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Business Ethics: Counseling the Closely Held Corporate Debtor: Bankruptcy Planning and Professional Ethics

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Introduction

Bankruptcy filings are on the rise generally, and Chapter 11 filings are increasing right along with them. The Chapter 11 cases range from General Motors all the way down to the local mom and pop restaurant on the corner. While some provisions govern "small businesses" directly in Chapter 11, the same law generally governs all Chapter 11 cases. That said, there is certainly a significant difference between the Chapter 11 case of General Motors and the Chapter 11 case of Jack and Jill's Pizza Emporium, Inc.

Filing a bankruptcy petition initiates a bankruptcy case, but it does not end a debtor's relationship to non-bankruptcy law. For example, rules governing the operation of a business apply even after the Chapter 11 petition is filed. The debtor still must comply with environmental regulations, tax laws, and the like. Non-bankruptcy law that governs the relationship between the corporation and its shareholders also continues to apply in the Chapter 11 case. In this paper we will consider the Chapter 11 case of a closely held corporation that manufactures widgets. We will assume that the stock of the corporation is owned entirely by one person who also serves as the President or CEO of the company. Just as under non-bankruptcy law, a Chapter 11 debtor that happens to be a corporation still is governed by basic corporate law principles. The corporation is a separate legal entity from its shareholders and its officers and directors. Nevertheless, as an artificial entity, the corporation can act only through the efforts of its agents. When one person owns all of the stock of the corporation and also serves as its CEO, that person is effectively the "face" of the corporation. In practice, that person believes that he/she is not only the "face" of the company, but also its heart and soul. As a practical matter that may be true, but legally the corporation is a separate entity.

When an attorney represents a corporation, Rule 1.13 of the Model Rules of Professional Conduct typically governs that relationship. Subsection (a) of that rule recognizes that the corporation acts only through its authorized constituents, so counsel for the corporation takes direction from the person who owns all of the stock of the corporation and also serves as the CEO. Notwithstanding that direction, however, counsel for the corporation needs to make clear to the sole shareholder/CEO that the lawyer's duties run to the corporation and not to the shareholder. Sometimes those interests can diverge. If they do, Model Rule 1.13 (b) provides that the corporation's lawyer must go over the head of any officer who is either engaged in action or intends to act or refuses to act in a manner relating to the attorney's representation that is a violation of the legal obligation to the corporation or is a violation of law that reasonably might be imputed to the organization and would result in substantial injury to the company. In that event, the lawyer is authorized to act as is reasonably necessary in the best interest of the corporation. In appropriate circumstances, the lawyer can "refer the matter to a higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law." Model Rule 1.13(b).

This directive in the Model Rules works well when the person giving the questionable direction to the lawyer is someone who is not also the highest authority of that corporation. In the situation of a closely held company where the sole shareholder also serves as the CEO, it is likely that he/she is also the entire board of directors of the corporation. If there is an independent board, then that entity is available to the attorney for consideration of appropriate action over the advice or direction of the sole shareholder/CEO. More likely, the attorney for the corporation is left to communicate directly to the sole shareholder/CEO to inform that person that the interests of the corporation may differ from the interests of that individual. In that

instance, the attorney must advise the shareholder/CEO that the attorney has to act in the best interests of the corporation. This can lead to the firing of the attorney by the shareholder/CEO. Nonetheless, that is the role that the attorney plays. We will see that those issues can arise in even greater frequency in a Chapter 11 case.

If a corporation files a Chapter 11 petition, not only must the counsel for the corporation advise the sole shareholder/CEO of the attorney's duties to the corporation as opposed to duties to the shareholder/CEO, but the attorney must also address the issue of a Chapter 11 debtor's different status from its status outside of bankruptcy. Whether or not state law might recognize the existence of fiduciary duties to creditors by insolvent corporations, once a corporation files a Chapter 11 petition, new fiduciary obligations arise in favor of the bankruptcy estate. Furthermore, the Chapter 11 debtor is now operating in a very different environment in which its actions are more public and more open to scrutiny. The United States trustee, the official unsecured creditors' committee, and creditors generally will have access to much more information about the debtor's operations than would exist outside of bankruptcy. The dbtor becomes a debtor-in-possession and will be required to open new bank accounts, to report regularly to the United States trustee and the court on the operations of the business, and will generally be watched much more carefully than was the case prior to the filing for bankruptcy relief. This is often a difficult environment in which to operate the business when the shareholder/CEO had been conducting business without any or very little oversight by third parties. Nevertheless, the debtor-in-possession has no option but to be operating the business in an open and public manner.

Getting Paid: Carve-outs and Third Party Funding

Section 330 of the Bankruptcy Code provides that attorneys representing the debtor can receive reasonable compensation for their services. Section 330(a)(3) sets out a variety of factors for the court to consider in determining the fee awards in favor of those counsel. All of this assumes, however, that assets exist from which to receive those payments. Section 503(b)(2) defines these fees as administrative expenses, and under § 507(a)(2) those administrative expenses have priority in payment over other unsecured creditors. The problem is that payments to administrative expense claimants, including counsel for the debtor-in-possession, come from the estate. Thus, if there are no assets, having a high priority claim is of little consolation. As a result, counsel for the debtor-in-possession typically seeks to obtain funds either to secure payment prior to the commencement of the case, or to obtain the agreement of third parties to fund the case, including third parties who may hold security interests in assets of the debtor.

It is not unusual for the assets of the debtor to be entirely encumbered by a perfected security interest in favor of the debtor's primary lender. For purposes of this paper, we will assume that our Chapter 11 corporate debtor is in just that situation. That is, the debtor's assets are subject to a perfected security interest in favor of First Bank. If the value of those assets exceeds the debt owed to First Bank, the bank is oversecured and there is value available out of the estate to pay priority claims. In that circumstance, counsel for the debtor-in-possession could simply seek payment out of the estate from that portion of the assets that is unnecessary to protect the interests of the secured creditor. All too often, however, the debtor's assets are insufficient to meet the debt owed to the secured creditor who is consequently undersecured. In that circumstance, we are back to a situation where no assets would be available to pay even

administrative expense claims, and the attorney is vulnerable to providing services to the debtor without being paid.

Assuming that there are no funds in the debtor's estate to pay counsel, the attorney for the debtor will likely seek money from a third party, including even the debtor's primary secured lender. Since the debtor is a corporation, the sole shareholder is an obvious source for funds to represent the debtor. It is likely that the sole shareholder/CEO has been funding the operations of the debtor for some time, so this may be just more of the same. While this is an obvious source of potential funds to pay attorney fees, it might also exacerbate the problem of the individual believing that he/she has greater control over the operations of the debtor than is expected by both corporate law and the Model Rules of Professional Conduct. Therefore, if the sole shareholder/CEO is the source of funds, the individual needs to be advised very specifically that supplying the money for the representation does not bring with it any authority to direct or decide the future course for the corporation. Once again, the Model Rules of Professional Conduct provide guidance in this area. For example, Model Rule 1.8(f) provides that compensation from someone other than the client is permissible only if the client gives informed consent to the transaction, that the attorney client confidentiality is maintained, and that "there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship. When the sole shareholder/CEO is the source of the funds, client confidentiality is usually not a problem. After all, the corporation can only act through its agent, the sole shareholder/CEO. More significantly, however, is the directive that the source of the funds not operate to "interfere" with the lawyer's independent professional judgment in favor of the client. Once again, it is incumbent upon the attorney to make it clear to the shareholder/CEO that the payment of the attorney's fee does not buy any allegiance to or protection of the

shareholder/CEO's personal interests. Rather, you must remind that person that your interests run to the corporation.

Even if you were able to successfully advise the shareholder/CEO that his/her payment of your fees would not buy any particular loyalty to them, it is often unnecessary to have that discussion. The reason that it is not necessary is because the individual frequently does not have any funds available to pay your fees. In that instance, you may have to look to other third parties to pay those fees. The debtor may have other people unrelated to the company who are willing to make such a contribution. In that event, counsel for the debtor must advise the third party providing the funding that the attorney's loyalties remain with the corporate debtor and do not extend to any other person including, but not limited to, the sole shareholder/CEO or the person providing the money. If this can be accomplished, then those funds can be used to pay the attorney subject to the court's approval.

Since many Chapter 11 debtors come to their attorneys so late in the process that there is a limited prospect for successful reorganization, funds for attorney's fees from friends and relatives of the sole shareholder/CEO are often not available. In that instance, the most likely source for those funds is the debtor's primary secured creditor. Again, assuming that the creditor has a properly perfected security interest in all of the debtor's assets and that the creditor is undersecured, counsel for the debtor needs to request a "carve-out" from the secured creditor to allow for the payment of attorney fees. Why would the creditor agree to such a request? The reason why creditors agree to such carve-outs is that there is a benefit that they receive by the debtor obtaining capable counsel to represent the debtor in the Chapter 11 process. Competent debtor's counsel increases the likelihood of successful reorganization or other appropriate action being taken in the bankruptcy case. Debtor's counsel that is insufficiently expert in the area of

corporate reorganization can lead to costly delays and ultimate failure in the process which can further injure the secured creditor. Thus, to the extent that the secured party has confidence that the proposed debtor's attorney is competent and trustworthy, it will frequently agree to a "carve-out" from its security interest to pay the debtor's attorney fees up to a certain amount. For example, the secured creditor might agree to permit the attorney for the debtor to apply for a payment of fees up to $50,000, with allowed fees being paid out of the debtor's assets which are subject to the perfected security interest of the creditor.

The secured creditor might also agree to a carve-out not just because it wants the debtor to have competent counsel, but because of the potential for the application of § 506(c). That section provides that reasonable fees can be paid for the "costs and expenses of preserving, or disposing of, [collateral] to the extent of any benefit to the [secured creditor]." Thus, an argument could well be made that actions by debtor's counsel may have inured to the benefit of the secured creditor by continuing the operation of the debtor's business and enhancing the value of the collateral. Arriving at a pre-bankruptcy agreement to carve out fees up to a certain amount permits the secured creditor the certainty of a cap on those amounts and avoids the expense to all parties that would be required if the attorney had to show the extent to which a secured creditor's collateral position was improved or protected under § 506(c). The greater the chance that a debtor's attorney is going to be able to recover funds under § 506(c), the more likely it would seem that the creditor would be willing to enter into an agreement permitting the carve-out of funds. As one court has noted, in the Eighth Circuit, "If a secured creditor consents to the debtor's continued operation, it also impliedly consents to the debtor's surcharging the necessary operating expenses of continuing its business against the creditor's secured claim." ***In re Machinery, Inc.***, 287 B.R. 755, 768 (Bankr. E.D. Mo. 2002), citing *In re Hen House Interstate,*

Inc., 150 F.3d 868 (8th Cir. 1998). All in all, the use of carve-out agreements has been widely recognized, and it has even been approved in the absence of carve-outs for other participants in the case.

For example, in ***In re Hotel Syracuse, Inc.,*** 275 B.R. 679 (Bankr. N.D. N.Y. 2002), the undersecured creditor agreed to a carve-out of fees for the debtor's counsel. The agreement did not, however, provide any carve-out for fees that might be incurred by counsel for the unsecured creditors committee. Upon request for a payment of committee counsel's fees out of the creditor's collateral, the court held that there was no authority to make such payment. Instead, the court noted that payments of administrative expenses normally are made only from property of the estate, and that only in the face of either an agreement allowing such a payment, or a finding that the actions operated to the benefit of the secured creditor under § 506(c) could those fees be paid to counsel for the unsecured creditors' committee. The court specifically rejected the argument made by the committee that permitting the payment of the debtor's attorney's fees but not the fees of the counsel for the creditors committee would subvert the priority provisions of the Code. As a practical matter, the only person in a position to exercise any leverage in an agreement with the undersecured creditor is counsel for the debtor because these agreements are made typically prior to the commencement of the case. No creditors' committee exists at that time, and the formation of the committee followed by its employment of counsel takes place long after the debtor has begun its operations in Chapter 11.

For many debtors, particularly those whose assets are subject to a perfected security interest held by an unsecured creditor, a carve-out is the only realistic source of funds for the payment of the debtor's attorney's fees. This is a common practice, and in reaching such an agreement, counsel for the debtor should be careful to negotiate an appropriate amount for the

carve-out. Needless to say, the creditor's interest is in limiting the amount of those fees while insuring that the debtor has competent counsel to assist in the successful reorganization of the debtor.

Using Debtor's Funds to Pay Attorney's Fees

As noted above, a likely source of funding will be the debtor. If the debtor has assets available that are not subject to a perfected security interest, those assets can be used to fund the case. Prior to the commencement of the case, the debtor can use its own money even if it is subject to a security interest. The payment of ordinary course expenses, as well as the payment of attorney's fees is generally effective even as against a security interest in those funds. If we assume that our debtor is continuing to manufacture widgets, to sell those widgets, and to collect payment for those sales, the funds received from purchasers will be proceeds of the collateral that are subject to the perfected security interest of the debtor's primary secured lender. Nonetheless, the debtor can use those funds to pay appropriate expenses, and in the absence of intentional fraud to injure the creditor, the attorney should be able to retain those payments. Moreover, to the extent that those funds are derived directly from the operation of the debtor's business, counsel for the debtor voids the potential for conflicts between counsel and the entity that provided the funds for the representation. No third party would have provided those funds, so they would not be seeking to exert any influence over the attorney. Again, the existence of the sole shareholder/CEO may still create some problems in that he/she might consider that "their money" as opposed to the money of the corporation. Once again, careful counseling should resolve the problem by explaining the ownership of those funds as in the corporation rather than in the shareholder or officer.

Regardless of the source of funds, Bankruptcy Rule 2014 requires the attorney being employed to submit a verified statement setting out the attorney's "connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee." Rule 2016(b) also requires that the debtor's attorney, whether or not that attorney applies for compensation, must "file and transmit to the United States trustee within fifteen days after the order for relief, or at another time as the court may direct, a statement required by § 329 of the Code, including whether the attorney has shared or agreed to share the compensation with any other entity." Section 329, in turn, provides that the attorney's statement must set out the "compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition ... and the source of such compensation." If the court concludes that the compensation exceeds the reasonable level for the services rendered, the court can require the attorney to disgorge any excess funds. The disgorgement would be made to the entity that provided the payment. "Unofficial" Form B-203 published by the Administrative Office of the U.S. Courts is the form for the disclosure of compensation of attorney for debtor. That form includes questions on the information required to be provided under § 329(a) and is a fertile source of information on the source, amount, and date of compensation received by counsel in the case.

Conflicts of Interest with the Primary Shareholder

Counsel seeking to be employed by the debtor-in-possession must file a disclosure statement setting out all of its connections with the debtor and creditors, among others. An attorney representing both the sole shareholder of the company, as well as the company, would be duty bound to disclose the representation of the sole shareholder. The purpose of the

disclosure is to assist the court in determining whether the attorney is disinterested or holds or represents any interest adverse to the estate. 11 USC § 327(a). The attorney is not disqualified automatically simply because he/she represents a creditor, but if another creditor or the United States Trustee objects, the court cannot approve the employment of the attorney if there is an actual conflict of interest. 11 USC § 327(c). Thus, in determining whether an attorney can be employed as counsel for the debtor, the court must decide if the attorney's representation of the sole shareholder disqualifies the attorney from representing the estate.

While some courts have adopted a "per se" rule finding that such dual representation is automatically disqualifying, see, e.g., ***In re Kendavis Indus. Int., Inc.***, 91 B.R. 742 (Bankr. N.D. Tex. 1988), others have approved the employment of counsel who have represented the sole shareholder prior to representing the debtor-in-possession. In ***In re Huntco, Inc.***, 288 B.R. 229 (Bankr. E.D. Mo. 2002), the debtor-in-possession sought to employ a law firm that also had represented its primary shareholders.[1] The law firm disclosed to the court that it had previously represented these controlling shareholders as well as the individuals in control of those controlling shareholders, but that its representation on behalf of those individuals was very limited and unrelated to the bankruptcy proceedings. The court noted that there was no evidence offered in opposition to an affidavit indicating that the law firm did not represent these individuals in any capacity at the time of the case, and that its prior representation was essentially limited to estate planning and similar work on behalf of the individual. The court rejected the notion that a per se rule should apply to prevent the employment of the law firm in these circumstances. Rather, the court concluded that § 327(a) of the Bankruptcy Code

[1] All of the common stock of the debtor-in-possession was held publicly, but a class of convertible preferred shares was owned by three family trusts. The "controlling shareholders" were essentially the family trusts and the persons that controlled and directed those trusts.

anticipates a flexible application of the law directed to the court's discretion. The existence of a "per se" rule would contravene that flexibility provided by the statute.

Huntco is also instructive as to the court's analytical process in evaluating an application for the employment of counsel. The court noted that it must find both that the attorney is not disinterested and that the attorney neither holds nor represents any interest adverse to the estate. The disinterestedness determination is made entirely under § 101(14). In that evaluation, the court frequently will review whether the attorney is a creditor of the estate. Creditor status makes the attorney "not disinterested," so an attorney who was owed a prepetition fee arguably is ineligible to be employed as counsel for the estate. In that case, counsel would frequently waive the outstanding fee and thereby no longer be a creditor. Another disqualifying characteristic under the disinterestedness test is whether the attorney was a director or officer of the debtor. Frequently, attorneys will serve as the corporate secretary, and this status would render that attorney ineligible for service as counsel to the debtor-in-possession. That disqualification, however, may not extend to other attorneys in the same law firm.

Attorneys who represent both the corporation and the sole shareholder, however, face another potential hurdle in their employment. Section 327(a) bars the employment of an attorney who represents an interest adverse to the estate. Some situations present obvious conflicts. For example, if the sole shareholder is a substantial creditor of the debtor, counsel certainly cannot represent both the corporation and the shareholder in the Chapter 11 case. The interests of the shareholder could be adverse to the debtor's interest in that the debtor's goal is to successfully reorganize the business, while the shareholder's interest may be to recover the largest amount it can even to the detriment of the corporation. Even if the attorney no longer represents the individual shareholder in that circumstance, however, the attorney must have disclosed that prior

connection, and the court may be concerned that the attorney will not zealously represent the interests of the debtor-in-possession. Creditors or the United States trustee may object to the employment of counsel on this basis, and the burden is on the debtor-in-possession to demonstrate the need for the employment of that particular counsel, as well as the attorney's qualifications under § 327(a). The prudent, and most regularly followed, course is for counsel to represent the debtor and to have separate counsel employed to represent the sole shareholder. This offers further opportunity for counsel for the debtor-in-possession to advise the sole shareholder that counsel represents the corporation as debtor-in-possession and does not represent the individual shareholder. While some courts have allowed compensation to attorneys who represent both the corporation and the sole shareholder, that is a somewhat risky undertaking for the attorney.[2] The existence of separate counsel for the individual shareholders should remove the barrier for employment of counsel under § 327(a). Nonetheless, one should expect scrutiny from the United States trustee and other creditors, as well as the court, in situations where counsel for the debtor-in-possession has represented the individual shareholder in the past.

Financing the Reorganization

Having overcome the substantial hurdle simply to be able to employ counsel at the beginning of the case, our Chapter 11 debtor still has to find a way to reorganize. Reorganization is a relative term, and may not result in the continuation of the business, but may instead be a sale to the business to a third party who would thereafter continue the operations.

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[2] See ***In re Hurst Lincoln Mercury, Inc.***, 80 B.R. 894 (Bankr. S.D. Ohio 1987). In Hurst, the counsel for the debtor-in-possession also represented the individual shareholder at one point during the Chapter 11 case. Notwithstanding this dual representation, the court approved the allowance of fees for the attorney finding that the interests of the company and the sole shareholder were united. The individual shareholder was separately represented later in the case in an action to recover his administrative claim in that case. Nonetheless, this decision probably represents the edge of allowable action by attorneys who seek to recover fees from the estate.

Of course, the debtor could simply continue to operate the business in a profitable manner and work its way out of debt in that fashion. Much depends on the operational liability of the enterprise.

Creating a newly viable entity typically will require an infusion of cash to operate and perhaps expand the business. Presumably, the debtor was unable to obtain this cash prior to bankruptcy, hence the need for the filing. The filing, however, creates a new opportunity for financing the debtor's operations. Section 364 of the Bankruptcy Code authorizes the debtor-in-possession to obtain credit to operate the business. That credit could be obtained in the ordinary course of business on an unsecured basis, although the likelihood of this is very limited. More likely, the debtor will seek to obtain financing secured by assets of the estate. Section 364(c)(2) and (3) permit this type of lending. If the debtor has unencumbered assets, or assets on which there is an existing secured claim but which still has equity available for another lender, the debtor can use those assets as collateral and borrow in that fashion. Section 364(d) goes further to provide that the debtor-in-possession can incur a secured debt that has a senior or equal lien to an existing lien on property. This "priming" type of secured loan is permissible only if the debtor-in-possession cannot otherwise obtain the credit and the interest of the existing secured creditor is adequately protected. 11 USC § 364(d). A motion for authority to obtain credit in this manner must be made under Bankruptcy Rule 4001(c). Rule 4001(c) requires that the motion to approve the obtaining of credit must include a concise statement of the relief requested that summarizes the material provisions of the proposed agreements supporting the credit extension. The rule contains a rather extensive list of matters that must be specifically disclosed, and it also provides that a final hearing on the motion for authority to obtain the credit can be commenced no earlier than fourteen days after service of the motion on the appropriate parties.

The court can authorize the credit extension more quickly, but only to the extent that it is necessary to avoid immediate and irreparable harm. Thus, if more expedited relief is granted, it should only be granted to "tide over" the debtor until the time has run for the court to render a final order in the matter.

Another regular means by which Chapter 11 debtors "reorganize" is through the sale of all or substantially all of their assets to a third party. Section 1123(a)(5)(B) provides that a Chapter 11 plan can include provisions for the transfer of all or any part of the property of the estate. This statutory directive authorizes the use of "liquidating" plans. Thus, a debtor who is unable to reorganize the business in such a way that it continues in operation can still sell all of the assets of the company as part of the plan process. This can be a somewhat lengthy process given that it requires compliance with the provisions in the Bankruptcy Code and Rules governing the proposal, approval, and confirmation of the Chapter 11 plan. The debtor would be proposing a plan and disclosure statement that would have to be approved by the court and distributed to creditors who would then have an opportunity to vote on the plan. If the requisite majorities of creditors both in number and amount voted in favor of the plan, then the court could confirm the plan if it otherwise meets the requirements of the Bankruptcy Code. Another, more expeditious route, is available.

Rather than liquidating the business through the use of a Chapter 11 plan, the debtor might also propose the sale of all or substantially all of the property of the estate under § 363 of the Code. That section permits the debtor to sell property of the estate outside of the ordinary course of business if the court grants approval to that request. Such a sale does not require confirmation of the plan nor the prerequisites to confirmation such as the approval and

distribution of a disclosure statement, and the affirmative vote of creditors. It also does not require the court to determine that a plan should be confirmed. These are substantial savings.

The usual objection to such sales is that they usurp the plan process. Since they do not include full disclosure in the manner of a disclosure statement under § 1125, nor do they include the protections such as the right to vote on the plan and the absolute priority rule that applies in a Chapter 11 plan confirmation context, creditors frequently object on the basis that their interests are not sufficiently protected in these sales of all the assets of the business. This type of conflict was most recently before the Second Circuit Court of Appeals in ***In re Chrysler LLC***, 2009 WL 2382766 (2nd Cir. August 5, 2009). Admittedly, most cases are not the size of the Chrysler case, but the principles presented in that case are the same whether the assets are in the billions or in the hundreds of dollars. The nature of the objection essentially is that the proposed sale of all or substantially all of the assets is an impermissible *sub rosa* reorganization plan. This form of objection to the sale has been raised since the earliest days of the Bankruptcy Code. The Second Circuit in ***In re Lionel Corp.***., 722 F.2d 1063 (2nd Cir. 1983) allowed such a sale over the objection of creditors. The court concluded that these sales were appropriate if the debtor has good business reasons for proposing the transaction. While historically these reasons had included the perishable nature of assets, the Second Circuit made it clear in Lionel that these kinds of sales were not limited to "emergency" situations. They could also be undertaken where there was little other prospect for sale, and the likely result of not selling the property would be additional significant losses to the estate. The Second Circuit cited Lionel extensively when it decided the Chrysler case in early August. A case the size of Chrysler may not be a perfect example for a court to follow when the debtor's business is relatively small. Nevertheless, the

principle that an immediate sale is necessary to avoid significant loss to the estate could be just as available in a smaller case as it is in these larger cases.

A final way in which Chapter 11 plans might be funded is to seek contributions from third parties. Just as third parties might provide the funding for the payment of attorney fees in a case, they may also be a likely source for new contributions to the estate for purposes of funding the plan. Third parties can provide these funds in return for stock in the reorganized enterprise, or they could provide loans to be repaid by the company after the plan is confirmed and the company continues on in business. A third party that is essentially buying the business through the plan process would likely be the plan proponent. The Chapter 11 plan need not be proposed by the debtor, and the party funding the entire business would likely author the plan so as to be sure to protect its own interests. This would require full disclosure to creditors, but it provides the appropriate level of control over the process for the plan proponent. The other requirements for confirmation of a Chapter 11 plan set out in § 1129 apply just as well to a plan proposed by a third party as it would to a plan proposed by the debtor. These third parties might be competitors in the industry, buyers of a significant portion of the debtor's production, or others interested in being owners and operators of the company. The sole shareholder/CEO of the company is likely to know persons who may have such interest in the debtor, and separate representation of those entities would again be required for counsel to remain as the attorney for the debtor-in-possession.

Ultimately, the only limitation on the form of the plan is § 1129 of the Code and one's imagination. Of course, in the absence of confirmation of a Chapter 11 plan, there's always Chapter 7.