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The Road to Repose: Limitations on Avoidance Actions in Chapter 11 via 11 U.S.C. § 546(a)(2)

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NOTES

THE ROAD TO REPOSE: LIMITATIONS ON AVOIDANCE ACTIONS IN CHAPTER 11 VIA 11 U.S.C. § 546(a)(2)

In a bankruptcy proceeding, a trustee can exercise avoiding powers, which allow the recovery of certain prepetition payments to creditors.[1] Section 546(a) of the bankruptcy code ("the Code") bars the bringing of an avoidance action "after the earlier of— (1) two years after the appointment of a trustee . . .; or (2) the time the case is closed or dismissed."[2] The appointment of a trustee is not required in a reorganization under chapter 11. Rather, chapter 11 gives the debtor in possession the same rights and duties as a trustee, including the power and obligation to bring avoidance actions.[3] When there has not been an appointment of a trustee, courts are likely to take one of two approaches to § 546(a)(1).

The first approach is simple. The debtor in possession is a trustee for purposes of § 546(a)(1). Therefore, the debtor in possession has two years or until the case closes to bring an avoidance action, whichever is earlier.[4]

The second approach is slightly more complicated. The debtor in possession is not a trustee for purposes of § 546(a)(1). One ration-

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[1] 11 U.S.C. §§ 544-545, 547-548, 553 (1988) (unless otherwise indicated, all statutory references are to the 1988 edition of title 11 of the United States Code); *see also* MARTIN J. BIENENSTOCK, BANKRUPTCY REORGANIZATION 345-436 (1987): The avoiding powers are "designed to compel entities to disgorge to the estate property whose redistribution would yield a more equitable sharing of losees [sic] suffered by creditors. [Avoiding powers] also extinguish[ ] claims held by entities which claims would wrongly entitle them to a portion of the debtors assets." *Id.* at 345.

[2] 11 U.S.C. § 546(a); *see, e.g.*, Edleman v. Gleason (*In re* Silver Mill Frozen Foods, Inc.), 23 B.R. 179 (Bankr. W.D. Mich. 1982) (addressing § 546(a)(2)).

[3] *See* 11 U.S.C. § 1107 (giving debtor in possession rights and duties of trustee); *id.* §§ 544-545, 547-548, 553 (giving trustee avoiding powers).

[4] Zilkha Energy Co. v. Leighton, 920 F.2d 1520 (10th Cir. 1990); *see also* Construction Management Servs., Inc. v. Manufacturers Hanover Trust (*In re* Coastal Group, Inc.) 125 B.R. 730 (Bankr. D. Del. 1991). This first approach to § 546(a)(1) finds support in 11 U.S.C. § 1107(a), which provides that a debtor in possession shall have almost all the rights, powers, functions and duties of a trustee. Legislative comments on § 1107 strengthen the argument by stating: "This section places a debtor in possession in the shoes of a trustee in *every* way. . . . He is . . . subject to any limitations on a chapter 11 trustee . . . ." S. REP. No. 989, 95th Cong., 2d Sess. 116 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5902 (emphasis added).

Because debtor-in-possession status is attained upon the filing of a petition seeking reorganization under chapter 11, this approach, in effect, bars avoidance actions after two years from the petition.

ale for this approach is that the debtor in possession is controlled by the very people who might be the defendants in an avoidance action.[5] Another rationale is that the two-year limit would impede negotiations between the debtor in possession and its creditors by forcing the debtor in possession to sue them.[6] A court following this second approach allows an avoidance action to be brought until two years after a trustee is appointed, or until the case is closed. If no trustee is ever appointed, only the closing of a case will bar the avoidance action.

It is difficult to choose between these two approaches to § 546(a)(1), because the language of § 546(a) only specifies *when* avoidance actions are barred, not *why*. The failure of § 546(a) to indicate a reason for providing creditors with repose allows a court to withhold that repose if it can justify denying it by reference to norms derived from other parts of Code. A creditor, *C*, may thus wish to argue, in defending an avoidance action, that the action is barred by § 546(a)(2) either because the case is actually closed, or because it should be deemed closed. *C* will especially wish to raise the argument before a court that follows the second approach to § 546(a)(1), because closure may be the only available limitation on the action.[7]

Upon this route to repose via § 546(a)(2), *C* will encounter a detour. The Code gives little guidance as to when a court should close a case. Moreover, because § 546(a) does not indicate why any avoidance action *ought* to be barred, interpreting what little guidance the Code does provide becomes quite formalistic; rather than arguing the

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[5] For example: Shortly before filing the petition, a debtor corporation repays in full a loan made to it by its president, *CEO*. That repayment may be subject to an avoidance action under § 547, but *CEO*, as manager of the debtor in possession, is unlikely to bring the action against himself. *See, e.g.*, One Marketing Co. v. Addington & Assocs. (*In re* One Marketing Co.), 17 B.R. 738 (Bankr. S.D. Tex. 1982); *see also* Korvettes, Inc. v. Sanyo Elec., Inc. (*In re* Korvettes, Inc.), 67 B.R. 730, 733 (S.D.N.Y. 1986) (citing cases in accord).

The court in *One Marketing Co.* ruled—in a persuasive opinion—that only an independent trustee should be barred by § 546(a). 17 B.R. at 739-40. The opinion points out (i) that the statute of limitations specified certain appointment provisions, but did not include § 1107, which puts the debtor in possession in the trustee's shoes; (ii) that problems with preferential transfers could be dealt with in the plan or through the confirmation process; and (iii) that the debtor in possession is really the same entity as the debtor, who made the preferential transfer, and therefore the debtor in possession might have little inclination to seek to avoid the transfer. *Id.*

One problem with this approach is that its scope is too broad, subjecting all creditors to a lengthened statute of limitations when its rationale is predicated on only creditors like *CEO* in the example.

[6] *See In re* Pullman Constr. Indus., 132 B.R. 359 (Bankr. N.D. Ill. 1991).

[7] Even in a court that follows the first approach to § 546(a)(1), *see supra* note 4 and accompanying text, *C* might argue a closure defense under § 546(a)(2) within two years of the filing of a petition. Unfortunately for *C*, courts are unlikely to deem a chapter 11 case closed prior to confirmation of a plan of reorganization, *see infra* part III.A, and confirmation is unlikely, in practice, to occur within two years of the commencement of a case.

action is barred because it is unfair, a waste of the court's time, unlikely to benefit the estate, or unprovable because of stable evidence—arguments not implicitly authorized by § 546(a)—*C* must instead resort to arguing, at least under § 546(a)(2), that the case is closed. The Code, in effect, points *C* in one direction (closure) without really considering the desired destination—repose—or a more direct route.

Congress may eventually provide a direct route by amending § 546(a)(1) to indicate a preference for the first approach, or by providing some other basis for limiting the time within which a chapter 11 creditor must face an avoidance action. Alternatively, Congress might select the second approach to § 546(a)(1), indicating that the interests of the estate outweigh *C*'s interest in repose. In the meantime, this Note explores the formal arguments *C* must make to seek repose under § 546(a)(2).

I. When Is a Chapter 11 Case Closed?

Section 350(a), which governs closure merely provides: "After an estate is fully administered and the court has discharged the trustee, the court shall close the case."[8] The Code does not define *fully administered estate.*

II. Detour: When Is an Estate "Fully Administered"?

A. *A Pit Stop*

Pause here to consider that the inquiry has become less concrete, and *C*'s road to repose less direct. Seeking some direction from the Code, *C* began by asking when avoidance actions are time-barred, and the Code answered that they may be time-barred, under § 546(a)(2), after a case is closed. *C* then asked when a case is closed, and the Code replied, in effect, that a case is closed after the estate is fully administered. *C* arrives at a cul-de-sac with the question of what a fully administered estate is. The Code does not expressly say.

In trying to map out a definition of a fully administered estate, *C* ought to bear in mind his original destination—the repose offered by § 546(a)(2)'s limitation on avoidance actions. Put differently, the definition of a fully administered estate should guide *C* in determining when a case is closed for time-bar purposes—namely, preventing stale claims, providing repose to defendants, or promoting "judicial economy" by cutting off some claims. But since the definition of full ad-

[8] 11 U.S.C. § 350(a). The legislative history simply mirrors the statutory language. *See* S. Rep. No. 989, *supra* note 4, at 49, *reprinted in* 1978 U.S.C.C.A.N. at 5835.

ministration is unlikely to refer to these time-bar purposes, *C*'s route is likely to be indirect—at least if *C* goes by way of § 546(a)(2).

B. *On the Road Again: Defining a "Fully Administered Estate"*

Like a tourist scrutinizing *Fodor's, C* will comb through the Code, the repealed bankruptcy laws, and cases to understand the term fully administered estate, the better to recognize one when he sees it.

The term fully administered estate first appeared, in the context of bankruptcy,[9] in § 2 of the Bankruptcy Act of 1898, which gave federal courts the jurisdiction to

> (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto . . .;
>
> (8) close estates . . . by approving the final accounts and discharging the trustees . . . *whenever it appears that [the estates] have been fully administered* . . . .[10]

Thus, in 1899, a district court could conclude that once the trustee had sold all the property of the estate, converted it into money and had the funds ready for distribution, a final settlement should be made promptly and the estate should be closed.[11]

Informed with some idea of what the term originally meant, *C* may proceed to the modern materials. Under the Code, the commencement of a case creates the bankruptcy estate, which is made up, roughly speaking, of all legal and equitable interests of the debtor at the time of filing.[12] The avoiding actions *C* wishes to defend are authorized in the subchapter of the Code dealing with the estate.[13] The term "administration," however, is not specifically defined by the Code.[14] Presumably, full administration of the modern estate entails

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[9] In the context of estate law, the term appears in federal case law as early as 1821. *See, e.g.*, Backhouse v. Jett, 2 F. Cas. 316 (C.C.D. Va. 1821) (No. 710) (referring to defense of fully administered). The term continues to be used in that context. *See, e.g., In re* Rules of Probate and Guardianship Procedure, 531 So. 2d 1261, 1315 (Fla.), *modified*, 537 So. 2d 500 (Fla. 1988).

[10] Act of July 1, 1898, ch. 541, § 2(7)-(8), 30 Stat. 544, 545-46 (repealed 1978) (emphasis added). To be sure, earlier bankruptcy acts contained the concepts of estate and administration, but did not necessarily link the two. *See, e.g.*, Act of Jan. 6, 1800, ch. 4, § 2, 2 Stat. 4, 5 (commissioners administer oath to bankrupt who gets discharged from prison, and judgment against bankrupt remains good and "may be satisfied out of any estate which may then, or at any time afterwards, belong to the debtor"); Act of April 4, 1800, ch. 19, § 5, 2 Stat 19, 23 (repealed 1803) (commissioners empowered to "take into their possession, all the estate, real and personal," of the bankrupt).

[11] *In re* Stein, 94 F. 124 (D. Ind. 1899).

[12] 11 U.S.C. § 541.

[13] *See* 11 U.S.C. §§ 541-560.

[14] All of chapter 3 is devoted to case administration, 11 U.S.C. §§ 301-366, and the first

a gathering up and distributing of all the debtor's interests.

Having gathered some information from history and the Code, *C* now embarks on a journey through chapter 11, looking to apply this rough definition of a fully administered estate to the earliest event at hand.

III. READING THE ROAD SIGNS: FINDING A FULLY ADMINISTERED ESTATE

A. *Confirmation of a Chapter 11 Plan*

An overview of a chapter 11 case indicates that the confirmation of a plan of reorganization would be the earliest event indicating that an estate has been fully administered. After a petition is filed in chapter 11,[15] creditors and the debtor in possession engage in a complex series of steps geared toward the confirmation of a plan of reorganization, setting forth the rights and obligations of all parties in interest.[16] Not all chapter 11 debtors seek reorganization. Some propose liquidation plans.[17]

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subchapter of chapter 11 refers to administration, 11 U.S.C. §§ 1101-1114. The relevance of these references is questionable; they appear to relate to *case* administration, not to *estate administration* in the sense of collecting and distributing assets.

[15] A bankruptcy case commences with the filing of a petition for relief under the federal bankruptcy laws. 11 U.S.C. §§ 301, 303(b). A debtor may file a petition under chapter 11, or may be forced by creditors to file an involuntary petition under chapter 11. *See id.* §§ 301, 303. On who may be a debtor, *see id.* § 109. In the paradigmatic bankruptcy case, this specifically defined act results in three critical changes: (i) commencement creates an "estate" comprising many of the debtor's property interests, *id.* § 541; (ii) either the court orders the appointment of a trustee, or the debtor, under the title of debtor in possession, takes on the rights and obligations of a trustee, *id.* § 1104 (appointment of trustee or examiner), *id.* 1107 (rights, powers, & duties of debtor in possession); and (iii) commencement activates an automatic stay which prevents creditors from pursuing most actions to collect from the debtor outside of the bankruptcy court, *id.* § 362.

[16] The debtor in possession has 120 days within which it has the exclusive power to file a plan. The debtor has 60 days beyond the 120 day period to obtain acceptances from all impaired classes of claims and interests. If the debtor cannot obtain the acceptances before 180 days has elapsed, then any party in interest may file a plan. *Id.* § 1121.

To obtain acceptance of a plan, the debtor in possession does not necessarily need acceptances from all of its creditors. Unimpaired creditors are deemed to have accepted. *Id.* §§ 1126(f), 1129(a)(8)(B). Voting is by class, so that if two thirds of the class by amount of debt owed and a majority by head count vote for the plan, minority dissents are ignored. *Id.* § 1126(c)-(d). If the class votes no, a situation known as *cramdown* results, in which a plan may be confirmed over the objections of creditors if certain safeguards are met. *See id.* § 1129(b). *See generally* Aaron J. Bell, Comment, *Making Cramdown Palatable: Postconfirmation Interest on Secured Claims in a Chapter 11 Cramdown*, 23 WILLAMETTE L. REV. 405 (1987) (describing cramdown and arguing for certain protections to creditors). Once a plan has met the statutory requirements, the court issues an order confirming the plan. *See generally* Charles E. Watkins, Jr., *The Chapter 11 Plan*, 28 PRAC. LAW. 11 (Dec. 1982) (basic overview of chapter 11 proceedings, including confirmation).

[17] *See* 11 U.S.C. § 1123(b)(4); *see also* Kurt Eichenwald, *Drexel, Symbol of Wall St. Era, is*

If the many requirements of chapter 11 are met,[18] the court will confirm a liquidation or reorganization plan, triggering the following effects. According to § 1141 of the Code,[19] the confirmed plan is a binding document, even on those who did not accept it.[20] Confirmation "vests all of the property of the estate in the debtor."[21] "[P]roperty dealt with by the plan is free and clear of claims and interests of creditors . . . ."[22] And subject to some exceptions, confirmation discharges the debtor from any debt that arose prior to the confirmation date, even if a creditor of a valid claim voted no on the plan.[23] All of these effects, however, can be varied in the confirmation order or in the plan itself.[24]

An indirect effect of confirmation is the termination of the automatic stay. Although § 1141 does not expressly discontinue the automatic stay, confirmation may terminate the stay by vesting property in the debtor and triggering discharge, both of which discontinue the stay.[25] Because the stay prohibits creditors from pursuing actions against the debtor, except in the bankruptcy forum, lifting the stay allows creditors to resort once again to actions against the debtor outside the bankruptcy forum.[26]

Dismantling; Bankruptcy Filed, N.Y. TIMES, Feb. 14, 1990, at A1 (Drexel Burnham Lambert files chapter 11 petition seeking liquidation, not reorganization). Of debtors seeking to reorganize, the great majority do not achieve confirmation of any plan at all: according to studies, the failure rate approaches 90%. *See In re* Robbins, 119 B.R. 1, 5 (Bankr. D. Mass. 1990). If rehabilitation of the debtor is unlikely, the court may convert a chapter 11 case to one in chapter 7, which governs the liquidation and distribution of a debtor's assets to its creditors under the supervision of a trustee. 11 U.S.C. § 1112.

18 Some requirements are described *supra* note 16. Other statutory requirements include compliance with title 11 by the plan itself and by the proponent of the plan, 11 U.S.C. § 1129(a)(1)-(2), good faith proposal of the plan, *id.* § 1129(a)(3), and disclosure requirements. *Id.* § 1129(a)(5)(A)-(B). A comprehensive overview of chapter 11 proceedings may be found in BIENENSTOCK, *supra* note 1, *passim*.

19 11 U.S.C. § 1141.

20 *Id.* § 1141(a).

21 *Id.* § 1141(b).

22 *Id.* § 1141(c).

23 *Id.* § 1141(d). Confirmation does not discharge the individual debtor from certain obligations, such as alimony, *id.* §§ 1141(d)(2), 523(a)(5), and a liquidating plan may also disqualify a debtor for discharge in some situations, *id.* § 1141(d)(3).

24 *See id.* § 1141.

25 *Id.* § 362(c)(1) & (2)(C). It follows that a confirmation order or a plan that explicitly withholds discharge or prevents the vesting of property in the debtor will not terminate the stay.

26 *In re* Ernst, 45 B.R. 700 (Bankr. D. Minn. 1985) (motion for relief from stay dismissed as moot); *see In re* Balogun, 56 B.R. 117, 119 (Bankr. M.D. Ala. 1985) (if debtor fails to carry out confirmed plan, debtor is no longer shielded by stay and court will not refuse creditors the right to enforce in proper state forum); *In re* Barker Medical Co., 55 B.R. 435, 436 (Bankr. M.D. Ala. 1985) ("if the debtor fails to carry out the confirmed plan, this court may or may not even have jurisdiction to grant relief," but relief would be available in appropriate forum);

Because confirmation usually fixes the rights of creditors and the debtor in a written document, discharges debt, vests estate property in the debtor, and indirectly terminates the stay, *C,* en route to repose, is likely to argue, after confirmation, that the estate was fully administered upon confirmation, that the case should be deemed to have closed upon confirmation, and that the action was barred under § 546(a)(2) upon confirmation. *C* might bolster the argument by pointing out that the estate, its property having vested with the debtor,[27] must be either empty or terminated.[28]

C, however, is unlikely to prevail with this argument. First, although the fixing of rights, discharge of debts, and return of property to the debtor all plausibly fall within the meaning of the term administration, there is no reason to use confirmation as a talisman for the fruition of those events. (Recall that the plan or confirmation order may forestall distribution, vesting, or even discharge.)

Second, unlike a case under chapter 7, in which the reduction of assets to cash and distribution to creditors might end the matter, satisfaction of debts may be long in coming after confirmation; as a matter of tradition, the court has taken a role in postconfirmation matters,[29] and so defining "fully administered" in terms of confirmation seems implausible.

Third, courts have rejected the argument. In *Edleman v. Gleason (In re Silver Mill Frozen Foods),*[30] a court sought to determine whether a case had closed by virtue of a chapter 11 plan being confirmed. After confirmation, a case under chapter 11 had been converted to a case under chapter 7, and a trustee appointed to effect a

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see also In re Great Northwest Recreation Ctr., 74 B.R. 846, 857 (Bankr. D. Mont. 1987) (creditors have their postconfirmation rights in state fora); Federal Land Bank of Jackson Miss. v. Herron (*In re* Herron), 60 B.R. 82, 83-84 (Bankr. W.D. La. 1986). But if a court were to confirm a plan and explicitly withhold discharge, the stay, at least under the terms of the Code, should continue. Creditors in such a case would be required to continue to seek remedies in bankruptcy court or to move for relief from the stay before seeking remedies in a nonbankruptcy forum.

27 11 U.S.C. § 1141(b).

28 In the words of one court, "in the absence of a plan provision retaining property in an estate, *the estate ceases to exist.*" *Ernst,* 45 B.R. at 702 (emphasis added); *see also In re* T.S.P. Indus., 117 B.R. 375, 377 (Bankr. N.D. Ill 1990).

This part of *C*'s argument is largely semantic. It turns on the definition of estate. When property of the estate vests in the debtor on confirmation, the estate—formerly comprised of that property—is either empty or terminated. Perhaps it is best to view the postconfirmation estate like an empty shell with a possibility of being used or filled again.

29 Edward B. Hopper II, *Confirmation of a Plan Under Chapter 11 of the Bankruptcy Code and the Effect of Confirmation on Creditor's Rights,* 15 IND. L. REV. 501, 518 (1982) ("Traditionally, the courts have viewed the order of confirmation in a reorganization case as merely a step in the administration of the estate.").

30 23 B.R. 179 (Bankr. W.D. Mich. 1982).

liquidation. To be sure, § 350(a) of the Code affirms that the court must close a case, whereas, in *Edleman*, all that had occurred was that a chapter 11 plan had been confirmed. Stating candidly that "[t]he Code is not very clear on when a chapter 11 case is closed,"[31] the court found it appropriate to determine whether the case could be deemed closed by virtue of being fully administered, and it concluded that the case under consideration had not closed upon confirmation:

> While there is little in the comments or legislative history to define what is meant by "fully administered," it is apparent that this case was not closed upon confirmation. [Under an article of the plan, t]he bankruptcy court retained rather substantial jurisdiction. . . . Given this retention of jurisdiction, I can not conclude that this case was closed upon confirmation. Conceivably a plan[32] could be closed . . . where debentures were issued which would be enforceable in state court. . . . That is not the situation here, however, and this case was not "fully administered" upon confirmation.[33]

The court grounded its conclusion on the retention of jurisdiction in the plan, but the court did not discuss its reasoning. The retention of jurisdiction could easily be interpreted to support a contrary finding, that the case had closed: why would a court need to retain jurisdiction at the end of a case, unless it were otherwise closed?

B. *Revocation Period*

The 180-day period following confirmation—during which a party in interest can move for a revocation of the confirmation order[34]—suggests a time period during which a court might presume an estate has not been fully administered. Even if the reorganization were complete on the day of confirmation, a revocation almost six months later would vitiate its completion. Given the potential for a revocation to undo both the order of confirmation and the plan itself, and hence to revest the debtor's property in the estate, the revocation period could be viewed as a period of administration of the estate.

On the other hand, a revocation is difficult to obtain because a party seeking revocation must show fraud in the obtaining of an order of confirmation. Revocation, therefore, is merely a particular proceeding over which the court has jurisdiction regardless of whether the estate has been fully administered.[35]

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31 *Id.* at 181.

32 The *Edleman* court used the word *plan,* not *case* or even *estate.*

33 *Edleman*, 23 B.R. at 181 (footnote added).

34 11 U.S.C. § 1144.

35 *Id.* (fraud required); BANKR. R. 3022 advisory committee's note, para. 2 (reopening to revoke permitted).

C. *Substantial Consummation: 'Tis a Consummation Devoutly to Be Wished*

After a plan is confirmed, the fulfillment of three conditions will achieve *substantial consummation* of a plan: (1) the transfer of substantially all property as the plan proposes; (2) the assumption of the business by the debtor; and (3) the "commencement of distribution under the plan."[36] Substantial consummation is not a precisely defined term. For example, the Code does not specify whether "commencement of distribution" involves one payment to one creditor, one payment to each creditor, or something else.

Nevertheless, it is at least a fair inference that an estate has not been fully administered before the three conditions for substantial consummation have been met—for *fully administered estate* appears to have connoted, at least initially, some form of distribution of the debtor's assets,[37] and, whereas confirmation of a plan only sets distributive rights, substantial consummation requires actual distribution. Two considerations add to the construction of substantial consummation as the minimum level of finality required to close a postconfirmation case. One consideration is § 1127(b) of the Code, which permits the modification of a plan before substantial consummation, but not after. The other is the advisory committee note to the 1991 revision of Bankruptcy Rule 3022 (Final Decree in chapter 11), in which the advisory committee adopts substantial consummation as a major factor in determining whether to close a case.[38]

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[36] 11 U.S.C. § 1101(2)(A)-(C). The precise language of the statute defines "substantial consummation" as:

> (A) transfer of all or substantially all of the property proposed by the plan to be transferred;
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> (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and
>
> (C) commencement of distribution under the plan.

Id.

[37] *See supra* part II.B.

[38] The advisory committee note reads in full:

> Entry of a final decree closing a chapter 11 case should not be delayed solely because the payments required by the plan have not been completed. Factors that the court should consider in determining whether the estate has been fully administered include (1) whether the order confirming the plan has become final, (2) whether deposits required by the plan have been distributed, (3) whether the property proposed by the plan to be transferred has been transferred, (4) whether the debtor or the successor of the debtor under the plan has assumed the business or the management of the property dealt with by the plan, (5) whether payments under the plan have commenced, and (6) whether all motions, contested matters, and adversary proceedings have been finally resolved.
>
> The court should not keep the case open only because of the possibility that

Less certain is how far past a substantially consummated plan a debtor must proceed before the estate is fully administered, for, if a fully administered estate requires *complete* distribution, substantial consummation (which is achieved by commencement, not completion of distribution), *a fortiori* cannot meet the requirement. One court has implied that a case does not close until the plan is fully consummated.[39] The opinion, however, is not clear as to precisely what full consummation entails, stating only that "[t]he meaning of 'consummation' is different from the meaning of 'substantial consummation,' "[40] and that "[c]onsummation of a plan involves many different acts, one of which is the 'substantial consummation of a plan.' "[41] In contrast to substantial consummation, full consummation may imply the retirement of every obligation described by the plan.[42]

Benjamin Weintraub and Michael J. Crames appear to argue that the estate is not fully administered until (i) full consummation has occurred (they use the term "consummation") *and* (ii) termination of court jurisdiction as set forth in the plan has occurred.[43] There are at least two problems with the view of Weintraub and Crames. First,

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> the court's jurisdiction may be invoked in the future. A final decree closing the case after the estate is fully administered does not deprive the court of jurisdiction to enforce or interpret its own orders and does not prevent the court from reopening the case for cause pursuant to § 350(b) of the Code. For example, on motion of a party in interest, the court may reopen the case to revoke an order of confirmation procured by fraud under § 1144 of the Code. If the plan or confirmation order provides that the case shall remain open until a certain date or event because of the likelihood that the court's jurisdiction may be required for specific purposes prior thereto, the case should remain open until that date or event.

BANKR. R. 3022 advisory committee's note. Factors three, four, and five are taken from the definition of substantial consummation. *See* 11 U.S.C. § 1101(2) (defining substantial consummation). Factor two probably relates to substantial consummation.

[39] *In re* Terracor, 86 B.R. 671 (D. Utah 1988); *see also* Edleman v. Gleason (*In re* Silver Mill Frozen Foods, Inc.), 23 B.R. 179, 182 (Bankr. W.D. Mich. 1982) (referring to full consummation in opinion dealing with a case that had not closed).

[40] *Terracor*, 86 B.R. at 676 n.12.

[41] *Id.* The court cites another case, *In re* Tri-L Corp., 65 B.R. 774 (Bankr. D. Utah 1986), to show that there are a number of steps to closing. The list of steps in the *Tri-L* case does not help; it outlines steps necessary to carry out a plan, some of which use the terms this note seeks to define—one step is "[p]reparing and filing a final accounting of the administration of the estate." *Tri-L*, 65 B.R. at 779; *see also* Keystone Acceptance Corp. v. Nardulli & Sons Co. (*In re* Nardulli & Sons, Inc.), 66 B.R. 882, 885 (Bankr. W.D. Pa. 1986) ("many chapter 11 Debtors operate under a confirmed plan for periods of time longer than 3 years"), *rev'd on other grounds*, 836 F.2d 871 (3d Cir. 1988).

[42] Full consummation thus might implicate the final payment on a 20-year mortgage. This period seems long, but at least one court makes a practice of denying discharge until after full consummation notwithstanding the time required. *In re* C & P Gray Farms, Inc., 70 B.R. 704, 710-11 (Bankr. W.D. Mo. 1987).

[43] Benjamin Weintraub & Michael J. Crames, *Defining Consummation, Effective Date of Plan of Reorganization and Retention of Postconfirmation Jurisdiction: Suggested Amendments to Bankruptcy Code and Bankruptcy Rules*, 64 AM. BANKR. L.J. 245, 253 (1990).

they do not make clear why jurisdiction should be a relevant inquiry.[44] Second, the view of a plan as a new indebtedness, enforceable in state court, supports the view that a plan need not be fully consummated before an estate has been fully administered.[45] Under the concept of new indebtedness, once the plan is set into motion through substantial consummation, little else would remain to be done to administer the estate, because all rights and obligations of the parties have been set, at least in theory, and these might be *enforced* in state court, rather than *administered* in federal; the difference being that *administration* deals with the establishment and initial distribution of rights and obligations, whereas *enforcement* merely compels compliance with the scheme established in the reorganization process. One might draw an analogy to a hand of bridge. The hand is fully administered when dealt, even though it has not yet been played.

As between substantial consummation and full consummation, the only difference will be the amount distributed; neither concept appears to incorporate collection of assets. And while distribution of assets from the estate appears to be inherent in the concept of full administration, distribution of assets pursuant to a plan is different from distribution from a liquidated estate. Plan rights resemble contract rights more than they resemble estate dividends, in that plans may be interpreted and enforced in state court,[46] and payments made

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[44] *See infra* part VI (discussing jurisdiction).

[45] Courts view the confirmed plan as representing a "new indebtedness," replacing all preconfirmation debt. *See, e.g., In re* Water Gap Village, 99 B.R. 226, 229 (Bankr. D.N.J. 1989); *In re* Ernst, 45 B.R. 700, 702 (Bankr. D. Minn. 1985) ("The effect of confirmation is to discharge the entire preconfirmation debt, replacing it with a new indebtedness as provided in the confirmed plan. The plan is essentially a new and binding contract, sanctioned by the Court, between a debtor and his preconfirmation creditors.").

Under the "new indebtedness" view, a creditor may enforce a plan's provision in state court, with the provisions of the plan subject to construction under state law. *See* Sanders v. City of Brady (*In re* Brady Mun. Gas Corp.), 936 F.2d 212, 218 (5th Cir. 1991) (state court and bankruptcy court had concurrent jurisdiction after confirmation of plan), *cert. denied*, 112 S. Ct. 657 (1991); Lucas v. Limbach, 518 N.E.2d 944, 946 (Ohio 1988) (state court interpretation of plan); *see also In re* Great Northwest Recreation Ctr., Inc. 74 B.R. 846, 857 (Bankr. D. Mont. 1987) (creditors have their postconfirmation rights in state fora); *In re* Herron, 60 B.R. 82, 83-84 (Bankr. W.D. La. 1986); *In re* Balogun, 56 B.R. 117, 119 (Bankr. M.D. Ala. 1985) (if debtor fails to carry out confirmed plan, debtor is no longer shielded by stay and court will not deny creditors right to enforce in proper state forum); *In re* Barker Medical Co., 55 B.R. 435, 436 (Bankr. M.D. Ala. 1985) ("[i]f the debtor fails to carry out the confirmed plan, this court may or may not even have jurisdiction to grant relief," but relief available in appropriate forum).

Occasionally, a judge will withhold discharge, undermining the view of a confirmed plan as a new indebtedness. *See C & P Gray Farms*, 70 B.R. at 711 ("It seems only fair that, if the debtor does not demonstrate its right to the discharge by actually performing its plan, the *original* indebtednesses should remain undischarged." (emphasis added)).

[46] *See supra* note 26 and accompanying text.

pursuant to plan provisions may come from postconfirmation revenues rather than from estate property. Moreover, although it is not law, the advisory committee's note to Bankruptcy Rule 3022 explicitly accepts that a chapter 11 final decree should not be delayed solely because plan-mandated payments have not been completed.[47]

C, in arguing for repose after a plan's substantial consummation, thus makes a more appealing argument than he does after mere confirmation.

Note, however, that the elements of substantial consummation are only tangentially related to *C*'s goal: repose under § 546(a)(2). None of them (property transfer, distribution, assumption of business) really addresses the time-bar concerns of repose, staleness, or judicial economy. Thus if a court is willing to deem a case closed after substantial consummation, *C* may reach this destination. Note, however, that *C* will have reached repose by the backroads of substantial consummation and § 546(a)(2), not by any direct route of reference to *C*'s normative entitlement to repose. Put differently, *C* will have reached repose because § 546(a)(2) authorizes a mechanical application of rules, not because it indicates why *C* "deserves" repose.

Moreover, *C* may not be out of the woods yet, even after the debtor has achieved substantial consummation of a plan, because the conversion of a case to chapter 7 may warrant a new inquiry into whether the case was closed.

IV. ARE WE THERE YET?: CONVERSION TO CHAPTER 7 AFTER SUBSTANTIAL CONSUMMATION

The Code permits the conversion of a chapter 11 case to a chapter 7 liquidation, in which a trustee sells off the assets of the estate and distributes the proceeds to creditors.[48] Because a liquidation plan

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[47] BANKR. R. 3022 advisory committee's note, quoted *supra* note 38.

Indeed, although Weintraub and Crames argue that consummation of a plan—by which they mean something more than substantial consummation—is practically synonymous with the plan's full administration, they do not specify what they mean by a consummated plan. Thus, except that their understanding of full administration requires that all court jurisdiction reserved in the plan has terminated, their concept of consummation is not necessarily inconsistent with the suggestion here that a fully administered estate may be one in which payments under the plan have been commenced but not completed. *See* Weintraub & Crames, *supra* note 43, at 252.

[48] *See* BIENENSTOCK, *supra* note 1, at 574 ("Chapter 7 calls for an orderly liquidation of the estate under the tutelage of a chapter 7 trustee.") Prior to confirmation, a chapter 11 plan calling for liquidation (in which the debtor in possession sells and distributes the estate) circumvents the added expense of a trustee. *See* Kurt Eichenwald, *Drexel, Symbol of Wall St. Era, is Dismantling; Bankruptcy Filed*, N.Y. TIMES, Feb. 14, 1990, at A1. (Drexel Burnham Lambert files a chapter 11 petition seeking liquidation, *not* reorganization).

eliminates the time and cost necessary for a trustee to learn the ropes of the debtor's business, a chapter 11 plan of liquidation is superior to conversion to chapter 7 in that it conserves assets of the estate for distribution to creditors. A court may therefore view conversion as an extreme measure to be used to cope with an uncooperative or fraudulent debtor.[49]

The express provisions of the Code provide for conversion prior to confirmation of a plan,[50] prior to the end of the six-month revocation period,[51] and prior to substantial consummation.[52] The Code may be interpreted to permit conversion even after substantial consummation, for

> (8) material default by the debtor with respect to a confirmed plan; [or]
>
> (9) termination of a plan by reason of the occurrence of a condition specified in the plan . . . .[53]

After conversion, the newly appointed chapter 7 trustee is likely to bring avoidance actions more vigorously than the previous debtor

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[49] *See* BIENENSTOCK, *supra* note 1, at 574.

[50] *See, e.g.*, 11 U.S.C. § 1112(b)(5) (conversion for inability to achieve confirmation).

[51] *Id.* § 1112(b)(6) (conversion for revocation of an order of confirmation and denial of confirmation of another plan or a modified plan).

[52] *See, e.g., id.* § 1112(b)(7) (conversion for inability to substantially consummate plan). Commentators and courts may assume that postconfirmation conversion is not permitted, rarely achieved, or simply unsound. *See, e.g.*, BIENENSTOCK, *supra* note 1, at 574; 3 DANIEL R. COWANS, COWANS BANKRUPTCY LAW AND PRACTICE § 20.30, at 431-49 (1989 & Supp. 1991); *see also* Rosenberg Real Estate Equity Fund III v. Air Beds, Inc. (*In re* Air Beds), 92 B.R. 419, 424 (Bankr. 9th Cir. 1988) ("[I]t is our empirical observation that many more plans of reorganization are contemplated than are proposed; fewer still are confirmed . . . ."). One court opinion states that "Congress apparently never anticipated the conversion to chapter 7 of a reorganized debtor after substantial operations under a confirmed plan." *In re* Jartran, Inc., 71 B.R. 938, 945 n.14 (Bankr. N.D. Ill. 1987), *aff'd*, 87 B.R. 525 (N.D. Ill. 1988), *aff'd*, 886 F.2d 859 (7th Cir. 1989). Yet another bankruptcy judge has asserted, "It remains unclear to me why Congress provided for postconfirmation dismissal or conversion of a chapter 11 case . . . ." *In re* Burner Servs. & Combustion Control Co., No. 4-87-1104, 1991 Bankr. LEXIS 251, at *3 (Bankr. D. Minn. Mar. 4, 1991).

[53] 11 U.S.C. § 1112(b)(8)-(9). The Code does not define the term *material default* in § 1112(b)(8). COLLIER ON BANKRUPTCY ¶ 1112.03[2][d][viii], at 1112-25 (Lawrence P. King ed., 15th ed. 1991). The Code's list of causes is also not exhaustive; section 1112(b) permits conversion simply "for cause." 11 U.S.C. § 1112(b); S. REP., *supra* note 4, at 117, *reprinted in* 1978 U.S.C.C.A.N. at 5903; *see also In re* Koerner, 800 F.2d 1358, 1368 (5th Cir. 1986) (bankruptcy judge has wide discretion to convert for cause); *In re* Northampton Corp., 39 B.R. 955, 956-57 (Bankr. E.D. Pa.) (conversion for cause), *aff'd*, 59 B.R. 963 (E.D. Pa. 1984).

Some courts have acknowledged the standing of creditors to seek conversion for material default that occurs two or more years after confirmation. *In re* Coral Air, Inc., 40 B.R. 979 (D.V.I. 1984) (court reserved judgment on conversion in decision dated May 30, 1984, 21 months after confirmation); *In re* Cinderella Clothing Indus., 93 B.R. 373, 379 (Bankr. E.D. Pa. 1988) ("applicants have standing" to have the case converted; in decision dated Nov. 21, 1988, 17 months after confirmation).

in possession or even the chapter 11 trustee, who may have been constrained to compromise on avoidance actions in negotiations with creditors, a constraint not necessitated by the only goals of chapter 7, the collection and equitable distribution of assets.

Because upon conversion the bankruptcy filing date remains the date of the original chapter 11 petition, some avoidance actions will remain viable after conversion.[54] *C* might not be protected even in a court that follows the first approach to § 546(a)(1),[55] because there is some authority that 546(a)(1) bars an avoidance action for two years after the appointment of *each* trustee.[56] In other words, a new trustee gets a new chance to avoid preferences. *C* would therefore like either to have a *new* case with a new filing date[57] or to seek repose under § 546(a)(2).

If the case has not actually closed, *C* might argue that the proposed conversion was inappropriate or unauthorized by the Code. If, as seems likely under the terms of the Code, the order of confirmation can only be revoked within 180 days after confirmation, and only for fraud, then a postconfirmation conversion cannot restore the original indebtedness of the parties unless it is grounded on revocation.[58] If postconfirmation conversion does not restore the original indebtedness, then the converted case looks like a new liquidation case, with the goal of distributing assets to creditors pro rata based on the indebtedness described by the plan. Therefore, *C* will argue, the proceeding should be a new case.

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[54] For example, under 11 U.S.C. § 547(b) some payments made to creditors within 90 days prior to the filing of the petition are voidable. Because the date of filing remains the same upon conversion, those payments remain voidable. *But cf.* the approach taken in Bank of La. v. Pavlovich (*In re* Pavlovich), 952 F.2d 114 (5th Cir. 1992) (on conversion to chapter 7, creditor bound by plan cannot contest dischargability of preconfirmation debt).

[55] Recall that this approach considers the debtor in possession to be a trustee for purposes of § 546(a)(1) and accordingly bars the action after two years from the filing of a petition. *See supra* text accompanying note 4.

[56] Stuart v. Pingree (*In re* AFCO Dev. Corp.), 65 B.R. 781, 785 (Bankr. D. Utah 1986).

[57] Other creditors might prefer a conversion of the original case with the same filing date. Among them would be those creditors that would benefit from the distribution of the proceeds of a successful avoidance action against *C*. Also among them might be creditors that are entitled to an administrative expense under 11 U.S.C. § 503 for preserving the estate in the first case.

[58] *See In re* Stratton Group, Ltd., 12 B.R. 471 (Bankr. S.D.N.Y. 1981). A different interpretation of § 1144, which governs revocation for fraud, is that revocation of confirmation is only one way to undo a plan's new indebtedness. Confirmation might be undone on conversion or modification as well. *See* 11 U.S.C. § 1127(b) (postconfirmation modification requires confirmation of modified plan). Modification is the "do-over" of chapter 11. It requires confirmation of the modified plan. *See id.* § 1127. For that reason, either (a) modification must occur within the revocation period (180 days from confirmation), or (b) six months is not the outside limit to undoing the plan.

But *C*'s argument—that *any* postconfirmation conversion is inappropriate if it fails to restore the original indebtedness—proves too much. The argument ignores that the Code expressly permits postconfirmation conversion if it is in the interest of creditors and the estate. Moreover, restoration of the original indebtedness might not be the only reason to allow conversion. Other reasons might be to save costs such as fees for filing a new case, to allow some creditors to claim an administrative expense for "preserving" the estate between confirmation and conversion,[59] or even to permit the very action *C* is trying so vigorously to defend—the voiding of a preferential transfer made prior to the original petition.

As time passes after confirmation and the plan has been substantially consummated, *C* may offer additional arguments that conversion for material default is unauthorized by the Code, or at least inappropriate. There does not seem to be any clear consensus on when a material default may occur, or what it is.[60] Research uncovers only a handful of opinions that even cite the material default section.[61] In only three of these opinions did a court grant confirmation

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[59] *See* 11 U.S.C. §§ 503(b), 507.

[60] Noting that the Code leaves the question of what is "material" to the judiciary, *Collier* presumes that "failure to pay amounts specified under the plan within a reasonable time of the dates specified therein is 'material.'" COLLIER ON BANKRUPTCY ¶ 1112.03[2][d][viii], at 1112-27 (Lawrence P. King ed., 15th ed. 1991). The *Collier* presumption implies that a bankruptcy court may convert at any time until all payments under the plan have been made. One court, placing some limitation on conversion for material default, defined material default as a default on a plan provision required by the Code in order for the debtor to obtain confirmation. *See In re* Compco Corp., No. 85 B 14070, 1990 Bankr. LEXIS 38, at *6-8 (Bankr. N.D. Ill. Jan. 25, 1990) (dismissing for material default pursuant to 11 U.S.C. § 1112(b)(8) for failing to satisfy tax obligations under § 1129(a)(9)(C) governing the priority of tax claims under the plan).

Courts have not revealed their rationales in finding defaults to be material. A default is *not* material when: (a) a plan provides for a transfer of property to satisfy the default (a "bulletproof" plan); (b) the creditor seeking conversion has no rights under the plan; or (c) as much as 80% of the chapter 11 debt has already been paid, the missed payment is not "important enough to affect [the] entire case," and the creditor has an adequate remedy at state law. *In re* Moody, No. BK 83-829, 1989 Bankr. LEXIS 1712, at *1-2 (Bankr. D. Neb. Mar. 2, 1989).

When a court *dismisses*, rather than converts, a case for material default, the materiality of the default frequently is undisputed or simply recited by the court. *See, e.g.*, *In re* Burner Servs. & Combustion Control Co., No. 4-87-1104, 1991 Bankr. LEXIS 251 (Bankr. D. Minn. Mar. 4, 1991); *In re* Page, 118 B.R. 456, 459 (Bankr. N.D. Tex. 1989); *In re* T.S.P. Indus., 117 B.R. 375, 376 (Bankr. N.D. Ill. 1990); *In re* Depew, 115 B.R. 965, 966 (Bankr. N.D. Ind. 1989).

[61] *See* Howe v. Vaughan (*In re* Howe), 913 F.2d 1138, 1148 n.33 (5th Cir. 1990) (case involving "bulletproof" plan with provision for transfer of property to creditor in event of default could not be dismissed for material default); United States v. Seminole Motors, Inc. (*In re* Seminole Motors, Inc.), No. 89-364-C, 1989 U.S. Dist. LEXIS 15634, at *1 (E.D. Okla. Nov. 29, 1989); *In re* Blanton Smith Corp., 81 B.R. 440, 441 (M.D. Tenn. 1987); *In re* Micro-Acoustics Corp., 49 B.R. 630, 631 (S.D.N.Y. 1985); *In re* Northampton Corp., 59 B.R. 963,

based solely on "material default" as a cause.[62] *C* may argue that material default is coextensive with substantial consummation. Indeed, many of the cases do not distinguish between a failure to achieve substantial consummation of a plan and a material default, but instead lump the two together.[63] *C* may also argue that material default is limited to within a year of confirmation; published opinions by courts that have actually converted for material default have usually done so within a year of confirmation.[64] If enough time has elapsed since the confirmation or the original petition, *C* may argue that conversion would be an administrative nightmare; at least one court appears to have considered this argument in allowing a second

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969 n.9 (E.D. Pa. 1984); *In re* Coral Air, Inc., 40 B.R. 979, 982 (D.V.I. 1984); *In re Burner Servs.*, 1991 Bankr. LEXIS 251, at *7 (dismissing case for material default); *Page*, 118 B.R. at 458; *In re* NTG Indus., 118 B.R. 606, 608 (Bankr. N.D. Ill. 1990); *T.S.P. Indus.*, 117 B.R. at 376; *In re* Century Inv. Fund VIII, 114 B.R. 1003, 1010 (Bankr. E.D. Wis. 1990) (citing 11 U.S.C. §§ 1112(b)(7)-(8) in passing); *In re* Martin, 113 B.R. 949, 961 n.6 (Bankr. N.D. Ill. 1990) (§ 1112(b)(8) addresses "failure to carry out a confirmed plan"); *Compco Corp.*, 1990 Bankr. LEXIS at *2 (dismissal for material default); *Depew*, 115 B.R. at 966 (dismissal for default on obligations under a confirmed plan); *In re* Melvin, 105 B.R. 100, 101-02 (Bankr. M.D. Fla. 1989); *In re* Orlando Investors, 103 B.R. 593, 599 (Bankr. E.D. Pa. 1989) (citing §§ 1112(b)(7)-(8) in passing); *In re* Le Papillion, Inc., No. 84-158, 1989 Bankr. LEXIS 1949, at *3 (Bankr. D.D.C. Apr. 3, 1989) (refusing to dismiss under § 1112(b)(8)); *Moody*, 1989 Bankr. LEXIS at *2; *In re* Cinderella Clothing Indus., 93 B.R. 373, 379 (Bankr. E.D. Pa. 1988); *In re* Kaleidoscope of High Point, 56 B.R. 562, 564 (Bankr. M.D.N.C. 1986); *In re* Wright Air Lines, Inc., 51 B.R. 96, 99 (Bankr. N.D. Ohio 1985) (preconfirmation case citing *Coral Air*); Stuart v. Pingree (*In re* Afco Dev. Corp.), 65 B.R. 781, 785-86 (Bankr. D. Utah 1986); *In re* Kelley, 53 B.R. 961, 962 (Bankr. W.D. Ky. 1985); *In re* Telemark Management Co., 41 B.R. 501, 507 (Bankr. W.D. Wis. 1984).

[62] *Micro-Acoustics Corp.*, 49 B.R. at 632; *NTG Indus.*, 118 B.R. at 608; *Kaleidoscope*, 56 B.R. at 563; *see also Compco Corp.*, 1990 Bankr. LEXIS at *7 (dismissal granted under 1112(b)(8) for material default).

[63] *E.g.*, *Blanton Smith Corp.*, 81 B.R. at 441 (motion to convert under both § 1112(b)(7) *and* (8)); *Coral Air*, 40 B.R. at 979 (same); *Telemark*, 41 B.R. at 507; *see also Cinderella Clothing Indus.*, 93 B.R. at 379 (granting discovery to determine creditors' rights to conversion under § 1112(b)(7)-(8)); *Afco*, 65 B.R. at 785-86 (citing § 1112(b)(7)-(9)).

[64] *See Blanton Smith Corp.*, 81 B.R. at 441 (confirmation on June 16, 1983; order of conversion on Nov. 25, 1983); *Kaleidoscope*, 56 B.R. at 563 (confirmation on Feb. 22, 1985; conversion on Oct. 15, 1985); *NTG Indus.*, 118 B.R. at 608 (confirmation on Apr. 10, 1989; conversion on Jan. 30, 1990); *In re* Iberis Int'l, Inc., 72 B.R. 624, 624-25 (Bankr. W.D. Wis. 1986) (confirmation on Dec. 11, 1985; decision dated July 30, 1986). *But see, e.g.*, *Compco Corp.*, 1990 Bankr. LEXIS at *1 (confirmation on Apr. 21, 1987; dismissal dated Jan. 25, 1990).

In contrast to conversions, many dismissals for material default occur over a year after confirmation. *See, e.g.*, *id.* (confirmation on Apr. 21, 1987; dismissal on Jan. 25, 1990); *Burner Servs.*, 1991 Bankr. LEXIS at *2 (confirmation on Nov. 3, 1989; dismissal on Mar. 4, 1991); *Page*, 118 B.R. at 457 (confirmation on June 18, 1985; dismissal on Apr. 24, 1990); *T.S.P. Indus.*, 117 B.R. at 375 (confirmation on Aug. 10, 1988; dismissal on Aug. 9, 1990); *Depew*, 115 B.R. at 965-66 (confirmation on May 4, 1988; dismissal on Oct. 20, 1989).

chapter 11 case to proceed rather than converting the first.[65]

Weintraub and Crames suggest that a conversion to chapter 7 should only be available when the court has retained jurisdiction in the plan to convert the case.[66] Acknowledging that the suggestion departs from the plain language of the Code, the authors fall back on the repealed Bankruptcy Act[67] and cases decided thereunder. They would hope to benefit "trade creditors who extend credit in anticipation that lack of jurisdiction gave them the right to proceed against the debtor or to deal with the debtor without court authority."[68] But they do not consider that a trade creditor might sometimes be better off in a converted case, especially if a newly appointed trustee could recover assets from *C* that a trustee in a subsequent case is barred from seeking.

C's second argument, that the estate was fully administered upon substantial consummation, may have the same appeal that it had before conversion, but if the case never actually closed and there are assets that may be collected and distributed, *C* seems less sympathetic and may have a difficult time prevailing.

If a case has actually been closed, *C* might avail himself of the argument that the case may not be converted after entry of a final decree.[69] If the court allows a case to be reopened and converted, *C* may still argue persuasively that although the Code does not expressly bar conversion after closure, § 546(a)(2) expressly bars an avoidance action after a case has been closed.

Or does it?

V. THE MIRAGE: REOPENING A CLOSED CASE TO EXERCISE AVOIDING POWERS

Although the Code gives repose to avoidance-action defendants after a case has actually closed[70] the Code also authorizes the "re-

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[65] *In re* Jartran, Inc. 71 B.R. 938, 943-45 & n.14 (Bankr. N.D. Ill. 1987), *aff'd*, 886 F.2d 859 (7th Cir. 1989).

[66] Weintraub & Crames, *supra* note 43, at 264-65.

[67] The analogous provision under the Bankruptcy Act required a retention of jurisdiction in order to convert a case after confirmation. *See* Act of June 22, 1938, ch. 575, § 377, 52 Stat. 840, 913 (repealed 1978).

[68] Weintraub & Crames, *supra* note 43, at 264.

[69] United States v. Seminole Motors, Inc. (*In re* Seminole Motors, Inc.), No. 89-364-C, 1989 U.S. Dist LEXIS 15634, at *1 (E.D. Okla. Nov. 29, 1989) (concluding that a conversion for material default is "only properly filed prior to the entering of a final decree."). *But cf. In re* Burner Servs. & Combustion Control Co., No. 4-87-1104, 1991 Bankr. LEXIS 251, at *7 (Bankr. D. Minn. Mar. 4, 1991) (*dismissal*, not conversion, after final decree).

[70] 11 U.S.C. § 546(a)(2).

opening" of a case for cause.[71] It follows that § 546(a)(2) means one of two things: (i) one can never bring an avoidance action after actual closure; or (ii) one can bring an avoidance action after actual closure, but only if the case is reopened.

Legislative history supports the second view, that an avoidance action may be brought after reopening.[72] There is some case law to support the view as well. In *Thomas v. Lurie (In re Thomas),*[73] two creditors sought to reopen an estate, eleven years after a debtor's discharge, to administer "nonscheduled assets." In other words, the debtor, to the creditors' detriment, had essentially concealed an interest in real property during the bankruptcy proceeding. The court was willing to "re-open" the estate to administer assets, notwithstanding the eleven-year lapse of time.

More recently, one court held—in the context of chapter 7—that on reopening a trustee had whatever part that was left of the two-year limit in § 546(a)(1).[74] Closing, in essence, tolled the two year statute of limitations, but did not bar the action.

The view supported by *Thomas* is that more than the mere existence of grounds for an avoidance action is necessary to reopen a case. At least one court may have followed this view under the Bankruptcy Act. In *In re Rosen,*[75] the court had before it a motion to close an estate subject to its reopening if the trustee later decided to pursue assets known to him at the time of the petition. The court refused.

C, arguing that a case should be deemed closed, will have a difficult time overcoming a "reopening argument": if the court could reopen a closed case to allow an avoidance action, why should it bother to deem the case closed, only to reopen it? *C* might resort to arguing that the particular circumstances would not justify reopening a closed case; *C* would be arguing, in terms of the language of § 350(b), that there is no "cause." For example, *CEO,* who concealed a fraudulent conveyance to himself, should be less entitled to repose than *C,* who gave a necessary vote of yes to confirm a plan based on an assumption or impression that he would not be subject to the avoidance action.

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71 *Id.* § 350(b).

72 S. REP. No. 989, *supra* note 4, at 49, *reprinted in* 1978 U.S.C.C.A.N. at 5835 ("[T]he court may permit reopening of a case so that the trustee may exercise an avoiding power, [although] laches may constitute a bar to an action that has been delayed too long.").

73 204 F.2d 788 (7th Cir. 1953).

74 Kozman v. Herzig (*In re* Herzig), 96 B.R. 264 (Bankr. 9th Cir. 1989).

75 15 F. Supp. 516 (S.D.N.Y. 1936).

VI. JURISDICTION: THE UNDISCOVERED COUNTRY

In arguing for repose under 546(a)(2), *C* not only must overcome the obstacle of reopening, but also of bankruptcy jurisdiction. The jurisdiction argument—that if the court is empowered to act, a case cannot be closed—seems intuitively correct. Some commentators and courts appear to adopt this position.[76] Title 28, however, does not link jurisdiction and closure. It provides that: "[t]he district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."[77]

Title 28 does not specify "closure" as a bar to jurisdiction, and although the precise limits to what is "related to a case under title 11" remains subject to further judicial development, research uncovers no opinion holding that the proceeding must be related to an *open* case. Rather the touchstone for "related to" jurisdiction seems to be whether the outcome of the proceeding will affect the distribution of the estate.[78]

Indeed, the Code authorizes, without reference to closure, specific postconfirmation proceedings. These are (i) modification of a plan prior to its substantial consummation;[79] (ii) revocation of the confirmation order on grounds of fraud, but only within six months;[80] (iii) conversion of a chapter 11 case to a chapter 7 case;[81] and (iv) the reopening of a case for cause.[82]

Before actually closing a case, must a court wait until all the above proceedings can no longer occur? The advisory committee's note to bankruptcy rule 3022 says that the court need not wait.[83] The view is supported by § 350(b) of the Code, which allows reopening of cases. If the court, before closing a case, had to wait until it could no longer exercise jurisdiction, § 350(b) would be pointless. Thus, the potential for conversion—which may haunt the debtor for some years

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76 *See* Edleman v. Gleason (*In re* Silver Mill Frozen Foods, Inc.), 23 B.R. 179 (Bankr. W.D. Mich. 1982); Weintraub & Crames, *supra* note 43.

77 28 U.S.C. § 1334(b) (1988). Bankruptcy courts have jurisdiction through a byzantine system of reference from the district courts that is beyond the scope of this note.

78 *See, e.g.*, *In re* Marcus Hook Dev. Park, 943 F.2d 261, 264 (3d Cir. 1991) and cases cited therein.

79 11 U.S.C. § 1127.

80 *Id.* § 1144.

81 *Compare* Act of June 22, 1938, ch. 575, § 377, 52 Stat. 840, 913 (repealed 1978), which requires retention of jurisdiction to convert after confirmation, *with* 11 U.S.C. § 1112, which does not.

82 *See* 11 U.S.C. § 350(b) (reopening); *supra* part V and accompanying text (discussing reopening).

83 *See supra* note 38 (quoting the advisory committee's note).

after confirmation,[84] need not prevent the entry of a final decree.

Of greater concern to *C* is whether a court will deem the case closed prior to its jurisdiction being precluded. If not, *C* will rarely prevail with an argument that a case should be deemed closed, because jurisdiction apparently goes on for a long time. In fact, the very avoidance action *C* is seeking to defend would be related to a title 11 case and would thus always prevent *C* from achieving repose. Thus, if the court would deem a case open whenever it had jurisdiction, then because the court would always have jurisdiction over an avoidance action (as related to a title 11 case), the court would never deem the case closed. It would be simpler to leave out the jurisdictional inquiry and never deem a case closed.

Although the question of whether a court has jurisdiction under title 28 is irrelevant to determining when the case should be deemed closed, the reservation by the court in a plan may be relevant. Reservation of jurisdiction in the plan may reflect the judge's opinion of what needs to be done to fully administer the estate. It may, on the other hand, only reflect boilerplate language.

VII. TO DEEM, OR NOT TO DEEM: BARRING AN AVOIDANCE ACTION UNDER § 546(a)(2)

A. *To Deem*

In the absence of a final decree that actually closes a chapter 11 case, a court cannot dismiss an avoidance action under § 546(a)(2) unless the court is willing to deem the case to have closed—a "constructive closure." In defining a fully administered estate for purposes of defining a closed chapter 11 case, a court should consider a plan's substantial consummation as the prerequisite for a fully administered estate; because after substantial consummation, the estate will be empty or terminated, distribution will have commenced, and the debtor will have assumed the operation of its business. A court may wish to set a minimum date of 180 days from confirmation, since hiding assets may be precisely the kind of fraud that would lead both to revocation of the confirmation order and commencement of an avoidance action. Additionally, courts have the guidance of the recently adopted advisory committee note to Rule 3022, which lists the factors discussed here as considerations in closing a case.[85]

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[84] *See supra* part IV (discussing conversion).

[85] *See supra* note 38 (quoting the advisory committee's note).

B. *Not to Deem*

There may be good reason, however, never to deem a case closed for the time-bar purposes of § 546(a)(2). Because the criteria for closing a case (substantial consummation, et cetera) are not directly concerned with the purposes of a statute of limitations (for example, repose, staleness, judicial economy), it is perhaps the better course for a court to insist on the existence of a final decree closing the case for purposes of a § 546(a)(2) time bar.

Although a constructive closing might serve the purpose of judicial economy by arbitrarily preventing some claims, the indicia of closing, other than a final decree, are too indefinite to assure a fair determination of closing after the fact. Confirmation, substantial consummation, or other events may provide some evidence that a case is over, but the fact that the debtor or trustee is seeking to recover assets on behalf of the estate belies the finding of a fully administered estate. After all, an avoidance action is part of the process of recovering assets to the estate for distribution,[86] which means it is part of the process of administering the estate.[87]

Retention of jurisdiction in a plan may be evidence of a bankruptcy judge's opinion that something more remains to be done in a case, but it may merely be evidence of a wily lawyer's attempt to keep the case open. Moreover, if one is going to look to documentary evidence to determine whether the bankruptcy judge thinks there is anything more to be done, there is not a more reliable document than a final decree which *expressly* closes the case. If the moment of closing were to be determined solely for the purpose of time-bars, that moment would be better determined by reference to the purposes of time-bars or even by picking dates out of a hat, rather than by looking for the answer to one question (whether an estate has been fully administered) in order to answer another (whether a creditor is entitled to repose).

VIII. WHERE DO WE GO FROM HERE?

Guidance from Congress of course would resolve many of the issues a chapter 11 creditor may face in seeking repose under § 546(a). Productive legislation might specifically address (i) whether a debtor in possession is a "trustee" for purposes of § 546(a)(1), barring avoidance actions after two years; (ii) whether a court may deem a case

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[86] *See supra* note 1.

[87] *See supra* part II.B (defining full administration of an estate as the gathering up and distribution of the estate's assets).

closed for purposes of § 546(a)(2); and (iii) whether closing serves as an absolute bar under § 546(a)(2), or simply as a hurdle to be overcome by a showing of cause for reopening under § 350(b). Subject to the usual caveats against their use, congressional reports or commentary accompanying that legislation would be helpful as well.

While courts wait for legislative change it is worth recognizing (i) that the second approach to § 546(a)(1) eliminates that section as a limitation on many chapter 11 avoidance actions, (ii) that the insistence on an actual final decree will eliminate § 546(a)(2) in some cases, and (iii) statutes of limitations are traditionally a part of every cause of action. Courts should therefore be chary about following the second approach to § 546(a)(1)while also insisting on a final decree for § 546(a)(2), since to do both will in some cases eliminate entirely the limitations period in § 546(a).

CONCLUSION

The considerations discussed above for determining when a chapter 11 estate is fully administered may be useful to a court in determining when to issue a final decree closing the case. The date of that decree may in turn be useful as a sign that marks, among other things, the point after which an avoidance action is time-barred under § 546(a)(2). Because the considerations do not directly relate to the concerns of statutes of limitations, they are less useful in determining—for time-bar purposes—whether the case should be deemed to have closed sometime in the past.

Congress should provide some guidance to why a creditor is entitled to repose, because *C,* who sought repose via § 546(a)(2), is likely to find that road unreliable. If the case has not actually closed, the indicia of closing are too indefinite for a court to deem it to have closed. Even if the case has actually closed, the case may be reopened and the avoidance action brought, and *C* may be left to find a more direct route[88] without directions from the Code, while the repose *C* thought had been achieved vanishes like a mirage on the road.

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[88] Laches, for example, which goes directly to the concerns of statutes of limitations, may be an available argument. *See, e.g., In re* Texas General Petroleum Corp., 122 B.R. 306 (Bankr. S.D. Tex. 1990).