debt); Official Comm. of Unsecured Creditors v. Raytech Corp. (In re Raytech Corp.), 190 B.R. 149 (Bankr. D. Conn. 1995) (allowing the debtor to authorize its wholly-owned subsidiary to use estate property to purchase the stock of another entity).

[107] See Richmond Leasing, 762 F.2d at 1312-13; Defender Drug Stores, 145 B.R. at 318; Raytech, 190 B.R. at 151.

[108] See Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop., Inc. (In re Cajun Elec. Power Coop., Inc.), 119 F.3d 349 (5th Cir. 1997); Lambert v. Flight Transp. Corp. (In re Flight Transp. Corp.), 730 F.2d 1128 (8th Cir. 1984); In re Marvel Entertainment Group, Inc., 222 B.R. 243 (D. Del. 1998); Official Unsecured Creditors Comm. of Pennsylvania Truck Lines, Inc. v. Pennsylvania Truck Lines, Inc. (In re Pennsylvania Truck Lines, Inc.), 150 B.R. 595 (E.D. Pa. 1992); SEC v. Drexel Burnham Lambert Inc. (In re Drexel Burnham Lambert Group, Inc.), 130 B.R. 910 (S.D.N.Y. 1991); In re Dow Corning Corp., 192 B.R. 415 (Bankr. E.D. Mich. 1996); In re Columbia Gas Sys., Inc., 1995 WL 404892 (Bankr. D. Del. 1995); In re Quality Beverage Co., 181 B.R. 887 (Bankr.

S.D. Tex. 1995); In re Crowthers McCall Pattern, Inc., 114 B.R. 877 (Bankr. S.D.N.Y. 1990); In re SIS Corp., 108 B.R. 608 (Bankr. N.D. Ohio 1989); In re Grant Broadcasting of Philadelphia, Inc., 71 B.R. 390 (Bankr. E.D. Pa. 1987); In re Lion Capital Group, 49 B.R. 163 (Bankr. S.D.N.Y. 1985).

[109] See Lambert, 730 F.2d 1128.

[110] See id.; Pennsylvania Truck Lines, 150 B.R. 595.

[111] See Grant Broadcasting, 71 B.R. 390.

[112] See Cajun Elec., 119 F.3d 349.

[113] Fed. R. Bankr. P. 9019.

[114] 119 F.3d 349 (5th Cir. 1997).

[115] See id. at 354-55.

[116] Id. at 354.

[117] Id. at 355 (quoting Richmond Leasing Co. v. Capital Bank, N.A., 762 F.2d 1303, 1313 (5th Cir. 1985)).

[118] See In re Crowthers McCall Pattern, Inc., 114 B.R. 877, 885 (Bankr. S.D.N.Y. 1990).

[119] Id. (footnote omitted)(citations omitted).

[120] See supra notes 80-82 and accompanying text.

[121] See In re Marvel Entertainment Group, Inc., 222 B.R. 243, 251 (D. Del. 1998); Crowthers, 114 B.R. at 886.

[122] See Woods v. Kenan (In re Woods), 215 B.R. 623, 626 (B.A.P. 10th Cir. 1998).

[123] See Jasik v. Conrad (In re Jasik), 727 F.2d 1379, 1382-83 (5th Cir. 1984).

[124] See 11 U.S.C. § 1141(a) (1994).

[125] 97 B.R. 852 (E.D. La. 1989).

[126] Id.

[127] See id.

[128] See id. at 856.

[129] Id. (quoting Pension Benefit Guaranty Corp. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.), 700 F.2d 935, 940 (5th Cir. 1983)).

[130] 181 B.R. 887 (Bankr. S.D. Tex. 1995).

[131] Id. at 895.

[132] See id. at 890-91.

[133] Id. at 895.

[134] 92 B.R. 973 (Bankr. N.D.N.Y. 1988).

[135] See supra text accompanying notes 90-94.

[136] See Copy Crafters, 92 B.R. at 975.

[137] See id.

[138] See id.

[139] See id. at 985-86.

[140] See id. at 983.

[141] 90 B.R. 575 (Bankr. D.N.H. 1988).

[142] Id.

[143] See id. at 575-76.

[144] See id. at 584.

[145] 82 B.R. 781 (Bankr. W.D. Pa. 1988).

[146] Id. at 783.

[147] See id. at 784.

[148] Id. at 785.

[149] Id. at 787.

[150] 54 B.R. 489 (Bankr. N.D. Tex. 1985).

[151] Id. at 497.

[152] See supra text accompanying note 81; infra text accompanying notes 165-66.

[153] 54 B.R. at 491-92.

[154] Id. at 498.

[155] In re Crowthers McCall Pattern, Inc., 114 B.R. 877, 885 (Bankr. S.D.N.Y. 1990).

[156] Id. at 883.

[157] See In re Public Serv. Co., 90 B.R. 575, 582 n.7a (Bankr. D.N.H. 1988).

[158] See supra text accompanying notes 99-105.

[159] See Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1069 (2d Cir. 1983).

[160] See discussion supra Part III.G.

[161] See Richmond Leasing Co. v. Capital Bank, N.A., 762 F.2d 1303, 1313 (5th Cir. 1985).

[162] See Pension Benefit Guaranty Corp. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.), 700 F.2d 935, 939-40 (5th Cir. 1983).

[163] Public Serv., 90 B.R. at 581.

[164] Id. at 582.

[165] As discussed in the text accompanying note 62, restrictions on plan voting is not within the scope of a section 363(b) order. Any transaction involving the use of a debtor's assets is subject to § 363(b). See, e.g., supra note 116 and accompanying text.

[166] See supra note 81 and accompanying text.

[167] See supra note 80 and accompanying text.

[168] See supra note 82 and accompanying text.

[169] See supra notes 20-25 and accompanying text.

[170] See discussion supra Part III.G.

[171] See In re Washington-St. Tammany Elec. Coop., Inc, 97 B.R. 852 (E.D. La. 1989) (extension of exclusivity); In re Quality Beverage Co., 181 B.R. 887, 895 (Bankr. S.D. Tex. 1995) (agreement settling, inter alia, claim for professional compensation and objections to claims, as well as valuing secured claim and determining its priority, converting the case to chapter 7, requiring creditors to assign claims to secured creditor in order to receive distribution of certain escrowed funds, and waiving claims where payment on distribution is not negotiated in 90 days); In re Copy Crafters Quickprint, Inc., 92 B.R. 973, 983-84 (Bankr. N.D.N.Y. 1988) (nunc pro tunc approval of postpetition lease of substantially all of debtor's property); In re Public Serv. Co., 90 B.R. 575 (Bankr. D.N.H. 1988) (transaction in which debtor would transfer managerial and operational control of plant to separate corporation); In re Conroe Forge & Mfg. Corp., 82 B.R. 781, 784-85 (Bankr. W.D. Pa. 1988) (immediate distribution of proceeds of sale of collateral); In re DRW Property Co. 82, 54 B.R. 489, 497-98 (Bankr. N.D. Tex. 1985) (substantive consolidation of debtor with 109 related nondebtor partnerships for all purposes, including federal taxation).

16 BKRDEVJ 37

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