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The Death of Chapter 11 Plans: Are Confirmed Chapter 11 Plans Subject to Statutory Renewal?

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In this article, the author explores the question of whether confirmed Chapter 11 plans of reorganization have an expiration date like other federal district court judgments.

Are confirmed Chapter 11 plans of reorganization immortal or do they have an expiration date like any other federal district court judgment? This article will answer this question and will conclude that a Chapter 11 confirmed plan — the order confirming the plan[1] — is not immortal. A confirmed plan of reorganization under Chapter 11 requiring the payment of money is a federal money judgment and therefore subject to the requirements of state statutory renewal similar to any federal or state money judgment based on the law of the domicile where the district or bankruptcy court is sited.[2] Confirmed plans expire like any other federal or state money judg-

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ment. Upon expiration of the confirmed plan and depending upon the renewal statutory scheme of the domicile state statute, the debtor is discharged of all continuing obligations under the plan including obligations to pay creditors directly or a trust established by a the plan for benefit of creditors.[3]

The answer to this inquiry is monumental. In these recessionary times, American marquee names file their pre-packaged Chapter 11 plans and exit the courthouse with multi-year confirmed plans in hand providing for payments due to:

- Bond holders;
- Commercial lenders;
- Unions;
- Asbestos or mass tort trust funds;[4]
- Governmental entities;
- Statutory compensation funds;
- Retiree and health care trusts;
- Commercial vendors; and
- Consumers and tort victims.

Plan payouts under these confirmed megaplans routinely exceed $1 billion.[5] Some cases, such as *General Motors Corporation* and *Chrysler LLC*, assume national and global financial and political proportions.[6] The expiration of these confirmed megaplans would relieve these debtors from billion dollar obligations which, given the financial stakes involved, becomes too tempting[7] to ignore and leaves attorneys and other fiduciaries potentially duty-bound to exploit.[8] As the major shareholder in the revested debtor, asbestos trust funds would reap a financial benefit which could exceed any degradation of trust assets suffered by the extinguishment of continuing payments. Asbestos trusts are major shareholders in Johns Manville, Owens Corning, W.R. Grace (warrants to buy company at a favorable price), and Halliburton,[9] among others.[10]

If indeed a Chapter 11 confirmed plan is subject to expiration based on state law, a broad swath of consumer and/or tort victims[11] would confront

the very real prospect that the debtor could effectively escape liability for massive and unconscionable wrongs perpetrated on a national basis and exit bankruptcy with its capital unscathed as the plan necessarily revests the debtor with estate assets.[12]

This article will demonstrate that Chapter 11 confirmed plans of reorganization are born on the bankruptcy bench and die of old age on the lawyer's desk if not timely renewed under state law.

CONFIRMED PLANS ARE FEDERAL JUDGMENTS: THE DOCTRINE OF FINALITY IN CHAPTER 11

Confirmed plans are simultaneously consent decrees,[13] judgments,[14] and contracts,[15] and they bind all parties.[16] The doctrine of *res judicata* applies "with equal force to final judgments rendered by bankruptcy."[17] A bankruptcy court's order of confirmation is treated as a final judgment with *res judicata* effect.[18] After confirmation, all parties are precluded from raising claims that could have been raised but were not raised before confirmation.[19] *Res judicata* principles bar parties from asserting a legal position after failing to object without reason to the relevant proposed plan of reorganization or its confirmation or to appeal the confirmation order.[20] A confirmed plan provides for finality[21] and the case law holds that a confirmed plan is a federal judgment with both collateral estoppel and *res judicata* effects.[22]

In *United Students Aid Funds, Inc. v. Espinosa,*[23] the Supreme Court held that an order confirming a Chapter 13 plan is a final judgment, holding, in pertinent part, as follows:

> "The Bankruptcy Court's order confirming Espinosa's proposed plan was a final judgment, see *In re Optical Technologies, Inc.,* 425 F.3d 1294, 1300 (C.A.11 2005), from which United did not appeal. Ordinarily, 'the finality of [a] Bankruptcy Court's orders following the conclusion of direct review' would 'stan[d] in the way of challenging [their] enforceability.'"

As an order confirming the plan (whether Chapter 11 or Chapter 13) is a judgment, the next question is whether the plan is a money judgment.

A CONFIRMED PLAN IS A FEDERAL JUDGMENT, AND THE PROVISIONS WHICH PROVIDE FOR PAYMENT DUE CREDITORS ARE MONEY JUDGMENTS

Confirmed Plans Require the Debtor to Pay Creditors

Confirmed plans require the debtor to pay the plan participants, examples being priority and administrative creditors (*e.g.* taxes, wages, and fees due professionals or the U.S. Trustee, etc., DIP financiers,[24] PACA claims,[25] reclamation claims,[26] secured, unsecured and subordinated creditors, and trusts for benefit of mass torts[27]). In Chapter 11 parlance, the debtor pays allowed claims which courts routinely characterize as a federal judgment. Based on this judicial characterization, the courts have held that the allowed claim is deemed a judgment and accrues interest predicated upon a federal money judgment pursuant to federal statute.[28] Upon bankruptcy, absent a timely objection, all claims against the estate are "deemed allowed" as of the filing date.[29] From and after the petition date, the creditors hold the equivalent of a federal judgment against estate assets which are enforceable only in federal court.[30]

The confirmed plan requires the debtor to pay creditors,[31] which is the core characteristic of any money judgment. Courts characterize the plan obligations owed by debtor to pay creditors as money judgments. In *Dow Corning Corporation,*[32] the court held that allowed claims were deemed judgments as part of the proposed plan of reorganization. The Official Creditor's Committee objected to the plan proposed by the debtor and the Committee of Tort Claimants on the basis that the plan provided for interest at the federal rate while the objecting parties (the Official Creditor's Committee presumptively consisting of commercial claimants) were seeking interest at a contract (and presumably higher) rate.

The issue in *Dow Corning* was that the debtor was solvent enough to pay interest at the more advantageous contract rate to creditors and that, therefore, any distribution less than payment of the full contract rate failed to comply with 28 U.S.C. § 1129(a)(7),[33] being the "best interest of creditor's test."[34] The court held that the federal rate, and not the contract rate, applied under 28 U.S.C. § 1961(a) on the basis that the allowed claim is a

money judgment,[35] reasoning that an allowed claim fundamentally constitutes a money judgment because the judgment is a final judicial decision subject to appeal. In reaching this position, the court cited to *Moore's Federal Practice,*[36] which states that "[i]f the order is appealable, the order is a judgment...."[37] The court also cited *Catlin v. United States,*[38] which held that "[a] final decision generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute on the judgment."[39]

In comparison, in *Dow Corning,* the issue was the appealability and finality of an order for payment of claims under 11 U.S.C. § 502(a)[40] as part of the confirmed plan of arrangement. Regardless of whether the payment is statutorily due under Section 502(a) *et seq*. or if the confirmed plan provides for payment independently under Section 1129(a)(7)(A)(ii), the result is the same. An order has been issued by the court which requires the debtor to pay the claims of creditors based on the fact that the creditor is legitimately owed the money, timely filed a claim, or that the claim is scheduled as undisputed and non-contingent.

The *Dow* court concluded, as follows:

> "The Code makes no substantive distinction among allowed-claim holders based on how allowance came about. *See* 11 U.S.C. § 502(a) ('A claim [to which no party in interest objects] ... is deemed allowed.') Black's Law Dictionary (6th ed.1990) (defining the word 'deem' as meaning to 'treat as if'). *See also*, e.g., 4 Collier on Bankruptcy ¶ 502.02 (3)(a) ('Until an objection is made and sustained, all allowed claims stand on equal footing for purposes of distribution of the debtor's assets.'); ...Consequently, a creditor that encounters no resistance to its claim is treated for distribution purposes the same as if a Section 502(b) order had in fact been entered in its favor. In the previous Section, the Court determined that a claim allowed pursuant to a Section 502(b) order constitutes a 'money judgment.' It follows that for purposes of distribution a claim that is 'deemed allowed' will be treated as if it were also a "money judgment."[41]

The inference from this statement is that the portion of a confirmed plan which provides for payment of allowed claims becomes a money judg-

ment and bears interest at the federal rate.[42] *Dow* holds that an allowed claim, by default or in a contested matter, is deemed a federal money judgment for the purpose of setting the rate of interest. *Dow* characterizes the plan obligation to pay owed by the debtor the creditor as a final judicial order which replicates a money judgment.

Confirmed Plans Require Payment of Money Like Any Other Money Judgment

Critics will charge that a confirmed plan (or part) providing for payment of money is not a judgment for money which usually specifies that a plaintiff *recovers* money from a defendant. This distinction is one of semantics.

Based on 11 U.S.C. § 1129(a)(7)(A)(ii), confirmed plans require that the "debtor shall pay creditors…[periodic payments, payments from a 'pot,' payments from profits or proceeds, payments from litigation recoveries, proceeds from the sale of assets, collection of notes or receivables, or an 'earn-out' due from a third party]." A civil judgment declares that "plaintiff recover money from the defendant."[43] In both cases, judgments (the money judgment and the plan) require the debtor to pay the creditors. The confirmed plan makes the creditor's claim a money judgment because the bankruptcy judge, by dint of the Confirmation Order, renders the plan a final judgment which requires the debtor to pay the creditors according to terms of the confirmed plan. Courts routinely conduct trials to adjudicate what the debtor is obligated to pay creditors under Section 1129(a)(7)(A)(ii), as noted in *In re Conseco, Inc*., as follows:

> As part of the confirmation hearing on an earlier version of the plan, the court conducted a lengthy trial to determine the value of the debtors for purposes of Section 1129(a)(7)(A)(ii). At the trial, the TOPrS Committee and the debtors each tried to prove that its valuation was correct. While the court was preparing its decision, the TOPrS Committee and the debtors reached a settlement... Under the settlement, the TOPrS Committee and the debtors agreed that the value of the debtors for purposes of Section 1129(a)(7)(A)(ii) is $3.8 billion, the amount the debtors attempted to establish at trial.[44]

Had the parties in *Conseco* not settled their differences, the trial court would have entered a judgment adjudicating what the debtors were required to pay under the confirmed plan. In the end, whether the judge states in a money judgment that "plaintiff shall recover against defendant the sum of *x* dollars" or in a confirmed plan that "the debtor shall pay creditors *x* dollars" makes no difference. The judge is ordering that money shall change hands and is requiring the debtor to pay the creditors.

Consent Decrees Requiring Payment are Subject to Renewal and Expiration if Not Renewed

In *Andrews v. Roadway Express,*[45] the court held that a consent decree requiring payment due the class constituted a money judgment and, subject to the requirements of the state, mandated a renewal statute to authorize execution. The plaintiffs had prosecuted with a class action discrimination (race and national origin) lawsuit against Roadway Express, culminating in a consent decree providing for compensation due 200 members.[46] Seventeen years after the Supreme Court denied review of the Order confirming the consent decree, the plaintiffs filed suit in district court to recover benefits under the consent decree.[47] The trial court construed the consent decree as a money judgment [48] and held the action to be untimely under Texas state law which mandated the renewal of a money judgment prior to its expiration under Texas law.[49] The plaintiffs also argued that the Consent Order was not sufficiently definite to support the issuance of a writ of execution because Texas state law required that the execution describe the names of the parties in whose favor and against whom judgment was entered and that it specify in the body the sum recovered or directed to be paid and the sum actually due when it is issued.[50]

The plaintiffs claimed that no writ of execution could issue under Texas state law because the order to be enforced did not include the names of the relevant parties or state the amount to be paid.[51] The court rejected these arguments, holding that even if the judgment (*i.e.*, the consent decree) was too vague for a writ of execution under Texas law, plaintiffs still should have brought an enforcement action in the district court before the time expired under Texas law.[52] The court also found sufficient particu-

larity to permit the issuance of a writ of execution because the Consent Decree obligated Roadway Express to "pay to the individuals listed on Exhibit '1' of the Joint Motion for Approval of Individual Calculations of Back-Pay Settlement Amounts…" and sufficiently identified a "debtor" and "creditors."[53]

Confirmed plans likewise provide for identical language requiring the debtor to pay various classes of creditors who are sometimes listed on the plan or contained in the schedules (if undisputed and non-contingent) or timely filed claims and allowed. In assessing whether a confirmed plan is a money judgment, the test is not necessarily *per se* whether a particular creditor could seek a writ of execution in favor of the creditor to enforce the plan terms against the debtor from the clerk of the United States Bankruptcy Court. As stated in *Andrews*, the test is whether the consent decree required the debtor to pay the creditor(s), which it did[54] and which is the key characteristic in any confirmed plan.

Dow Corning treated an allowed claim as a money judgment under a confirmed plan in calculating the rate of interest at the federal judgment rate set by 28 U.S.C. Section 1961(a), as opposed to the contractual rates incorporated in the pre-petition contracts between the creditors and the debtor.[55] Declaring the allowed claims as money judgments entitled to federal judgment rates of interest represents a judicial adjudication that the amounts now due creditors under the confirmed plan arise from a money judgment as the source of liability, and not the pre-petition contracts. Section 1129 (a)(7)(A)(ii) requires the debtor to pay these allowed claims. *Andrews* treats consent decrees as money judgments and obligates the claimants to timely renew their judgments or face extinguishment of their monetary claims.[56] These cases lead to the conclusion that confirmed plans requiring payments due creditors are, in fact, money judgments.[57]

Casting a confirmed plan as a federal judgment compels further parceling to assess whether a confirmed plan or any portion of the plan is actually a money judgment and subject to renewal. At their core, Chapter 11 plans seek to rehabilitate the distressed debtor. They require a minimum recovery due creditors based on their potential recovery in a Chapter 7 liquidation, as mandated by Section 1129(a)(7)(A)(ii). The part of the confirmed plan that requires payment of money are the terms compelling the debtor to pay credi-

tors who hold allowed claims under Section 1129(a)(7)(A)(ii). This mirrors payments due under a consent decree as seen in *Andrews.*

California defines a money judgment as "…*that part of a judgment* that requires the payment of money."[58] The key language is "*that part of a judgment*." This limits the requirements of a statutory renewal to the part of the judgment which requires payment of money. Superimposing California's definition of a money judgment upon a confirmed plan requiring the debtor to pay creditors who hold allowed claims can be harmonized on three separate levels.

First, the provision in the plan providing for payment due creditors is a money judgment and is consistent with *Dow Corning* in classifying an allowed claim under the confirmed plan as a money judgment awarding interest at a judgment rate. Second, classifying the plan terms that mandate payment from the debtor due a class of creditors as a money judgment mirrors the relief in the *Andrews* consent decree. Third, California's definition of money judgment is "that part of a judgment that requires the payment of money." The fact that the judgment (or part of the judgment) "requires payment of money" includes a category of monetary relief beyond the typical plaintiff/defendant scenario and can be readily expanded into interpleaders, class action recoveries, multi-party litigation, trust fund litigation, and other large-scale litigation[59] which may involve multiple plaintiffs and defendants and complex monetary relief, all of which replicate modern confirmed plans.

FEDERAL JUDGMENTS ARE SUBJECT TO RENEWAL UNDER F.R.C.P. 69(A)(1): FEDERAL MONEY JUDGMENT LACK ANY SPECIFIC STATUTE OF LIMITATIONS OR STATUTE OF REPOSE.

"There is 'no specific federal statute of limitations on how long [a federal] judgment is effective.' (citation omitted) When no federal statute applied, state practices and procedures are utilized…."[60] State law provides a judgment creditor with the rights and remedies to enforce a federal money judgment under F.R.C.P. 69(a)(1) including the renewal of a money judgment.[61]

In *In re Levander*,[62] the Ninth Circuit held that the federal courts uti-

lize the law of the domicile in the enforcement of a judgment.[63] Similarly, in *McCarthy v. Johnson,*[64] the court held that Utah state law provided the mechanism for the renewal of a federal judgment. In *Fidelity Nat. Fin. Inc. v. Friedman*, the Ninth Circuit also held that state law applies in measuring the life of judgments.[65] Federal and bankruptcy courts apply state law when renewing a judgment because federal judgments lack a *federal* expiration date.[66] While *Fidelity* dealt with a registered judgment, the principle that a registered judgment is deemed a judgment for all purposes under 28 U.S.C. § 1963 is nevertheless applicable. Ninth Circuit cases are consistent in holding that the federal courts are to apply state law in determining the statute of limitations.[67] Likewise, the Fifth Circuit applied Texas state law in *Andrews*, holding that a consent decree is time barred as a result of the plaintiffs' failure to timely renew the judgment.[68] Unless a federal statute provides otherwise, the practice relative to the revival of dormant judgment is governed by state law.[69]

Some states have held that a time-barred judgment is extinguished and ceases to exist at all, as opposed to having a procedural rule that merely bars recovery in the enforcement of judgments.[70] In *United States v. Tacoma Gravel & Supply Inc*.,[71] the Ninth Circuit, construing Washington state law, held that Washington state's limit on the enforceability of judgments is a statute of extinguishment (*i.e*., a statute of repose),[72] not a statute of limitations. The Fifth Circuit unequivocally held that "…this is not a statute of limitations but of extinguishment; after six years a Washington judgment has no force or effect—it ceases to exist. [Collection of Washington state cases]"[73] The *Tacoma* court applied Washington state law to bar enforcement brought by the United States, stating that the "Appellant had no judgment left to renew," a conclusion predicated in part on the government's filing in state court.[74] The court did not leave the government empty-handed, leaving open the prospect that the underlying claim was still viable under *United States v. Summerlin*.[75] *Tacoma* is important because it demonstrates that a renewal statute is also a statute of repose that may extinguish the judgment completely.

CONFIRMED PLANS PROVIDING FOR PAYMENT OF CREDITOR'S CLAIMS EXPIRE UNDER STATE LAW IF NOT TIMELY RENEWED

Chapter 11 Plans Are the Product of a Statutory Bargain

Upon plan confirmation, the estate no longer exists and the property then in the hands of the debtor in possession reverts to the debtor or a newly created entity.[76] Under 11 U.S.C. § 1141(d)(1)(A),[77] the confirmed plan discharges the debtor from any pre-petition liability owed to creditors and equity holders, reverting the estate property to the debtor.[78] Section 1141(d)(1)(A) swaps out the creditor's pre-petition claims against the debtor and Section 1129(a)(7)(A)(ii) swaps in the plan recompense due the creditor.[79, 80] 11 U.S.C. § 1129(a)(7)(A)(ii) provides that the creditors receive payment ("property") that is not less than the amount distributed had the debtor filed Chapter 7.[81] The confirmed plan is the sole means of payment due the creditors, who can then enforce the plan provisions providing for payment in the event of default, either via a motion to convert based on a plan default[82] or via filing a suit based on the plan in either federal or state court.[83]

The confirmed plan specifies what remedies, if any, are available to the creditors in the event of default and accrues a right of action in state court[84] to enforce the terms of the plan or in bankruptcy court to the creditors through a motion to convert under 11 U.S.C. § 1112(b)(4)(M) and (N).[85] Confirmed plans require the debtor to pay creditors at a specific date and create rights of enforcement due creditors in the event of a default in plan payments.[86] The right of enforcement for the amounts due creditors under Section 1127(a)(7)(A)(ii) is at the core of all judgments.

Federal Money Judgments Are Subject to Renewal and Therefore Confirmed Plans Are Subject to Renewal

Federal money judgments are subject to state laws regarding renewal. Therefore, a confirmed plan (or the part providing for requiring payment due creditors), as a federal money judgment,[87] is likewise subject to the same state-mandated rules to renew a money judgment. *Andrews,* in hold-

ing that a consent decree is a money judgment and subject to renewal under local law, supports the proposition that the confirmed plan (or that part providing of payment)[88] is subject to renewal under state court process like any other money judgment.

District court consent decrees and key provisions of Chapter 11 confirmed plans are identical in requiring a debtor to pay a group of creditors. Under 11 U.S.C. § 1129(a)(7), the plan provides for payments due creditors based on the jurisdiction of the court as their sole judicial recompense.[89] The confirmed plan, being a judgment, would have the same force and effect as any other money judgment (to the extent of payment)[90] and would be subject to the same requirements of statutory renewal that apply to judgments.[91]

Absent timely renewal, the confirmed plan (or part providing for payment to creditors) expires.[92] The rights of action, whether as an action in state court to enforce the plan or as motion to convert pursuant to 11 U.S.C. § 1112(b)(4)(M) and (N), are extinguished if based on a default in payments.[93]

California money judgments have a 10-year lifespan.[94] California state law authorizes a renewal by filing an application for renewal with the clerk of the court.[95] California likewise permits a judgment creditor to file a separate suit to renew the judgment.[96] In contrast, Arizona judgments have a five-year lifespan which may be shorter than the life of complex confirmed plans.[97] Given that F.R.C.P 69(a)(1) incorporates the law of the state to renew a judgment, a plan arising from the bankruptcy court located in Arizona would expire in five years unless it was renewed.

THE ARGUMENTS OVER WHETHER CONFIRMED PLANS ARE TO BE RENEWED OR THE PLAN EXPIRES AND FREES THE DEBTOR FROM PLAN COMPLIANCE

The Potential Outcome

The consequences are inescapable. Confirmed plans (or the parts which provide for payment of creditors) are federal judgments subject to state law for timely renewal. As a money judgment (the part providing for

payment), the confirmed plan will expire based on state law compelling renewal of any money judgment. Legal standing to renew the confirmed plan remains an issue that leaves doubt as to whether a particular creditor may renew the confirmed plan for itself only or for others.[98] A shrewd creditor would only seek to renew the confirmed plan itself and no other creditors, placing that creditor and the debtor in a better position because expiration of other claims enhances the debtor's financial position through wholesale debt relief.[99] The renewal would presumably be filed in the original bankruptcy court, but this presumes a reservation of jurisdiction; otherwise a party could file suit limited to that party's interest. Plan drafters should designate a party to renew the plan as a whole or grapple with the prospect of a partial renewal due individual creditors.

Repartee and Repost

The Debtor Claims That Confirmed Plan Is Extinguished

Being required to make payments under a plan in excess of a domicile state's renewal statute, the debtor might seek to discharge all remaining plan obligations, both monetary and non-monetary depending upon local state law.[100] The debtor may argue that the plan's expiration extinguishes all obligations and frees the debtor from making any payments accruing beyond the state judgment renewal requirements.

The Creditor Claims That Confirmed Plan Survives the Passage of Time to Guaranty Payment Required by Section 1129(a)(7)(A)(ii)

Creditors can theoretically respond that a plan is a contract and seek enforcement under a breach of contract theory, assuming that the state law statute of limitations for breach of contract claims has not expired. Creditors could also argue that the confirmed plan's expiration and extinguishment undermines the confirmed plan's guaranty of compensation due creditors under Section 1129 (a)(7)(A)(ii)[101] and that the confirmed plan would remain "alive" until all obligations are discharged.

Creditors could also claim that the plan obligates the debtor to continue plan payments as a contract and that any breach would precipitate the filing

of an independent action in state or federal court for traditional enforcement. This presumes that even though the plan as a judgment has expired, the plan is a "stand-alone" contract nonetheless.[102] This would possibly allow the creditor to enforce the plan in state or federal court according to its terms. Creditors could seek to enforce the terms of repayment, which would hopefully include acceleration, attorneys' fees, favorable venue, forum selection, and choice of law provisions, and a waiver of defenses and/or jury trial.

The Debtor Reply That the Confirmed Plan is the Sole Source of Liability and Absent a Renewal, Whether Filed or Automatic, the Plan Expires, and All Concurrent Duties to Continue Payments

The debtor could reply that the obligation to pay creditors is solely derived under the confirmed plan mandated by Section 1141(a) and the obligation to pay arises from the plan as a viable final judgment. Absent a renewal or effective waiver, the confirmed plan as a final money judgment would expire notwithstanding the fact that the plan's demise would deprive creditors of promised compensation.[103] The debtor could argue that even though the Chapter 11 plan is a contract between the debtor and the creditors, the "contract" is embodied in a court order which measures its enforceability, and most important, the confirmed plan is not subject to an "automatic renewal." The debtor could argue that plan immortality is a negotiating chip reflected by the fact that Section 1123(a), in its mandatory language,[104] does not require a plan term assuring immortality; therefore the creditor's committee should have insisted on an automatic renewal or designated a party in interest to renew the confirmed plan. The debtor could also counter that the state renewal statute is one of repose that extinguishes the judgment as opposed to barring enforcement only.

Given this, the debtor might concede that the confirmed plan has indicia of a contract in which the debtor agreed to pay creditors, leaving open the issue of whether a breach in this promise guaranties the creditor's access to the civil court. However, Section 1129(a)(7)(A)(ii) guaranties the recovery due creditors while Section 1141(a) condenses this guaranty into a judgment.

The debtor may then conclude that the obligation owed by the debtor

to the creditors is solely embodied in the plan as a judgment and that, if the plan (as a judgment) expires, then the creditors forfeit their rights.[105]

The Court Rules

A confirmed plan is a judgment, a consent decree, and a contract.[106] Under these hypothetical facts, the plan beneficiaries did not renew the confirmed plan. The confirmed plan lacks an "evergreen" provision, rendering it mortal. Domicile states such as Washington[107] and Mississippi[108] have statutes of repose that extinguish the confirmed plan like any other federal money judgment. The debtor may therefore move in bankruptcy court for an order declaring the plan extinguished under the domiciliary state's statute of repose, discharging the debtor from any continuing obligation to make plan payments. The creditors may respond with a countervailing motion to convert for a breach in the plan under 11 U.S.C. § 1112(b)(4)(M) and (N) (breach in plan performance). The stage is set.

In this scenario, the judge should apply the parol evidence rule[109] to find that the confirmed plan is the sole embodiment of the rights and liabilities of all parties and, absent actual renewal or a term that automatically renews the plan, the confirmed plan expires like any other federal money judgment. The court should also note that confirmed plans are judgments that foreclose the parties from raising any issue or claim at a later date because confirmed plans, like all federal judgments, are final.[110]

The court should note that any party in interest may object to the plan under 11 U.S.C. § 1128, which provides, in pertinent part, that "(a) After notice, the court shall hold a hearing on confirmation of a plan. (b) A party in interest may object to confirmation of a plan."[111] The court should find that the creditors should ensure that the plan guaranties payment under Section 1129(a)(7)(A)(ii)[112] and, if payments under the plan overlap, or expire and/or fall short of the requisite payment, then those creditors should raise this issue with the court at the plan confirmation hearing.

Section 1128 grants every "party in interest"[113] statutory standing to object to the plan confirmation hearing, rendering the plan confirmation process "democratic" as guaranteed by the right of participation mandated by Sections 1109(a) and 1128, along with the right to vote on the plan.[114]

Anybody with an Article III interest in the case may stand at the lectern.

Assuming that the creditors or the committee failed to point out the flaw at the plan confirmation hearing when they had an opportunity, finality and the parol evidence rule bar the court from judicially inserting an automatic right of renewal,[115] particularly in light of the fact that most plans represent months of contentious negotiations by sophisticated parties represented by experienced counsel and financial advisors thereby accruing millions of dollars of fees borne by the debtor. Many plans go through multiple versions[116] and these plans and disclosure statements rival billion dollar bond offerings and stock prospectuses in the quality and quantity of information. A court should likewise take note that the committee, a creditor, or other party with requisite standing can file the renewal with the court and preserve the vitality of the plan to ensure plan compliance and continued plan payments.[117] These parties had sufficient standing to object to the plan based on the lack of an automatic renewal and could have insisted that an automatic renewal be incorporated, lest the plan expires, depriving plan participants of their recovery promised under Section 1129(a)(7)(A)(ii).[118] Demanding the incorporation of a renewal in a plan replicates the mandate that a jurisdictional retention provision be incorporated to preserve the court's post-confirmation subject matter jurisdiction.[119]

Certainly, the creditors would complain that the plan expiration deprives them of the statutory grant of compensation not less than available in Chapter 7,[120] but the court's response in this scenario is that the creditors and the committee representing their interests are duty-bound to ensure that the confirmed plan compels the debtor to comply with this statutory mandate.

Courts should note the financial disaster that may befall creditors such as mass tort claimants (asbestos, breast implant, etc.), deprived of plan-mandated compensation due from the debtor, along with the concurrent adverse national impact upon government-funded health care and social services,[121] balanced against the financial windfall befalling the debtor and its shareholders in the debtor's newly-minted net worth that was restored by the discharge of the plan obligations.[122] It is worth noting that the multi-party adversarial process in Chapter 11 produces a confirmed plan

which embodies a negotiated compromise[123] that constitutes the judgment of the court,[124] of no greater or lesser potency and force than any other federal judgment,[125] and that negotiations of the parties should incorporate plan immortality during the plan process.

This recognizes that the hardship suffered by the creditors, who otherwise face plan extinguishment and forfeiture of compensation as guaranteed by the plan, is neither greater nor lesser than the burden facing any creditor in safeguarding valuable state law claims from expiration, based upon a statute of limitations or repose. "Confirmation generally discharges the debtor from its pre-confirmation debt and substitutes the obligations of the plan for the debtor's prior indebtedness. See Section 1141(c), (d), 'The plan is essentially a new and binding contract, sanctioned by the Court, between a debtor and his pre-confirmation creditors.'"[126] Section 1123(a) [mandatory terms], Section 1129(a)(7)(A)(ii) [recovery due creditors], Section 1141(a)(b)(c) or (d) [effect of plan confirmation] do not require that the plan render a recovery due creditors superior to the pre-confirmation claims, only that the plan recovery be equal to the Chapter 7 payout as the "substitute." Confirmed plans replace a creditor's claims for plan terms and nothing more.

A court should also emphasize that the Chapter 11 democracy enshrined by Sections 1109(b) and 1128, together with the right to vote under Section 1126(d), guaranties the right of participation and not plan perfection. Plan perfection and its many moving parts are left in the hands of the skilled, highly-experienced plan participants. Courts sometimes confirm a plan which may improperly release guarantors,[127] extinguish valuable claims to recover property due the debtor (or non-existent estate),[128] and/or bar viable claims against third parties.[129] Creditors need to object to these ostensibly flawed plans.

Nearly all, if not all, of the mishaps which degrade the recovery due creditors potentially below the statutory minimum of Section 1129(a) (7) (recovery equal to the Chapter 7 payout) arise from the creditor's (or the debtor's mediocre plan drafting) failure to object to the plan during the confirmation process.[130] The court should conclude that the creditor bears the affirmative responsibility to raise any claim of defect in the confirmed plan, lest, for example, the court confirm the plan in spite of the possibil-

ity of extinguishment of a statutory right (bar against discharge of non-debtor).[131] The court should caution that the creditors were duty bound to raise plan "mortality" at the confirmation hearing, and absent their participation, the court should confirm a plan, subject to expiration under the domicile state's renewal statute.[132] A court should conclude that because creditors entitled to payment by a bankruptcy court judgment must renew the money judgment in bankruptcy court or risk its expiration,[133] that the creditors entitled to payment compelled by a confirmed plan, deemed a judgment, must renew the confirmed plan or risk its expiration.

In a post-confirmation conversion to Chapter 7, some courts have held that the conversion is futile, reasoning that after confirmation no estate property remains to be administered.[134] On the other hand, other courts have concluded that upon conversion, the property of the debtor revests in the Chapter 7 estate upon conversion. The rationale is that a contrary result would render meaningful the express authorization of post confirmation conversion under 11 U.S.C. § 1112(b).[135] The crucible of these cases parcels out whether assets are to be revested in the estate or whether the assets held by the debtor (or newly formed entity) will be free from revesting in the hands of the trustee. Most plans provide for revesting as follows: "…all property owned by the estate will automatically revest in the debtor."[136]

In *Lacy,* the court found clear justification to ensure that the post-confirmation debtor was to be the owner of the assets, holding that "[t]he status of the Debtor as the owner of the assets is essential to the conduct of his business after confirmation. Public policy requires certainty in real estate titles. Those doing business with the Debtor must be free from the consequences of an order divesting the Debtor's title and exposing their transactions to the review and avoidance powers of a Chapter 7 trustee."[137]

In *General Media,*[138] the court similarly expressed concern that the power to convert and hale back the asset of the debtor (or newly created entity) to the estate undermines, if not greatly impairs, the ability of the debtor to conduct business. The court cited *North Am. Car Corp. v. Peerless Weighing & Vending Mach. Corp.*[139] in which the court held, in pertinent part, as follows:

Since the purpose of reorganization clearly is to rehabilitate the busi-

> ness and start it off on a new and to-be-hoped-for more successful career, it should be the objective of courts to cast off as quickly as possible all leading strings which may limit and hamper its activities and throw doubt upon its responsibility.

Post-confirmation, the debtor will continue to operate its business, enter into contracts, incur liabilities, sell and buy assets, grant liens and mortgages, acquire and sell other businesses and engage in other business transactions. Parties to these transactions will treat the debtor as any other commercial entity free from the "tutelage" of the bankruptcy court and resolve disputes in ordinary tribunals.[140] Post-confirmation parties such as financial institutions, vendors, investors, buyers and sellers of products, and financiers are encouraged to engage in business transactions with the debtor free of the protective umbrella of the bankruptcy court.[141] *Laissez-faire* enters post-confirmation by limiting the jurisdiction of the bankruptcy court over the debtor's assets[142] and ensuring that the confirmed plan represents the sole reconstruction of the debtor, returning the debtor to the marketplace and its concurrent civil court to resolve any dispute.

The specter of conversion and revesting the debtor's asset in the estate would upset the settled commercial and contractual expectations of the third parties dealing with the debtor and undermine the long-term reliance upon the debtor's freedom of contract, relegating the debtor to be a perennial "ward" of the bankruptcy court. This result was rejected in *OOCR, LLC*.[143] In *OOCR*, the court redirected the aggrieved creditor to the civil courts, holding that there "[n]o one disputes that GE Capital has the right to enforce the debtor's plan in a non-Bankruptcy Court of appropriate jurisdiction, be it state or federal."[144]

The issue here is whether a confirmed plan is mortal and subject to extinguishment and expiration, discharging all unperformed obligation. *Lacy, General Media,* and *OOCR LLC* all stand for the proposition that the plan constitutes the sole rights of recompense due creditors. It should be treated no differently than any other contract in dispute resolution ("[parties] should work out their mutual rights and duties in the ordinary tribunals and should not forever continue under the tutelage of the Bankruptcy Court."[145]). Confirmed plans should receive no greater or lesser effect than

any other federal money judgment (subject to expiration, unless renewed) or contract (subject to the statute of limitations), a policy consistent with the settled commercial expectation in the marketplace that money judgments and/or contracts go "stale" and become unenforceable. Treating confirmed plans as federal money judgments will enhance the credit worthiness of the Chapter 11 debtor by permitting the marketplace to better gauge their financial status and health.

As a last hurrah, creditors may argue that the plan is a contract, which entitles the creditor to seek relief in the civil courts to enforce the plan terms for the breach of any accruing plan obligations and that confirmed plan expiration does not discharge the debtor of future accruing obligations. In short, an expired confirmed plan is still a contract to pay money to the creditors, subject to enforcement through state court remedies or even a motion to convert or dismiss under 11 U.S.C. § 1112(b). Enforcing the plan beyond its statutory life as a federal money judgment suggests that the plan, at any time, may be enforced without any judicial authority, a suggestion that runs contrary to the mandate of Section 1129(a)[146] and grant of enforcement found in Section 1141(a).[147] The plan is enforceable because the plan "binds" all parties under Section 1141(a) while the court retains the jurisdiction to enforce specific terms under Section 1142.[148] While creditors may argue that the confirmed plan is a contract between the debtor and the creditors which is independently enforceable in state court,[149] the issue is aptly describing what the creditors and debtor received through the plan confirmation. Section 1141(a)-(d) constitutes a judgment of the rights and liabilities of the debtor and creditor, with a sweeping *res judicata* and collateral estoppel effect,[150] revesting of assets,[151] the debtor's asset are free and clear of claims and interests of creditors and others,[152] sweeping discharge of claims and equity interests.[153] The debtor emerges with the surviving obligation to pay creditors the amounts due had the debtor filed Chapter 7.[154] The obligations borne by the debtor arise from calculations authorized by Section 1129(a)(7)(A)(ii) and enforced by Section 1149(a)-(d). As the confirmed plan is a money judgment whose obligations accrue after the date mandated for a state law renewal, the plan expires and, if it is a statute of repose, it is extinguished, leaving the debtor free of any further obligation. The plan obligates the debtor to pay

its creditors because it is an order, signed by a bankruptcy judge (not just by the agreed parties),[155] reducing this judgment to a federal money judgment — complete with all the earmarks and benefits of *res judicata* and collateral estoppel.

In the mass tort bankruptcies, the court should consider the position asserted by the claimants' trust that faces the greatest ostensible loss if the debtor escapes the plan obligations to continue payments due the trust. In the field of mass torts, there has already been a tragedy, leading to legal, ethical, and business nightmares from the sale of the poisonous products. That tragedy is at the center of the underlying bankruptcy and the confirmed plan exists to provide for promised compensation due the injured and their families and renders the position of the trust foremost.

Mass tort confirmed plans fund the trust with insurance policies, future income, company assets, and stock in the newly revested debtor.[156] If the judge frees the revested debtor from the plan obligations and extinguishes the mass tort [asbestos] overhang, the debtor will enjoy a virtual recapitalization by wiping out a billion dollar plus liability. Based on the *Halliburton* model,[157] the debtor's publicly traded stock would greatly appreciate and spawn appreciable value for the benefit of the shareholders, such as the trust. The trust faces the Hobson's choice: either oppose the attempt by the debtor to exit the plan and insist on continuing plan performance, or accede to the debtor's exit and reap a windfall from the debtor's blossoming, and potentially exploding, stock values. If the trust anticipates greater value as a shareholder than as a creditor, the trust would urge the court to extinguish the plan obligations borne by the debtor, particularly if the projected stock appreciation exceeds the net present value of continuing trust fund contributions by the debtor.

The Law of Unintended Consequences

Drafters of prospective confirmed plans which include long-term payouts or continued multi-year obligations should incorporate a waiver of renewal under local law, or provide for an automatic renewal. Whether these terms would protect the plan from statutory expiration is for another day. Spirited battles to topple or defend long-term confirmed plans will

certainly cause someone great grief amounting to millions of dollars.[158] For example, Washington state law renders a judgment inoperable ("… ceases to exist…") only after six years (as cited in the case, and Washington state law now provides for 10 years), which would lead to complete chaos in seeking to enforce a confirmed plan with unsatisfied and future obligations. Certainly, a Washington state or Mississippi debtor aggrieved by an onerous Chapter 11 plan would readily seek to exit from all plan constraints and terms, particularly in light of the fact that each state's renewal statute is a statute of repose,[159] which discharges the confirmed plan and relieves the debtor from any continuing obligations. As the debtor has been revested with the estate assets, the debtor would receive the benefit of estate assets[160] without the burden of the confirmed plan obligations. The debtor's most curt response would be that the failure to renew the plan, leading to the plan's extinguishment, is a *de facto* fresh start,[161] or better stated, a second start.[162] While there are no second acts in American lives,[163] under Chapter 11, there are second acts in American business. The mass tort trust faces the conundrum of whether to battle the extinguishment of the plan or embrace the attempt and cast its vote for the better start.

The tobacco industry provides the model. The states and the major American tobacco manufacturers entered into a "Master Settlement Agreement." The MSA settlement discussions were not a secret and the announcement of the settlements came as no surprise. In fact, it would have been factored into the share price reflected in the November 1998 announcement.[164] In the wake of the Master Settlement Agreement, the major tobacco manufacturers all saw improved market performance of their stock. Tobacco revenues and profits from sales all increased from levels prevailing before the Master Settlement Agreement and, to a limited extent, increased the tobacco companies' value and profitability.[165]

General Motors Corporation (the old entity) owed billions to the UAW for health, welfare and retiree benefits. These liabilities added to the factors leading to GM's historic Chapter 11 bankruptcy. The confirmed plan and ensuing events converted the UAW legacy debt into an equity interest in the revested debtor. On November 16, 2010, General Motors issued an initial public offering. An independent trust fund for UAW retirees sold 89

million shares of GM in the IPO, yielding the fund $2.9 billion a windfall (as *The Wall Street Journal*[166] termed it). This once again shows that the marketplace can better compensate mass victims than a long-term payment agreement provided the debtor has access to the public market.

THE ONE-HANDED ECONOMIST[167]

The efficient markets hypothesis[168] ("EMH") posits that the price of a product represents the total sum of all real or imagined information. EMH affixes a dollar value on a commodity disconnected from traditional concepts of "value," cost, or any other verifiable basis. The classic example is the price of lingerie owned by a Hollywood starlet. Intimate wear owned by Marilyn Monroe[169] or Madonna[170] fetch prices well beyond the upper strata of such high class merchants as Neiman Marcus, Victoria's Secret, Henri Bendel or other haute couture.

EMH thrives on the Internet. Blogs[171] and newspapers[172] reported[173] on Apple CEO Steve Jobs' failing health throughout 2008,[174] spawning steep losses[175] in Apple stock. Whether the reports were true, or false, or pure fabrications,[176] does not matter. Reports and speculation of Jobs' declining health cost Apple investors billions of dollars throughout 2008.[177] Business, journalism, and law schools will look back on this for years to come. This proves that the efficient markets hypothesis takes all information into account, even if it is false or only partially true. For purposes of this analysis, EMH infuses the stock of the debt-burdened public company with value in the face of plan expiration.

The efficient markets hypothesis is not alone. EMH was posited as a counter point to the "Random Walk Model,"[178] which states that stock market prices evolve according to a random walk[179] and thus the prices of the stock market cannot be predicted. However, given the constant ebb and flow of news in the Information Age, while not rational, EMH still holds value.

Information, truth or lies, drives share prices. The three broadcast networks, together with FoxNews, CNN, MSNBC, and every Internet site blasted 24 hour coverage of the BP spill. America came to embrace the "Spillcam."[180] Experts on every side bloviated about the flow of oil leak-

ing into the Gulf of Mexico. These images drove down BP's share price to historic lows, taking BP's market capitalization down to a fraction of that of Google, Inc.

As of November 15, 2010, BP's market cap was $134.6 billion.[181] Google's market capitalization was $192.9 billion.[182] Google's revenues were $27.6 billion compared to BP's gross revenues of $298.6 billion. Additionally, Google's total assets were $40.5 billion for 2009 while BP's assets were $236 billion for 2009. BP's revenues exceeded Google's market cap, but Google's market capitalization exceeded that of BP. BP's assets exceeded Google's assets by 600 percent but BP still had a lower market cap. At present, Google's stock trades at around $600 per share while BP is at $43. Comparing BP to Google demonstrates the inextricable conclusion that the EMH drives stocks based on information, whether gold-plated truth or plain junk flowing from the Internet.

This article prophesizes that Chapter 11 plans will die of old age unless rejuvenated by renewal predicated upon the state law process. As plans near their natural end, the underlying debtor can undergo market recapitalization by shedding billion-dollar debt. Plan expirations will become public knowledge and the efficient markets hypothesis, by factoring in plan expirations, predicts stock appreciation and a revival of the revitalized companies' market capitalization unencumbered by payment of legacy debt. Stock prices may even spike if victims' funds affirmatively seek relief in the bankruptcy court to declare the plan time barred, extinguishing all residual obligations. Victims' funds, if successful, could reap an enormous windfall in escalating stock prices, exceeding the present value of the remaining payments under the confirmed plan of arrangement. The marketplace can compensate the victims for their losses in a more efficient manner than can the courthouse.

Does public policy lurk around the corner? Is this prospect mere fodder for academics to decry the inevitable destruction of a well-recognized mechanism for compensating mass tort victims? Certainly, the prospect of mass tort plans dying on the vine and the resulting freedom for the reorganized debtor from billion-dollar liabilities would unsettle nearly every plan participant. This prospect could potentially wreak havoc over large swathes of various victim-tethered constituencies. Plans that expire would

shift the axis away from well-known and well-understood compensation methodologies (such as channeling claims into a trust).

Is this bad? No. Most plans create a revested debtor in which the victims are the primary shareholders and in which market recapitalization through plan expiration serves the victims' interests as investors as opposed to as creditors. It is the plan managers, professionals and trust fund participants who have no interest in this outcome. Such plan servicers are ill-served by plan expiration because they would no longer serve a useful purpose. This community would take great issue at plan expiration.

Otherwise, the efficient markets hypothesis suggests that tort victims could profit from plan expiration, proving the old saw that it is best to let sleeping dogs lie.

NOTES

[1] The court confirms the plan by way of an "order confirming the plan of reorganization," and the plan becomes the "confirmed plan." Unless otherwise stated, all statutory references are to the Bankruptcy Code.

[2] The success and failure rates, pre- and post-confirmation, routinely visit the legal bibliography which features analytical studies and the clash of opinions. *See*, for example, Elizabeth Warren and Jay Lawrence Westbrook, *The Success of Chapter 11: A Challenge to the Critics*, 106 Mich. L. Rev., 603-642 (February 2009).

[3] Most plans compel payment due creditors. The plans in asbestos cases compel payment to an asbestos trust for the benefit of asbestos claimants. *See, e.g.*, Georgene Vairo, *Mass Tort Bankruptcies: The Who, the Why and the How*, 78 Am. Bankr. Law Journal 93, 100 (2004).

"The Manville trust was funded by insurance, settlements, stock in the revested debtor, cash receivables and the right to receive 20% of the future profits." Eric D. Green, Lawrence Fitzpatrick, James L Patton Jr., Edwin J. Harron, Travis N. Turner, *Prepackaged Asbestos Bankruptcies: Down but not Out*, 63 New York Univ. Ann. Survey of Am., 727-772 at 728-729; *see also*, *Special Purpose Unaudited Consolidated and Financial Statements as of March 31, 1999 and 1998,* Manville Personal Injury Settlement Trust, mantrust.org/filings/q1_99/1statmnt.htm (trust was funded with 20 percent of Manville's profits as defined in the plan, payable beginning in 1992

with respect to prior year's profits. In 1996, the Profit Sharing Rights were exchange for an additional 32,527,110 shares for common stock. The date of plan confirmation was October 26, 1988. Asbestos bankruptcy plans routinely establish trusts which are funded by insurance, cash, newly issued company stock and future profits as in Manville. In light of the fact that profits from the revested debtor in part fund the asbestos trust funds, the expiration of the plan would constrict compensation due future claimants. These plans anticipate claims filed by victims' decades after plan confirmation. *See Prepackaged Asbestos Bankruptcies: Down but not Out*, at 729, n. 12. Dow Corning was obligated in part to pay $2.35 billion net present value over 15 years to fund payment of the claimants. *In re Dow Corning vs. Dow Corning Corp.*, 280 F.3d 648, 645-655 (6th Cir. 2002)(funded by insurance, shareholders and operating cash reserves)(the bankruptcy is filed in Michigan, which has a 10-year statute for judgments. Mich. Comp. Laws Ann. § 600.5809(3)[West Supp.1998]); *see also Atlantic Richfield Co. v. Monarch Leasing Co*., 84 F.3d 204, 205-06 [6th Cir.1996]).

[4] *Prepackaged Asbestos Bankruptcies: Down but not Out,* at 730-731, n.18, 19, 24.

[5] *Prepackaged Asbestos Bankruptcies: Down but not Out,* at 729, n. 12 ($3.4 billion paid to claimants; W.R. Grace pays $1.8 billion; Owens Corning pays approx. $4 billion plus stock).

[6] President Obama assumed a "hands-on" approach in shepherding General Motors in and out of bankruptcy court in light of the economic impact borne nationally and globally by General Motors' collapse. The President's action sparked an intense national debate and many pundits nicknamed GM "Government Motors." The revested debtor, General Motors Company (GM's formal name when it entered bankruptcy was "General Motors Corporation"), filed papers with the Securities and Exchange Commission on August 19, 2010 to facilitate their IPO, which could happen as early as November. This IPO should pay off, at least in part, the federal government loans totaling approximately $50 billion. GM's viability is a matter of national and geo-political importance given GM's international standing and operations abroad, which include purchases of parts from foreign suppliers, a large work force, and the prestige of a large automobile manufacturing company on United States soil.

[7] *Prepackaged Asbestos Bankruptcies: Down but not Out,* at 750 ("After a bankruptcy court issuances a channeling injunction, however, the value of

such stock typically appreciates immediately as the effect of the asbestos overhang is eliminated.") *Id*. at 769-770, n 189-194. If the plan expired, the asbestos overhang is extinguished, along with the duty to fund the trust.

[8] If the debtor is a public entity and therefore duty-bound to maximize its value to the shareholders, the debtor is obligated to pursue this strategy to escape onerous financial obligations. If successful, the debtor would enhance its net worth manifold. Public and private debtors emerging from Chapter 11 would accrue enormous value upon plan expiration. The potential appreciation of publicly-traded stock and enhancement of the corporation's own net worth compels the board of directors to prosecute a strategy exiting the plan obligations. The board of directors owes a fiduciary duty of care and loyalty to the corporation and its shareholders. *Emerald Partners v. Berlin*, 787 A.2d 85, 90 (Del. 2001) (*citing to Malone v. Brincat*, 722 A.2d 5, 10 (Del, 1998)(Delaware law). *See also Desert Partners, LP v. USG Corp*., 686 F. Supp. 1289, 1294 (U.S.D.C., N.D. Ill. 1988) (collection of cases).

[9] Halliburton funded its asbestos trust with cash, stock, insurance policies, and notes.

[10] Dow Corning (Dalkon Shield trust fund owns stock); A.H. Robins Co. (Dalkon Shield Claimants Trust owned stock).

[11] *Prepackaged Asbestos Bankruptcies: Down but not Out*, at 729, n.12. (Manville Trust received 782,349 claims; 440,000 potential claimants in the largest "mass tort case") *Also In re Dow Corning*, at 485.

[12] 11 U.S.C. § 1141(b): "Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." Mega-cases include Johns Manville (asbestos) (*In Re Johns Manville Corp.*, 36 B.R. 743 [S.D. N.Y. 1984]); A.H. Robins (Dalkon Shield) (*In re A.H. Robins Co.*, 88 B.R. 742 [E.D. Va. 1988]).

[13] *See Bruce Bartleson, Earl Dolven et al. v. Bruce Bartleson, et al*., 253 B.R. 75, 78-79 (9th Cir. BAP 2000) ("Like a consent decree, a chapter 11 plan has elements of both a judgment and a contract;" *see also In re Penberthy*, 211 B.R. 391, 395 (Bankr. W.D. Washington 1997) (Consent decree).

[14] *In re Kevin Layo*, 460 F.3d 289, 293-294 (2nd Cir. 2004). *See also Paul v. Montes*, 906 F.2d 1468, 1471, n. 3 (10th Cir. 1990) ("Relying on *Stoll v. Gottlieb*, 305 U.S. 165 (1938) and *Sure-Snap Corp. v. State Street and Trust Co.*, 948 F.2d 689 (2d Cir. 1991), the district court noted that '[i]t is well settled that a Bankruptcy Court's order confirming a plan of reorganization constitutes a final judgment with preclusive effect under res judicata.'") *See*

also Laing v. Johnson (*In re Laing*), 31 F.3d 1050, 1051 (10th Cir. 1994); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1051 (5th Cir. 1987).

[15] "It is well established that a Chapter 11 plan constitutes a contract between the debtor and the creditors in which general rules of contract interpretations apply." *In re Hughes etc*., 279 B.R. 826, 830 (Bankr. S.D. Ill. 2002)(citing *Bartleson*).

[16] 11 U.S.C. § 1141(a): "Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan."

[17] *See In re Dabrowski*, 257 B.R. 394, 404 (Bankr. S.D.N.Y. 2001), *citing Air Line Pilots Int. v. Continental Airlines*, 145 B.R. 404, 409 (Bankr. Del. 1992); *see also First Union Comm. Corp*., 81 F.3d 1310, 1314 (4th Cir. 1996), and *In re Penn Dixie Indust*., 322 B.R. 173, 176 (Bankr. S.D.N.Y. 1983), *Allen v. McCurry*, 449 U.S 90, 94 (1980).

[18] *First Union* at 1316; *see also*, *In re Appel Corp*., 300 B.R. 564, 567 (S.D.N.Y. 2003).

[19] *First Union* at 1315.

[20] *See Levy v. Cohen*, 19 Cal.3d 165 (1977) (collateral estoppel effect in ensuing state court litigation). *See also*, *First Union* at 1315; and *Penn-Dixie* at 177.

[21] *In re Wolfberg*, 255 B.R. 879, 881-882 (9th Cir. BAP 2002).

[22] *See* Alec P. Ostrow, *The Res Judicata Effect of Impermissible but Unlimited Provisions in Confirmed Plans*, 2005 Norton Annual Survey of Bankr. Law 55-68.

[23] *See United Student Aid Funds, Inc. v. Espinosa*, — U.S. –, 130 S.Ct. 1367, 176 L. Ed. 2d 158 (March 23, 2010)(debtor filed a Chapter 13 plan which provided for the discharge of a student loan in which the lender failed to object. The court held that the order confirming the plan was a final judgment and discharged the claim, even though the claimant was clearly entitled to an order declaring that the student loan was non-dischargeable). *See* 11 U.S.C. § 523(a)(8)(limited right of debtor to discharge student loan on the basis of "hardship").

[24] Debtor in possession financiers. Chapter 11s are notoriously capital

intensive and at the outset, or even through the plan, the debtor will borrow very substantial sums of money from commercial lenders who collateralize these high interest loans with all company assets. DIP loans arise during the pendency of a case, and at the conclusion of the proceeding, the debtor will seek to "refinance" DIP loans for a lower interest loan with long-term repayments terms (*i.e.*, the "take out," loan).

[25] A PACA claim grants certain agricultural providers with "super-lien" on the debtor's assets. *See* Perishable Agricultural Commodities Act ("PACA") ("The PACA provides for damages to be paid by those not meeting their contractual obligations in buying and selling fresh and frozen fruits and vegetables. Interstate produce traders operating as commission merchants, dealers or brokers, and conducting a sufficient volume of business must be USDA-licensed. USDA is required to suspend the license of a business that fails to pay PACA reparations awarded against it.") *USDA Reports PACA Actions Against Nine Produce Businesses*, Agricultural Marketing Services Press Release No. 105-10, June 10, 2010.

[26] A reclamation claim entitles creditor who supplied products on the eve of bankruptcy with a prior claim. *See* 11 U.S.C. § 547(c) as follows:

(1) Except as provided in subsection (d) of this section and in section 507(c), and subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof, the rights and powers of the trustee under sections 544(a), 545, 547, and 549 are subject to the right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, within 45 days before the date of the commencement of a case under this title, but such seller may not reclaim such goods unless such seller demands in writing reclamation of such goods—(A) not later than 45 days after the date of receipt of such goods by the debtor; or (B) not later than 20 days after the date of commencement of the case, if the 45-day period expires after the commencement of the case.

A trade creditor is entitled to a priority claim under Section 503(b)(9) as follows: After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502 (f) of this title, including — the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

[27] *In re Dow Corning v. Dow Corning*, at 655 at Note 3 (6th Cir. 2002)

(nearly all asbestos trust compel the revested debtor to initially contribute substantial funds, and continue to make plan payments over the years, along with contributing common stock, warrants or other company assets).

[28] *In re Cardelucci*, 285 F.3d 1231, 1235 (9th Cir. 2002). 11 U.S.C. § 1962(a) ("Interest shall be allowed on any money judgment in a civil case recovered in a district court...").

[29] 11 U.S.C. § 502(a) ("A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under Chapter 7 of this title, objects.").

[30] *In re Melenyzer*, 143 B.R. 829, 833 (Bankr. W.D. Tex. 1992).

[31] 11 U.S.C. § 1129(a)(7)(A): "(a) The court shall confirm a plan only if all of the following requirements are met:
(7) 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…").

[32] *In re Dow Corning Corp*., 237 B.R. 380 (Bankr. E.D. Mich., 1999).

[33] *See* 11 U.S.C. 1129(a)(7)(A)(ii)(creditor should receive in a confirmed Chapter 11 what they would have received in a Chapter 7, which serves as the minimum mandatory payout owed to creditors as a condition of plan confirmation).

[34] What the creditor would have received had the debtor proceeded under Chapter 7.

[35] *In re Dow Corning Corp*., at page 386-387. "The next issue is whether an allowed claim is a 'money judgment.' As one might expect, a 'money judgment' consists of three elements: it must be a judgment, entitling the plaintiff to a specified sum of money, and such entitlement must be against an identifiable party." *See also In re Commonwealth Oil Ref. Co.*, 805 F.2d 1175, 1186 (5th Cir.1986). "By definition, an order issued pursuant to § 502(b) meets the second and third criteria. First, it confers upon the creditor a right of payment for a specified sum of money. *See* 11 U.S.C. § 502(b)(stating that after the court 'determine(s) the amount of (a) claim,' that such claim shall be allowed 'in lawful currency of the United States'). Second, it identifies

the party against whom such right of payment is enforceable--the Estate. An allowed claim is therefore a claim for 'money' within the meaning of § 1961(a)."

[36] 10 *Moore's Federal Practice*, Par. 54.02[2](3rd Ed. 1999).

[37] *In re Dow Corning Corp*. at 387-388.

[38] *Catlin v. United States*, 324 U.S. 229, 233, 65 S. Ct. 631 (1945).

[39] *See City of Louisiana v. Levi*, 140 F.2d 512, 514 (6th Cir. 1944) ("A final judgment is one which disposes of the whole subject, gives all the relief that was contemplated, provides with reasonable completeness, for giving effect to the judgment, and leaves nothing to be done in the cause save superintend, ministerially, the execution of the decree.").

[40] 11 U.S.C. § 502(a) ("A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.").

[41] *In re Dow Corning Corp*. at 392.

[42] *In re Dow Corning Corp*. at 391-392; *also* 28 U.S.C. § 1961.

[43] Cal. Code Civ. Proc. § 680.270: "Money judgment" means that part of a judgment that requires the payment of money."

[44] *In re Conseco Inc*., 301 B.R. 525, 526 (Bankr. N.D. Ill. 2003).

[45] *Andrews v. Roadway Express*, 475 F.3d 565 (5th Cir. 2006).

[46] *Salinas v. Roadway Express*, 802 F.2d 787, 789 (5th Cir. 1986) (defendant agreed to compensate multiple plaintiffs through a consent decree).

[47] *Andrews* at 567.

[48] *Id.* at 568.

[49] *Id*. at 568-569. "Execution of a dormant judgment that is not timely revived is barred forever."

[50] *Id.* at 569. (Confirmed plans and consent decrees share identical characteristics, including a "debtor" paying a sum of money to a class who timely filed claims. Confirmed plans are treated as consent decrees. *In re Penberthy*, 211 B.R. 391, 395 [Bankr. W.D.Wash. 1997]).

[51] *Id*.

[52] *Id*. (Collection of Texas cases authorizing enforcement) Nothing stopped the aggrieved parties from suing in state court.

[53] *Id*. at 570.

[54] *Id*. at 569-570.

[55] *In re Dow Corning*, at 386-391.

[56] Miss. Code Ann § 15-1-3 provides for extinguishment of both the right and the remedy, as follows:

> "The completion of the period of limitation prescribed to bar any action, shall defeat and extinguish the right as well as the remedy. However, the former legal obligation shall be a sufficient consideration to uphold a new promise based thereon."

Mississippi judgments have a 7-year life. *See* Miss Code Ann. § 15-1-43. The running of the 7-year statute of limitations not only defeats and extinguishes any remedy of the judgment creditor, but also defeats and extinguishes the right itself. *See Young v. Hooker*, 753 So.2d 456 (Miss. 1999).

[57] *Andrews* at 569-570.

[58] Emphasis added.

[59] Absent bankruptcies enumerated rights of the automatic stay and permanent injunctions, settlements of class actions and multi-party litigations bear a close similarity to confirmed plans; *i.e.*, the individual wrongdoer, multiple claimants, mass claims, claims administration, claim administrators, active judicial supervision, and judicial approval of counsel and payment of fees and expenses.

[60] *In re Fifarek (Stark v. Fifarek),* 370 B.R. 754, 758 (Bankr. Court, W.D. Mich. 2007); *In re Hunt (Lillie v. Hunt)*, 323 B.R. 665, 666 (Bankr. W.D. Tenn. 2005) ("Since there is no specific federal statute of limitations on how long this judgment is effective, the parties agree that we must look to Tennessee law [citation omitted])."

[61] *Fed R. Civ Pr. 69(a)(1).*("(a) *In General.*

> *(1) Money Judgment; Applicable Procedure.*
>
> A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution — and in proceedings supplementary to and in aid of judgment or execution — must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.
>
> *(2) Obtaining Discovery.*
>
> In aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person — including the judgment debtor — as provided in these rules or by the procedure of the state where the court is located

Fed. R. Civ. Pro. 69 is applicable in bankruptcy court under Bankruptcy Rule 7069.

[62] *In re Levander*, 180 F.3d 1114 (9th Cir. 1999).

[63] *Id.* at 1121-1122, "We have held that Federal Rule of Civil Procedure 69(a) empowers federal courts to rely on state law to add judgment-debtors under Rule 69(a), which permits judgment creditors to use any execution method consistent with the practice and procedure of the state in which the district court sits." *citing to Cigna Property & Cas. Ins. Co. v. Polaris Pictures Corp*., 159 F.3d 412, 421 (9th Cir.1998) (quoting *Peacock v. Thomas*, 516 U.S. 349, 359 n. 7, 116 S.Ct. 862 [1996])(internal quotation marks omitted); *see also*, *Andrews* at 568; *Crump v. Bank of America*, 235 F.R.D. 113, 115 (D.D.C. 2006); *RMA Ventures v. Sun Am. Life Ins. Co*., 576 F.3d 1070, 1074 (10th Cir. 2009) ("Once a federal district court issues a writ of execution, a judgment creditor must follow the procedure on execution established by the laws of the state in which the district court sits. [Citations omitted] ...). Thus, as required by FRCP 69(a)(10), Defendants have turned here to the method of execution prescribed under Utah law."

[64] *McCarthy v. Johnson*, 172 F.3d 63 (10th Cir. 1999). Unpublished Opinion.

[65] *Fidelity Nat. Fin. Inc. v. Friedman*, 602 F.3d 1121, 1123 (9th Cir. 2010) ("The process for registering the judgment of one federal district court in another federal district court is outlined in 28 U.S.C. § 1963. The federal court applies state law, however, when renewing a judgment that has already been registered in that state. Thus, this renewal case centers around the construction of three sections of Arizona law, Arizona Revised Statutes Annotated §§ 12-1551(B), 12-1611, and 1-215.").

[66] Fed.R.Civ.Pro 69(a) *et seq.* incorporates the law of the state in enforcing money judgments, including the requirement of a renewal. *McDaniel v. Signal Capital Corp*., 198 B.R. 483, 486-487 (Bankr. S.D. Texas 1996); *see also*, *In re Brink*, 227 B.R. 94, 95-96 (Bankr. N.D. Texas, 1998); *In re Davis*, 323 B.R. 745, 748-749 (Bankr. D. Ariz, 2005); *In re Hunt*; (*Lillie v. Hunt*), 323 B.R. 665, 666-667 (Bankr. W.D. Texas 2005); *In re Fifarek* (*Stark v. Fifarek*), 370 B.R. 754, 758 (Bankr. W. D. Mich. 2007). *Also In re Romano (Romano v. LaVecchia),* Westlaw cite unavailable, (9th Circuit BAP, 2009) ("Thus, state law governs the procedure for execution on a judgment in the absence of an applicable federal statute. There is no relevant federal statute we have been able to locate with regard to the renewal of judgment. The parties agree that Nevada law governs the enforcement of the judgment." [6 years], *aff'd* 2010 Ap. Lex 5444 (9th Circuit, 2010).

Non-money judgments are subject potentially to different treatment. *See*

Hamilton v. MacDonald, 503 F.2d 1138, 1147-1149 (9th Cir. 1974) ("Rule 69(a) adopts state procedures on execution and supplementary proceedings only when the judgment is for payment of money. [Citations omitted] Final process on equitable decrees ordering performance of specific acts is governed by Fed.R.Civ.Pro. 70, which does not provide for conformity to state practice."). In *Hamilton*, the court held that Rule 69(a) imports state supplemental procedures, including renewals, into federal court for money judgment, even though local state law (Arizona Revised Statute Ann. §§ 12-1551[B]) extinguishes the right to execution on all judgment, whether for payment of money or performance of specific acts. *Id*. at 1149. Chapter 11 plans require the debtor to pay creditors which constitutes a money judgment.

[67] *See Marx v. Go Publ. Co., Inc.,*721 F.2d 1272, 1273 (1983); *see also In the Estate of Ferdinand E. Marcos Human Rights Litigation v. Estate of Ferdinand Marcos*, 536 F.3d 980, 988 (2008); *Duchek v. Jacobi*, 646 F.2d 415, 417 (1981).

[68] *Andrews* at 567-568 (collection of cases). Note the discussion whether the issue is the time limits for the issuance of a writ of execution is subject to state law and whether the judgment is extinguished.

[69] *See Donellan Jerome Inc. v. Trylon Metals Inc.*, 996 F. Supp. 996 (USDC, N.D.Ohio 1967 (Collection of cases).

[70] *See supra*. Mississippi provides for statute of repose, not statute of limitations for judgment renewals. [Mississippi Code § Ann 15-1-43].

[71] *United States v. Tacoma Gravel & Supply Co*., 376 F.2d 343, 344-345 (9th Cir. 1967) ("Consequently, the judgment becomes inoperative for any purpose after expiration of six years.) Please note that, while Washington has extended the life of a judgment to ten years, the holding in *Tacoma* that the Washington statute is one of repose, extinguishing the judgment, still applies. *Cf*. RCW 4.16.020 and 4.56.210.

[72] A statute of repose cuts off a right of action after a specified period time, irrespective of accrual or even notice that a legal right has been invaded. *Giest v. Sequoia Ventures*, 83 Cal.App.4th 300, 305, 99 Cal.Rptr.2d 476 (Cal.App.1 Dist., 2000).

[73] *Tacoma* at 344.

[74] *Id*. at p. 345.

[75] *In re Penberthy*, 211 B.R. 391, 395 (Bankr.W.D. Wash. 1997).

[76] 11 U.S.C. § 1141(b) ("Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of

the estate in the debtor.") *See also*, *In re Captain Blilthers*, 311 B. R. 530, 536 (9th Cir. BAP 2004)(Property reverts subject to provisions of plan [citing *Hillis Motors, Inc. v. Hawaii Dealer's Assn.*, 997 F.2d 581, 587 [9th Cir. 1993] and *Consolidated Pioneer*, 264 F.3d 807).

[77] 11 U.S.C. § 1114(d)(1)(A) ("(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502 (g), 502 (h), or 502 (i) of this title, whether or not—

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; ...").

[78] *Southwest Marine, Inc. v. Danzi*, 217 F.3d 1128, 1140 (9th Cir. 2000).

[79] *See In re Montgomery Ward Holding Corp*., 396 B.R. 489, 495 (Bankr. Del. 2004)("11 U.S.C. § 1141(a) of the Code provides that the plan becomes a legally binding agreement. Thus, 'once the reorganization plan is approved by the Bankruptcy Court, each claimant gets a 'new' claim, based upon whatever treatment is accorded to it in the plan itself.'") *See also*, *In re Benjamin Coal Co*., 978 F.2d 823, 827 (3d Cir.1992); *In re Pettibone Corp.*, 134 B.R. 349, 351-52 (Bankr. N.D.Ill. 1991) ("A plan of reorganization is a contract which binds a debtor and its creditors."); *Fed. Land Bank of Jackson Miss. v. Herron (In re Herron),* 60 B.R. 82, 84 (Bankr. W.D. La. 1986) ("Once a plan is confirmed, the pre-confirmation debt is 'replaced' with a new indebtedness as provided in the confirmed plan. The new indebtedness is in essence a new and binding contract between the debtor and the creditors."); *In re Ernst*, 45 B.R. 700, 702 (Bankr. D.Minn. 1985) ("The plan is essentially a new and binding contract, sanctioned by the Court, between the debtor and his pre-confirmation creditors.").

Post-confirmation, the debtor might default in installment payments due creditors. Many plans lack an acceleration clause (the staple of promissory notes), leading to great uncertainty in whether the creditor (standing is an issue here) can declare the remaining installment due. If the plan provides for an automatic acceleration of the remaining plan payments, the succeeding issue is the accrual of the right of enforcement, and for purposes of renewal, when the total due creditors is due. *See supra*. An agreement to make payments in

installments will not support an acceleration of the remaining installments, in the event of default in the absence of an acceleration clause. *See Milstein v. Sec. Nat'l Bank*, 27 Cal.App.3d 482, 484 (1972); *Hills v. Gardiner Sav. Inst*., 309 A.2d 877, 882-83 (Maine 1973); *Taylor v. Taylor Products Inc.*, 105 N.C. App. 620, 626, 414 S.E.2d 568, 575 (1992), *over'd on other grounds by Brooks v. Giesey*, 334 N.C. 303, 318, 432 S.E.2d 339, 347 (1993); *Omal v. BP Amoco Corp*., 2003 WL 21887770 (E.D. Pa. 2003) [Lease]; *See also*, Theresa Cerezola, *Acceleration Clause Disclosure under the Truth in Lending Act*, 77 Columbia L. Rev. 649-668 (May 1977); Note, *Acceleration Clauses in Notes and Mortgages*, 88 Univ. Penn. L. Rev. ALR 94-110 (November 1939).
See also, *Maudlin v. Pacific Decision Sciences Corp*., 137 Cal.App.4th 1001, 1018, 40 Cal.Rptr.3d 724 (Cal.App.4 Dist. 2006) (collection of cases) ("It is well established in California law that, in the absence of an acceleration clause, a contract made unilateral by one party's complete performance renders the doctrine of anticipatory breach inapt.").

[80] "60 Minutes" featured Clarence L. "Kelly" Johnson, the legendary Lockheed designer of aircraft such as the P-38 Lightning, P-80 Shooting Star, F-104 Starfighter, U-2 spy plane and SR-71 Blackbird. When asked about his thoughts when his creations would lift off the tarmac on their maiden flight, Mr. Johnson wryly responded: "What did I forget?"
The message here is simple. The plan is only as good as getting it off the ground, escaping earth's gravitational pull and skyrocketing into orbit. Devoid of key protections, inadequately drafted plans might crater in the face of spirited resistance that would point out a fatal enforcement defect and upset the settled expectations of plan participants. Most plans lack an effective enforcement mechanism due unsecured creditors in the event of a default as would be found in any commercial promissory note. Mediocre plans entice the insiders, post-confirmation, to circumvent the plan predicated upon the paucity of remedies due plan participants. Typically, the revested debtor transfers the assets to a closely aligned new entity who executes in exchange a long-term unsecured promissory note. Creditors (if they can) seek conversion under Section 1112 and confront the bankruptcy judge who queries what transfer rights the creditors have under the plan, and whether this transfer contravenes the plan terms. (*see infra*). The revested debtor necessarily defaults in plan payments. Creditors can either enforce the plan terms which might lead to an empty judgment or pursue the new entity.

[81] Section 1129(a)(7) provides as follows: "With respect to each impaired

class of claims or interests — (A) each holder of a claim or interest of such class — ... (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...."

[82] 11 U.S.C. § 1112(b) (4)(M) & (N); *see also*, *In re Consolidated Pioneer Mortgage Entities*, 264 F.3d 803 (9th Cir. 2001) (re-vesting of debtor's and Chapter 11's estate pre-confirmation assets in Chapter 7 estate.).

If the confirmed plan expires and therefore is extinguished, the debtor will defend the conversion motion on the grounds that the debtor is freed of any obligation to make payments and free of a default under the plans. 11 U.S.C. § 1112(b) provides as follows: "The court shall commence the hearing on a motion under this subsection not later than 30 days after filing of the motion, and shall decide the motion not later than 15 days after commencement of such hearing, unless the movant expressly consents to a continuance for a specific period of time or compelling circumstances prevent the court from meeting the time limits established by this paragraph. (4) For purposes of this subsection, the term "cause" includes—

(M) inability to effectuate substantial consummation of a confirmed plan;

(N) material default by the debtor with respect to a confirmed plan...."

[83] The plan is deemed a contract and subject to enforcement for a breach. *Paul v. Montes*, 906 F.2d 1468, 1476 (10th Cir. 1990).

[84] Judgments are subject to enforcement upon entry. *See* Cal. Code Civ. Proc. § 683.010 ("Except as otherwise provided by statute or in the judgment, a judgment is enforceable under this title upon entry.") Under Fed.R.Civ.Pro. 62 (a), the judgment debtor is entitled to a 14-day stay of enforcement and, thereafter, the judgment creditor may proceed to enforce the judgment, absent a discretionary stay (on appeal) under Rule 62(d).

[85] 11 U.S.C. § 1112(b)(4)(M) & (N). *See, e.g.*, *Consolidated Pioneer* at 808-809; *In re Mobile Freezers Inc.*, 146 B.R. 1000, 1003-1004 (S.D. Ala. 1992). While outside the scope of this article, concerning post-confirmation conversion motions (11 U.S.C. § 1112(b) tests what assets become available to the Chapter 7 trustee).

[86] Nothing stops the creditor from filing suit on the plan in converting the plan terms into a state court judgment and seeking enforcement to the extent that the debtor is in default. This would be an action based on a contract, and entitles the creditor to seek pre-judgment relief, such as an attachment or

potentially an injunction. Plan terms might alter or modify these enforcement rights and provide for contractual terms. Such contractual terms may include a mandatory forum selection clause; choice of law provisions; notice of default; right to cure; mediation and/or arbitration provisions; attorneys' fees; waiver of rights to a jury trial or other routine commercial terms. Sometimes, a judgment renewal right accrues following the default of installments as provided in the judgment (as opposed to the date of entry). Further, most plans provide for installment payments in which the due date of the past-due installment resets the renewal period. *See* Cal. Code Civ. Pro§ 683.130(b)(1).

[87] 11 U.S.C. § 1129(a) (7) measures the minimum recovery due creditors. In many instances, skillful committee counsel generates a more favorable return and, upon the filing of nearly every major Chapter 11, counsel seeking appointment as committee counsel will remind all concerned about their prior achievements.

[88] The plan provides for a potpourri of terms, some of which are clearly monetary while others are not. This article focuses upon the expiration of the confirmed plan through state law mandates of renewal of money judgments and whether the failure to renew terminates the debtor's obligation to make plan payments. Whether the passage of time would terminate the debtor's non-monetary obligations is the subject of another article. These non-monetary obligations may include the cleanup of toxic sites, the issuance of which, among other mandates, serve national, state and local environmental goals.

[89] 11 U.S.C. § 1141(d) (discharge of all pre-petition debts).

[90] "The effect of confirmation is to discharge the entire pre-confirmation debt, replacing it with a new indebtedness as provided in the confirmed plan." *In re Pernod*, 169 B.R. 910, 916 (Bankr. N.D. Ind. 1994) ("...this had the effect of replacing the obligations under the promissory notes with the obligation provided in that plan." *See also, In re Consumers Realty & Development Company*, 238 B.R. 418 (8th Cir. BAP (Minn) 1999). These cases (and all others) uniformly hold that the plan embodies the obligations due the creditors and, therefore, constitutes a final, binding money judgment, subject to the right of appeal.

[91] California mandates the renewal of a money judgment (Cal. Civ. Pro. § 683.020(a)) and leaves intact non-money judgments. Plans provide for both monetary relief due creditors, and non-monetary relief, such as discharge, revesting, claims filings procedures, post-conformation issues, continuing

(limited or unlimited) jurisdiction of the bankruptcy court. Each state is different and given the limits to the length of this article, parceling out whether a non-monetary judgment is subject to expiration is the subject of further research for each state. Delaware judgments do not expire. *Gamles v. Gibson*, 939 A.2d 1269, 1272 (Dela., 2007). *See also* http://www.bernsteinlaw.com/news/50_State_Judgment.pdf (compilation of renewal for each state).

Each state has its own renewal statute in which money judgments are subject to renewal. Most states allow for a 10-or 20-year period of time in which to enforce a judgment, with varying provisions for renewal of the judgment. Several have significantly shorter times in which to act. Notably, Arizona (ARS 12-1612, ARS 12-1551), Idaho (I.C. 11-101), Kansas (K.S.A. 60-2404), Nebraska (25-1515), Ohio (O.R.C. 2323.12), Oklahoma (12-735), Puerto Rico, and Wyoming (W.S. 1-17-307) require a renewal within five years, while Chapter 11 plans routinely extend well over five years, particularly asbestos and other mass tort cases.

[92] That portion of the plan providing for payment.

[93] Critics would complain that under the plan, the bankruptcy court retains the authority to convert the case to a Chapter 7 liquidation in the event of a default under 11 U.S.C. § 1112(b) (4) (M) & (N). However, as the plan has expired due to the lapse of time and unenforceable based on the extinguishment of the obligation, the bankruptcy court could never find a default. If the plan has expired and been extinguished under local law, the bankruptcy court would be bereft of subject matter jurisdiction to entertain 11 U.S.C. § 1112(b)(4)(M) & (N).

[94] *See* Cal. Civ. Pro. § 683.020(a).

[95] *See* Cal. Civ. Pro. § 683.110(a) ("The period of enforceability of a money judgment or a judgment for possession or sale of property may be extended by renewal of the judgment as provided in this article.")

[96] *See Fredric Goldman v. Orenthal James Simpson*, 160 Cal.App.4th 255, n3, — Cal.Rptr.3d—(Cal.App.2 Dist. 2008); *also United States Capital Corp. v. Nickelberry*, 120 Cal.App.3d 864, 867, 174 Cal.Rptr. 814 (1981).

[97] Judgments expire in five years from date of entry; execution must be accomplished within that period. *See* A.R.S. Sections 12-1611-12.613 and 12 A.R.S. Sections 12-1551(B). *See also*, *Groves v. Sorce*, 161 Ariz. 619, 780 P.2d 452 (Div. 2d 1989); *Northstar Dev. Corp v. Wolfswinkel*, 146 Ariz. 406, 706 P.2d 732 (Div. 2d 1985).

[98] The jurisdiction of the bankruptcy court post-confirmation is limited,

leading to the risk of successful subject matter challenges. ("A Bankruptcy Court cannot hear a post-confirmation dispute simply because it might conceivably increase the recovery to creditors because the rationale could "endlessly stretch a Bankruptcy Court's jurisdiction." *In re Pegasus Gold Corp*., 394 F.3d 1189 at 1194, n. 1 (9th Cir.2005), *accord.*, *Bank of Louisiana v. Craig's Stores of Texas, Inc*. (*In re Craig's Stores of Texas Inc.*), 266 F.3d 388, 391 (5th Cir. 2001). *See also*, *In re General Media, Penthouse Media Group et al. v. Robert Guccione*, 335 B.R. 66, 75 (Bankr. S.D.N.Y. 2005).

[99] The expiration of the confirmed plan through the state statute of limitations does not materially damage the underlying purpose of a Chapter 11, which is to permit the debtor an opportunity to reorganize its financial affairs conditioned upon paying creditors an "exit" fee equal to the recovery available in a Chapter 7. *See* 11 U.S.C. § 1129(a)(7)(A)(ii). The debtor should not be burdened with any greater obligation imposed upon any debtor in the payment of a debt (i.e., the statute of limitations) or the payment of a judgment. Except for Delaware, all states mandate renewal to protect the debtor from "stale judgments." The confirmed plan should not burden the debtor with any obligation, other than as provided in the plan pursuant to Section 1123(a) & (b) or under state law.

[100] Anticipating an exit from the plan obligation, the debtor would move the bankruptcy court for an order discharging the debtor from the plan on the basis that the plan expired under local state law. Alternatively, the debtor would decline any continuing performance and test the viability of the plan in a motion to convert or a state court enforcement action. Regardless of the result befalling either party, in light of the stakes involved, appeals would certainly follow.

[101] Equal to the Chapter 7 payout.

[102] *OORC Leasing LLC*., 359 B.R. 227, 233 (Bankr. N.D., Ind. 2007) (creditor can enforce plan, based on default, in federal or state court).

[103] This is the complaint of any judgment creditor whose judgment expires and certainly those plaintiffs in *Andrews*.

[104] 11 U.S.C. § 1141(a) likewise does not guaranty confirmed plan immortality, but only that the plan is binding. The fact that Congress declined to *expressly* make confirmed plans immortal suggests that extending the plan's life beyond the state renewal statute would be a matter of negotiation of the parties.

[105] Adroit plan drafting guaranties this result. The debtor can incorporate into the plan that the sole remedy due creditors facing a plan default is a motion to dismiss or convert under 11 U.S.C. § 1112(b), as opposed to state court

remedies. The sole remedy means that in the event of a plan default, the creditor's sole recourse would be to file a motion in the bankruptcy court to convert or dismiss under 11 U.S.C. § 1112(b). If the plan is time-barred and bankruptcy court does not hear the matter pursuant to a 11 U.S.C. § 1112(b) motion, the creditors might face the prospect that they have right (i.e., the default leading to acceleration, suit and judgment) but no remedy. A creditor would reject this outcome and argue that the court always retains jurisdiction to convert or dismiss predicated upon a default in the plan. However, this analysis predicated upon the jurisdiction of the court to order relief based on a still valid and enforceable plan. If the plan is no longer enforceable because the money obligations expired, along with other terms, the court would be hard pressed to order a conversion.

[106] *See Bartleson*.

[107] RCW 4.16.020 provides that any action to enforce any judgment or decree, foreign or domestic, shall be commenced within 10 years.

[108] M.C. §§ 15-1-43 and 15-1-45 provide that any action to enforce any judgment or decree shall be commenced within seven years.

[109] *See Casa Herrera, Inc. v. Beydoun*, 32 Cal.4th 336, 344, 9 Cal.Rptr.3d 97, 83 P.3d 497 (2004) ("Unlike traditional rules of evidence, the parol evidence rule does not exclude evidence for any of the reasons ordinarily requiring exclusion, based on the probative value of such evidence or the policy of its admission. The rule as applied to contracts is simply that as a matter of substantive law, a certain act, the act of embodying the complete terms of an agreement in a writing (the 'integration'), becomes the contract of the parties. The point then is, not how the agreement is to be proved, because as a matter of law the writing is the agreement.")

[110] *See supra*. ("An arrangement confirmed by a Bankruptcy Court has the effect of a judgment rendered by a federal district court.") *Miller v. Meinhard-Commercial Corp*., 462 F.2d 358, 360 (5th Cir. 1972). The federal rule is that a judgment or order, once rendered, is final for purposes of *res judicata* until reversed on appeal or modified or set aside in the court of rendition. *Stoll v. Gottlieb*; *also Martin v. Martin*, 2 Cal.3d 752, 761, 87 Cal.Rptr. 526 (1970) (absent a reversal, modification, or vacatur of the order confirming plan of arrangement, the order is to be considered final.). Proceedings in bankruptcy are *in rem* proceedings and all persons concerned, including creditors, are deemed to be parties to the proceedings. *Chappel v. First Trust Co. of Appleton, Wis*., 30 F.Supp. 765, 766 (E.D.Wis. 1940); *see also*, 11

U.S.C. §§ 767(1), 873(1),(5). *Also*, Levy at 172 ("As an unsecured creditor of the limited partnership, plaintiff (against whom the plea of res judicata is here asserted) was a party to the consolidated proceeding in the Bankruptcy Court.").

[111] 11 U.S.C. § 1128.

[112] The same payout as under Chapter 7.

[113] All creditors of a debtor are parties in interest to object to a plan. *In re Tascosa Petro*. *Corp*. 196 B.R. 856, 863 (Bankr. D. Kansas, 1996) (collection of cases). *Also*, 11 U.S.C. § 1109(b) ("...a party in interest…including a creditor…may raise and may appear and be heard on any issue in a case under this chapter.") A meritorious objection might generate a full-blown contested hearing under Rule 9014 which authorizes discovery and ensuing evidentiary hearing in which the court would render findings under Rule 7052 (Fed. R. Civ. Pro. 52).

[114] *See* 11 U.S.C. § 1126(d) ("A class of interests has accepted a plan if such plan has been accepted by holders of such interests, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount of the allowed interests of such class held by holders of such interests, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan."

[115] *See* Levy at 174 (collateral estoppel effect in ensuing state court litigation). In this case, the plan discharged partners of liability even though the discharge contravened 11 U.S.C. § 23(j) - "The discharge of a partnership shall not discharge the individual general partners thereof from the partnership debts...").

In *Levy*, the creditors sued the partners in state court in which the partners defended on the basis that the plan (erroneously) discharged them. The California Supreme Court applied collateral estoppel principals, holding, as follows: "In the present action the findings establish: On May 25, 1973, plaintiff, as an unsecured creditor of the limited partnership, was given notice of the meeting of creditors (held June 26, 1973) which resulted in the order confirming plan of arrangement. 'Under Chicot County the crucial element that would bar collateral attack on a judgment seems to be whether the party was afforded an opportunity to litigate.' (*Brown v. United States*, *supra.*, 508 F.2d at p. 631.) Plaintiff here had notice of the meeting of creditors and he does not suggest that he was denied an opportunity, at such meeting, to raise his objection that the Bankruptcy Court lacked jurisdiction to discharge

defendants from liability for the obligations of the limited partnership. Since the objection could have been raised in the bankruptcy proceeding, the order confirming plan of arrangement is conclusive in the present action insofar as such order determined that defendants are not liable for obligations of the limited partnership."

Levy is a cautionary story in instructing creditors, be they represented by a committee or otherwise, to carefully read the disclosure statement and proposed plan to ensure that the plan is free of any traps and pitfalls which may deny the creditor the promised compensation.

[116] Plans cycle from the original through to the "fifth amended."

[117] The California form of renewal is a two page document (EJ-190). Notice is required (EJ-195). The judgment is deemed renewed upon filing with the clerk. *See* Cal. Code Civ. Pro. § 683.150(a) ("Upon the filing of the application, the court clerk shall enter the renewal of the judgment in the court.") *See also*, *Goldman* at 262. ("The statutory renewal of judgment is an automatic, ministerial act accomplished by the clerk of the court; entry of the renewal of judgment does not constitute a new or separate judgment."); Ahart, Cal. Practice Guide: Enforcing Judgments and Debts § 6:75, p. 6A-41 (2007) ("Filing the renewal application [and paying the appropriate filing fee, [pursuant to] Gov.C. § 70626(b)] results in automatic renewal of the judgment. No court order or new judgment is required. The court clerk simply enters the renewal of judgment in the court records. [*See* CCP § 683.150; *Jonathan Neil & Assocs., Inc. v. Jones*, 138 Cal.App.4th 1481, 1487, 1489, 42 Cal.Rptr.3d 350 (2006)]..."). " Thus, "[t]he judgment renewal procedure is a different mechanism to extend the life of a judgment than that of bringing an independent action on a judgment. (*Fidelity Creditor Svce. v. Browne*, 89 Cal. App.4th 195, 200, 106 Cal.Rptr.2d 854 (2001)) Entry by the trial court clerk of a renewal is a ministerial act..." *Neil* at 1489, n. 1.

"[R]enewal does not create a new judgment or modify the present judgment. Renewal merely extends the enforceability of the judgment." (*Id*. at 1489) The renewed judgment "has no independent existence" from the original judgment." *Id.* at 1490.

[118] 11 U.S.C. § 1109(b), and 1128.

[119] *See e.g.*, *Fairfield Communities Inc. v. Daleske (In re Fairfield Communities, Inc.),* 142 F.3d 1093, 1095 (8th Cir. 1988) (bankruptcy court may assume jurisdiction over aspects of plan related to administration and interpretation if such jurisdiction is explicitly retained in the plan); *see also*, *Hospital and*

Univ. Prop. Dam. Claimants v. John Manville Corp. (In re John Manville Corp.), 7 F.3d 32, 34 (2nd Cir. 1993) (bankruptcy court's post-confirmation jurisdiction is defined by reference to plan); *also In re General Media* at 73-74 (plan must provide for retention of jurisdiction); *Gallien v. Sanwa Leasing Corp.*, 214 B.R. 583, 585 (Bankr. Court, E.D. Ark. 1997) (plan must provide for jurisdiction for post-petition adversary proceeding): *Smith v. John Peter Lee, Ltd. (In re Smith),* unpublished opinion, 114 F.3d 1179, (9th Cir. 1998) (jurisdiction term in plan to support claim over assets).

These cases hold that the plan is the primary source of the bankruptcy court post-confirmation to interpret, enforce, or otherwise modify the plan. If the confirmed plan is time-barred, the court loses the jurisdiction to enforce the plan. Other courts have held that the scope of post-confirmation jurisdiction is unaffected by the plan itself. *See U.S. Trustee v. Gryphon at the Stone Mason Inc.,* 216 B.R. 764, 769 (W.D., Pa, 1997) *aff'd* 166 F.3d 552 (3rd Cir. 1999).

[120] 11 U.S.C. § 1129(a)(7)(A)(ii).

[121] Ensuring that wrongdoer continues to pay for massive losses serves the public interest in relieving the local, state and federal governments from the burden of never-ending financial obligation to provide long-term healthcare and other social service benefits to a large group of individuals facing catastrophic losses. Freeing the debtor from plan obligations concurrently burdens governmental entities for past and current services. In Chapter 11 cases, state and local governments file claims for the million-dollar reimbursements arising from health care and other social services benefits. Extinguishing the continuing plan obligations would deprive governmental entities of reimbursement for these expenditures. Bonds and other long obligations issued by a Chapter 11 debtor based on the continued viability of a confirmed plan are vulnerable to attack. These instruments certainly would decline in value if the confirmed plan were to be extinguished, leaving a trail of aggrieved (and litigious) investors. The marketplace in "junk" and/or "secondary debt" for bankruptcy claims and bonds would freeze up.

[122] Chapter 11 confirmed plans, like class action settlements, consent decrees, and other massive claims mechanisms, compensate claimants numbering in the tens of thousands and gross payouts routinely exceeding the billion-dollar mark. Being required to fund these settlements, a publicly-traded debtor represents the plan obligations on its balance sheet as a short- or long-term debt and a burden to its worth. Shareholders, insiders, or investors would attack the plan and, if successful, thereby increase the net worth of the debtor equal

to the debt relief. Detaching the debtor from the confirmed plan constitutes a billion-dollar recapitalization without any concurrent financial obligation other than attorneys' fees. An economist might argue that the destruction of claimants' rights in a Chapter 11 and coextensive enhancement of shareholder value represents an efficient asset transfer and would have little or no impact upon the economy as whole.

The social and moral implications are another matter. A legislative solution might emanate from impact of plan extinguishment. The change would require the inclusion of an "automatic renewal" of the confirmed plan as follows: "Notwithstanding any provision of the law of the state in which the bankruptcy sits which requires the renewal or refiling of a judgment, the confirmed plan shall remain enforceable according to its terms even though any term, promise, warranty, or condition, is subject to performance or enforcement, after the expiration of any state statute compelling the renewal or refiling of a judgment."

This outcome is presaged by interplay between tobacco litigation and the stock market. The stock market pegs the shares of tobacco companies such as Altria (formerly known as Philip Morris) based on its continuing successes and failures in the court system. Relief from a multi-million dollar claim or judgment enhances the share prices, creating millions of dollars of real value in the securities market. Under the efficient markets hypothesis, stock prices represent the total sum of all knowledge, real and imagined, including all aspects of any major litigation. *See, e.g*., *Tobacco Gains; Supreme Court Won't Review Disgorgement,* MarketWatch, June 28, 2010; *Supreme Court Rejects Appeal for Tobacco Damages*, CNN, June 28, 2010. Tobacco stocks are widely held and the spike in stock prices benefits a large shareholder base including mutual funds.

[123] Plans are frequently the result of extensive negotiations. "As counsel for the Unsecured Creditor's Committee described it: It is a plan that is the result of negotiations between two official committees and the debtor. It is a plan that is the joint plan of the Creditor's Committee and the debtor." *In re Keck, Mahin & Cate*, 241 B.R. 583, 598 (Bankr. N. D., Ill. 1999).

[124] 11 U.S.C. § 1141(a) [binds all parties], 11 U.S.C. § 1141(b) [revests assets], 11 U.S.C. § 1141(d)[discharges debts] and 1129(a)(7)(A)(ii)[payment equal to Chapter 7 recovery].

[125] Confirmed plans are judgments. *See supra*.

[126] *Quote from In re Lacy* 304 B.R. 439, 434-444 (USDC, D. Col. 2004), *citing*

In re Ernst.

[127] *See Federal Deposit Ins. Corp. v. O'Donnell*, 136 B.R. 585, 589 (D.D.C., 1991)(plan released liability of non-debtor), *citing Stoll* as being in direct contravention to Section 524(e). (*See discussion at page 589-590 for all cases on this issue*).

[128] *In re General Media* at 75 (the court lacks jurisdiction, post-confirmation, to compel turnover of valuable property); *see also*, *In re Petrowax, P.A. Inc. (Petrowax PA. Inc. v. C & C Petroleum & Chemicals Group Inc*., 200 B.R. 538 (Bankr. D. Del., 1996) (post-confirmation, revested debtor could not pursue estate turnover claim due to failure of plan to retain jurisdiction and enforcement).

[129] Claims against third parties should be set forth in the plan under 11 U.S.C. § 1123(b)(3)(B) or the property will become part of the debtor's post confirmation property pursuant to 11 U.S.C. § 1141(b). *Harstad v. First Am. Bank*, 39 F.3d 898, 902-903 (8th Cir. 1994) ("...the creditors are entitled to know if the debtors intend to pursue the preferences in post confirmation actions..."). The failure of a plan Confirmation to describe the claims against parties bars relief. *In re G-Plastic Inc.*, 320 B.R. 861, 867 (E.D., Mich. 2005) (*citing* to *Brown v. Levy*, 283 F.3d 761 (6th Cir. 2002) [legal malpractice claim]; *see also*, *In re P.A. Berger & Co*., 140 F.3d 1111 (7th Cir. 1998); *In re Associated Group, Inc.*, 283 B.R. 549 (9th Cir. BAP, 2002); *In re Appel Corp*. 300 B.R. 564 (S.D.N.Y. 2003); *In re Kmart,* 310 B.R. 107 (Bankr. N.D. Ill. 2004); *In re Pen Holdings Inc.,* 316 B.R. 107 (Bankr. M.D. Tenn. 2004); *In re Bleu Experience, Inc*., 304 B.R. 309 (Bankr. E.D., Mich., 2003); *In re USN Commc'ns*, 280 B.R. 573 (Bankr. D. Del. 2002); *In re Ampac Corp*., 279 B.R. 145, 160-161 (Bankr. D. Del. 2002).

[130] *See illustr.*, *Federal Deposit Insurance Corporation v. O'Donnell*, 136 B.R. 585,587 (D.D.C. 1991) (failure to object to jurisdiction of the court in discharging guarantors, and FDIC did not appeal court's order.).

[131] *Id*. at 588-589; *see also*, *Stoll* at 171-177.

[132] Bankruptcy Rule 7069 incorporates the law of the domicile state. *See In re Kerlo*, 311 B.R. 256, 261 (Bankr. C.D. Cal. 2004); *In re Mayex*, 178 B.R. 464, 467-468 (Bankr. W.D. Mo. 1995); *In re Svavely*, 314 B.R. 808, 812 (9th Cir. BAP (Wash), 2004); *see also*, *In re Davis*, at 748 ("Since the Plaintiffs registered the Judgment in Arizona, the foregoing authority suggests that the Court should review the law of Arizona to determine what steps should have been taken over the years to allow the Judgment to remain valid and

enforceable."); *but cf*., *Matanuska Valley Lines, Inc. v. Molito*r, 365 F.2d 358 (9th Cir. 1966).

This is not a case of "blame the victim" but rather is necessary burden-shifting to the party in interest to affirmatively assert a claim at plan confirmation which frequently leads to a trial on the disputed issues as a contested matter under Rule 9014. *See In re Tasocas Petro.Corp*., at 859 (contested matters arising from plan confirmation). The court renders findings. Rule 7052 is applicable under Rule 9014. The order of confirmation is a final binding judgment, complete with *res judicata* and collateral estoppel effects. "Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first." *Stoll* at 172.

[133] *See McDaniel* at 483; *see also*, *In re Brink*; *also In re Davis*, 730 F. 2d 176 (5th Cir. 1984); *In re Hunt*; *In re Fifarek*. *Further*, *In re Romano (Romano v. LaVecchia*); *Danzig v. Danzig,* 233 B.R. 85 (BAP, 8th Cir. 1999) (Renewal filed in bankruptcy court one day too late).

[134] *In re Lacy,* 304 B .R. 439, 444-445 (D. Colo 2004) (collection of cases).

[135] *Id*. (Collection of cases)(distinguishes *Pioneer Liquidating Corp v. United States Trustee (In re Consolidated Pioneer Mortgage entities),* 248 B.R. 368 (9th Cir, BAP, 2000), (affirmed 264 F.3d 803, 807-808, 2001) on the reasoning that the language and purpose of the plan demonstrated that the assets would be revested in the estate.

[136] *Lacy* at 446. *See also*, *In re Captain Blithers*, 311 B.R. 530, 537 (9th Cir. BAP, 2004) (court compelled the revesting of asset to estate based on the plans and disclosure statement provided that debtor would apply the asset for the benefit of creditors. Query if plan was not explicit whether the insiders could have successfully resisted revesting).

[137] *Lacy* at 446.

[138] *In re General Media* at 73.

[139] *See North Am. Car Corp. v. Peerless Weighing & Vending Mach. Corp*., 143 F.2d 938, 940 (2nd Cir. 1944).

[140] *See OORC Leasing, LLC.,* 359 B.R. 227, 233 (Bankr. N.D. Ind. 2007) (the discussion in this case dealt with the resolution of matters between the debtor

and the creditors, but would apply to post confirmation transactions.).

[141] *Id*. at 232-233. "The court's perception that it is not appropriate to reopen a chapter 11 case in order to seek conversion to chapter 7 is in full accord with the effect of confirmation upon the operations of the debtor. As observed by the 7th Circuit:

'Once the Bankruptcy Court confirms a plan of reorganization, the debtor may go about its business without further supervision or approval. The firm is also without the protection of the Bankruptcy Court. It may not come running to the bankruptcy judge every time something unpleasant happens... Formerly a ward of the court, the debtor is now emancipated by the plan of reorganization. A firm that has emerged from bankruptcy is just like any other defendant in a tort case: it must protect its interests in the way provided by the applicable non-bankruptcy law... (*citing to Pettibone v. Easley*, 935 F.2d 120, 122 (7th Cir.1991) (emphasis original).

'The corollary of this is that '[the debtor] and its creditors should work out their mutual rights and duties in the ordinary tribunals and should not forever continue under the tutelage of the Bankruptcy Court.' (*citing to Butler v. Greater Pythian Temple Assoc. of New York*, 205 F.2d 621, 623 (2nd Cir. 1953). Thus, just as the post-confirmation chapter 11 debtor should not continue to look to the Bankruptcy Court for solutions to its woes, neither should the debtor's creditors. Both of them should look to other courts to vindicate their rights, whatever they may be."

[142] Including profits, proceeds and all acquisitions.

[143] *OOCR Leasing* at 233 ("...formerly a ward of the court, the debtor is now emancipated by the plan of reorganization.").

[144] *Id*.

[145] *Id*.

[146] "…court shall confirm plan…"

[147] "…Provisions of a confirmed plan bind the debtor…"

[148] *See* 11 U.S.C. § 1142:

"(a) Notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court.

"(b) The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform

any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan."

[149] *OORC Leasing* at 223 (creditor can enforce plan based on default in federal or state court.

[150] 11 U.S.C. § 1141(a).

[151] 11 U.S.C. § 1141(b).

[152] 11 U.S.C. § 1149 (c).

[153] 11 U.S.C. § 1149 (d).

[154] 11 U.S.C. § 1129(a)(7)(A)(ii).

[155] 11 U.S.C. § 1129(a). plan confirmation order.

[156] *Prepackaged Asbestos Bankruptcies: Down but not Out*, at 729 ("The Manville trust was funded not only by insurance settlement, cash, and receivables, but also by stock in the reorganized company, and a right to receive future profits."); *see also In re Dow Corning v. Dow Corning Corp.* at 645-655 (funded by insurance, shareholders and operating cash reserves); *In re Johns Manville*, *supra.*; *also, In re A.H. Robins Co.*, 880 F.2d 769 (4th Cir. 1988).

[157] *Id*. at 769-770.

[158] The extinguishment of a confirmed plan favors the debtor who has been revested with estate assets, but freed of the plan obligations. The extinguishment undermines the court's continuing jurisdiction to adjudicate continuing litigation, much less any prior post-confirmation order or judgment. Should the court find the plan is extinguished which deprives creditors, among others, of continuing payments, the aggrieved parties will ponder, with new counsel at their side, their options in seeking to shift blame to those who are responsible for this misstep. The debtor does walk away with its assets untethered to an onerous repayment scheme due creditors, all which constitutes the epitome of asset protection.

[159] *See Tacoma* at 344-345. Washington State's legislature has since extended the time to ten years, but the statute remains a "statute of repose."

[160] 11 U.S.C. § 1141(b) provides for the revesting of assets.

[161] *Local Loan v. Hunt*, 292 U.S. 234, 241 (1934) ("One of the primary purposes of the Bankruptcy Act is to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start a fresh free from the obligations and responsibilities consequent upon business misfortunes.")

[162] 11 U.S.C. § 1123(a) [mandatory terms] does not mandate a plan term assuring plan immortality. Congress anticipated that parties would have

negotiated this term. Alternatively, Congress likewise anticipated that the passage of time would provide the debtor a "fresh start," in freeing the debtor from obligations found in a "stale" plan which replicates the fact that Congress provides other judgment debtors with a "fresh start," when any other federal [money] judgment expires based on the passage of time. Federal law does not provide for special statute of limitations or statute of repose for federal private party money judgments and instead mandates renewals consistent with local domicile state law absent judgments in favor of the government.

[163] As F. Scott Fitzgerald famously observed in annotations to his final and incomplete novel, "The Last Tycoon." *See* F. Scott Fitzgerald, The Last Tycoon (Edmund Wilson ed., Charles Scribner's Sons) (1941).

[164] As were major court rulings either upholding or overturning punitive damages claims against the tobacco companies.

[165] *See* Frank Sloan, *Impacts of the Master Settlement Agreement on the Tobacco Industry*, 13 Tobacco Control 356-346 (2004).

[166] *See* Matthew Dolan & Phred Dvorak, *Union Trust in $2.9 Billion Windfall*, The Wall St. Journal, Nov. 19, 2010 at B9.

[167] According to historical lore, President Truman would call on his economic advisors for input on various budgetary matters. The advisors would equivocate, "Well, on the one hand… But then on the other hand…" Fed up and frustrated (as the story goes), Truman declared, "What this country needs is a good one-handed economist."

[168] The true father of the efficient markets hypothesis was the French financial mathematician, Louis Bachelier. However, over a half century passed before it was ultimately popularized by Eugene Fama in *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25(2) J. Finance 383-417 (May 1970). EMH asserts that financial markets are "informationally efficient." The practical effect of this hypothesis is to prevent individual investors from reliably and/or consistently exploiting information publicly available at the time the investment is made for abnormal returns. The efficient markets hypothesis requires that agents have rational expectations, that on average the population is correct (even if no one person is) and whenever new relevant information appears, the agents update their expectations appropriately. The hypothesis does not state that the agents are, on an individual basis, rational, allowing for over-reaction and under-reaction when new information surfaces. All that is required is random investor reaction overall following a normal distribution pattern. This pattern produces a net effect on market prices that

cannot be reliably exploited to make an abnormal profit, especially when considering transaction costs (including commissions and spreads).

[169] K.C. Baker and Bill Hutchinson, *$8M Tribute to Marilyn Monroe Auction Draws Sexy Sums*, N.Y. Daily News, Oct. 29, 1999. [A full-length black silk crepe dress. Estimated at $4,000 to $6,000. Sold for $60,000. A pair of white lace dresses. Estimated at $6,000 to $8,000. Sold for $45,000].

[170] Joy Resmovits, *For sale: Madonna's Sexy Phone Messages to Ex-Boytoy Jim Albright, Plus Other Rock 'N' Roll Gems*, N.Y. Daily News, July 29, 2009 (lace bustier Madonna wore in her "Like a Virgin" tour is also up for auction, starting at $4,000). *See also* Scott Reyburn, *Madonna's Bra, Clapton's Guitar Targeted by Art Investor Funds*, Bloomberg News, Aug. 19, 2008 (bra designed by Jean-Paul Gaultier as part of concert tour, sold at Christie's (London) for $26,180. Marilyn Monroe-inspired dress worn in video for "Material Girl," sold for $32,200. Lace bustier and hat from 1987 tour sold for $12,650).

[171] The initial speculation began in June of 2008, after Jobs appeared at a press conference, having lost significant weight, leading to speculation that his cancer was no longer in remission. Reports on his appearance almost uniformly included the word "gaunt." *See, e.g.*, Dylan Tweney, *Developers at WWDC Looking Forward to iPhone 3G Platform*, Wired, June 9. 2008 ("Indeed, some observers felt that Jobs looked gaunt…"); Theresa Polletti, *Jobs' Health Questioned Again*, Marketwatch, June 12, 2008 ("While Jobs, 53, looked especially gaunt in his trademark black turtleneck and faded jeans…").

[172] Brad Stone, *Apple's Jobs Explains His Weight Loss*, N.Y. Times, Jan. 6, 2009, at B1.

[173] The rumor mill was out of control. At one point, Steve Jobs called *New York Times* reporter, Joe Nocera, personally, saying, "This is Steve Jobs. You think I'm an arrogant [expletive] who thinks he's above the law, and I think you're a slime bucket who gets most of his facts wrong." Mr. Jobs then had an off-the-record conversation about his true state of health (*see* Joe Nocera, *Apple's Culture of Secrecy*, N.Y. Times, July 28, 2008) which denied rumors of a recurrence of cancer but not that Jobs was having health problems.

[174] On December 16, 2008, the speculation began again with reports from Gizmodo.com (a tech enthusiast blog) stating that Steve Jobs would skip his annual appearance at a major Apple-themed trade convention (*see* Matt Buchanan, *Steve Jobs Skipping Final Macworld Apple Keynote*, Gizmodo, Dec. 16, 2008). Then, the same blog reported that Jobs was to miss the

convention because his health was rapidly declining. *See* Jesus Diaz, *Steve Jobs' Health Declining Rapidly, Reason for Macworld Cancellation*, GIZMODO, Dec. 30, 2008. Traditional media (newspapers and cable outlets) denied the rumor. *See* Jim Goldman, *Apple's Jobs Is (Still) Fine*, CNBC.com, Dec. 30, 2008. Steve Jobs then tried to staunch the flow of rumors by issuing a press release stating that he was having some health issues arising out of a "hormone imbalance." *See Press Release, Apple, Inc., Letter From Apple CEO Steve Jobs* (Jan. 5, 2009). A week later, it became clear that Jobs' health was far worse; in fact, he needed a liver transplant. Also clear was that Apple's public relations department, headed by Steve Dowling, had not been completely forthright with the public – including investors. Steve Jobs took a medical leave of absence from Apple to recuperate, announcing his leave of absence in an "internal" email to Apple employees. *See* Brian Lam, *Steve Jobs Taking a Leave of Absence from Apple Due to Health Problems*, GIZMODO, Jan. 14, 2009.

[175] Following the first week of speculation about Steve Jobs' health in June 2008, Apple's shareholders lost $12.17 billion in lost market capitalization. The second month of speculation (at the end of 2008) ultimately cost Apple's shareholders another $14 billion in market capitalization (Apple's stock has since rebounded and then some).

[176] Investors suffered a greater loss when Bloomberg News accidentally published an obituary for Steve Jobs. *See* Connie Guglielmo, *Steve Jobs, Apple Co-Founder, Arbiter of Cool Technology*, BLOOMBERG NEWS, Aug. 27, 2008 (URL no longer available); *see also*, Ryan Tate, *Steve Jobs's Obituary, As Run by Bloomberg*, GAWKER, Aug. 28, 2008. On the next day of trading, Apple's value lost $6.65 billion.

[177] Six months later, the SEC announced it was going to investigate whether Apple, its board, or Jobs intentionally misled shareholders about Steve Jobs' health. *See* Nicholas Carlson, *SEC Investigates Apple, Jobs*, THE BUSINESS INSIDER, July 8, 2009.

[178] Burton Malkiel is credited with popularizing the term "random walk" with his 1973 book, *A Random Walk Down Wall Street* (W.W. Norton & Co., Inc. 1973). In Malkiel's experiment, his students were given a hypothetical stock that was initially worth $50. The closing stock price for each day was determined by a coin flip: heads resulted in the price closing a half-point higher, tails, a half-point lower. Every day, the stock had a 50/50 chance of closing higher or lower than the day before. Malkiel then took the

results in a chart and graph form to a chartist, a person who "seeks to predict future movements by seeking to interpret past patterns on the assumption that 'history tends to repeat itself.'" The chartist advised Malkiel to buy the stock. The Random Walk Hypothesis posits that stock performance is just as random as a coin-toss.

[179] "The series looks like a wandering one, almost as if once a week the Demon of Chance drew a random number from a symmetrical population of fixed dispersion and added it to the current price to determine the next week's price." Maurice G. Kendall, *The Analysis or Economic Time-Series, Part I: Prices*, 96 J. of Royal Stat. Soc'y 11-25 (Part I 1953) at page 13.

[180] "Spillcam" was a frequently used word in English-language media in 2010 (impressive considering it did not exist prior to May 2010). See *Top Words of 2010*, The Global Language Monitor, Nov. 14, 2010, http://www.languagemonitor.com/top-words/top-words-of-2010.

[181] Based on 3.1 billion shares outstanding.

[182] Based on 319.8 million shares outstanding.