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*71 THE BANKRUPTCY EXAMINER

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I. INTRODUCTION

This article explains the role of the bankruptcy examiner, the impact on that role of reforms enacted by Congress in 1978, and the judicial response to those reforms. Those reforms prevented the examiner from becoming the trustee, and made the appointment of the examiner mandatory under specified circumstances. Those reforms also made the appointment of a trustee --even for a limited purpose -- automatically terminate both the appointment of the examiner and the exclusive right of the debtor to propose a plan.

As a result of the 1978 reforms enacted by Congress, the provisions of the Bankruptcy Code ("Code") [FN2] on the examiner invite judicial misinterpretation. The provisions are either ambiguous or, where clear, they rigidly limit judicial discretion. Their legislative history is complex. They complicate the judicial decision-making process by forcing the court to consider three issues simultaneously: appointment of the trustee, ouster of the examiner, and loss of exclusivity. All of these problems have caused courts to misinterpret the Code. Courts have incorrectly: (1) expanded the role of the examiner to avoid the appointment of a trustee, (2) failed to utilize the statutory remedy of a limited powers trustee, and (3) blurred the standards and procedures for the appointment of an examiner and trustee.

In 1989, a law review article [FN3] urged legislative reform of the examiner provisions of the Code. That article included several sound proposals, but it did not address key *72 statutory provisions, namely 11 U.S.C. s 343 [FN4] and 28 U.S.C. s 2075, [FN5] or their legislative history. Those materials show that Congress expected and authorized the Supreme Court to promulgate bankruptcy rules to define the examination process. The Supreme Court, however, refrained from issuing detailed rules on this subject. Judicial confusion and error resulted. This article attempts to clarify the law until either Congress or the Supreme Court takes further action.

Part II of this article traces the legislative history of the role of the examiner from the Bankruptcy Act of 1898, [FN6] through the Chandler Act of 1938, [FN7] to the current provisions of the Code. Part II shows the importance of the examination process in the history of efforts to reform bankruptcy administration. Part II also shows that, in enacting the

Code, Congress intended to remove the judge from the examination process and to preclude the judge from acting on its own motion. At the last minute, Congress altered the role of the examiner, so that several of the legislative history materials are a trap for the unwary, because they discuss proposed legislation which Congress rejected. During the legislative process, Congress expressed its intent that gaps in the Code on the examination process would be resolved pursuant to the grant of rule-making power in 28 U.S.C. s 2075. Part II describes how, after the Code was enacted, Congress and the Supreme Court authorized greater involvement by judges in the management of their cases. During the same period, the Supreme Court made only limited use of its rule-making power to define and implement the role of the examiner.

*73 Part III discusses the standards specified in section 1104(b) [FN8] for the appointment of an examiner, and shows the connection between those standards and the roles of the trustee and judge. Part III explains why the 1990 opinion of the Sixth Circuit in *In re Revco D.S., Inc.*, [FN9] on the mandatory standard for the appointment of an examiner is correct and may impact the confirmation of prepackaged plans. Part III asserts that the burden of proof for the appointment of an examiner or trustee should be the preponderance of the evidence standard; courts have mistakenly applied a "clear and convincing" standard to motions for the appointment of a trustee. Part III concludes that the Supreme Court may have authority to promulgate a bankruptcy rule of procedure that alters the burden of proof, even though the Court did not acknowledge the existence of this issue in its recent decision in *Grogan v. Garner* [FN10] on the burden of proof.

Part IV discusses the duties and powers of the examiner and the meaning of sections 321(b), [FN11] 327(f), [FN12] and 1106(b). [FN13] Part IV explains the legitimate functions *74 of an "expanded duties" examiner and rejects the concept of an "expanded powers" examiner.

Part V discusses the privileges and liabilities of the examiner. Part V also discusses the doctrine of quasi-judicial immunity, the publication privilege, and the use of protective orders in examinations.

Part VI discusses alternatives to the examiner. Part VI explains that the limited powers trustee is an alternative to the examiner. Part VI suggests that the failure of courts to utilize this alternative more frequently may result both from the loss of exclusivity caused by a trustee, and from broad language in *In re Curlew Valley Associates*. [FN14] That case incorrectly states that a bankruptcy judge has less power to restrict the conduct of a trustee than the conduct of a debtor in possession. Part VI also explains why the appointment of a trustee, instead of an examiner, is more likely to result in the conversion of a chapter 11 case to chapter 7 and why an examiner creates a risk of judicial abdication.

Part VII provides a procedural guide to the examination process, including the selection and approval process under section 1104(c). [FN15] Part VII identifies issues which should be addressed in moving for the appointment of an examiner, and discusses the role of the judge and the United States trustee in selecting an examiner.

Part VIII discusses statutory reform of the examiner provisions of the Code. Part VIII describes proposed legislation currently pending in Congress.

II. LEGISLATIVE HISTORY OF STATUTORY ROLE OF EXAMINER

A. UTILITY OF LEGISLATIVE HISTORY

The Code uses the vague terms "to conduct such an investigation of the debtor as is appropriate" in the "interests of creditors" to describe one ground for the *75 appointment of an examiner. [FN16] Because this statutory language is vague, the legislative history of the Code can be considered to interpret that language. [FN17]

In large part, the legislative history of the Code discusses earlier versions of the final statutory language. For this reason, each legislative history source must be correlated with the appropriate piece of proposed legislation. [FN18] As explained in this article, some courts either have not used the Code's enlightening legislative history or have misinterpreted it. [FN19]

B. PRE-CODE PRACTICES

1. 1898 Act

In 1881, at a time when the United States had no federal bankruptcy statute, Judge Lowell of Massachusetts, at the request of the Boston Merchants' Association, drafted a bill which was introduced in Congress by Senator Hoar of Massachusetts. [FN20] The Lowell bill proposed that the judges of each federal circuit appoint a supervisor in bankruptcy. The supervisor would examine the administration of bankruptcy proceedings, advise referees and trustees in administrative matters, and report to the *76 courts any misconduct on the part of trustees. [FN21] The chief opposition to the bill apparently came from those who wanted no bankruptcy legislation at all. [FN22]

In 1889, after the Lowell bill stalled in Congress, a convention of representatives of various commercial organizations was held in St. Louis for the purpose of formulating and presenting to Congress a proposed bankruptcy law. [FN23] The convention elected as its president Col. Jay L. Torrey, a St. Louis attorney. [FN24] Over the next five months, Torrey drafted a revised bill which eliminated the federal supervisors proposed in the Lowell bill. [FN25] However, the Torrey bill provided that in every case the court would publicly examine the debtor. The bill also provided that the United States attorney, if directed by the judge on application of a creditor, would attend the first meeting of creditors, publicly examine the debtor, and oppose its discharge unless satisfied that there was no ground for opposing it. [FN26] The Torrey bill passed in the House in 1890, but Senator Nelson of Minnesota opposed it in the Senate and supported his own bill. Senator Nelson attacked the Torrey bill for its harshness on the debtor. [FN27]

On June 15, 1898, Congress passed the Bankruptcy Act ("1898 Act" or "Act"), [FN28] and President McKinley signed it into law on July 1, 1898. [FN29] The 1898 Act was a compromise of the Torrey bill and the Nelson bill. [FN30]

The 1898 Act did not include the provisions of the Torrey bill for examinations and objections to discharge by the United States attorney. The Act required the court to set and preside at a first meeting of creditors, but did not require the court to examine the debtor at that meeting, [FN31] and did not require the debtor to attend and *77 submit to examination unless ordered to do so. [FN32] The Act did not contain any provision for the appointment of an examiner, nor did the Act contain any provision which specifically addressed the subject of corporate reorganizations. The Act permitted the debtor to seek approval of a "composition" of debts, provided that the debtor first submitted to an examination and made financial disclosure. [FN33]

2. 1931 Thacher Report

In 1930, as bankruptcy losses mounted, [FN34] President Hoover requested the Attorney General to conduct "an exhaustive investigation into the whole question of bankruptcy law and practice." [FN35] Pursuant to that request, Solicitor General Thacher directed an extensive investigation and submitted his report, the Thacher Report, [FN36] to the President in December 1931. [FN37]

The Thacher Report recommended that Congress amend the 1898 Act to create a staff of examining officials, appointed under civil service rules, at salaries not in excess of \$4,000 per annum, to examine every debtor. [FN38] These official examiners would be required to report to the court on every examination and to bring to the attention of trustees any facts ascertained which would be of assistance to the trustees in the performance of their duties. [FN39] In every case, the examiner would be required to examine the debtor publicly. The examiner would have the power to conduct an extensive

investigation when the facts warranted it, and would have the duty to report bankruptcy crimes to the United States attorney. [FN40]

The Thacher Report rejected the idea that the trustee should be entrusted with the examination. The report asserted that the trustee might not conduct an *78 examination in a nominal asset case and might have a stake in the outcome of the examination. For example, the trustee might have a "selfish interest" in denying the debtor a discharge for the benefit of creditors or in obtaining compensation from assets recovered. [FN41] The report complained that examinations "are left to private initiative, in most cases completely paralyzed for the lack of purpose or hope of reward" [FN42] and stated that bankruptcy administration injured the public interest to the extent that bankruptcy discharges occurred without adequate investigation of the debtor's conduct and affairs:

The wholesale discharge of bankrupts, practically without inquiry or opposition, has been seriously detrimental to the public interest because it encourages dishonest and reckless disregard of just obligations and thus destroys the integrity of the individual. In the case of those engaged in business the law facilitates and encourages recklessness, unconscionable waste and consumption of the money and property furnished by creditors, and outright fraud. Debtors who by such conduct have imposed heavy losses upon those who trusted them are turned back by the thousands into the trading community, encouraged to repeat their offenses with impunity. Moreover, the ease with which an unscrupulous merchant may live on credit and turn into court the remnants of what his creditors have loaned him in exchange for cancellation of his debts, tends to make more difficult the task of the honest merchant who must keep up his prices and cut down his personal expenses in order to pay his bills. [FN43]

3. 1934 Enactment of Section 77B

Because the 1898 Act contained only limited provisions for the composition and compromise of debts, and did not expressly provide for a comprehensive reorganization of the capital structure of corporations, corporate reorganizations were pursued through resort to the legal device of the equity receivership. [FN44] Equity receiverships were characterized by "lack of knowledge and control by the court of the conditions attending formulation of reorganization plans, the inadequate protection of widely scattered security holders, the frequent adoption of plans which favored management at the expense of other interests, and which afforded the corporation only temporary respite from financial collapse" [FN45]

*79 In 1934, to reform the use of equity receiverships and to provide statutory authority for corporate reorganization, Congress amended the 1898 Act to add section 77B. [FN46] Section 77B permitted the corporate debtor to remain in possession and did not require the court either to appoint a trustee or to require that the trustee be disinterested. [FN47]

Section 77B contained no provision for the appointment of an examiner. Despite this lack of authority, in *In re Utilities Power & Light Corp.*, [FN48] the Seventh Circuit Court of Appeals held that a district court presiding over a section 77B reorganization had inherent power to appoint an examiner:

It has long been the rule that courts of equity administering estates may call to their help commissioners, auditors, accountants, appraisers, examiners or masters. This power is one growing out of judicial necessity in order to achieve equity, and its exercise is based upon a finding, under rules of legal discretion, that, without aid to the court, the issues cannot be dealt with intelligently, efficiently or promptly. [FN49]

4. 1938 Chandler Act

In 1938, Congress completely overhauled the 1898 Act by enacting the Chandler Act. [FN50] The Chandler Act replaced section 77B with a new chapter X, [FN51] which applied to corporate reorganizations and was in large part the product of a study by the Securities and Exchange Commission ("SEC"). [FN52]

*80 The Chandler Act reflected the influence of the Thacher Report, even though Congress rejected the Thacher

Report's recommendation that governmental examiners should be established to assist in administering bankruptcy cases. [FN53] In particular, the Chandler Act contained various provisions designed to increase the level of examination of the debtor in all bankruptcy cases.

First, the Chandler Act amended sections 7 and 55 of the 1898 Act to mandate that the debtor attend the first meeting of creditors and submit to public examination before the court. [FN54] Thus, attendance by and examination of the debtor at the first meeting of creditors ceased to be optional.

Second, chapter X of the Chandler Act provided for an investigation of, and report on a corporate debtor by either a disinterested trustee or by an examiner. [FN55] *81 Pursuant to a statutory grant of rule-making power, [FN56] the Supreme Court promulgated Rule of Bankruptcy Procedure 10-208, which mandated that the trustee or the examiner investigate and report. [FN57] In explaining the statutory safeguards of chapter X, the House Judiciary Committee, of which Representative Chandler was a member, explained that SEC Commissioner William O. Douglas had supported the requirements of an independent trustee and investigation of the debtor. According to Commissioner Douglas, a single creditor was apt to do a "superficial and ineffective" examination of "large, publicly owned corporations," and both investors and the court lacked adequate information to appraise management and its conduct. [FN58]

*82 In a chapter X case, the appointment of a trustee was mandatory unless the debtor's indebtedness, liquidated as to amount and not contingent as to liability, did not exceed \$250,000. [FN59] If the indebtedness did not exceed the \$250,000 limit, then the court had discretion to leave the debtor in possession and to appoint an examiner to investigate and report on the debtor. [FN60]

Unlike sections 321(b) and 327(f) of the Code, chapter X did not prohibit the examiner from becoming the trustee in the case. [FN61] This may explain why no cases decided under chapter X address the issue of the authority of the court to expand the powers of the examiner beyond the power to investigate. There was no need to expand the powers of an examiner, because the court could appoint the examiner to serve as trustee.

Chapter X gave the examiner authority to employ professionals. [FN62] As part of a confirmed plan of reorganization, the examiner also had express statutory authority to file lawsuits on claims for relief uncovered by the examination. [FN63] In addition, the examiner had express authority, with leave of court, to examine witnesses under oath. [FN64]

*83 Although chapter X required the court to appoint a trustee if the debtor's indebtedness exceeded the \$250,000 limit, the appointment in fact was in part discretionary. The discretion existed because the court had to decide whether the "needs to be served" [FN65] in a case required a corporate debtor to reorganize under chapter X -- with its statutory safeguards, including a trustee (or examiner) -- or chapter XI, which generally permitted a debtor to remain in possession, without a trustee or examiner, regardless of the amount of indebtedness. [FN66] The Chandler Act enacted chapter XI to provide swift and economic relief to small companies, [FN67] but the terms of chapter XI did not restrict eligibility to relief under that chapter to small companies. [FN68] The discretion to choose between chapters X or XI was not completely open-ended: if a large corporate debtor had widespread public investors and its current management appeared to have committed repeated acts of securities fraud, then the court had to compel the debtor to proceed under chapter X instead of chapter XI. [FN69]

C. LEGISLATIVE HISTORY OF CODE

1. 1973 Commission Report

In 1970, Congress formed a commission ("Commission") to review and report on the bankruptcy system. [FN70] In 1973, the Commission filed its report ("Commission Report") with Congress. [FN71] Part one of the Commission Report

consisted of findings and recommendations, and part two consisted of proposed legislation ("Commission Bill"). The Commission Report included these recommendations:

a. Creation of Federal Administrator

*84 A new federal agency should be created to supervise the administration of bankruptcy cases, to select trustees appointed by the court, and, subject to judicial review, to handle such "nonjudicial matters" as deciding whether to authorize the debtor to continue to operate its business. [FN72] The Commission explained that, among other things, the current system, in which the judge selected the trustee who appeared before the judge, created a suspicion "on the part of some litigants that the judge favors the trustee in adversary proceedings." [FN73] Not only were judges unable adequately to police reorganizations, but "to the extent they attempt to do so, they create an appearance of bias." [FN74]

b. Consolidation of Chapters X and XI

Chapters X and XI should be consolidated into a unified, comprehensive business reorganization chapter. It was not feasible to carve out which cases needed to be reorganized under chapter X-type safeguards and which cases were appropriate for the relative speed, economy and debtor-control provisions of a chapter XI-type case. [FN75] The existence of multiple reorganization chapters "frustrated the reform achieved by Chapter X, since Chapter XI can usually be utilized. Chapter XI has the same potential for abuse as the equity receivership." [FN76]

c. Standard for Appointment of Trustee and Examiner

In the proposed unified reorganization chapter, the appointment of a trustee would not always be required. The appointment standard would generally be "discretionary," but the need for such appointment would be "presumptive" where indebtedness exceeded \$1,000,000 and there were 300 or more equity security holders. [FN77] The Commission stated that, if "an independent trustee is not appointed, . . . any party in interest may request that the court appoint an independent person to investigate or formulate a plan, even though existing management is not ousted." [FN78] *85 These proposals were reflected in Sections 7-102 [FN79] and 7-103 [FN80] of the Commission Bill.

2. 1977: H.R. 8200/H.R. Rep. No. 595

Following submission of the Commission Report in 1973, the House and Senate both considered a bill modeled on the Commission Bill and an alternative bill supported by the National Conference of Bankruptcy Judges. [FN81]

On September 8, 1977, the House Judiciary Committee favorably reported a bill, H.R. 8200, [FN82] to enact a new bankruptcy law. The House committee report [FN83] on H.R. 8200 included these proposals and recommendations:

a. Judicial Administration of Case

H.R. 8200 would establish a nationwide United States trustee system to supervise bankruptcy cases and to select trustees and examiners. [FN84] "The proposed United States trustees . . . will serve as bankruptcy watch-dogs to prevent fraud, dishonesty, and overreaching in the bankruptcy arena." [FN85] The private trustee in a case would be *86 authorized under proposed section 102 [FN86] to act without a hearing if no one timely objected, so that the judge would not become involved in reviewing undisputed actions. [FN87] Under proposed section 341, [FN88] the judge would no longer preside at the first meeting of creditors. This reform would reduce the involvement of the judge in the administration of the case and the likelihood that the judge would be exposed to inadmissible evidence in the context of this meeting. [FN89] As a result of this new statutory framework, the "judges will become passive arbiters of disputes that arise in bankruptcy cases." [FN90] Unlike the Commission Bill, which attempted to treat certain substantive issues -- such as the decision to operate the business -- as administrative (i.e., nonjudicial), H.R. 8200 made the administrative/judicial distinction primarily turn on whether an issue was disputed. H.R. 8200 emphasized that the proper function of the judge was "the dispute-deciding role" [FN91] and that the United States trustee had the function of supervising the administration of the case. In addition, H.R. 8200 assigned to the United States trustee the function of

selecting trustees (and examiners) in order to prevent cronyism and to preserve the impartiality of the judge in deciding bankruptcy disputes. [FN92]

b. Consolidation of Chapters X and XI

H.R. 8200 adopted the recommendation of the Commission to consolidate chapters X and XI into a comprehensive business reorganization chapter which would be more flexible than chapter X, yet provide more safeguards than chapter XI. [FN93] Unlike the Commission Bill, H.R. 8200 did not provide for a statutory presumption in favor of special treatment of publicly held corporations with large indebtedness. [FN94]

c. Standard for Appointment of Trustee and Examiner

The House committee report proposed a standard of "flexibility and case-by-case determination" to be developed by the courts. [FN95] H.R. 8200 contained language which *87 appeared to make the appointment of a trustee or examiner totally discretionary and determined by a protection/cost test. [FN96]

d. Powers of Examiner

In proposed section 343, H.R. 8200 both required the debtor to attend the first meeting of creditors and authorized the examiner to conduct an examination at that meeting. [FN97] As stated, proposed section 341 contemplated that the judge would no longer attend that meeting [FN98] -- thereby reversing pre-Code practice. [FN99]

e. Rule-Making Authority

H.R. 8200 proposed to maintain, with modifications, the rule-making authority of the Supreme Court in 28 U.S.C. s 2075. [FN100] The House report stated that procedural rules promulgated pursuant to section 2075 could address the examination *88 process, [FN101] but that " t he rules may not shift the burden of proof from the moving party" and "may not affect substantive rights . " [FN102]

3. November 29, 1977: SEC Opposition to H.R. 8200

The SEC opposed H.R. 8200 for failing adequately to protect the investing public. On November 29, 1977, SEC Commissioner Philip A. Loomis, Jr. appeared before the Senate subcommittee conducting hearings on H.R. 8200. Commissioner Loomis submitted a prepared statement of the SEC. In this statement, the SEC warned that large creditors could unfairly dominate the reorganization process. [FN103]

To illustrate this concern, the SEC referred to the case of W.T. Grant Co., a publicly held company whose chapter XI proceeding had allegedly been driven into a massive and rapid liquidation to comply with demands for repayment made by Grant's institutional lenders, a consortium of 27 banks owed \$641 million. After noting that the creditors' committee recommended the liquidation of Grant by a vote of six bank members and one trade creditor member against four dissenting trade creditor members, the SEC stated:

There is another aspect of this grim end [of W.T. Grant]. Prior to the Chapter XI case, Grant had 1,070 retail stores throughout the United States. It had 62,000 employees, who lost their jobs as a result of the Grant liquidation. The social cost in terms of unemployment and loss of *89 personal income should also be reckoned with in any legislative decision to turn over the governance of reorganizations of public companies who are in financial distress to a small group of large creditors.

We do not want our position here to be misunderstood. Banks are in the business of lending money to business. Like lenders generally they expect to be paid when loans are due, and defaults are a valid concern to them and their own shareholders. . . . It is too much to expect that in asserting and protecting their own interests in the bankruptcy courts, banks and other lenders will show due regard for others that are affected by the same common misfortune. [FN104]

The SEC also urged the rejection of H.R. 8200's proposed protection/cost test [FN105] for the appointment of a trustee

for a nonpublic company (and for the appointment of an examiner). The SEC claimed that test was "virtually impossible to apply" in that there "is no way to determine in advance what the cost of a trusteeship may be or the value of the benefits it may bring." [FN106] The SEC urged a test based on whether the "appointment would serve the interests of the estate and its creditors and security holders." [FN107]

4. 1978: S. 2266/S. Rep. No. 989

On July 14, 1978, the Senate Judiciary Committee favorably reported its own proposed bankruptcy legislation, S. 2266. [FN108] In S. 2266, the Senate committee proposed to consolidate chapters X and XI, but with the following significant differences from H.R. 8200:

a. Judicial Administration of Case

S. 2266 did not provide for the creation of an independent United States trustee system to remove bankruptcy judges from the administration of their cases. S. 2266 provided that the court would select the chapter 11 trustee or examiner, [FN109] and that the court would preside at the first meeting of creditors. [FN110] However, the Senate did *90 share the view of the House that the bankruptcy judge generally should not become involved in supervising proposed actions by the trustee or debtor unless a dispute arose for judicial resolution. [FN111]

b. Special Treatment of Public Companies

The proposed new consolidated chapter 11 in S. 2266 provided for special treatment of a "public company" debtor. S. 2266 defined a "public company" as a debtor with outstanding liabilities of \$5,000,000 or more, exclusive of liabilities for goods, services, or taxes, and with not less than 1,000 equity security holders. [FN112] S.2266 mandated the appointment of a trustee for a public company. [FN113] The Senate committee report explained that the mandatory appointment of a trustee was one of the "basic safeguards for public investors" under chapter X. [FN114] Echoing the concerns expressed by the SEC, [FN115] the report stated: "The bill, like chapter X, is designed to counteract the natural tendency of a debtor in distress to pacify large creditors, with whom the debtor would expect to do business, at the expense of small and scattered public investors." [FN116]

c. Standard for Appointment of Trustee and Examiner

S. 2266 not only mandated the appointment of a trustee for a public company, but also used language which suggested that, even in the case of a nonpublic company, the court had less than total discretion to decide whether or not to appoint a trustee. [FN117] In particular, proposed section 1104 in S. 2266 used the word "shall" in *91 places, [FN118] whereas H.R. 8200's version of section 1104 exclusively used the term "may." [FN119] Echoing again the comments of the SEC, [FN120] S. 2266 substituted an "interests of the estate" standard for the appointment of a trustee or examiner of a nonpublic company [FN121] for the protection/cost test of H.R. 8200. [FN122] The Senate committee report stated that the standard for the appointment of a trustee for a nonpublic company was "discretionary." [FN123] This statement referred to the version of proposed section 1104 in S. 2266. [FN124] It did not then include the alternative "cause" standard that was added later. [FN125]

5. 1978: Sponsors' Statements and Enactment of Code

Congress did not follow the procedure of holding a formal conference to resolve the conflicts between the House and Senate bills. Instead, negotiations took place between the managers of the legislation, including Representative Edwards and Senator DeConcini. A compromise bill, H.R. 8200 as amended, passed both houses of Congress in October 1978 and was signed into law by President Carter at Camp David, Maryland, late on the night of November 6, 1978. [FN126]

In obtaining passage of the Code, Representative Edwards and Senator DeConcini made nearly identical statements (the "Sponsors' Statements") [FN127] to their *92 respective chambers of Congress. These statements are "persuasive evidence" of legislative intent. [FN128]

a. Judicial Administration of Case

The Code as enacted provided for a United States trustee system to operate on an experimental basis, limited to 18 judicial districts. [FN129] In those districts, the United States trustee, not the judge, had authority to select trustees and examiners [FN130] and to "supervise the administration of cases and trustees in cases under chapter 7, 11 or 13" of the Code. [FN131] The Sponsors' Statements explained: "The main purpose of the U.S. trustee is to remove administrative duties from the bankruptcy judge leaving the bankruptcy judge free to resolve disputes untainted by knowledge of matters unnecessary to a judicial determination." [FN132] To further this goal, section 102 included the "notice and hearing" concept of H.R. 8200 and S. 2266, and the sponsors stated that the phrase "on request of a party in interest" (which appears in section 1104) "is intended to restrict the court from acting sua sponte." [FN133] Similarly, section 341(c) of the Code removed the judge from the examination process by expressly prohibiting the judge from even attending the examination of the debtor at the first meeting of creditors. [FN134]

b. Consolidation of Chapters X and XI

The Code as enacted did consolidate chapters X and XI into a unified chapter 11, but rejected the proposal in S. 2266 to provide special procedures for public companies. The Sponsors' Statements explained: (1) "[t]he new consolidated chapter 11 contains no special procedure for companies with public debt or equity *93 security holders"; [FN135] (2) chapter X had caused "negative results" by reason of its "stilted procedures, under which management is always ousted and replaced by an independent trustee"; [FN136] and (3) public investors no longer required the protection of chapter X-type safeguards, partly as a result of the "pervasive effect of the Federal securities laws and the extraordinary success of the Securities and Exchange Commission in sensitizing both management and members of the bar to the need for full disclosure and fair dealing in transactions involving publicly held securities." [FN137] Instead of defining the public interest exclusively in terms of the protection of public investors, the sponsors indicated that they expected the bankruptcy court to "balance the needs of public security holders against equally important public needs relating to the economy, such as employment and production, and other factors such as the public health and safety of the people or protection of the national interest." [FN138]

*94 c. Standard for Appointment of Trustee and Examiner

Sections 1104 and 151104 of the Code [FN139] did not adopt either the totally discretionary cost/protection standard proposed by the House for the appointment of a trustee or examiner, or the mandatory "public company" standard for the appointment of a trustee proposed by the Senate. The Sponsors' Statements explained that "the two alternative standards of appointment are derived with modifications from S. 2266, instead of the standard stated in the House bill." [FN140]

i. Trustee

The two grounds in sections 1104 and 151104 of the Code [FN141] for the appointment of a trustee included a variation on the "interests of the estate" ground proposed in S. 2266, [FN142] plus an alternative statutory ground not contained in S. 2266. This alternative statutory ground provided that the court "shall" appoint a trustee for *95 "cause, including fraud . . ." [FN143] The sponsors explained: "For example, if the current management of the debtor gambled away rental income before the filing of the petition, a trustee should be appointed after the petition, whether or not postpetition mismanagement can be shown. However, under no circumstances will cause include the number of security holders of the debtor, or the amount of assets or liabilities of the debtor." [FN144]

ii. Examiner

The two grounds in sections 1104 and 151104 of the Code [FN145] for the appointment of an examiner included a variation on the "interests of the estate" ground proposed in S. 2266, [FN146] plus an alternative statutory ground not contained in S. 2266. This alternative statutory ground provided that the court "shall" appoint an examiner when

specified debts of the debtor exceeded \$5,000,000. [FN147] The sponsors characterized this provision as a "mandatory" ground for appointment of an examiner. [FN148] This mandatory ground did not contain any reference to public stockholders, and the sponsors stressed that the "new consolidated chapter 11 contains no special procedure for companies with public debt or equity security holders." [FN149] In the same paragraph of text, the sponsors added that the new mandatory ground for the appointment of an examiner "should adequately represent the needs of public security holders in most cases" and was designed "to insure that adequate investigation of the debtor is conducted to determine fraud or wrongdoing on the part of present management" [FN150]

d. Powers of Examiner/New Sections 321(b) and 327(f)

Like H.R. 8200 and S. 2266, section 343 [FN151] of the Code expressly empowered the examiner to examine the debtor at the first meeting of creditors. In addition, the Code included restrictions on the examiner which had never existed prior to the Code *96 and had not been proposed in the Commission Bill, H.R. 8200 or S. 2266. These restrictions appeared in sections 321(b) and 327(f), which prohibited an examiner from becoming the trustee or from becoming employed by the trustee. [FN152] The Sponsors' Statements explained these new restrictions as follows: "It will not be necessary for the court to consider the report of the examiner prior to approval of a disclosure statement. The investigation of the examiner is to proceed on an independent basis from the procedure of the reorganization under chapter 11. In order to ensure that the examiner's report will be expeditious and fair, the examiner is precluded from serving as a trustee in the case or from representing a trustee if a trustee is appointed, whether the case remains in chapter 11 or is converted to chapter 7 or 13." [FN153]

e. Grant of Rule-Making Authority

Concerning the grant of rule-making authority to the Supreme Court in 28 U.S.C. s 2075, [FN154] the Sponsors' Statements explained that the Code amended that provision to prohibit procedural rules from superseding substantive provisions of the Code. [FN155] Unlike the House report on H.R. 8200, [FN156] the sponsors stated that the procedural rules could vary the burden of proof: "Although various sections of title 11 specifically allocate the burden of proof, for example, sections 362(g), 363(e), and 364(d)(2), that allocation is not intended to preclude the Rules of Bankruptcy Procedure from providing the same or a different burden of proof on other issues arising under those sections or otherwise." [FN157] Explaining the requirement that the court act "on request of a party in interest" (which appears in section 1104), the sponsors stated: "Rules of bankruptcy procedure or court decisions will determine who is a party in interest for the particular purposes of the provision in question, but the court will not be permitted to act on its own." [FN158] *97 D. 1983-1986: CHANGE IN JUDICIAL POLICY TOWARDS CASE MANAGEMENT AND DISCOVERY, BUT RESTRAINED EXERCISE OF BANKRUPTCY RULE-MAKING POWER I. 1983 Amendments to Fed. R. Civ. P. 16 and 26

Even as Congress enacted the Code for the stated purpose of removing bankruptcy judges from "administrative duties," [FN159] the judicial policy of case management evolved to favor intense judicial involvement in resolving complex litigation. [FN160] This evolving policy was reflected by the 1983 amendments to Rule 16 of the Federal Rules of Civil Procedure and by the Advisory Committee Note to the 1983 revision of Rule 16. [FN161] Citing a 1977 study, the Advisory Committee stated:

Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pre-trial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices. [FN162]

Rule 16 applies to all adversary proceedings and, in the discretion of the court, to contested matters in bankruptcy cases. [FN163] Also in 1983, Rule 26 of the Federal Rules of Civil Procedure was amended to restrict costly overuse of civil discovery. Rule 26 applies to all adversary proceedings and contested matters in bankruptcy cases. [FN164]

***98 2. 1986 Amendments to Code**

In 1986, Congress amended the Code to authorize bankruptcy judges to involve themselves further in the management of their dockets. [FN165] As amended, section 105(a) expressly authorized a bankruptcy judge to act on its own motion when necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process. [FN166] The 1986 amendments also expanded the United States trustee system to cover nearly all judicial districts. [FN167] These amendments reflected a continued commitment by Congress to removing bankruptcy judges from administrative matters and from the potential for cronyism and bias in the selection of trustees and examiners. The amendments also signaled an increased commitment by Congress to the oversight function of the United States trustee system in the administration of bankruptcy cases.

3. Restrained Exercise of Bankruptcy Rule-Making Power

Following enactment of the Code, the Supreme Court exercised restraint in promulgating rules under 28 U.S.C. s 2075 to define and implement the role of the examiner: Fed. R. Bankr. P. 2004, the rule governing the examination process, was promulgated without any express reference to the examiner, and the Court did not promulgate other possible procedural rules mentioned in the legislative history of the Code. [FN168]

***99 III. STANDARD FOR APPOINTMENT OF EXAMINER A. RELATIONSHIP BETWEEN
STANDARD FOR APPOINTMENT OF TRUSTEE AND STANDARD FOR APPOINTMENT OF EXAMINER 1.
Standard for Appointment of Trustee**

The Code's standards for the appointment of a trustee help to explain the role of the examiner.

Under section 1104(a)(1)-(2), [FN169] on request of a party in interest, a court "shall" appoint a trustee on either of two alternative grounds: (1) for "cause," including fraud or gross mismanagement by "current management" whether committed "before or after the commencement of the case," or (2) "if such appointment is in the interest of creditors, and equity security holders, and any other interests of the estate . . ." Both standards are designed to prevent the debtor in possession ("DIP") from remaining in possession when it can not be depended upon to perform the fiduciary responsibilities of a trustee. [FN170]

In contrast to the standards for the appointment of an examiner, both standards for the appointment of a trustee provide that they are to be applied without regard to "the number of holders of securities of the debtor or the amount of assets and liabilities of the debtor." [FN171] This language precludes courts from making the standard for the appointment of a trustee depend on whether the debtor is a large corporation *100 or has public shareholders. This plain meaning is consistent with the legislative history, which reflects that Congress rejected the Senate's proposal to accord separate treatment under chapter 11 to "public companies" as defined in S. 2266. [FN172] This language also may preclude a cost/benefit analysis in determining whether to appoint a trustee, and this interpretation is consistent with the legislative history. It reflects that section 1104(a) was derived from the Senate's proposal, [FN173] which rejected the cost/benefit standard proposed by the House. [FN174]

Because the provisions for the appointment of an examiner do not direct the court to disregard "the number of holders of securities of the debtor or the amount of assets and liabilities of the debtor," the court can and should consider those factors in deciding whether to appoint an examiner. Under section 1104(b)(2), the court on request must appoint an examiner when the debtor has debts of a specified type that exceed \$5,000,000. [FN175] a. 11 U.S.C. s 1104(a)(1): Relationship Between Appointment of Trustee for "Cause" and Standard for Appointment of Examiner

The language of section 1104(a)(1) parallels the language of section 1104(b). Section 1104(a)(1) provides that the court "shall" appoint a trustee when there is "cause," including "fraud, dishonesty, incompetence or gross mismanagement of

the affairs of the debtor by current management, either before or after the commencement of the case." Similarly, section 1104(b) provides that, if no trustee is appointed, then the court on request shall appoint an examiner "in the interests" of creditors and other parties in interest to investigate "allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management."

When subsections 1104(a)(1) and (b)(1) are read together, the statutory scheme is clear: (1) if "cause" exists, then the court must appoint a trustee, but (2) the court may utilize an examiner to assist in determining whether cause exists, and must do so if in the best interests of creditors and other parties in interest, and (3) "cause" to appoint a trustee does not include misconduct by former management.

*101 In *Committee of Dalkon Shield Claimants v. A.H. Robins Co., Inc.*, [FN176] the Fourth Circuit Court of Appeals expressly declined to decide whether the existence of "cause" would mandate the appointment of a trustee [FN177] and ruled that the trial court had "discretionary authority" to determine whether misconduct constitutes "cause." The circuit court expressed concern that a slight or immaterial act of misconduct might trigger the appointment of a trustee, and the court emphasized the "policy of flexibility" in the Code. [FN178]

The use of the term "shall" in section 1104(a)(1) is inconsistent with a totally flexible (i.e., purely discretionary) standard. [FN179] While the term "cause" is undeniably flexible, the legislative history of section 1104(a)(1) reflects that Congress rejected the purely discretionary standard for the appointment of a trustee proposed by the House. [FN180] The Sponsors' Statements also reflect that, if current management committed serious misconduct amounting to "cause," then current management's subsequently blameless conduct is irrelevant and the court must appoint a trustee. [FN181] The language of section 1104(a)(1) and its legislative history show that a court must appoint a trustee when "cause" exists. Further, the mandatory duty imposed by section 1104(a)(1) is meaningless if a court has total discretion to characterize various acts of misconduct as insufficient to constitute "cause."

The examples of "cause" provided in section 1104(a)(1) show that "cause" consists of some form of misconduct that is so serious as to cast doubt on the ability of current management to be entrusted with the management of the estate. Thus, "cause" for the appointment of trustee under section 1104(a)(1) should not include the need for an investigation, although that need would constitute grounds for the appointment of an examiner. *102 b. Section 1104(a)(2): Relationship Between Appointment of Trustee in Interests of Parties in Interest and Standard for Appointment of Examiner

Section 1104(a)(2) provides that the court "shall" appoint a trustee if such appointment "is in the interests of creditors, any equity security holders, and other interests of the estate . . ." Using similar language, section 1104(b)(1) provides that the court "shall" appoint an examiner to conduct such an investigation of the debtor as is appropriate if "such appointment is in the interests of creditors, any equity security holders, and other interests of the estate . . ."

Since the trustee also can and must investigate the debtor under section 1106(a)(3)-(4), it may be argued that, to avoid duplication of effort, it will always be in the "interests" of the estate to appoint a trustee in the first place whenever an investigation appears justified. Read as a whole, the Code fails to support this reasoning.

The appointment of a trustee has different consequences from the appointment of an examiner. First and foremost, the appointment of a trustee -- unlike the appointment of an examiner -- automatically terminates the DIP's exclusivity period. [FN182] Loss of exclusivity lessens the bargaining power of the estate and increases the likelihood that a disgruntled creditor may destroy the going concern value of the estate by successfully proposing a liquidation plan. [FN183] Thus, if the DIP deserves continued exclusivity, then an examiner, instead of a trustee, should perform the investigation. Second, the appointment of a trustee is different from the appointment of an examiner in that a trustee may have an

incentive to recommend conversion of the case to chapter 7 in order to obtain the protection of section 726(b) for the trustee's ongoing administrative expenses and to eliminate other chapter 11 administrative expenses. [FN184] Third, the trustee may be more adversarial in its investigation and report than an examiner would be, because the trustee (unless its powers are limited) [FN185] will have a stake in pursuing any causes of action identified in the investigation. Even a totally impartial and fair trustee may be reluctant to file *103 a report which discloses in detail possible weaknesses in causes of action which the trustee plans to prosecute. [FN186]

It has also been argued that the appointment of a trustee is different from the appointment of an examiner in that the "examiner's role is less intrusive" than the trustee's. [FN187] This argument lacks merit. The trustee may choose to employ management, and the Code permits the court to appoint a limited powers trustee which does not oust management from operating the business. [FN188] However, unlike an examiner, the Code does not preclude a limited powers trustee from having its powers expanded. [FN189]

2. Procedure for Determining Whether to Appoint Trustee

The need for an examiner may arise as a result of disputed facts or complex issues raised on a motion for the appointment of a trustee. The examiner will more likely be needed in this situation if the court incorrectly insists that the moving party show the need for a trustee by clear and convincing evidence. a. Bankruptcy Rule 9017: Examiner as Assistant in Deciding Motion to Appoint Trustee

In *In re Ionosphere Clubs, Inc.*, [FN190] the court stated that there was no need to conduct a full evidentiary hearing on a motion for a trustee, [FN191] but, in *In re Microwave Products of America, Inc.*, [FN192] the court stated that it must conduct "a full evidentiary hearing" on a motion for a trustee. [FN193] Strangely, these conflicting statements in *Ionosphere* and *Microwave* both relied upon citations to *In re Casco Bay *104 Lines, Inc.*, [FN194] in which the key facts were undisputed so that no evidentiary hearing was needed. [FN195]

Neither *Ionosphere*, *Microwave*, nor *Casco Bay* cites to the applicable procedural rules which govern the scope of the evidentiary hearing on a motion for a trustee. Those rules appear in *Fed. R. Bankr. P. 2007.1(a)* and *9017*. *Rule 2007.1(a)* provides that a request for a chapter 11 trustee is made by motion, and *Rule 9017* provides that *Fed. R. Civ. P. 43* applies in bankruptcy cases. [FN196] *Rule 43(e)* provides that a court "may hear" a motion on affidavits. [FN197]

Although *Rule 43(e)* expressly permits a court to decide a motion solely on affidavits, *Rule 43(e)* does not mandate this procedure. A court may hesitate to decide a motion on affidavits when there are complex factual issues or legitimate credibility issues. [FN198] For example, in *Hyman v. Pottberg's Executors*, [FN199] Judge Learned Hand, in discussing *Rule 43(e)*, concluded that a motion to vacate an arbitration award had to be decided by means of a trial before a judge or a master by reason "of the welter of asseveration and denial contained in the affidavits from which no reliable conclusion was possible . . ." [FN200] Similarly, in *Gordon v. National Youth Work Alliance*, [FN201] Judge Skelly Wright reversed an order granting a motion to dismiss by reason of the district court's failure to apply a "fair procedure" for the taking of evidence on a motion. [FN202] Judge Wright stated that, even in deciding a *Rule *105 12(b)(1)* motion, "procedural safeguards equivalent to those in *Rule 56* are required, with *Rule 56* used selectively as a guide to ensuring fairness." [FN203]

Rule 43(e), particularly as applied by Judge Hand in the *Hyman* case, shows how the procedure for hearing a motion for a trustee may result in the appointment of an examiner: if the motion for a trustee involves significant factual disputes, then the court may postpone deciding the motion pending the outcome of an investigation and report by an examiner. [FN204]

On the other hand, the existence of genuine factual issues on whether management is guilty of fraud or other misconduct

should not invariably require the court to postpone deciding whether to appoint a trustee. Instead, the court can and, when possible, should resolve the trustee issue quickly by either of two alternative means. First, the court may conduct an expedited trial that is limited to deciding key, dispositive factual issues. [FN205] Alternatively, the court may decide that, even though factual issues preclude a finding of "cause" under section 1104(a)(1), the significant evidence of "cause" and the risk of damage to the estate justify appointing a trustee "in the interest" of the estate under section 1104(a)(2). This second approach is consistent with the approach taken by courts in deciding whether to grant a motion for provisional relief, [FN206] and a motion for the appointment of a trustee should be regarded as the equivalent of a motion for a provisional remedy.

b. Burden of Proof for Appointment of Trustee or Examiner

i. Grogan and the Clear and Convincing Burden of Proof

If the court places a heavy burden of proof on the party moving for a trustee, then the court is more likely to deny the motion and appoint an examiner to investigate and report. Courts have repeatedly ruled that a movant must show the *106 need for a trustee by "clear and convincing evidence." [FN207] The legal support for this evidentiary burden should be reexamined in light of the legislative history of section 1104 and the recent decision of the Supreme Court in *Grogan v. Garner*. [FN208]

In *Grogan*, the Supreme Court held that a creditor could except a debt from discharge under section 523(a)(2) by proving fraud by a preponderance of the evidence, instead of by clear and convincing evidence. The Court began its analysis by noting that the language of the statute and its legislative history were silent on the issue of the burden of proof. [FN209] The Court further stated that a debtor had no constitutional or fundamental right to a discharge in bankruptcy, and that a preponderance of the evidence standard struck a "fair balance" between protecting victims of fraud and giving debtors a fresh start. [FN210] The Court noted that section 523(a) "groups together in the same subsection a variety of exceptions to discharge without any indication that any particular exception is subject to a special standard of proof." [FN211]

The analysis in *Grogan* raises doubt about whether courts have correctly required that a movant prove by clear and convincing evidence that a trustee should be appointed under section 1104. First, as in *Grogan*, the language of section 1104 is silent on the issue of the burden of proof. Second, the legislative history of section 1104 only shows that Congress rejected both the irrebuttable presumption in favor of appointing a trustee for public companies as recommended by the Senate [FN212] and the rebuttable presumption favored by the Commission in similar circumstances. [FN213] Neither the House report, [FN214] the Senate report, [FN215] nor the Sponsors' Statements [FN216] recommended a "clear and convincing" burden of proof for the appointment of a trustee for either a public or nonpublic company. Third, pre-Code law reflects that a court had some discretion to decide whether a corporate debtor could proceed to reorganize without a trustee under chapter XI or would be required to proceed subject *107 to a trustee under chapter X. [FN217] Similarly, pre-Code law gave the court some discretion to decide whether to appoint a receiver for a corporate or individual debtor in a chapter XI case. [FN218] Fourth, as in *Grogan*, the interests at stake are equally important: the interest in protecting creditors and shareholders against unfit management cannot readily be said to be less than the interest of the debtor in remaining in possession. Fifth, section 1104 includes in the same provision the grounds for the appointment of both a trustee and an examiner, and those provisions contain no language to suggest that Congress expected different standards of proof to apply to those provisions, or to suggest that a "clear and convincing" standard should apply to any of them. Thus, the reasoning of *Grogan* tends to show that the longstanding clear and convincing standard of proof for the appointment of a trustee is incorrect, and that a preponderance of the evidence standard should be applied instead. *Grogan* also supports the conclusion that the standard of proof for appointment of an examiner should be a preponderance of the evidence: the applicable statutory provisions appear in the same section as the provisions for the appointment of a trustee and do not include any language indicating that a different burden of proof applies. 3.

Grogan Revisited: Possibility of Bankruptcy Rule of Procedure to Alter Burden of Proof

The statutory analysis in Grogan was incomplete, however, because the Supreme Court did not address either 28 U.S.C. s 2075 or the Sponsors' Statements on the power of the Supreme Court under that provision to adopt a rule to set the burden of proof. [FN219]

Section 2075 of title 28 authorizes the Court to prescribe rules of practice, [FN220] and the sponsors stated that, except as expressly provided in such specific provisions as section 364(d), [FN221] the bankruptcy rules could prescribe the burden of proof. [FN222] In other words, the law was "silent" in Grogan only because the Supreme Court had omitted to promulgate an applicable bankruptcy rule of procedure, and the legislative *108 history was "silent" because the Court only read the legislative history of section 523, without looking at the legislative history of section 2075. Because the Court did not even mention section 2075, Grogan cannot be fairly interpreted as having decided whether section 2075 authorizes the Court to promulgate a bankruptcy rule that sets (or alters) the burden of proof under either sections 523 or 1104.

Given the importance of the standard of proof for the appointment of a trustee, why did Congress apparently delegate to the judiciary the responsibility to decide by procedural rule the burden of proof issue? It may be that the House and Senate were deadlocked on the issue and could not decide it. Alternatively, some representatives may simply have overlooked this delegation of authority or assumed that the Code imposed the burden of proof on the moving party, as indicated by the House committee report on H.R. 8200. [FN223]

May a "procedural" rule promulgated under section 2075 lawfully be used to set the burden of proof for the appointment of a trustee or examiner, or would such a rule be deemed to be "substantive" and to exceed the authority delegated under section 2075? As set forth above, there is evidence that Congress did intend to delegate such authority to the Court. Further, a claim for relief under section 1104 is a federal issue, so that no Erie [FN224] limitation on the rule-making power of the Court would exist. [FN225]

4. Concurrent Service of Examiner and Trustee

Section 1104(b) provides that the court can appoint an examiner in a case only if the court does not appoint a trustee. Although section 1104(b) does not say so clearly, this apparently means that an examiner cannot serve concurrently with a trustee. [FN226] Section 327(f) confirms this conclusion by prohibiting a trustee from employing the examiner. Without addressing the language of either sections 327(f) or 1104(b), or applicable precedent, [FN227] the court in the Eastern Airlines case authorized the examiner to serve as "Special Advisor" to the trustee. [FN228]

*109 Of course, when affiliates have related cases pending, the court may appoint a trustee in one case and an examiner in the other. [FN229]

B. STANDARD FOR APPOINTMENT OF EXAMINER 1. 11 U.S.C. s 1104(b)(1):

Appointment of Examiner under Best Interests Standard a. Scope of Discretion in Deciding to Appoint Examiner under Best Interests Standard

Section 1104(b)(1) provides that the court "shall" appoint an examiner "to conduct such an investigation of the debtor as is appropriate," if "such appointment is in the interests of creditors, any equity security holders, and other interests of the estate." Although section 1104(b) uses the term "shall," courts have interpreted the "in the interests of creditors" standard as "discretionary." [FN230] This interpretation is reasonable if it means that a court has discretion to determine whether appointing an examiner is in the best interests of the estate. But "shall" means that a court must appoint an examiner when doing so would clearly be in the best interests of the estate.

Absent an evidentiary basis, the court will not appoint an examiner under section 1104(b)(1). Mere allegations of a need for an investigation of misconduct will not suffice. [FN231] However, if the evidence shows "cause" within the meaning of section 1104(a)(1), then the court must appoint a trustee, not an examiner. [FN232]

In *In re Table Talk, Inc.*, [FN233] the court rejected a conclusory assertion of a need for "an impartial assessment" as grounds for the appointment of an examiner. The court stated that this argument would justify an examiner in every case. [FN234] In *Table Talk*, the court noted that the creditors' committee had already employed a major accounting firm to investigate the debtor. [FN235]

*110 In exercising discretion under section 1104(b)(1), courts consider whether the cost of the examination will be "disproportionately high." [FN236] A strict cost-benefit analysis is inappropriate. The Sponsors' Statements [FN237] show that section 1104(b)(1) was based mainly on the Senate bill (S. 2266), and the Senate apparently rejected a test based primarily on probable costs and benefits. [FN238]

b. Purpose of Appointment of Examiner

in Interests of Parties in Interest

In deciding whether to appoint an examiner under section 1104(b)(1), the court must consider what an examiner would accomplish. As described in detail in Part IV, the basic role of the examiner is to investigate and report under section 1106(a)(3)-(4) on such matters as the court may direct under section 1104(b) in a manner that is disinterested and nonadversarial, and to perform such other trustee duties as the court may direct. [FN239] The investigation may serve the reorganization process by uncovering valuable claims for relief or by showing the need for new management. In a pre-Code case, Justice Douglas stated why a sound reorganization may require investigation of management:

Readjustment of the debt structure of a company, without more, may be inadequate unless there is also an accounting by the management for misdeeds which caused the debacle.

Readjustment of the debts may be a minor problem compared with the need for new management. Without a new management today's readjustment may be a temporary moratorium before a major collapse. [FN240]

The Thacher Report similarly explained that the public interest was harmed when "practically without inquiry" the bankruptcy system permitted the "wholesale discharge of bankrupts" to the detriment of their creditors and honest competitors, [FN241] and the SEC warned that large creditors might dominate a bankruptcy so as to sacrifice the public interest to their private self-interest. [FN242]

*111 An examiner does not only investigate fraud and other irregularities by debtor's management. Courts appoint examiners to facilitate plan negotiations and the resolution of claims, and section 1106(b) expressly permits the court to assign to the examiner such other investigative and reporting functions as the review of claims and the formulation of a plan. [FN243]

c. Requirement That Appointment Serve All Parties in Interest

The language of section 1104(b)(1) requires that the appointment of the examiner be in the interest of creditors, shareholders "and" any other interest in the estate. However, if the debtor is truly insolvent, then the shareholders have no real interest. [FN244] Unlike the appointment of a trustee, which ends exclusivity and may completely oust the directors elected by shareholders (unless the trustee's powers are limited), the appointment of an examiner will rarely impair the legitimate interest of any constituency. 2. 11 U.S.C. s 1104(b)(2): Appointment of Examiner for Debtor Having More Than \$5 Million in Debt

Section 1104(b)(2) provides that the court "shall" appoint an examiner "to conduct such an investigation of the debtor

as is appropriate," if "the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed \$5,000,000." This is a remnant of the Senate proposal in S. 2266 to require mandatory appointment of a trustee for any "public company" in chapter 11. [FN245]

As enacted, section 1104(b)(2) by its terms applies regardless of whether the debtor has public investors. [FN246] An explanation for the deletion of any reference to public investors is that Congress realized that employees, trade creditors and other parties in interest, in addition to public investors, might require the protection of an examiner in a case involving large claims, other than claims arising from scattered trade debt. The \$5,000,000 debt test may be an extension of the Senate's expressed *112 concern about the "tendency of a debtor in distress to pacify large creditors" [FN247] and the similar concern expressed by the SEC to the Senate about the domination of the W.T. Grant bankruptcy by a bank consortium. [FN248] Although the Senate and SEC generally confined their concern to public investors, the Sponsors' Statements reflect an awareness by Congress that a bankruptcy court had to consider other "public needs" besides those of public investors, "such as the public health and safety of the people or protection of the national interest." [FN249] In a case involving large, nontrade creditors, the debtor may be pressured to pacify those powerful creditors who have little interest in the welfare of the debtor's employees or other matters. [FN250] These same creditors may also dominate the creditors' committee, and smaller creditors may lack the resources to employ professionals. The government agencies responsible for protecting the relevant public interests may lack the funding or staff to participate in many cases. As a result, without an examiner, the bankruptcy judge may have no way of knowing whether or the extent to which public interests and the interests of certain parties are harmed.

a. Misinterpretation of "Shall" as "May"

Some courts incorrectly stated that, where no purpose would be served by an examination, a request for the mandatory appointment of an examiner under section 1104(b)(2) could be denied. [FN251]

In *In re Shelter Resources Corp.*, [FN252] the court stated that section 1104(b)(2) should not be regarded as mandatory if the examination would be "needless, costly and nonproductive and would impose a grave injustice on all parties," [FN253] but this statement was dicta, because the request for an examiner had become moot.

In *In re GHR Companies, Inc.*, [FN254] the court interpreted section 1104(b)(2) as nonmandatory by means of a flawed analysis of the legislative history. The GHR case *113 involved large, privately held corporate debtors. [FN255] The court noted that there was already an investigation pending, [FN256] and that any examiner appointed by the United States trustee would have to be removed if the court transferred venue of the cases to a nonpilot United States trustee district (as the court planned to do). [FN257] After an extensive review of the legislative history from chapter X forward, the court concluded that there was no apparent purpose for mandatory appointment of an examiner in a case not involving public shareholders, who had historically been viewed as requiring the extra protection of chapter X. [FN258] The court in GHR failed to perceive that the mandatory provision of section 1104(b)(2) furthers the Senate's expressed concern about the tendency of a debtor to favor its large creditors. [FN259] The court also disregarded applicable principles of statutory interpretation. [FN260] Both the use of the term "shall" in the text of section 1104(b)(2) and the Sponsors' Statements [FN261] reflect that section 1104(b)(2) made the appointment of an examiner mandatory. Further, the entire GHR opinion was arguably dicta: the court explained that the appointment of an examiner would be an exercise an futility given the court's intent to transfer the cases to a district in which the examiner would be removed from office. [FN262]

b. Revco: "Shall" Means "Shall"

In *In re Revco D.S., Inc.*, [FN263] the Sixth Circuit Court of Appeals held that "shall" in section 1104(b)(2) meant that a bankruptcy judge had no discretion to decline to appoint an examiner under the circumstances specified in that section. This result reflects the only reasonable interpretation of the term "shall." [FN264] Although the Revco opinion did not

say so, its interpretation of section 1104(b)(2) furthered the policy of providing a safeguard against the tendency of a debtor to favor its large creditors to the detriment of other interests. The Revco opinion also stated that the bankruptcy judge had discretion to define the scope of the investigation, because section 1104(b) states that the "court shall order such an investigation of the debtor as is appropriate . . ." [FN265]

*114 It has been argued that Congress should repeal the mandatory standard for the appointment of an examiner, because the creditors' committee and their professionals can be relied upon in large cases to investigate and report on any alleged impropriety. [FN266] This proposal has doubtful merit for two reasons.

First, this argument rests on the questionable assumption that the Senate erred in concluding that a distressed debtor tends to favor its larger creditors, [FN267] for the creditors' committee will frequently consist of the debtor's larger creditors. [FN268] Further, the creditors' committee by definition consists of persons who are not disinterested. [FN269] Each member of the committee will inevitably have a financial stake in the outcome of any investigation of the debtor. Smaller creditors and such third parties as the debtor's employees may never know whether the committee's internal conflicts and financial stake in the investigation skewed its results.

Second, this argument places a heavy transaction cost on a party who wants a totally impartial person to investigate and report. In a large bankruptcy, both the committee and the DIP will likely have sophisticated professionals and experts who can make compelling arguments against the appointment of an examiner. A party in interest should not have to undergo the expense of investigating and litigating just to prove that there should be an impartial investigation by an examiner.

c. Impact of Section 1104(b)(2) on Prepackaged Plans

The mandatory appointment standard of section 1104(b)(2) may derail an attempt to obtain rapid confirmation of a prepackaged plan. Congress intended that an examination would proceed independently from the confirmation process. [FN270] But, in the context of a prepackaged plan, the examiner may have no time in which to act unless the court delays the confirmation process. A court may hesitate to render the protection of section 1104(b)(2) meaningless, and may therefore delay confirming a plan until the examiner can investigate and report.

*115 IV. DUTIES AND POWERS OF EXAMINER

A. DUTIES OF EXAMINER

1. Duty to Investigate

Section 1106(b) expressly directs the examiner to perform the duty specified in section 1106(a)(3), which requires the examiner to conduct an investigation on certain subjects "except to the extent that the court orders otherwise." Subject to that limitation, the investigation may extend to these subjects: (1) "the acts, conduct, assets, liabilities, and financial condition of the debtor," [FN271] (2) "the operation of the debtor's business and the desirability of the continuance of such business," [FN272] and (3) "any other matter relevant to the case or to the formulation of a plan." [FN273]

2. Duty to Report on Investigation

Section 1106(b) requires the examiner to perform the duty specified in section 1106(a)(4), which directs the examiner "as soon as practicable" to "file a statement of any investigation conducted . . ." The "as soon as practicable" language reflects Congress' intent that an examination be "expeditious" and not delay the progress of the case. [FN274] Section 1106(a)(4) specifies that the examiner's statement of investigation must include: "any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate."

3. Additional Duties of Examiner

Section 1106(b) authorizes the examiner to perform "any other duties of the trustee that the court orders the debtor in possession not to perform." This language clearly authorizes the court to expand the duties of the examiner to encompass the trustee's duties that are specified in sections 1106(a)(1)-(2), and (5)-(7). In summary, those duties include the following: (1) to be accountable for all property received, [FN275] (2) if a purpose would be served, to examine proofs of claim and object to the allowance of any claim that is improper, [FN276] (3) to furnish information about the *116 estate, including operating reports and a final account, [FN277] (4) if the debtor has not done so, to file the list, schedule and statement required under section 521(1), [FN278] (5) to file a plan, or an explanation of why a plan will not be filed, and a recommendation as to whether the case should be dismissed or converted, [FN279] (6) to furnish information to taxing authorities pertaining to years in which the debtor has not filed a tax return, [FN280] and (7) after confirmation of a plan, to file such reports as are necessary or as the court orders. [FN281]

4. Expanded Duties Examiner

Section 1106(b) expressly permits the court to expand the duties of the examiner to encompass additional duties of a trustee, but section 1106(b) fails to specify whether the additional "duties" which may be assigned to the examiner extend beyond the duties specified in section 1106(a)(1)-(7).

Some courts have interpreted section 1106(b) to authorize expanding the role of the examiner to perform the duties of a trustee beyond those specified in section 1106(a)(1)-(7). [FN282] For example, in *In re Liberal Market, Inc.*, [FN283] the court authorized the examiner to operate the DIP's business under section 1106(b). In contrast, in *In re International Distribution Centers, Inc.*, [FN284] the court stated that section 1106(b) only permitted the court to assign additional investigative responsibilities to an examiner, and did not permit an examiner to serve as the functional equivalent of a trustee. [FN285]

The cases on both sides of the issue analyze it incorrectly. Some cases confuse expanding the duties of the examiner (which section 1106(b) permits), with expanding *117 the powers of the examiner (which section 1106(b) does not address). [FN286] Some cases fail to note that all of the trustee duties specified in section 1106(a)(1)-(7) consist of investigative and reporting type functions which could be assigned to an examiner without altering its investigative, nonmanagerial role. [FN287] One case relies on inapposite practice under chapter X, in which an examiner could obtain authority to file lawsuits, and fails to note that chapter X had no policy against permitting an examiner to become trustee, unlike the Code. [FN288] The correct interpretation of section 1106(b) is that it only authorizes the court to assign to an examiner the additional duties specified in section 1106(a)(1)-(7). Seven reasons support this conclusion:

a.

The text of section 1106 does not reasonably support the view that the "duties" referred to in section 1106(b) encompass duties beyond those specified in section 1106(a)(1)-(7). Section 1106(b) only permits the court to expand the "duties" of the examiner, not its powers. Specific "duties" of the chapter 11 trustee are listed in the same provision in section 1106(a)(1)-(7), and all of those duties consist of the type of investigative, reporting and accounting duties which are consistent with the basic role of the examiner. The Code describes the authority and powers of the trustee and DIP in other sections. [FN289]

b.

Interpreting section 1106(b) to permit the court to expand the functions of the examiner to include making managerial decisions conflicts with the text of sections 321(b) and 327(f). Those provisions prohibit an examiner from serving as trustee, and section 323 expressly provides that the trustee represents the estate and has the capacity to sue and be sued. By definition, an examiner acts in violation of sections 321(b) and 323 when the examiner makes management decisions

on behalf of the estate.

*118 c.

Expanding the "duties" of the examiner to encompass noninvestigative and reporting type functions is inconsistent with the legislative history of, and policies reflected by sections 321(b) and 327(f). The Sponsors' Statements state that those provisions were adopted "to ensure that the examiner's report will be expeditious and fair." [FN290] Interpreting section 1106(b) to permit the examiner to obtain a decision-making role in the case, or any kind of stake in implementing any recommendation made in the examiner's report, would defeat these stated policies of speed and fairness. Reliance on the House and Senate reports is mistaken, because sections 321(b) and 327(f) did not appear in the proposed legislation discussed in those legislative history materials.

d.

Interpreting section 1106(b) to include "duties" of a trustee beyond those specified in section 1106(a)(1)-(7) leads to an absurd result. This absurd result follows because the "duties" of the trustee include the "duty to maximize the value of the estate" as stated by the Supreme Court in *CFTC v. Weintraub*. [FN291] That duty encompasses the entire management of the estate by the trustee, even though sections 321(b) and 327(f) prohibit an examiner from undertaking that function.

e.

Pre-Code practice cannot reasonably be used to justify expanding the duties of the examiner to encompass noninvestigative and reporting type functions. As described above, under pre-Code practice, the examiner could and did become a trustee. [FN292] In fact, pre-Code practice supports a restrictive interpretation of section 1106(b). The duties specified in section 1106(a)(1)-(7) closely resemble the additional duties which could be assigned to an examiner under former Bankruptcy Rule 10-208. [FN293]

f.

A restrictive interpretation of section 1106(b) should not cause any undue expense to the estate. If the examiner prepares a thorough report recommending certain business decisions, including the pursuit of litigation, then the court, creditors and trustee or DIP may use the information in the report. If the report fails to permit this kind of smooth transition, then the examiner probably lacked the competence to implement the report in any event. Strictly enforcing safeguards on the impartiality of the examiner by limiting its role to investigation and reporting may also reduce administrative expenses, because an impartial examiner with no *119 stake in implementing the report may be less inclined to recommend unjustified ouster of management (possibly by an expanded powers examiner) or the pursuit of costly litigation.

g.

Finally, precedent which authorizes the examiner to employ professionals or to waive the DIP's attorney-client privilege should be distinguished from precedent giving other powers and duties to the examiner. The former precedent does not alter the basic investigative role of the examiner and does not raise questions about the impartiality of the examiner.

B. POWERS OF THE EXAMINER

1. Power to Investigate

A law review article complains: "While the drafters of the Code intended the examiner to fulfill an investigatory function, they utterly failed to provide the examiner with any investigatory tools with which to conduct a meaningful investigation, barring complete cooperation from all parties involved." [FN294] That article arrived at that mistaken conclusion by overlooking section 343 of the Code and its legislative history. Section 343 of the Code expressly authorizes the examiner to examine the debtor under oath at the first meeting of creditors. [FN295] Thus, Congress did

provide the examiner with investigative power.

It may be argued that the investigative power provided by section 343 is too limited. For example, the examiner may wish to examine third parties, or the court may not appoint the examiner until after the first meeting of creditors. The legislative history of section 343 shows that Congress adequately addressed these problems by maintaining in effect 28 U.S.C. s 2075. Both the House and Senate committee reports on section 343 state: (1) the scope of the section 343 examination would be governed by the Bankruptcy Rules "as it is today," citing, among other things, former Bankruptcy Rule 10-213 (which expressly authorized an examiner to examine the debtor with leave of court), [FN296] and that (2) "examination of other persons in connection with the bankruptcy case is left completely to the Bankruptcy Rules, just as examination of witnesses in civil cases is governed by the Federal Rules of Civil *120 Procedure." [FN297] Further, the House report stated that the planned bankruptcy rules (or local rules of court) could contain "guidelines regulating an examiner's or trustee's investigation of the debtor in a case under chapter 11," [FN298] and "guidelines for filing and distributing investigative reports of a creditors' committee, trustee, or examiner in a case under chapter 11." [FN299]

Congress implemented the intent reflected in this legislative history. At the same time that Congress enacted section 343, Congress also amended and maintained 28 U.S.C. s 2075 to continue to empower the Supreme Court to prescribe rules of procedure and practice for bankruptcy cases. [FN300]

Despite these statutory provisions and legislative history, the Supreme Court has yet to promulgate the contemplated rules regulating an examiner's investigation and report. However, pursuant to section 2075, the Supreme Court did promulgate Fed. R. Bankr. P. 2004, which authorizes "any party in interest" to conduct a Rule 2004 examination with leave of court.

Because the examiner has both the power under section 343 and the duty under section 1106(a)(3)-(4) to investigate the debtor, it appears that an examiner is a "party in interest" entitled to conduct a Rule 2004 examination with leave of court. The definition of "party in interest" in section 1109 is nonexclusive, [FN301] and it would be unreasonable to contend that an examiner is not a party in interest for the purpose of examining the debtor and witnesses. [FN302] Any confusion on this issue could be removed by a bankruptcy rule of procedure, and the Sponsors' Statements reflect that they expected such a rule could be promulgated. [FN303]

*121 2. Power to Employ Professionals

The Code authorizes the trustee (and the DIP) to employ professionals, [FN304] but does not expressly authorize an examiner to employ professionals. One respected commentator suggests that this was an oversight. [FN305] This assertion provides thin support for interpreting the Code to authorize the examiner to employ professionals. However, the Code can reasonably be construed to authorize an examiner to employ professionals under certain circumstances.

a. Power to Employ Professionals under Section 105

Section 105(a) of the Code authorizes a court to issue any order "that is necessary or appropriate to carry out the provisions" of the Code. Courts have relied on section 105 to authorize employment of professionals by examiners when necessary or appropriate. [FN306] In those cases, the courts may have been motivated by a desire to avoid appointing a trustee (which would have ended exclusivity under section 1121(c)). [FN307]

The Code addresses in detail the issues of employment and compensation of professionals and only authorizes the trustee (and the DIP) and a chapter 11 committee to employ professionals. [FN308] The Code also specifies when professionals employed by creditors and other specifically identified parties in interest may obtain compensation from the estate. [FN309] This detailed statutory scheme addresses an important topic: the disbursement of estate funds to pay priority claims for professional services. Given the detail of the statutory scheme and the importance of the topic, it is

difficult to conclude that Congress simply forgot to empower examiners *122 to employ professionals. Further, under Fed. R. Bankr. P. 2014(a), an employment application can only be made by a trustee, DIP, or committee, not an examiner.

On the other hand, the Code is ambiguous in that it does not expressly prohibit an examiner from employing professionals. Further, to interpret the Code as precluding an examiner from employing professionals would be to find that the Code altered pre-Code practice, [FN310] even though the legislative history of the Code does not appear to contain any clear expression of legislative intent to prohibit an examiner from employing professionals or to prohibit courts from exercising their inherent power to appoint auditors and other experts. In addition, to find that the Code prohibits the compensation of any professional not specifically mentioned in sections 327-331 or section 503(b)(3) might lead to the implausible result that bankruptcy judges cannot provide for the compensation of court-appointed expert witnesses under Rule 706 of the Federal Rules of Evidence.

Thus, although the statutory scheme appears to be clear, there is a nonfrivolous (but implausible) argument to the contrary. As stated, courts appear to have accepted the less plausible argument in order to avoid appointing a trustee (and to thereby preserve the DIP's exclusivity), and not because the statutory scheme supports the result. [FN311] As explained below, there is no need to twist the language of the Code to find a basis for providing professionals to assist the examiner.

b. Court's Power to Require DIP

to Employ Professionals for Benefit of Examiner

Section 1107(a) expressly authorizes the court to prescribe "limitations or conditions" on a DIP. This rule is a continuation of pre-Code practice, which also permitted the court to impose conditions on both a DIP and a trustee. [FN312] Further, under both pre-Code practice and the Code, the court had and has authority to compel the DIP to act when it unjustifiably fails to act in the best interest of the *123 estate. [FN313] Under section 1107(a), the court would therefore appear to have authority to compel the DIP to employ disinterested counsel for the benefit of the examiner.

In opposition, it might be argued that such an order would constitute undue judicial involvement in the administration of the case. That argument incorrectly equates an administrative matter with a business matter. That distinction was made to some extent by the Commission, [FN314] but was in large part rejected by Congress in favor of a distinction between an administrative matter and a dispute requiring judicial resolution. [FN315] Further, section 1107(a) expressly authorizes the court to put conditions on the DIP, and both pre- and post-Code practice would permit the court to direct the DIP to take specific action to fulfill its fiduciary duties. [FN316]

It might also be argued that such an order would violate section 321(b) by permitting the examiner in substance to exercise the employment power of a trustee (or DIP). The DIP, not the examiner, exercises the employment power so that sections 327-328, 330-331 are not violated. Section 321(b) is not violated because this arrangement neither (1) divests the DIP of any managerial discretion, nor (2) changes the investigative, impartial, nonadversarial role of the examiner, so long as the examiner's professionals are also made subject to the restrictions of sections 321(b) and 327(f). To avoid the need for a trustee, the DIP will likely stipulate to employ professionals for the examiner.

c. Power to Employ Professionals with DIP's Consent

The examiner may also obtain leave to employ professionals if the DIP voluntarily agrees to employ professionals on behalf of the examiner. [FN317] In *In re *124 Mortgage & Realty Trust*, [FN318] the court declined to approve a second-tier employment application. In it, a financial advisor to the DIP sought authority to employ an investment bank (Salomon Brothers, Inc.) to assist the financial advisor at the DIP's expense. In denying the application, the court implied

that, instead of the financial advisor, the DIP should have applied to employ the investment bank. By analogy, it should be proper for a DIP to submit an application to employ professionals to assist the examiner in rendering service to the estate.

d. Alternatives to Employment of Professionals by Examiner

Even if the examiner lacks the statutory power to employ professionals, the Code permits several alternatives which achieve an equivalent result.

First, the DIP may employ disinterested professionals to perform an independent investigation and report. Although none of the professionals would be titled "examiner," they would act as the functional equivalent of an examiner. Moreover, the court could appoint an examiner to advise the DIP on selecting the appropriate professionals and to monitor and report on their investigation.

Second, although only one "person" can serve as an examiner, [FN319] the Code includes corporations and partnerships in its definition of "person." [FN320] Thus, the examiner can "employ" the examiner's firm through the alternative of persuading the United States trustee to designate the entire firm as the "person" who will act as examiner. The United States trustee, however, may oppose permitting a corporation or partnership to undertake the fiduciary responsibility of acting as examiner. Further, the examiner's firm may lack all of the kinds of expertise required to perform the examination.

Third, under sections 363(c)(1), 1107-1108, it appears that the court has authority to appoint a limited powers trustee. [FN321] The court could direct the trustee to restrict its activities to investigating and reporting on the DIP with the assistance of professionals employed under section 327. Under section 1105, the court could remove the trustee after the completion of the examination. However, this alternative would end the DIP's exclusivity, despite the trustee's limited involvement. [FN322]

*125 3. Power to Waive DIP's Attorney-Client Privilege

In *CFTC v. Weintraub*, [FN323] the Supreme Court held that a bankruptcy trustee had authority to waive the attorney-client privilege of a corporate debtor. In arriving at this result, the Court stated that the trustee replaced management of a corporate debtor, and that management of the DIP would have authority to waive the attorney-client privilege if there were no trustee. [FN324]

An examiner has no management power, and neither section 321(b) nor section 1106(b) should permit the court to confer management power on the examiner. [FN325] For these reasons, an examiner should not have the same right as a trustee to compel a DIP to waive its attorney-client privilege. [FN326] Nevertheless, the examiner may have a way to get access to privileged materials. [FN327]

Even though the examiner should not have the power to waive the DIP's attorney-client privilege, both the examiner and other parties may have the practical ability to compel the DIP to waive that privilege (or to permit access to privileged materials). For example, prior to deciding whether to appoint an examiner or a trustee, the court may legitimately inquire of a corporate DIP whether it will give the examiner unqualified access to and use of all attorney-client privileged information; if the DIP equivocates, the court may conclude that a trustee would be more appropriate than an examiner, particularly if there is already significant evidence of misconduct. In *CFTC v. Weintraub*, the Supreme Court observed that it "would often *126 be extremely difficult" to investigate management misconduct if management controlled "access to the corporation's legal files." [FN328] Similarly, once appointed, the examiner may notify the DIP that, if such access and use are not granted, then the examiner will have to recommend the appointment of a trustee to complete the investigation. In either event, a well-advised DIP would likely grant the examiner access to

and use of all privileged files. 4. Examiner as Designated Agent to Control Causes of Action under Reorganization Plan

Chapter X expressly authorized a reorganization plan to designate an examiner to serve as an agent to enforce causes of action belonging to the debtor or the estate. [FN329] Section 1123(b)(3)(B) of the Code now opaquely provides that a chapter 11 plan may designate "the trustee" or "a representative of the estate appointed for such purpose" to enforce causes of action. May an examiner serve as the "representative of the estate" under section 1123(b)(3)(B)?

The answer should be no. The legislation proposed by the Commission, the House, and the Senate all undoubtedly contemplated that the answer would be yes. [FN330] But, in the last minute amendments to the Code, Congress changed that answer by adopting sections 321(b) and 327(f) to prevent an examiner from having any trustee-type functions or from becoming employed by the trustee. [FN331] Further, both H.R. 8200 as initially proposed and the Code as enacted included section 348(e), which, in combination with section 701(a): (a) permits a chapter 11 trustee to become the chapter 7 trustee, but (b) terminates the involvement of the examiner when the case is converted to chapter 7. Sections 348(e) and 701 also reflect an intent to limit the role of the examiner.

Permitting an examiner to serve as a designated representative under a plan would undermine the impartial, nonadversarial, investigative and reporting role of the examiner. [FN332] Similarly, compromising the neutrality of the examiner by designating it as a representative under section 1123(b)(3)(B) would arguably violate section 1123(a)(7), which prohibits plan provisions that violate "public policy with respect to the manner of selection of any officer, director or trustee under the plan"

*127 5. Other Expanded Powers

The Code does not contain any provision which expressly authorizes an expansion of the powers of the examiner. Section 1106(b) authorizes the court to expand only the "duties" of the examiner to encompass additional investigative and reporting functions specified in section 1106(a)(1)-(7). [FN333] When Congress added sections 321(b) and 327(f) to the final version of the Code, Congress sought to safeguard the fairness of the examiner's role by preventing that role from expanding to include any trustee-type functions or employment by the trustee. [FN334] Using section 105, courts have arguably (but implausibly) [FN335] given legitimate authority to the examiner to employ professionals for the purpose of facilitating the investigation. But there is no reasonable basis in the Code for giving the examiner managerial authority, including the authority to control the enforcement of causes of action.

The powers of the examiner should not be expanded on the theory that the Code assigns duties to the examiner without any corresponding powers. The terms of section 343 and its legislative history reflect that Congress did provide for investigative power, but no other power, for the examiner. [FN336]

V. LIABILITIES AND PRIVILEGES OF THE EXAMINER

A. LIABILITY OF THE EXAMINER

The examiner's investigation may cause the subject of the investigation to sue the examiner. Courts have found that trustees may be held liable for violations of their fiduciary obligations, [FN337] and the same precedent may support imposition of liability on an examiner for breach of its duties to the estate, unless an immunity or privilege applies. The scope of the examiner's potential liability will depend on the scope of the duties undertaken by the examiner. If the examiner becomes an expanded powers examiner, then the examiner should become subject to potentially expanded liabilities. When the examiner's duties are limited to conducting an investigation, then the interest in obtaining a full and fair report from the examiner militates strongly against *128 permitting any party from using threats of litigation and liability against the examiner to influence the report. [FN338]

B. QUASI-JUDICIAL IMMUNITY

A trustee may obtain immunity from personal liability under the doctrine of quasi-judicial immunity, which provides some immunity for acts of a trustee, including those performed pursuant to a court order. [FN339] The examiner may also be entitled to invoke this doctrine, especially if the examiner acts pursuant to appropriate orders in the course of the investigation.

In *Weissman v. Hassett*, [FN340] a district court ruled that a trustee had immunity from liability arising from his allegedly erroneous report of his investigation of the debtor. Similarly, in *Howard v. Drapkin*, [FN341] the California Court of Appeal ruled that "absolute quasi-judicial immunity" protected "neutral third parties" for their conduct in, among other things, "the making of findings or recommendations to the court." [FN342] *Howard* involved state law claims against a state court-appointed psychologist. However, the court relied in part on federal cases to determine that quasi-judicial immunity protected the psychologist [FN343] and emphasized the "relevant policy considerations of attracting to an overburdened judicial system the independent and impartial services and expertise upon which that system necessarily depends." [FN344]

It remains to be seen whether other courts will follow *Weissman* and *Howard*. Both cases may be distinguished on the ground that they relied on alternative holdings, and one court has already distinguished *Weissman* on this basis. [FN345] To the extent that courts and Congress restrict the immunity of examiners and trustees, qualified individuals may be deterred from serving in bankruptcy cases, especially in contentious cases. Examiners and trustees are especially vulnerable to threats of costly litigation, *129 because in many cases the bankruptcy estate lacks funds to indemnify the examiner or trustee.

C. PUBLICATION PRIVILEGE

The most likely cause of threats of litigation against an examiner will be the contents of the examiner's report. State law privileges may provide the examiner with absolute immunity from such litigation, because statements made in the course of a judicial proceeding may be absolutely privileged. [FN346]

Fed. R. Bankr. P. 9011 sanctions, however, may apply to a report filed by an examiner if the report is not well grounded. Rule 9011 by its terms only applies to a "party," but an examiner should be deemed a party to the court-ordered examination, even if the examiner is not a party to the case for other purposes. [FN347]

D. WORK PRODUCT PRIVILEGE

The work product privilege, embodied in Fed. R. Civ. P. 26(b)(3), limits a party from obtaining discovery of materials prepared in anticipation of litigation by another party or its representative. [FN348] By its terms, Rule 26(b)(3) may limit access to the examiner's work product on the theory that: (1) the examination proceeds as part of a contested matter to which Rule 26(b)(3) applies, [FN349] (2) the examiner is a "party" for the purposes of the examination, [FN350] and (3) the examiner's work product is generated in anticipation of litigation, because one of the duties of the examiner is to search for claims for relief belonging to the estate. [FN351] On the other hand, the withholding of any relevant information by an examiner is arguably inconsistent with its duty to render a fair report of the investigation.

*130 In three cases, courts stated that an examiner has a qualified right to withhold information obtained during an investigation when a protective order was in effect. [FN352] Nevertheless, protective orders have limited utility, because an examiner has a statutory duty to file a statement of investigation. Under section 1106(a)(4) of the Code, the statement must include "any fact" ascertained pertaining to fraud or other misconduct. [FN353] The examiner might obtain leave to file a sealed report under Fed. R. Bankr. P. 9018, [FN354] but section 1106(a)(4) does not appear to permit the examiner to omit any material facts pertaining to misconduct. Further, once the examiner files the report, then the court may act on its own motion under section 105(a) and may have a duty to file the report with the United States attorney.

[FN355]

Section 1106(a)(4) also directs the examiner to transmit a copy of its report or a summary of it to any committee, indenture trustee and to such other entity as the court designates. This provision does not say that the court has any authority to deny a committee or indenture trustee access to the information in the examiner's report.

E. ATTORNEY-CLIENT PRIVILEGE

If the examiner is authorized to employ attorneys, then the examiner should also have an attorney-client privilege for communications with the examiner's counsel. One unanswered question is whether a subsequently appointed trustee may have access to the examiner's attorney-client communications on the theory that the trustee is the successor to the examiner. Another question is whether the DIP or creditors may obtain access to the examiner's privileged communications on the theory that creditors are beneficiaries of a trust relationship with the examiner. [FN356] As a policy matter, the DIP or other subjects of the examiner's investigation should not be permitted to have access to such communications, because the threat of such access would severely inhibit the ability of the examiner freely to confer with its counsel.

*131 VI. ALTERNATIVES TO EXAMINER

A. TRUSTEE

The chapter 11 trustee has the same investigative duties as the examiner, and has the right and power to operate the debtor's business [FN357] and to sue on behalf of the estate. [FN358] The trustee has a fiduciary duty to maximize the value of the estate. [FN359] In seeking to maximize the value of the estate, the trustee must investigate the conduct of prior management to uncover and assert causes of action against the debtor's officers and directors. [FN360] Thus, even though a trustee must be disinterested, [FN361] the trustee is correctly perceived as a potential adversary. In contrast, although an examiner has the same investigative duties, an examiner is "first and foremost disinterested and nonadversarial." [FN362]

The appointment of a trustee may disrupt management and lessen the debtor's ability "to project to the public an image of vitality." [FN363] On the other hand, the trustee may decide to keep key employees in place, and the United States trustee may select a trustee who inspires new confidence in the debtor. [FN364] The court may later restore the debtor to possession. [FN365]

The appointment of a trustee automatically ends the debtor's exclusivity period. [FN366] Loss of exclusivity increases the likelihood that a disgruntled creditor may propose a liquidating plan. This likelihood may make the court reluctant to appoint a trustee.

*132 A trustee may have so many operating problems to address that the trustee takes longer than an examiner would to investigate and report on the debtor. In addition, unlike an examiner, the trustee's compensation is subject to a statutory limit, [FN367] which may give the trustee a disincentive to give personal attention to the case. The trustee's professionals, however, may have a financial incentive to recommend that the estate pursue litigation and other tasks that will generate fees for the professionals.

The trustee has financial incentives to conclude that the case should be converted to a chapter 7 liquidation. For example, conversion to a chapter 7 liquidation may increase the potential compensation of the trustee, [FN368] and does give the chapter 7 fees of the trustee and the trustee's professionals an administrative priority. [FN369] Conversion ends the administrative expense of the professionals for the creditors' committee. Conversion also ends the union contract and retirement benefit administrative obligations which arise only in a chapter 11 case. [FN370] A chapter 11 trustee may

become the chapter 7 trustee, but an examiner cannot become a trustee and is automatically terminated upon conversion to chapter 7. [\[FN371\]](#)

B. LIMITED POWERS TRUSTEE AND TEMPORARY TRUSTEE

In lieu of completely ousting management, the court may appoint a limited powers trustee, whose function is limited to investigating and pursuing causes of action under the authority of section 363(c)(1). It provides that a chapter 11 trustee may operate the business in the ordinary course, without notice or hearing, "unless the court orders otherwise . . ." Congress enacted this provision for the stated purpose of permitting a court "to restrict the trustee's powers in the order authorizing operation of the business." [\[FN372\]](#) Thus, in light of the text and legislative history of section 363(c)(1), it authorizes a court to direct, for example, that the trustee shall *133 make no management decisions and shall keep current management and employees in place. [\[FN373\]](#)

Sections 1107(a) and 1108 are consistent with section 363(c)(1). Section 1107(a) states that a DIP is subject to "any limitations on a trustee" in addition to "such limitations or conditions as the court prescribes" for the DIP. Section 1108 provides that a trustee may operate the debtor's business, unless the court "orders otherwise," and section 363(c)(1) permits the court to order otherwise as to the trustee.

Interpreting sections 363(c)(1), 1107(a) and 1108 to permit the court to limit the trustee's management powers makes the Code consistent with practice in chapters X and XI and equity receiverships. [\[FN374\]](#)

If the power to appoint a limited powers trustee exists, why is that power not exercised more frequently? One explanation may be judicial reluctance to trigger the loss of exclusivity under section 1121(c) caused by the appointment of any trustee. Another explanation may be an opinion by the respected and scholarly Judge Mabey in *In re Curlew Valley Associates*, [\[FN375\]](#) which contained dicta that gave an unduly restrictive interpretation of sections 1107(a) and 1108 of the Code. In *Curlew*, the court stated that those provisions permitted the court to place restrictions on the DIP but limited "judicial surveillance" of a trustee. [\[FN376\]](#) The court drew this inference from *134 the language of section 1107(a), which expressly provides that the court may impose "limitations and conditions" on the DIP, but is silent on whether the court may impose "limitations" on the trustee. The analysis in *Curlew* did not address section 363(c)(1), which showed that the Code was, in fact, not "silent" [\[FN377\]](#) on the subject of the court's power to impose limitations on the trustee's operation of the business. On the contrary, section 363(c)(1) authorizes -- and was intended by Congress to authorize -- judicially imposed limitations on a trustee. [\[FN378\]](#)

Instead of a limited powers trustee, the court may appoint a temporary trustee and may restore the debtor to possession at any time before confirmation of a plan. [\[FN379\]](#)

C. JUDGE

1. Propriety of Judicial Involvement

If there is no pending dispute before the judge for resolution, then section 105(a) contemplates that the judge may act on its own motion only if necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process. [\[FN380\]](#) Even as amended in 1986, section 105 by its terms does not give the judge unqualified power to act on its own motion to police the case. Further, the legislative history of the Code confirms that Congress intended to restrict bankruptcy judges to performing the traditional judicial function of resolving actual disputes. [\[FN381\]](#) If an actual dispute does arise, however, then *Fed. R. Civ. P. 16* and *26(b)* and *Fed. R. Bankr. P. 7016* and *9014* permit the judge to take an active and early role to manage the dispute, to control discovery, and to explore alternative solutions. To preserve impartiality and to avoid improper contacts with the parties, the judge may require the aid of an examiner, settlement judge or other dispute resolution assistance.

*135 2. Judicial Management of Case

The court should not use the appointment of an examiner to abdicate responsibility to confront and decide difficult issues. Unfit management may irreparably damage the estate during the pendency of the examination. Damaging false allegations may disable honest new management during a protracted examination.

The Supreme Court has condemned the excessive use of special masters, [FN382] and judicial reliance on an examiner poses similar risks of delay, expense and judicial abdication. In the Eastern Airlines bankruptcy, the estate sustained substantial losses during the examiner's investigation and before the court decided that management had to be replaced by a trustee. [FN383] In *In re Timbers of Inwood Forest Associates Ltd.*, [FN384] the Fifth Circuit Court of Appeals urged bankruptcy judges to manage and expedite the resolution of chapter 11 cases:

Early and ongoing judicial management of Chapter 11 cases is essential if the Chapter 11 process is to survive and if the goals of reorganizability on the one hand, and creditor protection, on the other, are to be achieved. In almost all cases the key to avoiding excessive administrative costs, which are borne by the unsecured creditors, as well as excessive interest expense, which is borne by all creditors, is early and stringent judicial management of the case. We recognize that Congress, in 1978, amended the bankruptcy laws with the intention of removing bankruptcy judges from the administration of the debtor's estate. The purpose of this amendment was to insure the impartiality of the bankruptcy judge. We do not believe, however, that Congress thereby intended to relieve the bankruptcy judge of the responsibility of managing the cases before him in such a way as to promote the objectives and goals of the Bankruptcy Code. [FN385]

The bankruptcy judge has numerous means to expedite the case and limit expenses without the assistance of an examiner. Subject to various limitations, the *136 court may limit or extend exclusivity, [FN386] place restrictions on the DIP, [FN387] control the employment of professionals and the compensation awarded to them, [FN388] convert a case which fails to progress, [FN389] and order the appointment of a trustee. [FN390] The judge may structure the prompt processing of civil disputes by means of *Fed. R. Bankr. P. 7016*, [FN391] and the claim estimation process, [FN392] with the assistance of expert witnesses when needed. [FN393]

3. Judicial Administration of Business Operations

The court not only has the power to manage the procedural progress of the bankruptcy case, but also has the power to intervene in the operations of the business of the estate. The most extreme example of such intervention is the appointment of a trustee. Sections 363(c)(1) and 1107-1108 also give the court the power to impose conditions on both the trustee and DIP. [FN394] To assist the court in controlling the conduct of a corporate debtor, *Fed. R. Bankr. P. 9001(5)* permits the court to *137 designate a member of the DIP's control group to perform the duties of the DIP. [FN395] It appears that the DIP may agree to delegate certain powers to a designated representative. [FN396]

During the conduct of an extensive examination, it may be wise for the court to impose reasonable conditions on the DIP so as to prevent harm (or fraud) from occurring while the examination takes place, and to prevent the examiner from feeling compelled to rush to a conclusion. [FN397]

D. CREDITORS' COMMITTEE

The creditors' committee has the right to investigate the debtor and to participate in the formulation of a plan. [FN398] A creditors' committee almost by definition cannot conduct a disinterested [FN399] investigation, nor can the committee likely act as thoroughly and quickly as an examiner. [FN400] The creditors' committee may be distracted by the numerous issues present in any reorganization. [FN401] Further, members of the committee inevitably have preconceptions about the debtor and a financial stake in the outcome of the investigation. The committee's report therefore will not have the same credibility as a report prepared by a disinterested examiner.

With leave of court, the creditors' committee may file an adversary proceeding on behalf of the estate. [FN402] In contrast, an examiner should not be able to obtain authority to sue on behalf of the estate. [FN403]

*138 E. PARTY IN INTEREST STATUS

Under Rule 2004, a creditor can conduct its own investigation of the debtor's estate, but will usually have to bear the expense of that investigation, unless it results in a "substantial contribution" to the estate. [FN404] By obtaining the appointment of an examiner, a creditor compels the DIP to pay for the investigation and to cooperate with the investigator.

A creditor has a qualified right to bring a lawsuit on behalf of the estate with leave of court. [FN405] An individual creditor may be less likely than an official creditors' committee to obtain leave of court. [FN406]

F. DEBTOR IN POSSESSION

Under section 1107, a DIP has no authority to perform the investigation required by section 1106(a)(3) and (4). These provisions are misleading in at least two respects.

First, the DIP has substantial disclosure obligations. The DIP must attend the first meeting of creditors and submit to examination. [FN407] The DIP also must file schedules of assets and liabilities shortly after the filing of the case, [FN408] must submit to examination by parties in interest [FN409] and cannot solicit plan acceptances without first obtaining court approval of a disclosure statement. [FN410] The court may either avoid the need for an examiner or reduce the examiner's work by conditioning extensions of the exclusivity period on the DIP's filing a disclosure statement.

Second, the DIP has the same fiduciary obligations as the trustee to uncover and pursue causes of action against management. A committee of independent members *139 of the board of directors of a corporate debtor may therefore be capable of performing these fiduciary obligations without a trustee or examiner. [FN411]

G. INDEPENDENT PROFESSIONALS

Section 327 of the Code requires the DIP to be represented by disinterested professionals, and an examiner may be appointed to investigate a debtor's relationship with its counsel. [FN412] When the DIP's professionals are truly competent and trustworthy, the appointment of an examiner may be unnecessary. For example, in a case in which the DIP employed a major outside accounting firm to do an audit, the court declined to appoint an examiner. [FN413]

H. UNITED STATES TRUSTEE

The United States trustee has broad power to monitor and supervise the administration of bankruptcy cases. [FN414] It has the right to be heard on any and all issues in a case, and has the right to select trustees and examiners and the members of committees. [FN415] The conduct of the United States trustee is subject to judicial review. [FN416] The United States trustee has authority to serve as a trustee in a chapter 7 case if necessary. [FN417]

I. UNITED STATES ATTORNEY

The United States attorney may investigate and prosecute acts constituting bankruptcy fraud under chapter 9 of title 18. [FN418] If a bankruptcy judge or trustee submits a proper report of a possible bankruptcy crime to the United States attorney, then it has a duty "to inquire into the facts" for possible prosecution. [FN419] The United *140 States attorney may utilize such investigative devices as grand jury subpoenas, search warrants and wiretaps, which are not available in civil litigation.

The lack of interest of the United States attorney in prosecuting a case may actually assist parties in interest. If the United States attorney declines to prosecute, then it may agree to grant immunity under section 344 of the Code to

compel testimony from witnesses who assert their privilege against self-incrimination in the civil investigation.

Alternatively, a criminal prosecution may interfere with the examiner's investigation, because the prosecutor may seek to stay all civil discovery in order to prevent the targets from obtaining information. The court has discretion to grant or deny such a stay. [FN420]

J. COURT-APPOINTED EXPERT WITNESS

Rule 706 of the Federal Rules of Evidence applies in bankruptcy proceedings. [FN421] Rule 706 authorizes the court to appoint an expert witness to assist the court in a civil action or proceeding. Rule 706(a) permits the court to select the person who will serve as the court-appointed witness. An unresolved issue is the extent to which a bankruptcy judge can use Rule 706 to circumvent the power of the United States trustee to select an examiner under section 1104(c).

K. SPECIAL REPRESENTATIVE AND SPECIAL ASSISTANT

Courts have appointed "special representatives" under section 105 to represent the interests of constituencies who have an important stake in a reorganization, but who are unable to represent themselves without judicial assistance. [FN422] Courts have inherent equitable power to appoint special assistants whenever "judicial necessity" exists, [FN423] so long as the exercise of that inherent power does not conflict with statutory law. [FN424]

*141 L. SPECIAL MASTER

Fed. R. Civ. P. 53 authorizes the appointment of a special master in civil actions. Under Rule 53(a), the court selects the special master and sets the terms of the master's compensation. It may be charged to the parties or paid out of any fund or subject matter of the action, unless the master is a U.S. magistrate judge. Rule 53(c) gives a master the power to require the production of evidence. Under Rule 53(e)(3), a master's findings are even admissible in evidence in a jury trial.

Although a special master can provide valuable assistance in a complex case, Fed. R. Bankr. P. 9031 expressly provides that Rule 53 "does not apply in cases under the Code." It is ironic that Fed. R. Bankr. P. 9031 contains this prohibition, because Rule 53(a) includes an "examiner" in its definition of "master." [FN425] By barring application of a modified version of Rule 53 for examiners in bankruptcy cases, the Advisory Committee and Supreme Court deprived the bankruptcy court of a procedural rule which would have provided guidance on the conduct of proceedings before a bankruptcy examiner. In any event, Rule 9031 by its terms would not preclude the appointment of a special master in a civil proceeding which involves the debtor but does not arise under the Code. [FN426]

Courts have condemned the excessive delegation of judicial functions to special masters. [FN427] For the same reason, a bankruptcy court should not use an examiner to abdicate responsibility to resolve the case and to decide disputes.

M. RECEIVER

In a nonbankruptcy proceeding, the court may appoint a receiver to conduct an investigation. [FN428] However, state receivership law lacks the detailed statutory framework of the Code for the administration, protection and investigation of the assets and affairs of an entity in financial distress. Federal bankruptcy law was enacted *142 in part to remedy the abuses of receivership practice, [FN429] and the appointment of a receiver for substantially all of the assets of a debtor constitutes one ground for the filing of an involuntary petition. [FN430] Even if creditors do not file an involuntary petition, the receivership court may authorize the receiver to file a petition on behalf of the debtor to obtain the protections and statutory guidance of the Code. [FN431]

Under section 105(b), [FN432] a bankruptcy judge appears to be prohibited from appointing a receiver in a case under title 11. One federal court of appeals, however, affirmed the appointment of a receiver in a civil proceeding filed in

connection with a bankruptcy case. The circuit court stated that section 105(b) did not apply to a separate controversy between a creditor and the debtor or another creditor. [FN433] Under section 543(d), the court has discretion to prevent the DIP from ousting a receiver who was appointed before the commencement of the case. [FN434]

N. CLAIM ESTIMATION

A substantial contingent or unliquidated claim may threaten to delay the progress of a chapter 11 case. In lieu of appointing an examiner to review the claim or conducting a lengthy trial on the merits, the court may exercise its statutory authority to estimate the claim. [FN435] Alternatively, an examiner may help the parties and the court to estimate complex claims. [FN436] Fairness may require the assistance of an examiner or court-appointed expert, because misestimation can permanently impair the rights of the claimant and the estate. [FN437]

*143 VII. PROCEDURAL ASPECTS OF EXAMINATION

A. WHO CAN REQUEST APPOINTMENT OF EXAMINER

Section 1104(b) provides that the request for the appointment of an examiner can be made by a "party in interest or the United States trustee." [FN438] The term "party in interest" is broadly defined in section 1109. Congress authorized the Supreme Court to promulgate bankruptcy rules to give further definition to that term, [FN439] but the Supreme Court has not promulgated a rule to define who is a party in interest for the purpose of seeking an examiner. Section 1103(c)(4) [FN440] expressly authorizes the creditors' committee to request the appointment of an examiner.

A court can order the appointment of an examiner on its own motion under the limited circumstances specified in section 105(a). [FN441] That section should be interpreted in light of the policies of: (1) limiting judicial involvement to resolution of actual disputes except in specified circumstances, and (2) encouraging intense and early judicial involvement when a dispute is pending. [FN442] Section 105(a) does not purport to authorize the court to disregard the notice and hearing requirements of sections 102 and 1104, or to disregard the substantive standards for the appointment of an examiner.

B. FORM OF REQUEST FOR APPOINTMENT OF EXAMINER

The "request" for the appointment of the examiner must be in the form of a motion. [FN443] The motion must be served on the DIP and on such entities as the court may require. [FN444] To expedite the examination, the motion should address such *144 important investigative issues as the scope of the investigation, the examiner's right to employ professionals, [FN445] the DIP's willingness to waive the attorney-client privilege if an examiner (instead of a trustee) is appointed, [FN446] a time and expense budget for the examination, and the possible alternative of a limited powers trustee. [FN447]

C. FORM OF ORDER APPOINTING EXAMINER

Section 1104(b) provides that the court "shall" order the examiner "to conduct such an investigation of the debtor as is appropriate." In addition, section 1106(a)(3) permits the court to define the scope of the investigation [FN448] and section 1106(b) permits the court to assign additional duties to the examiner. Accordingly, thought should be given to the terms of the appointment order, which may impact the scope, efficiency and cost of the examination. A restrictive appointment order may hamper the ability of the examiner to get information or to investigate significant issues that arise during the examination. An unrestricted appointment order may increase the cost and duration of the examination.

D. SELECTION OF EXAMINER BY UNITED STATES TRUSTEE

Section 1104(c) provides that: "[i]f the court orders the appointment of . . . an examiner . . . , then the United States trustee, after consultation with parties in interest, shall appoint, subject to the court's approval, one disinterested person other than the United States trustee to serve as . . . examiner . . . in the case." [FN449]

Because the quality of the examination will depend on the quality of the examiner selected, parties in interest should decide as early as possible on a suitable candidate and the qualifications required to perform the examiner's duties in the case. This information should then be submitted to the United States trustee. If the parties distrust each other, they will likely each object to any candidate named by any other party.

*145 Parties in interest have a right to an opportunity to consult with the United States trustee, [FN450] but have no right to compel it to select any particular person. [FN451] No formal procedures now exist for the consultation process. The United States trustee and the court must identify and prevent any attempt to misuse the consultation and selection process to obtain appointment of an unsuitable examiner. Perhaps persons who consult with the United States trustee should be required to submit a sworn statement disclosing their relationship to the estate and to their nominee for examiner.

The United States trustee has no duty to select a panel trustee to serve as examiner. [FN452] Panel trustees may argue that they are entitled to, or deserve a lucrative appointment to compensate them for losses sustained in administering numerous no-asset chapter 7 cases. Parties in interest may be concerned that a panel trustee lacks the experience, expertise, time or inclination to conduct an intense and complex examination.

E. APPROVAL OF UNITED STATES TRUSTEE'S SELECTION

Section 1104(c) provides that the United States trustee's appointment of the examiner is "subject to the court's approval." The United States trustee must obtain this approval by submitting an "application" to the bankruptcy judge. [FN453]

The bankruptcy judge cannot properly use this approval power to recommend or suggest to the United States trustee that it select a particular person. One of the purposes of the Code was, besides removing bankruptcy judges from participating in the administration of the case, to "eliminate the cronyism that exists in many parts of the country in the appointment of trustees by bankruptcy judges, and the *146 uncomfortably close relationship that exists between the judges and their trustees." [FN454]

The legislative history of section 1104(c) includes evidence that court approval was meant to be "perfunctory." [FN455] Nevertheless, the language of section 1104(c) does not direct the bankruptcy judge to give "perfunctory" approval to the appointment. The proposed examiner should give the bankruptcy judge an evidentiary basis for finding that the examiner is qualified to do the job.

In determining whether to approve an appointment, the court may look at three factors: (1) whether the United States trustee has consulted with parties in interest; (2) whether the candidate is disinterested (and complies with Fed. R. Bankr. P. 5002); and (3) whether the United States trustee committed an abuse of discretion in selecting the candidate. [FN456]

F. WHO CAN BE AN EXAMINER

Section 1104(c) provides that the examiner selected by the United States trustee shall be "one disinterested person."

1. "Disinterested" Person Requirement

"Disinterested" is defined in 11 U.S.C. s 101(14). Among other things, the definition of "disinterested" precludes an insider, creditor or person having a materially adverse relationship to the debtor from serving as examiner.

Before accepting an appointment to serve as an examiner in a case, the candidate should carefully review the debtor's schedules, statement of affairs and key pleadings in order to ascertain: (a) that the candidate is "disinterested," and (b) that the candidate will not have any personal reasons for conducting less than a full and fair investigation.

*147 2. "One Person" Requirement

Only "one . . . person" can serve as an examiner under section 1104(c), but the term "person" includes "individual, partnership, and corporation." [FN457] Accordingly, a law firm or an accounting firm could be appointed to serve as an examiner.

The "one person" requirement will remain a significant issue so long as there remains any doubt concerning the right of an examiner to employ professionals. As a practical matter, unless economics dictate otherwise, the examiner should not be denied permission to employ professionals when needed, if the alternative would be the appointment of a trustee. [FN458]

3. Prohibition on Improper Connections

Fed. R. Bankr. P. 5002 [FN459] prohibits nepotism in the appointment of examiners. Rule 5002 also prohibits approval of the appointment of an examiner who is so "connected" to the judge or the United States trustee "as to render the appointment . . . improper."

G. EMPLOYMENT OF PROFESSIONALS BY EXAMINER

In *In re Southmark Corp.*, [FN460] the court suggested the procedures for determining whether to authorize an examiner to employ professionals. The court gave extensive notice of the employment application, conducted an evidentiary hearing, and entered an order to preclude parties in interest from contesting the employment order later in the case. [FN461]

*148 H. THE INVESTIGATION AND REPORT

I. Investigative Tools

Under section 343, [FN462] the examiner has express authority to examine the debtor at the first meeting of creditors. In addition, Fed. R. Bankr. P. 2004 allows "any party in interest" to move the court for an order for "the examination of any entity." [FN463] Given the text of sections 343, and 1104(b), the examiner, who has a statutory right and duty to examine the debtor, should be a "party in interest" within the meaning of Rule 2004, even if the examiner is not a party in interest for other purposes. [FN464]

2. Confidentiality

Section 1106(a)(4) directs the examiner to file the examiner's report with the court and to transmit a "copy or summary" to the creditors' committee and to other specified parties. There is authority for the proposition that the court can limit access to information obtained by the examiner, particularly information obtained pursuant to a protective order. [FN465] The court may have authority to seal the report under section 107 and Fed. R. Bankr. P. 7026 and 9018, and the examiner may expedite the investigation by obtaining protective orders at the outset. To prevent erosion of public confidence in the bankruptcy system, protective orders should be narrowly tailored and should not authorize a violation of the statutory duty to report bankruptcy crimes as required by 18 U.S.C. s 3057 (which applies to the judge and the trustee, but not the examiner).

In the Eastern Airlines bankruptcy, the examiner obtained a protective order from the bankruptcy judge to seal the testimony of witnesses examined. In connection with a criminal investigation, the government served a grand jury subpoena on the examiner for production of the sealed transcripts. The trial court directed the examiner to comply and cited him for contempt. On appeal, the Second Circuit reversed and remanded for a hearing on whether the government could show either that the protective order was improvidently granted, or that production was justified by exceptional circumstances or compelling need. [FN466]

*149 Since one purpose of an examination is to identify causes of action of the estate, a protective order should never provide that it precludes the information obtained during the examination from being used to pursue such causes of action.

3. Limited Prohibition on Ex Parte Contracts

Fed. R. Bankr. P. 9003(a) [FN467] prohibits ex parte communications between the examiner and the court about the case. But that rule does not prohibit the examiner from having ex parte communications with parties in interest.

4. Speed of Investigation

Under section 1106(a)(4), the examiner must file a "statement of any investigation" as soon "as practicable." A court invites obstruction or premature conclusions if the court sets an arbitrary deadline for the completion of the investigation. But the court can expedite the investigation by requiring periodic status reports and by setting meaningful deadlines based on those reports. [FN468]

5. Effect of Examination on Progress of Reorganization

Section 1104(b) provides that the appointment of an examiner can be made "at any time before confirmation of a plan." However, the legislative history tends to show that the examiner's investigation was not supposed to provide a basis for slowing the reorganization process. [FN469] A respected commentator states that, as a practical matter, an examination may slow the reorganization process:

It is unlikely, however, that should the examiner come up with something, even preliminarily, that the case could really go forward without taking his findings into account. An impropriety found by the examiner could have a direct bearing on the nature of the plan, on retention of the debtor in possession, on whether the solicitation materials contain adequate information, and whether the plan should be confirmed. It is conceivable *150 that the case could be slowed down, even grind to a halt, while the examiner is performing the role required by the Code. [FN470]

6. The Report

Because the examiner's report currently appears to have no binding effect, [FN471] the persuasive power of the report depends primarily on its quality. On the other hand, the examiner's report may include significant admissible evidence. For example, the examiner may conduct Rule 2004 examinations during which potential defendants give testimony which will be admissible against them in later proceedings. Similarly, either the examiner or one of the examiner's professionals may be an "expert" within the meaning of Fed. R. Evid. 702, and may formulate admissible expert opinions as a result of the examination.

I. COMPENSATION OF EXAMINER

Both sections 330 and 331 [FN472] authorize awards of reasonable compensation and reimbursement of expenses to the examiner. The court has broad discretion to control the timing of payment of interim compensation. [FN473] Like any other chapter 11 administrative claimant, the examiner must share the risk of administrative insolvency. [FN474] Upon conversion from chapter 11 to chapter 7, the examiner's service is automatically terminated [FN475] and the examiner's administrative claim to compensation is subordinated to the chapter 7 "burial expenses." [FN476]

*151 VIII. STATUTORY REFORM

A. CLARIFYING STATUTORY AMENDMENTS

To remove any confusion about the current meaning of the examiner provisions of the Code, Congress could adopt three clarifying amendments. First, section 1104(b) could be clarified by amending section 102 to provide that the word "shall" as used in the Code creates a mandatory duty, and does not mean "may" as some courts have found. [FN477] Second, section 1106(b) could be clarified by amending it to provide that the only additional duties which can be assigned to the

examiner consist of those trustee duties specified in section 1106(a). [FN478] Third, section 1107 could be clarified by amending it to provide that, on request of a party in interest, the court may direct a DIP to take action in the best interest of the estate (including employing professionals for the benefit of the examiner) when the DIP unjustifiably refuses to do so. [FN479]

B. SUBSTANTIVE STATUTORY AMENDMENTS

Courts are reluctant to enforce the innovations in sections 321(b) and 327(f) of the Code, which prevent the examiner from becoming a trustee or from being employed by the trustee. [FN480] Congress may wish to revisit the substantive issue of whether the need to safeguard the fairness of the examination justifies the rigid disqualification provisions of sections 321(b) and 327(f). Alternatively, Congress could keep section 321(b) in place, but could amend sections 327(f) and 1121(c) to provide that the appointment of a trustee does not automatically prevent employment of the examiner or terminate exclusivity. This would give courts more flexibility.

Courts are also reluctant to enforce the mandatory standard for the appointment of an examiner in cases involving more than \$5,000,000 of debt under section 1104(b)(2). [FN481] The mandatory standard results from Congress' perception that large creditors may dominate a case and extract undue favors without regard to the public interest. [FN482] For reasons already stated, [FN483] the mandatory standard should not be abolished. However, the \$5,000,000 debt test seems outdated and may result in the appointment of examiners in what would now appear to be small cases. A sensible adjustment would be to raise the \$5,000,000 debt threshold for application of *152 the mandatory standard. This is the approach proposed by S. 1985, [FN484] which would raise the threshold to \$10,000,000. [FN485]

S. 1985 also proposes to create a new reorganization chapter, chapter 10, for small business debtors having aggregate liquidated secured and unsecured debts not in excess of \$1,500,000. [FN486] Proposed new chapter 10 does not provide for the appointment of an examiner, and does not even require a trustee to perform an investigation unless ordered to do so. [FN487] Chapter 10 appears to reflect a perception that small cases rarely can succeed if subjected to the administrative expense of a full blown investigation by a trustee or examiner.

S. 1985 also proposes to create a new bankruptcy commission to investigate and report on the Code. [FN488] That commission, if created, may be urged to recommend abolishing the concept of the DIP as suggested by a recent law review article. [FN489] Without the DIP, the examiner's role might cease to exist. That commission may also revisit the Code's history and conclude that it supports further expansion of the role of the examiner. [FN490]

IX. CONCLUSION

In last minute revisions to the Code in 1978, Congress limited the role of the examiner to conducting an expeditious and impartial investigation. In the interest of fairness to the subject of the investigation, Congress rejected the historical practice of permitting the examiner to profit from its report by becoming the trustee or an employee of the trustee. [FN491]

The duties of an examiner can be expanded to encompass the additional investigative and reporting duties specified in section 1106(a)(1)-(7), but no others. With the consent of the DIP, or pursuant to section 1107(a), the court may authorize *153 the examiner (or the DIP on behalf of the examiner) to employ professionals. The court has no authority to alter the neutral role of the examiner by giving it management of the DIP's operations, or control of causes of action of the DIP. [FN492]

It is incorrect to say that Congress "utterly failed to provide the examiner with any investigatory tools with which to conduct a meaningful investigation, barring complete cooperation from all parties involved." [FN493] Congress gave the examiner express authority to examine the debtor under section 343. The legislative history of that section shows that

Congress intended to, and did authorize the Supreme Court in 28 U.S.C. s 2075 to promulgate rules of practice and procedure concerning examinations in bankruptcy cases. [FN494] Congress also intended to restrict the judge from participating in the examination or acting on its own motion, except in specified circumstances or in the context of resolving a pending dispute. [FN495]

Apart from authorizing Rule 2004 examinations by "any party in interest," the Supreme Court has not promulgated a rule which describes the examiner's role in the detail that Fed. R. Civ. P. 53 describes the special master's role, or in the detail that Fed. R. Crim. P. 6 describes the grand jury's role. The Supreme Court should promulgate such a rule. Until then, this article may provide guidance.

If and when Congress decides to revise the role of the examiner, Congress will find guidance in the history of the debates and legislative proposals that began with Judge Lowell's bill in 1881. [FN496] Congress may also find guidance in the proposals in Part VIII of this article.

An examiner can serve the investigative function of a civil grand jury. The examiner resembles a court-appointed expert witness and can provide disinterested analysis of complex issues. The examiner also resembles a special master and presents a similar risk of judicial abdication, expense and delay. The utility of an examiner depends on whether the evidence mandates the appointment of a trustee, and whether some other alternative would best accomplish the desired result. The examiner may be less likely to favor conversion to chapter 7 than a trustee. [FN497] The examiner will inevitably be more attractive than a trustee to management of the DIP. So long as the Code links the appointment of a trustee (even a limited powers trustee) to the automatic ouster of the examiner and termination of exclusivity, both courts and management will attempt to expand the role of the examiner.

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[FN2] 11 U.S.C.A. ss 101-1330 (West 1979 & Supp. 1992) and scattered provisions of title 28 and other titles. The Code was enacted on November 6, 1978 as Pub. L. No. 95-598, 92 Stat. 2549.

The provisions of the Code which expressly refer to the examiner are 11 U.S.C.A. ss 321(b), 324, 327(f), 330(a), 331, 343, 348(e), 1103(c)(4), 1104(b)-(c), and 1106(b) (West 1979 & Supp. 1992).

Congress authorized the Supreme Court to promulgate procedural rules in 28 U.S.C.A. s 2075 (West 1982), which was amended in connection with the enactment of the Code. Pub. L. No. 95-598, s 247, 92 Stat. 2672. Provisions of the Federal Rules of Bankruptcy Procedure which expressly refer to the examiner are FED. R. BANKR. P. 2007.1, 2013, 5002, and 9003. In addition, in FED. R. BANKR. P. 9029, the Supreme Court authorized the district courts and bankruptcy judges to promulgate local procedural rules.

[FN3] Lawrence K. Snider, The Examiner in the Reorganization Process: A Need To Modify, 45 BUS. LAW 35 (1989) ("The Examiner in the Reorganization Process").

[FN4] 11 U.S.C.A. s 343 (West Supp. 1992) provides:

The debtor shall appear and submit to examination under oath at the meeting of creditors under section 341(a) of this title. Creditors, any indenture trustee, any trustee or examiner in the case, or the United States trustee may examine the debtor. The United States trustee may administer the oath required under this section.

[FN5] 28 U.S.C.A. s 2075 (West 1982) provides:

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and

motions, and the practice and procedure in cases under title 11.

Such rules shall not abridge, enlarge, or modify any substantive right.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May and until the expiration of ninety days after they have been thus reported.

[FN6] Act of July 1, 1898, ch. 541, 30 Stat. 544.

[FN7] Act of June 22, 1938, ch. 575, 52 Stat. 840.

[FN8] 11 U.S.C.A. s 1104(b) (West 1979 & Supp. 1992) provides:

(b) If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor or by current or former management of the debtor, if

(1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or

(2) the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed \$5,000,000.

[FN9] 898 F.2d 498 (6th Cir. 1990).

[FN10] 498 U.S. , 111 S. Ct. 654 (1991).

[FN11] 11 U.S.C.A. s 321(b) (West Supp. 1992) provides: "A person that has served as an examiner in the case may not serve as trustee in the case."

[FN12] 11 U.S.C.A. s 327(f) (West 1979) provides: "The trustee may not employ a person that has served as an examiner in the case."

[FN13] 11 U.S.C.A. s 1106(b) (West Supp. 1992) provides:

(b) An examiner appointed under section 1104(c) of this title shall perform the duties specified in paragraphs (3) and (4) of subsection (a) of this section, and, except to the extent that the court orders otherwise, any other duties of the trustee that the court orders the debtor in possession not to perform.

11 U.S.C.A. s 1106(a)(3) and (4) (West 1979 & Supp. 1992) provide that a trustee shall:

(3) except to the extent that the court orders otherwise, investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;

(4) as soon as practicable

(A) file a statement of any investigation conducted under paragraph (3) of this subsection, including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate[.]

[FN14] 14 B.R. 506 (Bankr. D. Utah 1981).

[FN15] 11 U.S.C.A. s 1104(c) (West Supp. 1992) provides:

(c) If the court orders the appointment of a trustee or examiner, if a trustee or an examiner dies or resigns during the

case or is removed under section 324 of this title, or if a trustee fails to qualify under section 322 of this title, then the United States trustee, after consultation with parties in interest shall appoint, subject to the court's approval, one disinterested person other than the United States trustee to serve as trustee or examiner, as the case may be, in the case.

[FN16] See 11 U.S.C.A. s 1104(b)(1) (West 1979 & Supp. 1992) and note 8.

[FN17] The Supreme Court has articulated several rules concerning the interpretation of the Code: (A) when the language of the Code is unambiguous, then "there generally is no need . . . to inquire beyond the plain language of the statute" (United States v. Ron Pair Enterprises, 489 U.S. 235, 240-41 (1989)); (B) the interpretation of the Code is a "holistic endeavor" requiring that provisions of the Code not be read in isolation (United Savings Association of Texas v. Timbers of Inwood Forest Associates Ltd., 484 U.S. 365, 371 (1988)); and (C) when the language of the Code is ambiguous, then it will be interpreted in light of its legislative history and pre-Code practice (Dewsnup v. Timm, 502 U.S. . . , 112 S. Ct. 773 (1992) ("this Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the congressional history")). See Kenneth N. Klee & Frank A. Merola, Ignoring Congressional Intent: Eight Years of Judicial Legislation, 62 AM. BANKR. L.J. 1, 2 (1988) (contending that courts "adopt a 'plain meaning' posture where the language of the statute meets with judicial approval, and use legislative intent to contradict the language of the statute where a literal reading is not kind to the desired result"). See also In re Virtual Network Services Corp., 98 B.R. 343, 345-46 (N.D. Ill. 1989) (noting that judicial reliance on legislative history "creates a powerful incentive for disgruntled Members, staff or lobbyists to smuggle their views into the extrinsic materials in the hope that one day a court will elevate them to the status of law," but also noting that: "[l]egislative history may prove invaluable when construing an ambiguous text"), aff'd, 902 F.2d 1246 (7th Cir. 1990).

[FN18] See In re Town & Country Home Nursing Services, Inc., 952 F.2d 305, 309 (9th Cir. 1991) ("As a general canon of statutory construction, where the final version of a statute deletes language contained in an earlier draft, a court may presume that the earlier draft is inconsistent with ultimate Congressional intentions"). A discussion of the use of legislative materials relating to the Code is contained in Kenneth N. Klee, Legislative History of the New Bankruptcy Code, 54 AM. BANKR. L.J. 275, 295 (1980).

[FN19] See, e.g., Parts III.B.2, IV.A.4 and IV.B, *infra*.

[FN20] MESSAGE FROM THE PRESIDENT OF THE UNITED STATES RECOMMENDING THE STRENGTHENING OF THE PROCEDURE IN THE JUDICIAL SYSTEM TOGETHER WITH THE REPORT OF THE ATTORNEY GENERAL ON BANKRUPTCY LAW AND PRACTICE, S. DOC. NO. 65, 72d Cong., 1st Sess. 58 (1932) (hereinafter "S. DOC. NO. 65"). The report of the Attorney General included in S. DOC. NO. 65 is commonly known as the "Thacher Report" and was prepared by Solicitor General Thomas D. Thacher and by Lloyd K. Garrison, Special Assistant to the Attorney General.

[FN21] S. DOC. NO. 65 at 58-59. In 1883, shortly after Judge Lowell formulated his proposal, England enacted a bankruptcy law which required debtors to submit to examination by an "Official Receiver." Bankruptcy Act, 1883, 46 & 47 Vict., ch. 52, ss 24, 66-71. The Official Receiver was appointed by the Board of Trade (*id.* s 66) and had a duty to investigate and report on the debtor, subject to directions of the Board of Trade (*id.* s 69).

[FN22] S. DOC. NO. 65 at 59-60.

[FN23] *Id.* at 61.

[FN24] Id.

[FN25] Id.

[FN26] Id. at 62.

[FN27] Id. at 62-63.

[FN28] Act of July 1, 1898, ch. 541, 30 Stat. 544.

[FN29] S. DOC. NO. 65 at 62-63.

[FN30] Id. at 62.

[FN31] 1898 Act s 55(b), 30 Stat. 559, 11 U.S.C.A. s 91(b) (Mason's 1926) (repealed), provided: "At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor."

[FN32] 1898 Act s 7, 30 Stat. 548, 11 U.S.C.A. s 25 (Mason's 1926) (repealed), provided in relevant part: "The bankrupt shall (1) attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed"

[FN33] 1898 Act s 12(a), 30 Stat. 549, 11 U.S.C.A. s 30(a) (Mason's 1926) (repealed), provided: "A bankrupt may offer terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors and filed in court the schedule of his property and list of his creditors required to be filed by bankrupts."

[FN34] S. DOC. NO. 65 at 1.

[FN35] Id. at 1.

[FN36] See note 20.

[FN37] S. DOC. NO. 65 at xiii.

[FN38] Id. at 93.

[FN39] Id.

[FN40] Id. at 94.

[FN41] Id. at 95-96.

[FN42] Id. at 14.

[FN43] Id. at 13.

[FN44] See SEC v. U.S. Realty and Improvement Co., 310 U.S. 434, 448-49 (1940); see also note 33 and accompanying text.

[FN45] SEC v. U.S. Realty and Improvement Co., 310 U.S. at 448-49.

[FN46] Act of June 7, 1934, ch. 424, 48 Stat. 911, 912, 11 U.S.C. s 207 (repealed), reprinted in 6 COLLIER ON BANKRUPTCY p 0.06, at 72-87 (14th ed. 1977). See generally Securities and Exchange Commission, Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, pt. VIII (1940).

[FN47] See *id.* Section 77B(c) provided that the court "may appoint a trustee or trustees, and may remove any such trustee or trustees and continue the debtor in possession . . ." 48 Stat. 916.

[FN48] 90 F.2d 798, 800 (7th Cir. 1937). In the Utilities Power case, the debtor in possession alleged that it was the victim of "damaging unfounded charges" and that, "as a result, the good will of the debtor had been seriously impaired, the confidence of investors in its securities shaken, and reorganization rendered impossible except by aid of the court." *Id.* at 799. The district court decided to keep the debtor in possession and to appoint "an investigator" to provide "such aid as might be derived from an independent investigation . . ." *Id.*

[FN49] 90 F.2d at 800. The Utilities Power case relied on *Ex Parte Petersen*, 253 U.S. 300, 312-13 (1920), in which the Supreme Court ruled that a district court had inherent power to appoint an auditor in a jury trial involving complex accounting issues. In appointing an "investigator," the district judge in the Utilities Power case expressly declined to utilize a special master. 90 F.2d at 800. The circuit court analogized the investigator to an amicus. *Id.*

[FN50] Act of June 22, 1938, ch. 575, 52 Stat. 840.

[FN51] Chandler Act ss 101-276, 52 Stat. 883-905, 11 U.S.C.A. ss 501-676 (West 1970) (repealed).

[FN52] Eugene V. Rostow and Lloyd N. Cutler, *Competing Systems of Corporate Reorganization: Chapters X and XI of the Bankruptcy Act*, 48 YALE L.J. 1334, 1335-36 (1939) ("Chapter X is principally the work of the Securities and Exchange Commission"). Congress created the SEC only the day before Congress enacted s 77B. Act of June 6, 1934, ch. 404, 48 Stat. 881, 885 (establishing SEC); Act of June 7, 1934, ch. 424, 48 Stat. 911, 912 (enacting s 77B).

[FN53] H.R. REP. NO. 1409, 75th Cong., 1st Sess. 2 (1937) (explaining that the Hastings-Michener bill based on the recommendations of the Thacher Report failed in part by reason of "the opposition to the establishment of a central bureau for the administration of the law").

[FN54] Chandler Act s 7(a)(1) and (b), 52 Stat. 847, 11 U.S.C.A. s 25(a)(1) and (b) (West 1979 Title 11 App.) (repealed), provided in relevant part that the debtor had to attend the first meeting of creditors and that, if the debtor was a corporation, then its officers, directors, trustees or other controlling persons, or such of them as the court designated, had the duty to perform the debtor's obligations. In addition, Chandler Act s 55(b), 52 Stat. 865, 11 U.S.C.A. s 91(b) (West 1968) (repealed), provided: (b) At the first meeting of creditors, the judge or referee shall preside and, before proceeding with other business, may allow or disallow the claims of creditors there presented, and shall publicly examine the bankrupt or cause him to be examined, and may permit creditors to examine him.

[FN55] Chandler Act ss 167-68, 52 Stat. 890, 11 U.S.C.A. ss 567-68 (West 1970) (repealed). Chandler Act s 167 provided:

The trustee upon his appointment and qualification

(1) shall, if the judge shall so direct, forthwith investigate the acts, conduct, property, liabilities, and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof, and any other matter relevant to the proceeding or to the formulation of a plan, and report thereon to the judge;

(2) may, if the judge shall so direct, examine the directors and officers of the debtor and any other witnesses concerning the foregoing matters or any of them;

(3) shall report to the judge any facts ascertained by him pertaining to fraud, misconduct, mismanagement and irregularities, and to any causes of action available to the estate;

(4) may, subject to the approval of the judge, employ such person or persons as the judge may deem necessary for the purpose of assisting the trustee in performing the duties imposed upon him under this chapter;

(5) shall, at the earliest date practicable, prepare and submit a brief statement of his investigation of the property, liabilities, and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof, in such form and manner as the judge may direct, to the creditors, stockholders, indenture trustees, the Securities and Exchange Commission, and such other persons as the judge may designate; and

(6) shall give notice to the creditors and stockholders that they may submit to him suggestions for the formulation of a plan, or proposals in the form of plans, within the time therein named.

Chandler Act s 168 provided:

If a debtor is continued in possession, the judge may at any time appoint a disinterested person as examiner to prepare and file a plan and to perform the duties imposed upon a trustee under paragraphs (1) to (5), inclusive, of section 167 of this Act, or to perform any of such duties.

[FN56] The 1898 Act s 30, 30 Stat. 544, 11 U.S.C.A. s 53 (Mason's 1926) (repealed), and, beginning in 1964, 28 U.S.C. s 2075, 78 Stat. 1001, gave the Supreme Court procedural rule-making authority in bankruptcy cases. 2A COLLIER ON BANKRUPTCY s 30, at 1281 (14th ed. 1978); 13A COLLIER ON BANKRUPTCY p 10-1.02 (14th ed. 1977). See also note 5.

[FN57] Rule of Bankruptcy Procedure 10-208(a)-(b) provided:

(a) Trustee. A trustee shall (1) file the lists as required by Rule 10-108; (2) unless otherwise ordered, make a report at the meeting provided for in Rule 10-212 which shall include a summary of his operations of the business and management of the property; (3) file with the court within the times fixed by the court, periodic reports and summaries of the operations of the business, and such other information as may be required by the court; (4) investigate the acts, conduct, liabilities and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof, and any other matter relevant to the case or to the formulation of a plan; (5) file a report with the court concerning any facts ascertained by him pertaining to fraud, misconduct, mismanagement, and irregularities, and to any cause of action available to the estate; (6) if the court so authorizes, examine the directors and officers of the debtor and any other witnesses concerning the foregoing matters; (7) as soon as practicable, file a statement of his investigations, and cause copies or a summary thereof to be mailed to the creditors, stockholders, indenture trustees, the Securities and Exchange Commission, and such other persons as the court may designate; (8) notify creditors and stockholders that they may submit to him plans or suggestions for the formulation of a plan, within a time fixed by him in such notice; (9) file a plan or report as required by Rule 10-301(c)(1); (10) within 30 days after the date of the order confirming the plan or within such other time as the court may fix, file a report with the court concerning the action taken by him and the progress made in the consummation of the plan and file such further reports as the court may direct until the plan has been consummated; and (11) after consummation of a plan, file an application for a final decree showing that the plan has been consummated, and the names and addresses, if known, of the holders of claims or interests which have not been surrendered or released in accordance with the provisions of the plan and the nature and amounts of such claims and interests, and such other facts as may be necessary to enable the court to pass upon the provisions to be included in the final decree.

(b) Debtor in Possession; Examiner. If a debtor is continued in possession it shall perform the duties specified in subdivision (a)(9) and such other duties specified in subdivision (a) of this rule as directed by the court or the court may appoint a disinterested person as specified in Rule 10-202(c) as examiner to perform all or any of such duties.

[FN58] H.R. REP. NO. 1409, 75th Cong., 1st Sess. 37-38 (1937). This report on H.R. 8046, which was the proposed Chandler Act, quoted Commissioner Douglas as having stated:

Under section 77B as it now stands, there is no duty, and no real opportunity, to make an examination and appraisal of the management of the debtor. The debtor may remain in possession of the property; or one of its officials may be appointed trustee for the debtor. . . . By use of this machinery, perpetuation in control of the company's assets, absolute power over the funds of investors and the fate of creditors, is relatively easy for the debtor, with the aid of its investment banking and other allies, to gain. With the debtor so securely in the saddle, there is no possibility of genuine appraisal of the of the management's virtues or shortcomings; of its honesty or culpability; and of the desirability of continuing it in control. Anything that a creditor can do in a 21A examination, involving large, publicly owned corporations, is apt to be superficial and ineffective.

H.R. REP. NO. 1409, supra, at 37-38.

[FN59] Chandler Act s 156, 52 Stat. 888, 11 U.S.C.A. s 556 (West 1970) (repealed).

[FN60] Chandler Act ss 156, 167-68, 52 Stat. 888, 890, 11 U.S.C.A. ss 556, 567-68 (West 1970) (repealed).

[FN61] See In re Garden City Brewery, 208 F.2d 377 (7th Cir. 1953) (chapter X examiner became the trustee in the case).

[FN62] Chandler Act ss 167(4), 168, 52 Stat. 890, 11 U.S.C.A. ss 567(4), 568 (West 1970) (repealed). Rule of Bankruptcy Procedure 10-215(c)(1) expressly provided in relevant part that: "Reasonable compensation for necessary services and reimbursement of necessary expenses incurred in a Chapter X case may be allowed by the court to the trustee, receiver, examiner, and their attorneys." See 6A COLLIER ON BANKRUPTCY p 13.03[4.3], at 569 (14th ed. 1977) (allowable expenses of examiner "may include allowances for an attorney").

[FN63] Chandler Act s 216(13), 52 Stat. 897, 11 U.S.C.A. s 616(13) (West 1970) (repealed), expressly provided that a chapter X plan:

(13) may include provisions for the settlement or adjustment of claims belonging to the debtor or to the estate; and shall provide, as to such claims not settled or adjusted in the plan, for their retention and enforcement by the trustee or, if the debtor has been continued in possession, by an examiner appointed for that purpose[.]

[FN64] Rule of Bankruptcy Procedure 10-213(b) provided: "The trustee or examiner shall, if the court so directs . . . examine the directors and officers of the debtor and any other witnesses."

[FN65] General Stores Corp. v. Shlensky, 350 U.S. 462, 466-68 (1956).

[FN66] SEC v. U.S. Realty and Improvement Co., 310 U.S. 434, 450-51 (1940) (stating that chapter XI "sacrifices to speed and economy every safeguard" of chapter X).

[FN67] H.R. REP. NO. 1409, 75th Cong., 1st Sess. 51 (1937).

[FN68] See generally Eugene V. Rostow and Lloyd N. Cutler, Competing Systems of Corporate Reorganization: Chapters X and XI of the Bankruptcy Act, 48 YALE L.J. 1334 (1939). This article states:

In its large way, Congress intended Chapter X for the reorganization of big corporations, and Chapter XI for the relief of small debtors, incorporated and unincorporated. But the forty-odd experts who worked eight years revising the Act omitted from it any formula for determining which corporate debtors should be rehabilitated under Chapter X and which under Chapter XI.
Id. at 1334-35.

[FN69] SEC v. American Trailer Rentals, 379 U.S. 594, 614-20 (1965). In American Trailer Rentals, the Supreme Court stated that the "basic purpose" of chapter XI was "to provide a quick and economical means of facilitating simple compositions among general creditors who have been deemed by Congress to need only the minimal disinterested protection provided by that Chapter." Id. at 606-07.

[FN70] Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468.

[FN71] REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 137, 93d Cong., 1st Sess. (1973), reprinted in COLLIER ON BANKRUPTCY, App. 2 (15th ed. 1992).

[FN72] COMMISSION REPORT, pt. I, at 248.

[FN73] Id.

[FN74] Id.

[FN75] Id. at 245-48.

[FN76] Id. at 247-48.

[FN77] Id. at 253.

[FN78] Id.

[FN79] COMMISSION BILL s 7-102(a) provided:

(a) Determination by Court. On the application of the administrator or any party in interest, and after hearing on notice, the court may order the administrator to appoint a trustee. If the debtor is a corporation having debts of \$1,000,000 or more and 300 or more security holders, the administrator shall apply to the court to determine whether a trustee should be appointed, and the court shall order such appointment unless it finds that the protection afforded by a trustee is unnecessary or that the expense would be disproportionate to the protection afforded.

[FN80] COMMISSION BILL s 7-103(a) resembled and was derived from Rule of Bankruptcy Procedure 10-208, see note 57, supra, and s 7-103(a)(5)-(6) required the trustee to investigate and report on the debtor. Section 7-103(b) provided:

(b) Debtor. If a trustee is not appointed, the debtor shall perform the duties specified in clauses (1), (2), (3), (4), (8), (9), (10), and (11) of subdivision (a) [of s 7-103] unless otherwise ordered by the administrator. The administrator may perform the duties specified in clauses (5), (6), or (7) of subdivision (a) and any other duties not ordered to be performed by the debtor unless he appoints a disinterested person, whose selection shall be subject to approval of the court, to perform any or all of such duties, except those specified in clauses (3) and (4).

[FN81] Hearings on H.R. 31 and H.R. 32 Before the Subcommittee on Civil and Constitutional Rights of the House

Committee on the Judiciary, 94th Cong. 1st & 2d Sess. (1975-1976); Hearings on S. 235 and S. 236 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. (1975).

[FN82] H.R. 8200, 95th Cong., 1st Sess. (1977) ("H.R. 8200"), reprinted in COLLIER ON BANKRUPTCY, App. 3 (15th ed. 1991).

[FN83] H.R. REP. NO. 595, 95th Cong., 1st Sess. (1977) ("H.R. REP. NO. 595"), reprinted in 1978 U.S.C.C.A.N. 5963-6435.

[FN84] See H.R. REP. NO. 595 at 88-116, reprinted in 1978 U.S.C.C.A.N. 6049-76.

[FN85] H.R. REP. NO. 595 at 88, reprinted in 1978 U.S.C.C.A.N. 6049.

[FN86] H.R. 8200 s 101 (proposed 11 U.S.C. s 102).

[FN87] H.R. REP. NO. 595 at 107-08, reprinted in 1978 U.S.C.C.A.N. 6068- 69.

[FN88] H.R. 8200 s 101 (proposed 11 U.S.C. s 341).

[FN89] H.R. REP. NO. 595 at 88-91, 331, reprinted in 1978 U.S.C.C.A.N. 6049-53, 6287.

[FN90] H.R. REP. NO. 595 at 107, reprinted in 1978 U.S.C.C.A.N. 6069.

[FN91] Id.

[FN92] H.R. REP. NO. 595 at 88-91, 107-09, reprinted in 1978 U.S.C.C.A.N. 6049-51, 6068-70.

[FN93] H.R. REP. NO. 595 at 223-24, reprinted in 1978 U.S.C.C.A.N. 6182- 83.

[FN94] Compare notes 79 and 96.

[FN95] H.R. REP. NO. 595 at 233-34, reprinted in 1978 U.S.C.C.A.N. 6192- 93.

[FN96] H.R. 8200 s 101 (proposed 11 U.S.C. s 1104) provided:

(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court may order the appointment of a trustee only if

(1) the protection afforded by a trustee is needed; and

(2) the costs and expenses of a trustee would not be disproportionately higher than the value of the protection afforded.

(b) If the court does not order the appointment of a trustee, under this section, then at any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court may order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, or gross mismanagement of the debtor of or by current or former management of the debtor, if

(1) the protection afforded by an examiner is needed; and

(2) the costs and expenses of an examiner would not be disproportionately higher than the value of the protection afforded. (Emphasis added.)

[FN97] H.R. 8200 s 101 (proposed 11 U.S.C. s 343) provided: "The debtor shall appear and submit to examination under oath at the meeting of creditors under section [341] of this title. Creditors, any indenture trustee, and trustee or examiner in the case, or the United States may examine the debtor."

[FN98] H.R. REP. NO. 595 at 331, reprinted in 1978 U.S.C.C.A.N. 6287.

[FN99] See note 54.

[FN100] H.R. 8200 s 248 (proposed amendment to 28 U.S.C. s 2075).

[FN101] H.R. REP. NO. 595 at 332, reprinted in 1978 U.S.C.C.A.N. 6288, gave this explanation of proposed s 343: This section, derived from section 21a of the Bankruptcy Act, requires the debtor to appear at the meeting of creditors and submit to examination under oath. The purpose of the examination is to enable creditors and the trustee to determine if assets have improperly been disposed of or concealed or if there are grounds for objection to discharge. The scope of the examination under this section will be governed by the Rules of Bankruptcy Procedure, as it is today. [Citations omitted.] . . . Examination of other persons in connection with the bankruptcy case is left completely to the Rules, just as examination of witnesses in civil cases is governed by the Federal Rules of Civil Procedure.

The Senate committee report, S. REP. NO. 989, 95th Cong., 2d Sess. (1978) ("S. REP. NO. 989") at 43, reprinted in 1978 U.S.C.C.A.N. 5829, contained an identical explanation of s 343 as proposed in the Senate's alternative bankruptcy bill, S. 2266.

H.R. REP. NO. 595 at 292, 302-03, reprinted in 1978 U.S.C.C.A.N. 6249, 6259-60, stated that procedural rules promulgated pursuant to the grant of rule-making authority in 28 U.S.C. s 2075 might include: "(217) Guidelines regulating an examiner's or trustee's investigation of the debtor in a case under chapter 11" and "(221) Guidelines for filing and distributing investigative reports of a creditors' committee, trustee, or examiner in a case under chapter 11 [.]"

S. REP. NO. 989 at 157-58, reprinted in 1978 U.S.C.C.A.N. 5943-44, stated that the Supreme Court would continue to have authority to promulgate procedural rules under 28 U.S.C. s 2075 as proposed in S. 2266 s 222. However, unlike the House report, the Senate report did not include a detailed description of contemplated procedural rules.

[FN102] H.R. REP. NO. 595 at 308, reprinted in 1978 U.S.C.C.A.N. 6265.

[FN103] Hearings on S. 2266 and H.R. 8200 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 95th Cong., 1st Sess. 620-24 (1977).

[FN104] Id. at 623-24.

[FN105] See note 96.

[FN106] Hearings on S. 2266 and H.R. 8200 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee of the Judiciary, 95th Cong., 1st Sess. 625 (1977).

[FN107] Id.

[FN108] S. 2266, 95th Cong., 2d Sess. (1978), reprinted in COLLIER ON BANKRUPTCY, App. 3 (15th ed. 1991). The Senate committee report on S. 2266 is referred to herein as "S. REP. NO. 989." See note 101.

[FN109] S. 2266 s 101 (proposed 11 U.S.C. s 1104(c)).

[FN110] Id. s 101 (proposed 11 U.S.C. s 341(c)).

[FN111] S. 2266 s 101(proposed 11 U.S.C. s 102); S. REP. NO. 989 at 27-28, reprinted in 1978 U.S.C.C.A.N. 5812-13.

[FN112] S. 2266 s 101 (proposed 11 U.S.C. s 1101(3)).

[FN113] Id. s 101 (proposed 11 U.S.C. s 1104).

[FN114] S. REP. NO. 989 at 9-10, reprinted in 1978 U.S.C.C.A.N. 5795-96.

[FN115] See notes 103-04 and accompanying text.

[FN116] S. REP. NO. 989 at 10, reprinted in 1978 U.S.C.C.A.N. 5796.

[FN117] S. 2266 s 101 (proposed 11 U.S.C. s 1104) provided in relevant part:

(a) In the case of a public company, the court, within ten days after entry of an order for relief under this chapter, shall appoint a disinterested trustee. In the event of a vacancy a successor shall be appointed by the court as soon as practicable. Section 1105 shall not apply to an appointment under this subsection.

(b) In the case of a nonpublic company, at any time after the commencement of the case but before confirmation of a plan, on request of a party in interest and after notice and a hearing the court for cause shown may order the election or if the creditors do not elect a trustee the court may appoint a trustee. The court shall order the election, or if the creditors do not elect, the appointment of a trustee if such appointment would be in the interests of the estate and security holders. The creditor election permitted by this subsection shall be in the manner prescribed by and subject to the provisions of sections 702(a), 702(b), and 702(c) of this title.

(c) If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest and after notice and a hearing, the court for cause shown may order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, or gross mismanagement of the debtor of or by current or former management of the debtor. The court shall order the appointment of an examiner if such appointment would serve the interests of the estate and security holders. (Emphasis added.)

[FN118] Id.

[FN119] See note 96.

[FN120] See notes 106-07 and accompanying text.

[FN121] See note 117.

[FN122] See note 96.

[FN123] S. REP. NO. 989 at 115, reprinted in 1978 U.S.C.C.A.N. 5901.

[FN124] S. 2266 s 101 (proposed 11 U.S.C. s 1104).

[FN125] 11 U.S.C. s 1104(a)(1), 92 Stat. 2627.

[FN126] Kenneth N. Klee, Legislative History of the New Bankruptcy Code, 54 AM. BANKR. L.J. 275, 289-93 (1980), reprinted from 28 DEPAUL L. REV. 941 (1979).

[FN127] The Sponsors' Statements appear at 124 CONG. REC. H11,089 (daily ed. Sept. 28, 1978) (Rep. Edwards statement), reprinted in 1978 U.S.C.C.A.N. 6436, and 124 CONG. REC. S17,406 (daily ed. Oct. 6, 1978) (Sen. DeConcini statement), reprinted in 1978 U.S.C.C.A.N. 6505.

[FN128] Begier v. IRS, 495 U.S. 53, at n.5, 110 S.Ct. 2258, 2266 n.5 (1990) ("Because of the absence of a conference and the key roles played by" the sponsors, their floor statements are "persuasive evidence of Congressional intent").

[FN129] Pub. L. No. 95-598, s101, 92 Stat. 2652, 11 U.S.C.A. s 1501 (West 1979) (repealed). Because the United States trustee system initially existed only in 18 judicial districts, the Code contained a chapter 15 which consisted of provisions that applied only in those districts. For example, as enacted in 1978, there were two versions of s 1104: (A) s 1104 (92 Stat. 2627), which provided that the judge would select the trustee or examiner, and (B) s 151104 (92 Stat. 2655), which provided that the United States trustee would select the trustee or examiner. In 1986, Congress expanded the United States trustee system and repealed chapter 15. Pub. L. No. 99-554, ss 222, 231, 100 Stat. 3088, 3102-03 (1986).

[FN130] See id.

[FN131] Pub. L. No. 95-598, s 224, 92 Stat. 2663, 28 U.S.C. s 586(a)(3), amended by Pub. L. No. 99-554, s 113, 100 Stat. 3091 (1986).

[FN132] 124 CONG. REC. at H11,107 (daily ed. Sept. 28, 1978), reprinted in 1978 U.S.C.C.A.N. 6483; 124 CONG. REC. at S17,424, reprinted in 1978 U.S.C.C.A.N. 6552.

[FN133] 124 CONG. REC. at H11,090, (daily ed. Sept. 26, 1978), reprinted in 1978 U.S.C.C.A.N. 6439; 124 CONG. REC. at S17,407 (daily ed. Oct. 6, 1978), reprinted in 1978 U.S.C.C.A.N. 6508.

[FN134] 11 U.S.C.A. s 341(c) (West Supp. 1992) provides: "The court may not preside at, and may not attend, any meeting under this section including any final meeting of creditors."

[FN135] 124 CONG. REC. H11,100 (daily ed. Sept. 28, 1978), reprinted in 1978 U.S.C.C.A.N. 6465; 124 CONG. REC. S17,417, reprinted in 1978 U.S.C.C.A.N. 6534.

[FN136] 124 CONG. REC. H11,101 (daily ed. Sept. 28, 1978), reprinted in 1978 U.S.C.C.A.N. 6467; 124 CONG. REC. S17,418, (daily ed. Oct. 6, 1978), reprinted in 1978 U.S.C.C.A.N. at 6536. Both sponsors quoted from H.R. REP. NO. 595 at 221-22, reprinted in 1978 U.S.C.C.A.N. 6181.

[FN137] 124 CONG. REC. H11,101 (daily ed. Sept. 26, 1978), reprinted in 1978 U.S.C.C.A.N. 6467; 124 CONG. REC. S17,418 (daily ed. Oct. 6, 1978), reprinted in 1978 U.S.C.C.A.N. 6536.

[FN138] 124 CONG. REC. H11,100 (daily ed. Sept. 28, 1978), reprinted in 1978 U.S.C.C.A.N. 6465-66; 124 CONG. REC. S17,417 (daily ed. Oct. 6, 1978), reprinted in 1978 U.S.C.C.A.N. 6534-35.

[FN139] As enacted, 11 U.S.C. s 151104, 92 Stat. 2655 (repealed), provided, and s 1104 as amended in 1986, 100 Stat.

3102, now provides:

s 151104 [s 1104]. Appointment of trustee or examiner

(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or

(2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

(b) If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor or by current or former management of the debtor, if

(1) such appointment is in the best interest of creditors, any equity security holders, and any other interests of the estate; or

(2) the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed \$5,000,000.

(c) If the court orders the appointment of a trustee or an examiner, if a trustee or examiner dies or resigns during the case or is removed under section 324 of this title, or if a trustee fails to qualify under section 322 of this title, then the United States trustee, after consultation with parties in interest, shall appoint, subject to the court's approval, one disinterested person other than the United States trustee to serve as trustee or examiner, as the case may be, in the case. (Emphasis added.)

[FN140] 124 CONG. REC. H11,102 (daily ed. Sept. 28, 1978), reprinted in 1978 U.S.C.C.A.N. 6470; 124 CONG. REC. S17,419 (daily ed. Oct. 6, 1978), reprinted in 1978 U.S.C.C.A.N. 6539.

[FN141] See notes 129 and 139.

[FN142] See notes 117 and 139.

[FN143] See note 139.

[FN144] 124 CONG. REC. H11,102 (daily ed. Sept. 28, 1978), reprinted in 1978 U.S.C.C.A.N. 6470; 124 CONG. REC. S17,419 (daily ed. Oct. 6, 1978), reprinted in 1978 U.S.C.C.A.N. 6539.

[FN145] See note 139.

[FN146] See note 117.

[FN147] See note 139.

[FN148] 124 CONG. REC. H11,102 (daily ed. Sept. 28, 1978), reprinted in 1978 U.S.C.C.A.N. 6470; 124 CONG. REC. S17,419 (daily ed. Oct. 6, 1978), reprinted in 1978 U.S.C.C.A.N. 6539.

[FN149] 124 CONG. REC. H11,100 (daily ed. Sept. 28, 1978), reprinted in 1978 U.S.C.C.A.N. 6465; 124 CONG. REC. S17,417 (daily ed. Oct. 6, 1978), reprinted in 1978 U.S.C.C.A.N. 6534.

[FN150] Id.

[FN151] See note 4.

[FN152] See notes 11-12.

[FN153] 124 CONG. REC. H11,103 (daily ed. Sept. 28, 1978), reprinted in 1978 U.S.C.C.A.N. 6472-73; 124 CONG. REC. S17,420 (daily ed. Oct. 6, 1978), reprinted in 1978 U.S.C.C.A.N. 6542.

[FN154] See note 5.

[FN155] 124 CONG. REC. H11,108 (daily ed. Sept. 28, 1978), reprinted in 1978 U.S.C.C.A.N. 6485; 124 CONG. REC. S17,425 (daily ed. Oct. 6, 1978), reprinted in 1978 U.S.C.C.A.N. 6554.

[FN156] See note 102 and accompanying text.

[FN157] 124 CONG. REC. H11,108 (daily ed. Sept. 28, 1978), reprinted in 1978 U.S.C.C.A.N. 6485; 124 CONG. REC. S17,425 (daily ed. Oct. 6, 1978), reprinted in 1978 U.S.C.C.A.N. 6554.

[FN158] 124 CONG. REC. H11,090 (daily ed. Sept. 28, 1978), reprinted in 1978 U.S.C.C.A.N. 6439; 124 CONG. REC. S17,407 (daily ed. Oct. 6, 1978), reprinted in 1978 U.S.C.C.A.N. 6508.

[FN159] Id.

[FN160] Professor Arthur Miller asserts that this movement began in 1951, when a committee of judges chaired by Judge E. Barrett Prettyman issued a report calling for active management by the trial judge of pretrial procedures in complex cases. Arthur R. Miller, Confidentiality, Protective Orders, and Public Access to the Courts, 105 HARV. L. REV. 427, 448 (1991).

[FN161] Amendments to Rules, 97 F.R.D. 165 (1983).

[FN162] Advisory Committee Note, FED. R. CIV. P. 16 (1983 amendment); Amendments to Rules, 97 F.R.D. 165, 206-07 (1983). The 1983 amendments to Rule 16 also reflected the trend in favor of extra-judicial solutions to disputes by means of alternative dispute resolution devices. As amended, Rule 16(c)(7) provides that, at a Rule 16 conference, the participants may explore "the possibility of . . . the use of extrajudicial procedures to resolve the dispute[.]"

[FN163] FED. R. BANKR. P. 7016, 9014.

[FN164] FED. R. BANKR. P. 7026, 9014.

[FN165] Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088. Section 209 of pending bill S. 1985 would grant bankruptcy judges additional explicit authority to manage their dockets and to set deadlines in chapter 11 cases.

[FN166] As amended in 1986 by s 203 of Pub. L. No. 99-554, 11 U.S.C.A. s 105(a) (West Supp. 1992) provides:
No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement

court orders or rules, or to prevent an abuse of process.

COLLIER ON BANKRUPTCY attacks the 1986 amendment to § 105(a) as follows:

This insertion into the Code was done without benefit of consideration by any Congressional committee or subcommittee and without the assistance of any legislative statement as to its need or propriety. Apparently, a Senator or Senators from a particular part of the country were importuned by local bankruptcy judges to include such a provision and to help place the bankruptcy judges back into the administration of cases, from which the Code so carefully excluded them. The provision is and was unnecessary and can only accomplish mischief. As applied to § 1104(a), presumably the court can, on its own motion, order the appointment of a trustee. How the court will prove to itself that cause exists is an interesting question.

5 COLLIER ON BANKRUPTCY p 1104.01(b), at 1104-19 n.35a (15th ed. 1991).

[FN167] Pub. L. No. 99-554, s 111.

[FN168] See note 101, supra, and Part IV.B.1, infra. FED. R. BANKR. P. 2004(a) and (b) provide in relevant part:

(a) Examination on Motion. On motion of any party in interest, the court may order the examination of any entity.

(b) Scope of Examination. The examination of an entity under this rule or of the debtor under § 343 of the Code may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge. In a . . . reorganization case under chapter 11 of the Code, other than for the reorganization of a railroad, the examination may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefor, and any other matter relevant to the case or to the formulation of a plan.

In contrast to Rule 2004, the procedural rules promulgated under the Chandler Act expressly authorized the examiner to conduct an examination. See note 64.

One judge recently commented that the drafters of the national bankruptcy rules of procedure are taking a "minimalist approach to their task, proposing only such rules as are actually necessary to implement the Code . . ." Hon. Leif Clark, Dicta, ABI NEWSLETTER, April 1992, at 23.

[FN169] See note 139.

[FN170] "[T]he willingness of courts to leave debtors in possession .is premised upon an assurance that the officers and managing employees can be depended upon to carry out the fiduciary responsibilities of a trustee." CFTC v. Weintraub, 471 U.S. 343, 355-56 (1985), quoting Wolf v. Weinstein, 372 U.S. 633, 649-52 (1963).

[FN171] See note 139.

[FN172] 124 CONG. REC. H11,102 (daily ed. Sept. 28, 1978), reprinted in 1978 U.S.C.C.A.N. 6465 (the "new consolidated chapter 11 contains no special procedure for companies with public debt or equity security holders"). See note 149 and accompanying text.

[FN173] 124 CONG. REC. H11,102 (daily ed. Sept. 28, 1978), reprinted in 1978 U.S.C.C.A.N. 6470 ("the two alternative standards of appointment are derived with modifications from [S. 2266], instead of the standard stated in the House bill"). See note 140.

[FN174] H.R. 8200 had proposed a cost/protection standard for the appointment of a trustee. See note 96. In response, the SEC urged the Senate to reject this test as impossible to apply. See notes 106-07 and accompanying text. The Senate thereafter proposed S. 2266, which omitted any reference to any form of cost/protection analysis. See note 117.

[FN175] See Part III.B.2, *infra*, and note 8.

[FN176] 828 F.2d 239 (4th Cir. 1987).

[FN177] *Id.* at 242 ("Since we hold that the court did not abuse its discretion in determining that cause did not exist, we need not reach the question concerning the statutory consequences of a finding of cause").

[FN178] 828 F.2d at 242. The court of appeals noted that the trial court had "found the present management [of A.H. Robins] capable and amenable to a fair and expeditious plan" and that a trustee might impede a reorganization. *Id.* at 241. The court of appeals also emphasized that the trial court had found that "cause" did not exist. *Id.* The court of appeals provided few facts to explain why current management's payment of prepetition debts in violation of a court order was not so material as to constitute cause for a trustee.

[FN179] "As used in statutes, contracts, or the like [the] word [shall] is generally imperative or mandatory." BLACK'S LAW DICTIONARY (5th ed. 1979); 1A SUTHERLAND STAT. CONST. s 25.04, at 445 (1985 ed.) (in construing a statute, "[u]nless the context otherwise indicates [,] the use of the word 'shall' (except in its future tense) indicates a mandatory intent"); see also In re Revco D.S., Inc., 898 F.2d 498 (6th Cir. 1990) ("shall" in s 1104(b)(2) is mandatory).

[FN180] 124 CONG. REC. H11,102 (daily ed. Sept. 28, 1978), reprinted in 1978 U.S.C.C.A.N. 6470 ("the two alternative standards of appointment are derived with modifications from [S. 2266], instead of the standard stated in the House bill").

[FN181] 124 CONG. REC. H11,102 (daily ed. Sept. 28, 1978), reprinted in 1978 U.S.C.C.A.N. 6470 ("For example, if the current management of the debtor gambled away rental income before the filing of the petition, a trustee should be appointed after the petition, whether or not postpetition mismanagement can be shown"). See note 144 and accompanying text.

[FN182] 11 U.S.C.A. s 1121(c)(1) (West 1979 & Supp. 1992) provides:

(c) Any party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may file a plan if and only if

(1) a trustee has been appointed under this chapter

[FN183] See *id.* "The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." NLRB v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984).

[FN184] See Part VI.A, *infra*.

[FN185] See Part VI.B, *infra*.

[FN186] Nevertheless, a trustee should have no right unfairly to keep information from a creditor. A trustee should be both disinterested (11 U.S.C.A. s 1104(c) (West Supp. 1992)) and objective. In re Redman, 69 B.R. 27, 29 (Bankr. D. Ha. 1986) ("A [t]rustee must be totally objective"); In re Steele, 26 B.R. 233, 235 (Bankr. W.D. Ky. 1982) (same). For example, in In re Drexel Burnham Lambert Group Inc., 123 B.R. 702, 712 (Bankr. S.D.N.Y. 1991), the court denied a DIP's motion to limit a claimant's discovery and stated that: "It is not the debtors' or committees' function to prevent discovery of a claim, but rather one of their functions as fiduciaries is to see that substantial justice is provided to all estate claimants."

[FN187] See The Examiner in the Reorganization Process at 37.

[FN188] See Part VI.B, *infra*.

[FN189] See *id.* and 11 U.S.C.A. s 321(b) (West Supp. 1992).

[FN190] 113 B.R. 164 (Bankr. S.D.N.Y. 1990).

[FN191] *Id.* at 167.

[FN192] 102 B.R. 666 (Bankr. W.D. Tenn. 1989).

[FN193] *Id.* at 670.

[FN194] 17 B.R. 946 (1st Cir. BAP 1982).

[FN195] See *id.* at 950.

[FN196] FED. R. BANKR. P. 9017 provides: "The Federal Rules of Evidence and Rules 43, 44 and 44.1 F. R. Civ. P. apply in cases under the Code."

[FN197] FED. R. CIV. P. 43(e) provides: "When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly on oral testimony or depositions."

[FN198] See, e.g., Williamson v. Tucker, 632 F.2d 579, 589 (5th Cir. 1980) ("although Fed. R. Civ. P. 43(e) allows factual motions to be heard on the basis of affidavits alone, a judge may be required to hear oral testimony where the facts are complicated and testimony would be helpful"); Huddleston v. Nelson Bunker Hunt Trust Estate, 102 B.R. 71, 74 (N.D. Tex. 1989) ("this court interprets Rule 43(e) to require at least a narrowly focused adversary hearing when the evidence presents a controlling credibility question"); 5 MOORE'S FEDERAL PRACTICE p 43.14, at 43-20 (2d ed. 1991) ("while motions are normally heard on affidavits, that does not preclude a trial"); Stewart v. RCA Corp., 790 F.2d 624 (7th Cir. 1986) (Rule 43(e) does not permit trial judge to decide a summary judgment motion by resolving disputed issues of fact). In In re Cardinal Industries, Inc., 109 B.R. 755, 765 (Bankr. S.D. Ohio 1990), the court declined to base its appointment of a trustee on a finding of fraud or dishonesty because there were "highly contested allegations" and other grounds justified a trustee.

[FN199] 101 F.2d 262 (2d Cir. 1939).

[FN200] *Id.* at 266.

[FN201] 675 F.2d 356 (D.C. Cir. 1982).

[FN202] *Id.* at 361.

[FN203] *Id.* at 360.

[FN204] See, e.g., In re Hamiel & Sons, Inc., 20 B.R. 830, 833 (Bankr. S.D. Ohio 1982) ("Judicial caution dictates that

an intermediate procedure be first explored, delaying the appointment of a trustee until a more mature investigation can be conducted" by an examiner).

[FN205] See Gordon v. National Youth Work Alliance, 675 F.2d 356, 360-61 n.3 (D.C. Cir. 1982) (in deciding a motion raising factual issues on which the parties have no right to jury trial, the "obvious solution is to deny the motion for summary judgment without prejudice and then hold a limited evidentiary hearing . . .").

[FN206] In International Molders' & Allied Workers' Local Union v. Nelson, 799 F.2d 547, 555 (9th Cir. 1986), the court declined to adopt a rule that would require an evidentiary hearing on a preliminary injunction motion whenever a factual dispute arose. The court stated that: "an evidentiary hearing should not be held when the magnitude of the inquiry would make it impractical." Id. at 555. In arriving at this result, the court declined to follow other precedent adopting a "presumption" in favor of an evidentiary hearing on a preliminary injunction motion when the parties submit conflicting affidavits. Id. at 554-55.

[FN207] In re Sharon Steel Corp., 871 F.2d 1217, 1226 (3d Cir. 1989) ("The movant, in this case the committee, must prove the need for a trustee by clear and convincing evidence"); In re Microwave Products of America, Inc., 102 B.R. 666, 670 (Bankr. W.D. Tenn. 1989) ("The evidence to support the motion must be clear and convincing"); In re Tyler, 18 B.R. 574, 577 (Bankr. S.D. Fla. 1982) (same).

[FN208] 498 U.S. , 111 S. Ct. 654 (1991).

[FN209] 111 S. Ct. at 659.

[FN210] Id.

[FN211] Id. at 659-60.

[FN212] See note 117 and accompanying text.

[FN213] See note 79.

[FN214] See note 95 and accompanying text.

[FN215] See notes 112-17 and accompanying text.

[FN216] See notes 139-44 and accompanying text.

[FN217] See notes 65-69 and accompanying text.

[FN218] Chapter XI provided that a court "may" appoint a receiver if "necessary." See Chandler Act s 332, 52 Stat. 908, 11 U.S.C.A. s 732 (West 1970) (repealed), and Rule of Bankruptcy Procedure 11-18. A treatise described the power to appoint a receiver under chapter XI as "discretionary." 8 COLLIER ON BANKRUPTCY p 5.08, at 561 (14th ed. 1978). The Commission reported that "in some districts such a receiver is automatically appointed in every Chapter XI case." COMMISSION REPORT, pt. I, at 24.

[FN219] See note 128 (Sponsors' Statements are "persuasive evidence" of legislative intent).

[FN220] See note 5.

[FN221] 11 U.S.C.A. s 364(d)(2) (West 1979), which applies to motions by the estate for authority to incur senior indebtedness, provides: "In any hearing under this subsection, the trustee has the burden of proof on the issue of adequate protection."

[FN222] See note 157 and accompanying text.

[FN223] See note 102 and accompanying text.

[FN224] Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

[FN225] 10 MOORE'S FEDERAL PRACTICE p 302.02, at III-37 (2d ed. 1988) ("In federal matters, the rule of Erie does not govern, and the federal courts are free to follow their own ideas as to the burden of proof"). A procedural rule that establishes an irrebuttable presumption operates as a rule of substantive law (id. at III-38), so that s 2075 should not be construed to permit a procedural rule that creates an irrebuttable presumption that a trustee or examiner should, or should not be, appointed.

[FN226] See In re GHR Companies, Inc., 43 B.R. 165, 176 (Bankr. D. Mass. 1984) ("both a trustee and an examiner may not serve concurrently in the same case"), aff'd, 792 F.2d 476 (5th Cir. 1986); see also 11 U.S.C.A. ss 321(b), 327(f) and 348(e) (West 1979 & Supp. 1992). Under pre-Code law, an examiner could not serve concurrently with a trustee. Vendramis v. Sword S.S. Line, 116 F.2d 669 (2d Cir. 1940).

[FN227] See id.

[FN228] In re Ionosphere Clubs, Inc., 113 B.R. 164, 172 (Bankr. S.D.N.Y. 1990).

[FN229] When there are affiliated debtors, the court may decide to appoint a single examiner for all of the affiliates. This will prevent the circumvention of 11 U.S.C.A. s 321(b) (West Supp. 1992) that would occur if the examiner later became the trustee of one of the affiliates.

[FN230] In re Table Talk, Inc., 22 B.R. 706, 710 (Bankr. D. Mass. 1982); In re American Bulk Transport Co., 8 B.R. 337, 341 (Bankr. D. Kans. 1980) ("the question is one that is equitable and discretionary with the Court").

[FN231] In re Lenihan, 4 B.R. 209, 212 (Bankr. D. R.I. 1980).

[FN232] See Part III.A.I.a, supra.

[FN233] 22 B.R. 706 (Bankr. D. Mass. 1982).

[FN234] Id. at 713.

[FN235] Id. at 710-13.

[FN236] In re Gilman Services, Inc., 46 B.R. 322, 327 (Bankr. D. Mass. 1985).

[FN237] See note 140 and accompanying text.

[FN238] See notes 117-22 and accompanying text.

[FN239] In re Baldwin-United Corp., 46 B.R. 314, 316 (Bankr. S.D. Ohio 1985) (the examiner "is first and foremost disinterested and nonadversarial" and "performs the investigative duties of a trustee, and may perform other trustee duties as the Court directs"); In re Interco, Inc., 127 B.R. 633, 638 (Bankr. E.D. Mo. 1991) ("the Examiner's role is by its nature disinterested and non-adversarial").

[FN240] General Stores Corp. v. Shlensky, 350 U.S. 462, 466 (1955).

[FN241] See note 43 and accompanying text.

[FN242] See Part II.C.3, *supra*.

[FN243] In re Public Service Co. of New Hampshire, 99 B.R. 177, 182 (Bankr. D.N.H. 1989) (examiner appointed for the dual purpose of helping to mediate plan negotiations and to explain to court "the rather arcane concepts employed in the utility rate-setting regulatory world"); In re UNR Industries, Inc., 72 B.R. 789, 795-96 (Bankr. N.D. Ill. 1987) (examiner appointed to mediate plan negotiations); In re Apex Oil Co., 92 B.R. 843, 844-45 (Bankr. E.D. Mo. 1988) (examiner directed to facilitate resolution of discovery and claim disputes in the context of litigation to estimate claims); see Part IV.A, *infra*.

[FN244] See In re Ionosphere Clubs, Inc., 113 B.R. 164, 170 (Bankr. S.D.N.Y. 1990) (appointment of trustee satisfied best interests test of s 1104(a)(2) in that corporate debtor was insolvent so that creditors were its true owners).

[FN245] In re Lenihan, 4 B.R. 209, 211 (Bankr. D. R.I. 1980).

[FN246] See note 8.

[FN247] See note 116 and accompanying text. Section 402 of pending bill S. 1985 would increase the \$5,000,000 debt test to \$10,000,000.

[FN248] See Part II.C.3, *supra*.

[FN249] See note 138 and accompanying text.

[FN250] A current example is the activity of vulture funds. These funds are institutional investors that invest in distressed bonds and "are inclined to hold out for disproportionate repayment of the bonds that they purchased at a marked discount." John C. Coffee, Jr. & William A. Klein, Bondholder Coercion: The Problem of Constrained Choice in Debt Tender Offers and Recapitalizations, 58 U. CHI.L. REV. 1207, 1214 (1991).

[FN251] In re Shelter Resources Corporation, 35 B.R. 304, 305 (Bankr. N.D. Ohio 1983); In re GHR Companies, Inc., 43 B.R. 165, 170-76 (Bankr. D. Mass. 1984), *aff'd*, 792 F.2d 476 (5th Cir. 1986).

[FN252] 35 B.R. 304 (Bankr. N.D. Ohio 1983).

[FN253] *Id.* at 305.

[FN254] 43 B.R. 165 (Bankr. D. Mass. 1984), *aff'd*, 792 F.2d 476 (5th Cir. 1986).

[FN255] Id. at 167 n.3.

[FN256] Id. at 175.

[FN257] Id. at 175-76.

[FN258] See id. at 175.

[FN259] See note 116 and accompanying text.

[FN260] See note 17.

[FN261] See note 148 and accompanying text.

[FN262] See 43 B.R. at 175-76.

[FN263] 898 F.2d 498 (6th Cir. 1990).

[FN264] See note 148 and accompanying text, and note 179.

[FN265] 11 U.S.C.A. s 1104(b) (West 1979 & Supp. 1992) (emphasis added).

[FN266] The Examiner in the Reorganization Process contends:

In the larger reorganization cases, whether the debtor is publicly or privately owned, there is at least one and, in most cases, several committees with competent and knowledgeable counsel, assisted by large and sophisticated accounting firms, ready and able to conduct any necessary investigation into the affairs of the debtor. The threat that some alleged impropriety will not be suitably investigated or pursued by one or more interested parties in the larger reorganization cases is minor.

Id. at 45.

[FN267] See note 116 and accompanying text.

[FN268] 11 U.S.C.A. s 1102(b)(1) (West Supp. 1992) provides that the creditors' committee "shall ordinarily consist of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on such committee"

[FN269] 11 U.S.C.A. s 101(14) (West Supp. 1992).

[FN270] See note 153 and accompanying text.

[FN271] 11 U.S.C.A. s 1106(a)(3) (West 1979 & Supp. 1992).

[FN272] Id.

[FN273] Id.; see In re Revco D.S., Inc., 898 F.2d 498, 499 (6th Cir. 1990) (court has power to define scope of investigation).

[FN274] See note 153 and accompanying text.

[FN275] 11 U.S.C.A. s 1106(a)(1) (West Supp. 1992) (incorporating s 704(2)). This provision suggests that an examiner could serve in a custodial role: an examiner arguably cannot "be accountable" for property without having custody of it.

[FN276] 11 U.S.C.A. s 1106(a)(1) (West Supp. 1992) (incorporating s 704(5)).

[FN277] 11 U.S.C.A. s 1106(a)(1) (West Supp. 1992) (incorporating s 704(7)-(9)).

[FN278] 11 U.S.C.A. s 1106(a)(2) (West 1979 & Supp. 1992).

[FN279] 11 U.S.C.A. s 1106(a)(5) (West Supp. 1992).

[FN280] 11 U.S.C.A. s 1106(a)(6) (West 1979 & Supp. 1992).

[FN281] 11 U.S.C.A. s 1106(a)(7) (West 1979 & Supp. 1992).

[FN282] See, e.g., Williamson v. Roppollo, 114 B.R. 127, 129 (W.D. La. 1990) (examiner given expanded authority to perform the trustee's duty to file lawsuit); In re Franklin-Lee Homes, Inc., 102 B.R. 477 (E.D.N.C. 1989) (examiner authorized to file lawsuits on behalf of estate); In re Carnegie International Corp., 51 B.R. 252, 254 (Bankr. S.D. Ind. 1984) (same); In re Liberal Market, Inc., 11 B.R. 742 (Bankr. S.D. Ohio 1981) (examiner authorized to operate business).

[FN283] 11 B.R. 742 (Bankr. S.D. Ohio 1981).

[FN284] 74 B.R. 221 (S.D.N.Y. 1987).

[FN285] Id. at 224.

[FN286] E.g., In re Liberal Market, Inc., 11 B.R. 742, 745 (Bankr. S.D. Ohio 1981) (s 1106(b) authorized court to expand "function" of examiner to include operating the business of the DIP).

[FN287] In In re International Distribution Centers, Inc., 74 B.R. 221, 222 (S.D.N.Y. 1987), the district court reversed an order of the bankruptcy court which had expanded the duties of the examiner "to encompass all powers described in 11 U.S.C. s 1106(a)" (Emphasis added.) The quoted language of the order of the bankruptcy court showed that it confused the "duties" specified in s 1106(a) with the powers specified elsewhere in the Code. Under s 1106(b), the bankruptcy court plainly could have entered an order giving the examiner all of the "duties" specified in ss 1106(a)(1)-(7). On appeal, the district court failed to notice that all of the matters (whether termed "powers" or "duties") in s 1106(a) consist of investigative and reporting functions. Instead, the district court concluded that s 1106(b) seemed to allow "the unlimited delegation of the trustee's powers to the examiner." 74 B.R. at 223-24. The district court then concluded that, in light of s 321(b), s 1106(b) could not mean what the district court incorrectly said it might mean.

[FN288] In re Carnegie International Corp., 51 B.R. 252 (Bankr. S.D. Ind. 1984); see note 61 and accompanying text. In Carnegie International, the court relied on the "nearly identical statutory framework" of provisions of chapter X and provisions of the Code. 51 B.R. at 255. Only a few paragraphs earlier in the opinion, the court discussed ss 321(b) and 327(f), but the court omitted to discuss or note that those provisions make the statutory framework of the Code different

from chapter X.

[FN289] See, e.g., 11 U.S.C.A. ss 323, 1107-08 (West 1979 & Supp. 1992).

[FN290] See note 153 and accompanying text.

[FN291] 471 U.S. 343, 352 (1985).

[FN292] See note 61 and accompanying text.

[FN293] Rule of Bankruptcy Procedure 10-208(b) permitted the court to expand the duties of an examiner to include the duties of a trustee as listed in Rule 10-208(a). Those duties closely resemble the duties specified by the Code in § 1106(a)(1)-(7). See note 57 and Part IV.A, supra. The Examiner in the Reorganization Process, at 49, incorrectly states that under "former rule 10-208, an examiner was granted far broader powers than under section 1106."

[FN294] The Examiner in the Reorganization Process at 51 (emphasis added).

[FN295] See note 4.

[FN296] Rule of Bankruptcy Procedure 10-213(b) provided: "The trustee or examiner shall, if the court so directs, and any other person may with the permission of the court, examine the directors and officers of the debtor and any other witnesses." (Emphasis added.) See also 13A COLLIER ON BANKRUPTCY p 10-213.09, at 10-213-7, 8 (14th ed. 1977) ("The examination of officers, directors and other witnesses implements the inquisitorial powers and duties of the trustee").

[FN297] H.R. REP. NO. 595 at 332, reprinted in 1978 U.S.C.C.A.N. 6288; S. REP. NO. 989 at 43, reprinted in 1978 U.S.C.C.A.N. 5828.

[FN298] H.R. REP. NO. 595 at 292-91, 302 p 217, reprinted in 1978 U.S.C.C.A.N. 6259.

[FN299] H.R. REP. NO. 595 at 303 p 221, reprinted in 1978 U.S.C.C.A.N. 6260.

[FN300] See Pub. L. No. 95-598, s 247, 92 Stat. 2672.

[FN301] In 11 U.S.C.A. s 1109(b) (West 1979), a "party in interest" is defined as "including" the debtor, a trustee, a creditor, and other entities. In 11 U.S.C.A. s 102(3) (West 1979 & Supp. 1992), the Code specifies that the term "including" is "not limiting." Nevertheless, The Examiner in the Reorganization Process, at 53-54, suggests that "it certainly can be argued" that an examiner is not a party in interest within the meaning of Rule 2004(a). This argument would require a court to ignore that the definition of "party in interest" in § 1109(b) is nonexclusive, and that, pursuant to ss 1104(b) and 1106(a)(3)-(4), the examiner has a substantial interest in examining witnesses. Although one court in dicta described the examiner as a "nonparty" (In re Baldwin-United Corp., 46 B.R. 314, 317 (Bankr. S.D. Ohio 1985)), another court described the examiner as "an independent party" (In re Apex Oil Co., 101 B.R. 92, 99 (Bankr. E.D. Mo. 1989) (emphasis added)).

[FN302] 2 COLLIER ON BANKRUPTCY p 343.02, at 343-44 (15th ed. 1991) (stating that it "would seem obvious" that parties entitled to conduct examination under § 343 would each be parties in interest for purpose of conducting an examination under Rule 2004).

[FN303] See note 158 and accompanying text. See also note 101.

[FN304] 11 U.S.C.A. ss 327 and 1107 (West 1979 & Supp. 1992).

[FN305] There does not appear to be any provision in the Code for the employment by the examiner of professional persons as there is for the trustee or committee. This may have been an oversight because of the lateness in the day in reaching compromises to obtain enactment of the legislation.
Lawrence P. King, Chapter 11 of the 1978 Bankruptcy Code, 53 AM. BANKR. L.J. 107, 117 (1979).

[FN306] In re Southmark Corp., 113 B.R. 280 (Bankr. N.D. Tex. 1990) (under s 105, court authorized examiner to employ professionals in a mega-case); In re Tighe Mercantile, 62 B.R. 995 (Bankr. S.D. Cal. 1986) (court authorized examiner to employ professionals under s 105). In In re Tarkowski, 104 B.R. 828, 829-30 (Bankr. E.D. Mich. 1989), the court determined that it (A) had exceeded its authority under the Code by authorizing an examiner to employ an attorney, but (B) had authority under s 105 to allow compensation to the examiner's attorney who had relied on the employment order.

[FN307] See *id.* In In re Southmark Corp., supra, 113 B.R. at 284, the court noted that: "No party in interest has suggested that Southmark should be placed in the hands of a trustee." In In re Tighe Mercantile, supra, 62 B.R. at 1001, the court stated that: "The Court declined to appoint a trustee because she felt the debtor was essential to the reorganization."

[FN308] See 11 U.S.C.A. ss 327-31, and 1103 (West 1979 & Supp. 1992).

[FN309] 11 U.S.C.A. s 503(b)(3) (West 1979 & Supp. 1992).

[FN310] See notes 55 and 62.

[FN311] See notes 306-07 and accompanying text.

[FN312] Rules of Bankruptcy Procedure 10-207 and 11-23 both provided: "The court may authorize the trustee, receiver, or debtor in possession to conduct the business and manage the property of the debtor for such time and on such conditions as may be in the best interest of the estate."

[FN313] Gochenour v. Cleveland Terminals Bldg. Co., 118 F.2d 89, 95 (6th Cir. 1941); In re Curry and Sorensen, 57 B.R. 824, 828 (9th Cir. BAP 1986). In *Gochenour*, a pre-Code case, a creditor of the debtor sought to recover on claims against the officers of the DIP. The court of appeals held that, because the causes of action still belonged to the bankruptcy estate, the creditor's remedy was to petition the court to compel the debtor in possession to act:

The officers of the debtor were under control of the court and if appellants [the creditors] believed a wrong was being done them by failure of the officers of the debtor to act in the collection of its assets, the court was open for them upon reasonable showing to invoke its power to compel the debtor to proceed.

Gochenour, supra, 118 F.2d at 95. Similarly, in *Curry and Sorensen*, the court held that a creditor may compel the DIP to act, and that, upon a showing that the DIP unjustifiably failed to act, the court may authorize the creditor to act in the name of the debtor. See also CFTC v. Weintraub, 471 U.S. 343, 356 n.7 (1985), in which the Supreme Court stated that a shareholder of a corporate debtor would have standing to challenge the failure of a trustee to act consistently with its fiduciary duties.

[FN314] See note 72 and accompanying text.

[FN315] See notes 91 and 132 and accompanying text.

[FN316] See note 313.

[FN317] See In re Boileau, 736 F.2d 503, 505-06 (9th Cir. 1984) (pursuant to court-approved stipulation with DIP, examiner had the authority to waive the attorney-client privilege of the DIP).

[FN318] 123 B.R. 626, 633 (Bankr. C.D. Cal. 1991).

[FN319] 11 U.S.C.A. s 1104(c) (West Supp. 1992).

[FN320] Id. s 101(41).

[FN321] See Part VI.B, *infra*.

[FN322] See 11 U.S.C.A. s 1121(c) (West 1979 & Supp. 1992).

[FN323] 471 U.S. 343 (1985).

[FN324] Id. at 348-57.

[FN325] See Part IV.A.4, *supra*. A DIP should not be permitted to waive s 321(b). Permitting such waivers would encourage an examiner to pressure the DIP and would encourage the DIP to bribe the examiner with an offer to stipulate to an expansion of the examiner's powers. Section 321(b) does not provide that it can be waived.

[FN326] In In re Boileau, 736 F.2d 503, 505-06 (9th Cir. 1984), the Ninth Circuit held that an examiner did have the right to waive the DIP's attorney-client privilege. In that case, however, the DIP had signed a stipulation in which it had divested itself of practically all management responsibilities. Thus, Boileau does not stand for the proposition that an examiner generally has authority to waive the attorney-client privilege of the DIP.

[FN327] As the functional equivalent of a trustee, an individual or corporate DIP may have a fiduciary obligation to permit beneficiaries of the estate to review privileged communications. Under general trust law principles, the beneficiary of a trust has the right to review legal opinions given the trustee to carry out the trust, except for such opinions as the trustee obtained on its own account to protect itself against charges of misconduct. Martin v. Valley National Bank of Arizona, 140 F.R.D. 291, 325 (S.D.N.Y. 1991); In re Baldwin-United Corp., 38 B.R. 802, 805-06 (Bankr. S.D. Ohio 1984) (as a fiduciary, creditors' committee had only a qualified attorney-client privilege to withhold information). Historically, bankruptcy trustees and state law trustees have not been treated identically. See, e.g., IIIA AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS s 262 at 422 (4th ed. 1988).

Other exceptions to the attorney-client privilege may apply, such as the crime-fraud exception. In a corporate bankruptcy, the court may require management to show cause why the attorney-client privilege should not be waived. See Garner v. Wolfenbarger, 430 F.2d 1093, 1103-04 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971) (in suit by stockholders alleging corporate mismanagement, court may require corporate management to show good cause why privilege should be invoked); see also CFTC v. Weintraub, 471 U.S. 343, 356 n.7 (1985) (stating that the trustee's decision to waive the privilege of a corporate debtor can be challenged "on the ground that it violates the trustee's fiduciary duties").

[FN328] 471 U.S. at 353.

[FN329] See note 63 and accompanying text.

[FN330] See, e.g., COMMISSION BILL ss 7-103(b), 7-303(12). Cases which support giving the examiner the power to enforce causes of action are cited in note 282. These cases, if correct, would permit an examiner to serve under s 1123(b)(3)(B). See, e.g., In re Franklin-Lee Homes, Inc., 102 B.R. 477 (E.D.N.C. 1989).

[FN331] See Part II.C.5.d, supra.

[FN332] See, e.g., In re Interco, Inc., 127 B.R. 633, 638 (Bankr. E.D. Mo. 1991) ("the Examiner's role is by its nature disinterested and non-adversarial"); In re Baldwin-United Corp., 46 B.R. 314, 316 (Bankr. S.D. Ohio 1985) (an examiner "is first and foremost disinterested and nonadversarial"). See Part IV.A, supra.

[FN333] See Part IV.A.4, supra.

[FN334] See Part II.C.5.d, supra.

[FN335] See notes 306-10 and accompanying text.

[FN336] See Part IV.B.I, supra.

[FN337] See Mosser v. Darrow, 341 U.S. 267, 274 (1951); In re Cochise College Park, Inc., 703 F.2d 1339, 1357-58 (9th Cir. 1983); In re Center Teleproductions, Inc., 112 B.R. 567, 576-78 (Bankr. S.D.N.Y. 1990); Sherr v. Winkler, 552 F.2d 1367, 1375 (10th Cir. 1977).

[FN338] See, e.g., In re Baldwin-United Corp., 46 B.R. 314, 317 (Bankr. S.D. Ohio 1985) ("[W]e believe that the Examiner, as a nonparty to any proceeding and a nonadversarial officer of the Court, is entitled to some immunity from the whirlwind of litigation commonly attendant to large Chapter 11 cases").

[FN339] Bennett v. Williams, 892 F.2d 822, 823 (9th Cir. 1989).

[FN340] 47 B.R. 462 (S.D.N.Y. 1985).

[FN341] 222 Cal. App. 3d 843, 271 Cal. Rptr. 893 (1990).

[FN342] Id. at 860.

[FN343] Id. at 855-56.

[FN344] Id. at 857. The court in Howard also relied on the publication privilege of CAL. CIVIL CODE s 47 (West Supp. 1992) as an alternative ground. Id. at 860-64. A dissenting judge complained that the majority opinion constituted judicial legislation and dicta.

[FN345] In re Center Teleproductions, Inc., 112 B.R. 567, 576-78 (Bankr. S.D.N.Y. 1990) (describing unsettled law of immunity and stating that "Weissman might best be viewed as an exception under the judicial proceedings privilege").

[FN346] See, e.g., CAL. CIVIL CODE s 47 (West Supp. 1992) (privilege from liability for a statement made in any judicial proceeding); Howard v. Drapkin, 222 Cal. App. 3d 843, 860-64, 271 Cal. Rptr. 893 (1990) (California

publication privilege): Weissman v. Hassett, 47 B.R. 462, 468-69 (S.D.N.Y. 1985) (New York publication privilege).

[FN347] See note 301.

[FN348] FED. R. CIV. P. 26(b)(3) provides in part:

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has a substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. . . .

[FN349] FED. R. BANKR. P. 2007.1(a) and 9014.

[FN350] See note 301.

[FN351] 11 U.S.C.A. s 1106(a)(4)(A) (West 1979 & Supp. 1992) requires an examiner's report to disclose "any fact ascertained or pertaining" to "a cause of action available to the estate[.]"

[FN352] In re Grand Jury Subpoena Duces Tecum Dated April 19, 1991, 945 F.2d 1221 (2d Cir. 1991); In re Apex Oil Co., 101 B.R. 92 (Bankr. E.D. Mo. 1989); In re Baldwin-United Corp., 46 B.R. 314, 317 (Bankr. S.D. Ohio 1985).

[FN353] 11 U.S.C.A. s 1106(a)(4) (West 1979 & Supp. 1992).

[FN354] A procedural rule could be promulgated under 28 U.S.C. s 2075 to provide for secrecy of proceedings before an examiner until the examiner issued its report. See Part IV.B.1, supra.

[FN355] 18 U.S.C.A. s 3057 (West 1985).

[FN356] See Martin v. Valley National Bank of Arizona, 140 F.R.D. 291, 322-25 (S.D.N.Y. 1991) (under general principles of trust law, nonbankruptcy trustee cannot generally shield beneficiaries from access to advice given to trustee about the administration of the trust); In re Baldwin-United Corp., 38 B.R. 802, 805 (Bankr. S.D. Ohio 1984) (as a fiduciary, creditors' committee had only a qualified privilege to keep information from creditors). See note 327.

[FN357] See 11 U.S.C.A. ss 363, 1106-08 (West 1979 & Supp. 1992).

[FN358] Id. ss 323, 542-50.

[FN359] CFTC v. Weintraub, 471 U.S. 343, 352-56 (1985).

[FN360] Id. at 352-53 (the trustee is "directed to investigate the debtor's financial affairs, ss 704(4), 1106(a)(3), and is empowered to sue officers, directors, and other insiders to recover, on behalf of the estate, fraudulent or preferential transfers of the debtor's property, ss 547(b)(4)(B), 548"); see 11 U.S.C.A. s 1106(a)(3)-(4) (West 1979 & Supp. 1992).

[FN361] 11 U.S.C. ss 101(14), 1104(c) (West Supp. 1992).

[FN362] In re Baldwin-United Corp., 46 B.R. 314, 316 (Bankr. S.D. Ohio 1985); In re Interco, 127 B.R. 633, 638 (Bankr. E.D. Mo. 1991) ("the Examiner's role is by its nature disinterested and non-adversarial").

[FN363] See 124 CONG. REC. at H11,101 (daily ed. Sept. 28, 1978), reprinted in 1978 U.S.C.C.A.N. 6468 (stating that the success of a corporation depends on its ability to attract and hold skilled management, to obtain credit, and "to project to the public an image of vitality").

[FN364] Unlike a chapter 7 trustee, the chapter 11 trustee does not have to be a panel trustee. See 11 U.S.C.A. ss 701(a)(1), 1104(c) (West Supp. 1992). A panel trustee will likely be a professional more accustomed to liquidating bankruptcy estates than to reorganizing them.

[FN365] 11 U.S.C.A. s 1105 (West Supp. 1992).

[FN366] Id. s 1121(c) (West 1979 & Supp. 1992). See In re Kun, 15 B.R. 852 (Bankr. D. Az. 1981) (appointment of trustee ends debtor's exclusivity period).

[FN367] 11 U.S.C.A. s 326(a) (West Supp. 1992).

[FN368] In re Financial Corp. of America, 114 B.R. 221, 225 (9th Cir. BAP 1990), aff'd, 946 F.2d 689 (9th Cir. 1991) (statutory limit in s 326 on trustee's maximum compensation may be increased by including funds which chapter 11 trustee turns over to himself in his capacity as chapter 7 trustee).

[FN369] 11 U.S.C.A. s 726(b) (West 1979).

[FN370] Compare 11 U.S.C.A. s 705 (West 1979 & Supp. 1992) (chapter 7 creditors' committee has no express authority to employ counsel) with 11 U.S.C.A. s 1103(a) (West 1979) (chapter 11 creditors' committee has express authority to employ counsel). See also 11 U.S.C.A. ss 1113-14 (West Supp. 1992).

[FN371] 11 U.S.C.A. ss 348(e), 701(a) (West Supp. 1992).

[FN372] H.R. REP. NO. 595 at 345, reprinted in 1978 U.S.C.C.A.N. 6301; S. REP. NO. 989 at 56, reprinted in 1978 U.S.C.C.A.N. 5842. The House and Senate reports both referred to this kind of restriction as one of several "limitations" on the trustee's powers. *Id.* This description uses the same terminology as s 1107(a), which provides that a DIP is "[s]ubject to any limitations on" a chapter 11 trustee. In other words, a court does have the power to impose limitations on the extent to which a trustee may operate the business.

[FN373] If the court does not limit the trustee's powers, then the trustee by operation of law completely ousts management. See CFTC v. Weintraub, 471 U.S. 343, 352-53 (1985). In CFTC v. Weintraub, the Supreme Court did not address whether the court may limit the trustee's powers, but did note that the trustee's right to use property of the estate is "[s]ubject to court approval" under s 363(b). CFTC, 471 U.S. at 352.

[FN374] Rules of Bankruptcy Procedure 10-207 and 11-23 expressly authorized the court to place limitations on the trustee's operation of the business: "The court may authorize the trustee, receiver, or debtor in possession to conduct the business and management the property of the debtor for such time and on such conditions as may be in the best interest of the estate." COLLIER stated that: "a debtor continued in possession [under chapter X] is subject to whatever conditions, terms and restrictions the court may order, and certainly the trustee is subject at all times to the court's command." 6 COLLIER ON BANKRUPTCY p 8.12, at 1422 n.13 (14th ed. 1978). Similarly, in equity receivership practice and practice under chapter XI, "limited receivers" or their equivalents would be utilized. Stuart M. Kaplan, *The Courts and Equity Receiverships*, LOS ANGELES LAWYER, May 1978, 13, 22. This article states:

In a rehabilitation proceeding under Chapter XI of the Bankruptcy Act, creditors or the court may be loathe to allow

the debtor to remain in possession and yet a fully incarnate receiver may be stoutly resisted. An extra-statutory solution has sometimes been used in which the court-appointed agent-administrator is more euphemistically designated as 'Controller.' In equity receiverships, this concern is more often met through the use of a limited receivership. The purposes of such a limited receivership can be narrowly defined and may include carrying out accounting or legal functions not specifically related to management's day-to-day conduct of business operations The mechanism of appointing 'special counsel' is also available where investigatory and accounting work requires a disinterested, independent, agent responsible to the court.

Kaplan, *supra*, at 22 (footnotes omitted). As previously noted, the COMMISSION REPORT stated that there was widespread use of receivers in chapter XI cases in certain districts. See note 218.

[FN375] 14 B.R. 506 (Bankr. D. Utah 1981).

[FN376] Id. at 510-11 n.6.

[FN377] Id.

[FN378] See note 372 and accompanying text. Recently, limited powers trustees were appointed in In re Madison Management Group, Inc., 137 B.R. 275, 282-83 (Bankr. N.D. Ill. 1992), and In re North American Communications, Inc., 138 B.R. 175, 180 (Bankr. W.D. Pa. 1992) ("Except for the limited role to be played by the trustee . . . , debtor shall continue as debtor-in-possession and shall continue to perform all of the statutorily prescribed duties").

[FN379] 11 U.S.C.A. s 1105 (West Supp. 1992). E.g., In re Eastern Consolidated Utilities, Inc., 3 B.R. 591, 592-93 (Bankr. E.D. Pa. 1980) (court removed trustee under s 1105 and restored debtor to possession after it hired "competent, experienced legal counsel").

[FN380] See note 166.

[FN381] See note 158 and accompanying text and Part II.D, *supra*. In In re UNR Industries, 72 B.R. 789 (Bankr. N.D. Ill. 1987), the bankruptcy court appointed an examiner sua sponte, but did so in the context of a dispute over whether to extend the debtor's exclusivity period.

[FN382] "There is one special cause of delay in getting cases on for trial that must be singled out for particular condemnation, the all-too-prevalent habit of sending matters to a reference. There is no more effective way of putting a case to sleep for an indefinite period than to permit it to go to a reference with a busy lawyer as referee. Only a drastic administrative rule, rigidly enforced, strictly limiting the matters in which a reference may be had and requiring weekly reports as to the progress of each reference will put to rout this inveterate enemy of dispatch in the trial of cases." La Buy v. Howes Leather Co., 352 U.S. 249, 253 n.5 (1957), quoting VANDERBILT, CASES AND MATERIALS ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION, 1240-41 (1952).

[FN383] See In re Ionosphere Clubs, Inc. 113 B.R. 164, 170 (Bankr. S.D.N.Y. 1990).

[FN384] 808 F.2d 363 (5th Cir. 1987) (en banc), aff'd, 484 U.S. 365 (1988).

[FN385] 808 F.2d at 373.

[FN386] 11 U.S.C.A. s 1121 (West 1979 & Supp. 1992).

[FN387] Id. s 1107.

[FN388] See id. ss 327-31.

[FN389] Id. s 1112. In In re Graf Bros. Inc., 19 B.R. 269 (Bankr. D. Me. 1982), the court ordered the conversion of a liquidating chapter 11, rejected the DIP's proposal to appoint an examiner, and stated:

If the debtor is permitted to liquidate its assets under the scrutiny of an examiner and the creditors' committee continues to investigate and possibly pursue claims, administrative costs could be excessive. Fees and expenses of the examiner, the creditors' committee, and the debtor-in-possession would continue to accrue. If the liquidation were concluded by a trustee, there would be no reason for continued extensive activity on the part of the creditors' committee

...
Id. at 270.

[FN390] 11 U.S.C.A. s 1104 (West 1979 & Supp. 1992).

[FN391] See Part II.D, *supra*. Note that FED. R. CIV. P. 16(c)(6) and (c)(7) contemplate that extrajudicial procedures or a special master may sometimes facilitate resolution of a dispute. Although FED. R. BANKR. P. 9031 prohibits appointment of a master, an examiner may play a role similar to a master, mediator, or other alternative dispute resolution device.

[FN392] See Part VI.N, *infra*.

[FN393] See Part VI.J, *infra*.

[FN394] See Part VI.B, *supra*. The language of s 1107(a) closely resembles the language of former Rule of Bankruptcy Procedure 11-23. COLLIER ON BANKRUPTCY gives the following examples of "conditions" that might be placed on a DIP under Bankruptcy Rule 11-23:

Matters which the court might decide to regulate in the exercise of its discretionary control are whether checks are to be countersigned by the court or by the creditors' committee, whether there should be a limit on purchases, whether purchases and sales may be made on credit as well as for cash, the number of employees, and whether their salaries are to be fixed by the court or left to the judgment of the receiver, the trustee or the debtor in possession operating the enterprise.

14 COLLIER ON BANKRUPTCY p 11-23.03, at 11-23-3 (14th ed. 1976).

[FN395] In re Gaslight Club, Inc., 782 F.2d 767 (7th Cir. 1986) (with the consent of the debtor's president and controlling shareholder, court "designated" a third party to control the debtor). See also In re U.S. Communications of Westchester, Inc., 123 B.R. 491, 496 (Bankr. S.D.N.Y. 1991) (trustee would be appointed unless, within three days, parties unanimously agreed on an independent financial manager to run the business).

[FN396] See id.; see also In re Boileau, 736 F.2d 503 (9th Cir. 1984).

[FN397] In In re Plaza de Diego Shopping Center, Inc., 911 F.2d 820, 832 (1st Cir. 1990), the court stated that a bankruptcy court has the power to order interim controls on the business of an estate to protect its assets "until a trustee or an examiner could be appointed."

[FN398] 11 U.S.C.A. s 1103 (West 1979 & Supp. 1992). See In re Table Talk, Inc., 22 B.R. 706, 710-13 (Bankr. D. Mass. 1982) (court denied motion for appointment of examiner because no explanation was given why accountants for

creditors' committee could not do the investigation).

[FN399] An entity is not "disinterested" if it is a creditor. 11 U.S.C.A. s 101(14)(A) (West Supp. 1992).

[FN400] See In re 1243 20th St., Inc., 6 B.R. 683, 686 (Bankr. D.C. 1980) ("the examiner is far better able [than a creditors' committee] to undertake an in-depth investigation").

[FN401] In re Southmark Corp., 113 B.R. 280, 283 (Bankr. N.D. Tex. 1990) (in a complex mega-case, the committees may seek an examiner to investigate the debtor while they "concentrate on the reorganization effort").

[FN402] In re STN Enterprises, 779 F.2d 901, 904 (2d Cir. 1985); In re Joyanna Holitogs, Inc., 21 B.R. 323 (Bankr. S.D.N.Y. 1982).

[FN403] See Part IV, supra.

[FN404] 11 U.S.C.A. s 503(b)(3)(D) (West 1979 & Supp. 1992).

[FN405] 11 U.S.C.A. ss 503(b)(3)(B), 1109 (West 1979 & Supp. 1992); see also In re Curry and Sorensen, 57 B.R. 824, 828 (9th Cir. BAP 1986) (to divest DIP of control of cause of action, creditors must obtain leave of court to do so by showing that DIP's inaction "is unjustifiable and therefore constitutes an abuse of discretion"); see also In re Chernicky Coal Company, Inc., 67 B.R. 828, 832 (Bankr. W.D. Pa. 1986).

[FN406] In re V. Savino Oil & Heating Co., 91 B.R. 655, 656-57 (Bankr. E.D.N.Y. 1988) (stating that an individual creditor must show "extraordinary circumstances" to obtain leave to bring an avoidance action on behalf of an estate).

[FN407] 11 U.S.C.A. ss 341, 343 (West Supp. 1992).

[FN408] FED. R. BANKR. P. 1007(c).

[FN409] FED. R. BANKR. P. 2004.

[FN410] 11 U.S.C.A. s 1125(b) (West 1979 & Supp. 1992).

[FN411] CFTC v. Weintraub, 471 U.S. 343, 355 (1985) ("if a debtor remains in possession . . . [then] the debtor's directors bear essentially the same fiduciary obligation to creditors and shareholders as would the trustee for a debtor out of possession"); In re Curry and Sorensen, 57 B.R. 824, 828 (9th Cir. BAP 1986) (same). See Lewis v. Anderson, 615 F.2d 778 (9th Cir. 1979), cert. denied, 449 U.S. 869 (1980) (under applicable state law, special committee of independent directors of corporation had authority to investigate and dismiss cause of action belonging to corporation).

[FN412] In re Jartran, 78 B.R. 524, 527 (Bankr. N.D. Ill. 1987) (on its own motion, court appointed examiner to investigate whether debtor's counsel should be disqualified).

[FN413] In re Tyler, 18 B.R. 574, 579 (Bankr. S.D. Fla. 1982); see also In re Eastern Consolidated Utilities, Inc., 3 B.R. 591, 592-93 (Bankr. E.D. Pa. 1980) (court removed trustee after debtor employed competent counsel).

[FN414] 11 U.S.C.A. s 307 (West Supp. 1992); 28 U.S.C.A. s 586 (West Supp. 1992).

[FN415] See 11 U.S.C.A. ss 307, 701, 1102 and 1104(c) (West 1979 & Supp. 1992).

[FN416] 11 U.S.C.A. s 1104(c) (West Supp. 1992); FED. R. BANKR. P. 2007, 2007.1, 2020, and 9014.

[FN417] 11 U.S.C.A. ss 321(c) and 1104(c) (West Supp. 1992).

[FN418] See 18 U.S.C.A. s 3057 (West 1985).

[FN419] 18 U.S.C.A. s 3057(b) (West 1985).

[FN420] Federal Savings and Loan Insurance Corp. v. Molinaro, 889 F.2d 899, 902 (9th Cir. 1989).

[FN421] FED. R. EVID. 101, 1101(a).

[FN422] See In re UNR Industries, Inc., 46 B.R. 671, 676-77 (Bankr. N.D. Ill. 1985) (United States trustee directed to appoint a disinterested person to represent the interests of putative asbestos disease victims in reorganization of asbestos manufacturer).

[FN423] Reilly v. United States, 863 F.2d 149, 154-59 (1st Cir. 1988) (independent of FED. R. EVID. 706, court had inherent power to appoint technical advisor); In re Utilities Power & Light Corp., 90 F.2d 798, 800 (7th Cir. 1937) (reorganization court had inherent power, based on judicial necessity, to appoint an investigator); Ex Parte Petersen, 253 U.S. 300, 312 (1920).

[FN424] Ex Parte Petersen, 253 U.S. 300, 312-13 (1920).

[FN425] FED. R. CIV. P. 53(a) defines "master" to include "a referee, an auditor, an examiner, and an assessor." The role of the examiner originated in part from the need to create an alternative to the special master in corporate reorganizations. See note 49. Under chapter X, the examiner was not the same as a special master. The special master served as an assistant judge or referee, but the examiner served as an investigator. See Chandler Act ss 117, 167-68, 52 Stat. 885, 890, 11 U.S.C.A. ss 517, 567-68 (West 1970) (repealed).

[FN426] The Advisory Committee Note to FED. R. BANKR. P. 9031 states that: "This rule precludes the appointment of masters in cases and proceedings under the Code." (Emphasis added.) In post-confirmation proceedings, a special master was appointed in In re Joint Eastern & Southern District Asbestos Litigation, 129 B.R. 710 (E. & S.D.N.Y. 1991).

[FN427] Burlington Northern Railroad Co. v. Dept. of Revenue of State of Washington, 934 F.2d 1064, 1072-73 (9th Cir. 1991). See also note 382.

[FN428] See Stuart M. Kaplan, The Courts and Equity Receiverships, LOS ANGELES LAWYER, May 1978, at 22 (describing the use of a limited powers receiver to perform "narrowly defined" functions which may include accounting and legal functions not related "to management's day-to-day conduct of business operations").

[FN429] See notes 44-46 and accompanying text.

[FN430] 11 U.S.C.A. s 303(h)(2) (West 1979 & Supp. 1992).

[FN431] See CFTC v. FITC, Inc., 52 B.R. 935, 937 (N.D. Cal. 1985) (stating that "it was the receiver . . . who this Court

empowered with the authority to place FITC in bankruptcy").

[FN432] 11 U.S.C.A. s 105(b) (West Supp. 1992) provides in part that: "a court may not appoint a receiver in a case under this title."

[FN433] In re Memorial Estates, Inc., 797 F.2d 516, 520 (7th Cir. 1986) (Posner, J.).

[FN434] 11 U.S.C.A. s 543(d) (West Supp. 1992). In CFTC v. Weintraub, 471 U.S. 343, 345-46 (1985), the receiver filed the bankruptcy petition and became the chapter 7 trustee of the debtor.

[FN435] 11 U.S.C.A. s 502(c) (West 1979 & Supp. 1992).

[FN436] In re Apex Oil Co., 92 B.R. 843, 844-45 (Bankr. E.D. Mo. 1988) (examiner directed to assist in estimation of claims).

[FN437] For example, in the Johns-Manville bankruptcy, the court confirmed a reorganization plan based on an underestimation of the claims of asbestosis victims. After confirmation of the plan, the victims' claims depleted the funds available for payment under the plan, and a complex class action settlement was required to settle the victims' claims and to salvage the plan. In re Joint Eastern & Southern District Asbestos Litigation, 129 B.R. 710 (E.&S.D.N.Y. 1991).

[FN438] See note 8.

[FN439] See note 158 and accompanying text.

[FN440] 11 U.S.C.A. s 1103(c)(4) (West 1979) provides that a creditors' committee may "request the appointment of a trustee or examiner"

[FN441] In re UNR Industries, Inc., 72 B.R. 789, 793-94 (Bankr. N.D. Ill. 1987) (court had power to appoint examiner on its own motion); In re Public Service Co. of New Hampshire, 99 B.R. 177, 182 (Bankr. D.N.H. 1989) ("the court nevertheless believes it has the power to sua sponte appoint an examiner") see also In re Landscaping Services, Inc., 39 B.R. 588, 590-91 (Bankr. E.D.N.C. 1984) (court moved for the appointment of an examiner); see Part II.D, supra.

[FN442] See note 158 and accompanying text and Part II.D, supra.

[FN443] See FED. R. BANKR. P. 2007.1(a) and 9014. Rule 2007.1(a) provides: "In a chapter 11 reorganization case, a motion for an order to appoint a trustee or an examiner pursuant to s 1104(a) or s 1104(b) of the Code shall be made in accordance with Rule 9014."

Rule 9014 provides in part: "In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. . . ."

[FN444] FED. R. BANKR. P. 9013 provides in part:

A request for an order, except when an application is authorized by these rules, shall be by written motion, unless made during a hearing. . . . Every written motion other than one which may be considered ex parte shall be served by the moving party on the trustee or debtor in possession and on those entities specified by these rules, or, if service is not required or the entities to be served are not specified by these rules, the moving party shall serve the entities the court directs.

[FN445] See Part IV.B.2, supra.

[FN446] See Part IV.B.3, supra.

[FN447] See Part VI.B, supra.

[FN448] In re Revco D.S., Inc., 898 F.2d 498 (6th Cir. 1990).

[FN449] See note 15.

[FN450] See In re Capital Services & Investments Inc., 90 B.R. 382, 385 (Bankr. C.D. Ill. 1988) ("Sec. 1104(c) requires the United States Trustee to make a good faith attempt to get input from the parties in interest").

[FN451] Id. at 384-86.

[FN452] See 11 U.S.C.A. ss 701(a) and 1104(c) (West 1979 & Supp. 1992).

[FN453] FED. R. BANKR. P. 2007.1(b) provides:

(b) Application of Appointment. An order approving the appointment of a trustee or examiner pursuant to s 1104(c) of the Code shall be made only on application of the United States trustee, stating the name of the person appointed, the names of the parties in interest with whom the United States trustee consulted regarding the appointment, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any parties in interest, their respective attorneys and accountants, the United States trustee, and persons employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person appointed setting forth the persons connections with debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, and any person employed in the office of the United States trustee.

Rule 2007.1 did not become effective until 1991, and it remains to be seen how strictly courts will enforce its disclosure provisions.

[FN454] H.R. REP. NO. 595 at 108, reprinted in 1978 U.S.C.C.A.N. 6069; see In re Plaza de Diego Shopping Center, Inc., 911 F.2d 820 (1st Cir. 1990) (court exceeded approval power in s 1104(c) by directing the United States trustee to give the court three candidates from which to select a trustee).

[FN455] H.R. REP. NO. 595 at 234, reprinted in 1978 U.S.C.C.A.N. 6194; see In re Capital Services & Investments, Inc., 90 B.R. 382, 383 (Bankr. C.D. Ill. 1988) (if the United States trustee consults with parties in interest and selects a disinterested person, then court approval should be granted unless the United States trustee "has abused his discretion").

[FN456] In re Plaza de Diego Shopping Center, Inc., 911 F.2d 820, 831 n.18 (1st Cir. 1990), quoting In re Capital Services & Investments, Inc., 90 B.R. 382, 385 (Bankr. C.D. Ill. 1988); see In re Ruffin, Inc., 10 B.R. 862, 863-64 (Bankr. D.R.I. 1981) (United States trustee's selection disapproved due to lack of relevant business experience); In re Cardinal Industries, Inc., 113 B.R. 378 (Bankr. S.D. Ohio 1990) (United States trustee's selection disapproved by reason of lack of relevant experience).

[FN457] 11 U.S.C.A. s 101(41) (West Supp. 1992).

[FN458] See Part IV.B.2, supra. See also In re Mako, Inc., 102 B.R. 809, 814 (Bankr. E.D. Ok. 1988) (court urged United States trustee to select an examiner "who is proficient in both accounting and law" in order to avoid the expense

of having to employ professionals).

[FN459] FED. R. BANKR. P. 5002 provides in part:

(a) Approval of Appointment of Relatives Prohibited. The appointment of an individual as a trustee or examiner pursuant to § 1104 of the Code shall not be approved by the court if the individual is a relative of the bankruptcy judge approving the appointment or the United States trustee in the region in which the case is pending. . . .

(b) Judicial Determination that Approval of Appointment or Employment Is Improper. A bankruptcy judge may not approve the appointment of a person as a trustee or examiner pursuant to § 1104 of the Code . . . if that person is or has been so connected with such judge or the United States trustee as to render the appointment or employment improper.

[FN460] 113 B.R. 280 (Bankr. N.D. Tex. 1990).

[FN461] Id. at 283-84.

[FN462] See note 4.

[FN463] See note 168.

[FN464] See Part IV.B.1, *supra*.

[FN465] In re Grand Jury Subpoena Dated April 19, 1991, 945 F.2d 1221 (2d Cir. 1991); In re Apex Oil Co., 101 B.R. 92 (Bankr. E.D. Mo. 1989); In re Baldwin-United Corp., 46 B.R. 314, 316-17 (Bankr. S.D. Ohio 1985).

[FN466] See In re Grand Jury Subpoena Duces Tecum Dated April 19, 1991, 945 F.2d 1221, 1224 (2d Cir. 1991).

[FN467] FED. R. BANKR. P. 9003(a) provides:

(a) General Prohibition. Except as otherwise permitted by applicable law, any examiner, any party in interest, and any attorney, accountant, or employee of a party in interest shall refrain from *ex parte* meetings and communications with the court concerning matters affecting a particular case or proceeding.

[FN468] Similarly, when a special master is used in civil litigation, courts have urged limiting the scope of the reference and requiring periodic status reports. La Buy v. Howes Leather Co., 352 U.S. 249, 253 n.5 (1957); Burlington Northern Railroad Company v. Dept. of Revenue of State of Washington, 934 F.2d 1064, 1073 n.5 (9th Cir. 1991).

[FN469] 124 CONG. REC. S17,420 (daily ed. Oct. 6, 1978), reprinted in 1978 U.S.C.C.A.N. 6542.

[FN470] Lawrence P. King, Chapter 11 of the 1978 Bankruptcy Code, 53 AM. BANKR. L. J. 107, 117 (1979). See In re Evans Products Co., 65 B.R. 31, 33 (Bankr. S.D. Fla. 1986) (examiner appointed one month before confirmation hearing).

[FN471] In re Baldwin-United Corp., 46 B.R. 314, 316 (Bankr. S.D. Ohio 1985).

[FN472] 11 U.S.C.A. ss 330-31 (West 1979 & Supp. 1992). Section 330(a) of the Code expressly provides that the court may award compensation "to an examiner," and § 331 expressly provides that "an examiner" may apply for interim compensation. Even though a chapter 11 trustee has the same duty as the examiner to conduct an investigation under 11 U.S.C.A. s 1106(a)(3)-(4) (West 1979 & Supp. 1992), the trustee's compensation for that task and all other tasks combined is subject to a fixed statutory maximum based on a percentage of "moneys disbursed" (11 U.S.C.A. s 326(a))

(West Supp. 1992)). In contrast, the examiner's compensation is not subject to that limitation. The limitation of s 326 on the trustee's compensation does not, however, apply to compensation of the trustee's professionals. See 11 U.S.C.A. ss 326, 330 (West Supp. 1992).

[FN473] See In re Barron, 73 B.R. 812, 813 (Bankr. S.D. Cal. 1987) (payment of examiner's compensation delayed where there was a risk of administrative insolvency).

[FN474] Id.; see generally In re IML Freight, Inc., 52 B.R. 124 (Bankr. D. Utah 1985).

[FN475] 11 U.S.C.A. s 348(e) (West Supp. 1992).

[FN476] 11 U.S.C.A. s 726(b) (West Supp. 1992).

[FN477] See Part III.B.2, *supra*.

[FN478] See Part IV.A.4, *supra*.

[FN479] See Part IV.B.2.b, *supra*.

[FN480] See notes 228, 282-93 and accompanying text.

[FN481] See Part III.B.2, *supra*.

[FN482] Id.

[FN483] See Part III.B.2.b, *supra*.

[FN484] S. 1985 was introduced in the Senate by Senator Heflin on November 19, 1991 and, on March 19, 1992, the Senate Judiciary Committee approved by voice vote a committee substitute. This article refers to the text of the committee substitute.

[FN485] S. 1985 s 402(d).

[FN486] S. 1985 s 205.

[FN487] Id.

[FN488] S. 1985 s 102.

[FN489] Michael Bradley and Michael Rosenzweig, The Untenable Case for Chapter 11, 101 YALE L.J. 1043 (1991). This article attacks chapter 11 as an unwarranted device for entrenchment of management of the debtor-in-possession. The article proceeds from the premise that chapter 11 permits management entrenchment by creating a "strong presumption" favoring retention of management. Id. at 1044. As suggested in Part III.A.2.b, *supra*, this "strong presumption" may not in fact exist.

[FN490] See Part II, *supra*.

[FN491] See notes 61-62 and Part II.C.5.d, supra.

[FN492] See Part IV, supra.

[FN493] The Examiner in the Reorganization Process at 51.

[FN494] See Part IV.B.1, supra.

[FN495] See Parts II.C.5 and II.D, supra.

[FN496] See Part II, supra.

[FN497] See Part VI, supra.

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