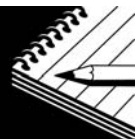


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Issues and Information for the Insolvency Professional

## Chapter 11 - “101”



## Confirmation Is Not the End of the Case

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**Editors' Note:** We have tried over the course of this column to paint a picture of the life of a prototypical chapter 11 debtor. We are near the end now, having written about plan confirmation last month. But confirmation is not the end of a case. Important things happen post-confirmation. This month, we highlight some of the more important things that should be on your radar screen as you approach, and move beyond, confirmation.

Confirmation is a watershed event in any chapter 11 case, often followed by a celebratory dinner attended by the professionals and principals of the debtor and committee, and memorialized by deal toys. The confirmation date, however, typically has less practical effect than the “effective date” of the plan. The term “effective date” is not defined in the Bankruptcy Code, but it is typically understood to mean the date on which the provisions of the plan actually go into effect.

### Confirmation Date vs. Effective Date

A plan's effective date is often 10 days after entry of the confirmation order. One reason for this is that a party can appeal a confirmation order until 10 days after confirmation, and, absent an order to the contrary, the confirmation order is stayed for

10 days pursuant to Bankruptcy Rule 3020(e). Sometimes, however, the plan dictates that the effective date is the confirmation date. In yet other situations, it is the date on which certain specified conditions have been satisfied.

Debtors typically don't want to wait any longer than necessary to have their plans become effective. There are often business reasons for this. Aside from business reasons, debtors sometimes want to implement their plans quickly in order to render appeals of the confirmation order moot. There is a doctrine of “equitable mootness” that has been used to dismiss appeals of a confirmation order when the plan has been implemented such that effective relief cannot be granted to the appellant without “unscrambling the eggs.” Thus, debtors often seek a waiver of the 10-day stay in the confirmation order, and then seek to implement their plans as promptly as possible.

Less commonly, an effective date is intentionally delayed. For example, if the plan depends on funds that are going to be received at some point in the future, the plan may provide for a delayed effective date—since the plan doesn't make any sense unless the money shows up. The same may be true where critical transactions are subject to post-confirmation regulatory review. Courts differ, however, in their views regarding whether an effective date that is delayed in this way is appropriate.

### Implementing the Plan

On the effective date (or as soon thereafter as possible), the reorganized debtor, or whomever is charged with implementing the plan under its terms, will implement the plan. What this entails depends on what the plan provides. It may involve closing on the sale of assets, entering into new or amended notes and security agreements, merging into a new entity, amending articles and bylaws, or any number of other transactions. Bankruptcy Code §1142(a) provides for this implementation of the plan.

Sometimes, the reorganized debtor will need cooperation from other parties in order

to implement the plan. For example, the debtor may need a secured creditor to record an instrument releasing its lien as provided in the plan. Section 1142(b) provides that the court may order parties to execute and deliver documents that are necessary to implement the plan.

### Revocation of Confirmation and Related Relief

Code §1144 allows the court to revoke the confirmation order within 180 days after its entry if the confirmation order was procured by fraud. If this happens, the debtor loses its discharge and the plan is no longer effective. However, §1144 provides that an order revoking confirmation will “contain such provisions as are necessary to protect any entity acquiring rights in good-faith reliance on the order of confirmation.” For example, a purchaser of assets who was not a part of the fraud should be protected by the court's revocation order. If you represent a party who has entered into transactions with a reorganized debtor under a plan, and the court is subsequently considering revocation of confirmation, you will want to make sure you appear and obtain sufficient protections in any order that might be entered.

Perhaps more frequently than the fraud case described above, you may see confirmation undermined because conditions precedent to the effective date could not be satisfied, so the plan could not be implemented. Perhaps a financing transaction did not close, an asset-purchaser walked away or some necessary governmental approvals were not obtained. Absent fraud, this sort of problem cannot be solved under §1144. If the problem arises within 10 days after entry of the confirmation order, relief may be available under Bankruptcy Rule 9023, which makes Fed. R. Civ. P. 59 applicable to bankruptcy cases and allows amendment or modification of the confirmation order.<sup>1</sup>

<sup>1</sup> In contexts other than confirmation, Fed. R. Civ. P. 60 would allow parties to seek relief from an order for up to one year on a variety of grounds. While Fed. R. Civ. P. 60 is made applicable to bankruptcy cases by Bankruptcy Rule 9024, Rule 9024 limits the time to file a complaint seeking to revoke an order confirming a chapter 11 plan to the 180-day time period provided under Code §1144. Rule 9024 does not mention §1144's requirement that fraud be shown to obtain relief, but courts have imposed that requirement as the only reasonable interpretation of the interplay between §1144 and Rule 9024.

Some plans will contain specific provisions governing what happens if the plan is confirmed but thereafter cannot be implemented. It is probably a good idea to include such a provision if there is any risk that an effective date condition will not be satisfied in order to avoid uncertainty. It may also be possible to salvage the plan by modifying it. Code §1127 allows modification of a plan that has been confirmed but has not yet been substantially consummated. The modified plan must then be presented to the court for confirmation under Code §1129.

## Discharge

While confirmation can be viewed as a goal unto itself, it is not confirmation *per se* that debtors seek to achieve. What they seek is to restructure their debts and other relationships so that their business can be viable and then to obtain a discharge so that creditors cannot enforce pre-confirmation claims other than in accordance with the confirmed plan. Code §1141(d) provides for this discharge. Note that the discharge is afforded only to debtors that remain in business; those that will liquidate under a chapter 11 plan do not receive a discharge. See Code §1141(d)(3).

Plans also sometimes provide for the release of certain third parties, including officers, directors, creditors' committees and their members, new investors, and often their professionals, advisors and the like. With input from the U.S. Trustee's office, some courts limit the scope of these releases, and a substantial body of case law has grown up around this issue.

## Res Judicata Effect of the Plan

A chapter 11 plan that has been confirmed by a final order of the bankruptcy court is *res judicata* as to the matters it addresses, so long as its confirmation was not obtained by fraud or by the denial of due process. Even provisions that are arguably inappropriate will bind parties who had proper notice, unless the confirmation order is timely appealed.

## What Happens to the Debtor's Assets?

A plan is often described as a contract between the debtor and its creditors. The debtor has to make the payments provided for under the plan, but the assets of the estate are otherwise re-vested in the reorganized debtor, unless the plan provides otherwise. Although the reorganized debtor will usually want to move on with life, it will have bankruptcy-related tasks even after the effective date. These may include reviewing and objecting to claims, making payments provided for under the plan,

pursuing avoidance actions, filing reports, paying U.S. Trustee's fees and other tasks. In some cases, these tasks may take a couple of years or more—particularly in large cases.

If the plan is not a reorganization plan but a liquidating plan, the estate's assets typically vest in a "liquidating trust" (or sometimes another liquidating entity, such as an LLC). These entities complete the liquidation of assets, pursue avoidance and other actions, review and resolve claims, and make distributions to creditors. Even in the case of a reorganizing debtor, there will sometimes be a creditors' trust to deal with certain non-core assets, such as avoidance actions. In many cases, this liquidating entity is administered by former creditors' committee members or their professionals.

## The Bankruptcy Court's Continuing Jurisdiction

The bankruptcy court's jurisdiction over the reorganized debtor and the estate does not end abruptly at confirmation, and plans typically provide for a bankruptcy court to retain rather broad jurisdiction.

A reorganized debtor may enforce a confirmed plan in non-bankruptcy court, just as it would enforce any other contract. However, most debtors tend to prefer the bankruptcy court, thinking that the bankruptcy court will understand the background better than another court, and perhaps will be more sympathetic to the debtor's cause. Thus, most plans contain, toward the back, a long list of disputes over which the bankruptcy court will retain jurisdiction. Many such lists include a catch-all that purports to cover just about everything. Many debtors hope that by including a broad "continuing jurisdiction" provision in the plan and then deferring closing the case, they will be able to come back to the bankruptcy court to litigate any disputes, rather than proceeding in state court.

There is some difference among the circuits with respect to the scope of post-confirmation jurisdiction, with some circuits limiting it to matters relating to implementation of the plan and others appearing to construe the scope more broadly. Parties who get sued by a reorganized debtor should look at the continuing jurisdiction provisions of the plan and the particular circuit's case law regarding the scope of post-confirmation bankruptcy court jurisdiction. They may find their settlement leverage increased if the debtor believes that it will have to litigate outside the bankruptcy court.

## A Final End to the Bankruptcy

When the case has been fully administered, Code §350 provides for the case to be closed. The estate representative (reorganized debtor, liquidating trustee or whoever has taken over these responsibilities) will file a final report showing how the estate has been administered, what payments were made, etc., and will request the entry of a final decree closing the case. That is typically the end of the case, although §350(b) does allow a case to be reopened if there is cause to do so. ■

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