A SUBMISSION
on the

INSOLVENCY LAW REFORM BILL

Submitted by

Proprietor of
the retail business of

of

This submission is made in response to
the March 1, 2006, invitation of the

New Zealand House of Representatives'
COMMERCE COMMITTEE

March 27, 2006

This submission
is presented in four parts:

1 A copy of the Commerce Committee's invitation to make a submission

2 Louis Pogoni's experience of company insolvency problems in New Zealand and his case for the urgent promulgation of new legislation aimed at the restructuring of insolvent companies rather than their destruction by bankers, receivers, accountants and insurers under current New Zealand insolvency/receivership practices

3 A precis of the American legislation termed 'Chapter XI' which for the past 27 years has transformed most company insolvencies in the United States from the trauma of corporate failure and its devastating outcome for all but a few beneficiaries, into the thriving restructured entities that most of the so-called 'failures' have become

4 A fuller version of Chapter XI

COMMERCE COMMITTEE

1 March 2006

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Dear Mr :

Insolvency Law Reform Bill

The above bill has been referred to the Commerce Committee for consideration and report back to the House.

The committee invites you to make a submission on this bill. If you intend to make a submission you should forward 25 copies of the submission to me by Friday, 7 April 2006.

Please indicate clearly on your submission if you or members of your organisation wish to appear before the committee to present your submission. If this is the case, you should provide names, addresses and daytime contact telephone numbers for all persons wishing to appear.

A submission received by the committee generally becomes public when it is released by the committee, or when it is presented orally before the committee, or when the committee makes its report to the House. If you do not want your address and telephone number released, such details should be omitted from your submission and provided in a separate covering letter. You may apply for any or all of your evidence to be heard in private or secret. Committees normally require reasons before agreeing to such requests. Please contact me if you wish to make such an application.

Should the committee decide to hear submissions orally, hearings will be arranged at the committee's discretion. You will be contacted regarding dates for the hearing.

Yours sincerely

Clerk of the Committee
Commerce Committee

THE SUBMITTER'S EXPERIENCE OF BUSINESS INSOLVENCY PROBLEMS AND LEGISLATION IN NEW ZEALAND

My son was the victim of a comprehensive receivership when our Palmerston North garment factory burned down in his absence in 1984. I wrote a book, *The Pogoni Conspiracy: Justice Debased in New Zealand* detailing the history of his ruination and the despicable actions of a handful of so-called professional men (I call them 'funeral directors') to bring us to our knees. Of course, he was not alone in such misfortune. Shamefully, the same kind of debasement of justice continues to this day. It must be halted.

My purpose in making this submission is to bring to the notice of those responsible for new legislation the profound problems confronting failing business enterprises and those which, like ours, are forced by catastrophic disasters into receivership; and to propose the urgent introduction of legislation aimed at restructuring as many future unfortunates as possible, thus allowing them to trade out of their misfortune.

After 55 years of residence in New Zealand I am proud to call myself a New Zealander. I shall be even more proud if my concerns and suggestions are translated into a much fairer future for those suffering under the present system.

It is estimated that at least 95% of New Zealand enterprises which are placed into receivership do not survive.

In the United States the reverse is the case. About 90 % of companies filing for what is known as 'Chapter XI' reorganization are able to restructure and go on to become strong, viable productive organizations.

Why are New Zealand laws so outdated and why have we not changed them to ensure that companies have the opportunity to restructure and survive?

The answer is simple. A change would be detrimental to New Zealand trading banks. It is a tragedy that any change for the better will attract the strongest opposition from parties interested only in preserving incomes from plum receivership cases, but it is essential that a change is made to eliminate most receiverships, thus allowing the small entrepreneur to run his business without fear of 'funeral directors' and allowing him to keep the wheels of progress turning.

Under our existing law the first person to get paid in a receivership situation is the receiver.

In fact, when a company is placed in receivership by a debenture holder (normally a trading bank) the receiver will seek a guarantee of payment of their fees from the debenture-holder. No matter what happens, receivers get paid.

The second party to get paid are the staff for wages and holiday pay owing.

The third party to be paid is the government. As a preferred creditor, any outstanding PAYE, not including penalty charges (penalty charges rank as an unsecured creditor) makes the IRD the next in line.

Next comes the first debenture holder, who gets back not only the amount outstanding at the time of receivership but also the interest he charges at default rates on all outstanding borrowings until the total is repaid.

The last in line to be paid are any other debenture-holders, followed by unsecured creditors. The final balance, if any, is theoretically then available to shareholders – theoretically because I know of fewer than a handful of cases in which anything has been left for shareholders.

Our existing system determines that any chance of failing businesses trading their way out of receivership is remote.

In some other countries, legislation allows failing businesses the opportunity to work with staff and creditors to restructure back into viable organizations. The best example of such legislation is Chapter XI of the USA's Bankruptcy Code, which for over a quarter of a century has given new heart and hope to many hundreds of businesses which have filed for reorganisation under Chapter XI and have restructured and survived. It should be noted that without Chapter XI hardly any airlines would still be operating in the USA, and if Chapter XI legislation were operative in New Zealand 8-9 years ago, the construction-industry problems of that time would not have been so destructive.

Lawmakers in the States regard their Chapter XI as the basis for the rehabilitation of business enterprise. Its purpose is to prevent a sinking organization from drowning. In this largest economy of the OECD, the United States, their Chapter XI statute provides security for all creditors (not just secured creditors), and includes a stay of proceedings allowing some breathing-space. One of the pillars of Chapter XI is that the seven largest unsecured creditors administer the ailing business as a committee during the stay of proceedings – not a receiver or administrator.

Over almost 20 years, New Zealand governments have reviewed our bankruptcy and insolvency legislation. Some amendments have been introduced, giving band-aid relief, but no real change protecting all parties has been achieved – or even seriously considered.

Every time there is a downturn in either global or domestic trade a number of New Zealand companies end up forced into receivership. In more than 95% of the cases the business is liquidated, secured creditors (usually banks) get most of their money back, but other parties, including the IRD, lose out. Under the existing system, any chance of such businesses trading their way out of financial difficulty is remote – simply because the law does not allow for the possibility of a failing company picking itself up and, with help, re-establishing itself.

New Zealand's receivership process has no incentives for the receivers to get maximum value from the sale of a company's assets. In theory the unsecured creditors of the shareholders can sue the receiver if they believe he has not extracted sufficient value or has been wanting in the liquidation of assets. In practice, unsecured creditors and

shareholders are generally not prepared to expend further money to fight a receiver when the costs of the fight will be charged back to the company in receivership. In some cases this may result in the shareholders calling on the debenture-holder to meet those further costs under their personal guarantee.

Everyone who has been involved with receivership has stories to tell of assets sold for a small portion of their value. One of the worst cases I know of involved paintings worth several thousand dollars being auctioned on a non-reserve basis and consequently fetching about $20.00 each.

Politicians have been made aware of the unfairness of the New Zealand bankruptcy laws many times over the past few years. After the 1987 share-market crash it looked as though a change would occur. However, lobbying by banks and large accounting firms has so far prevented any change. Receiverships in New Zealand have consequently had a domino effect, and any reasonably large case results in smaller creditors failing.

We need changes to our laws. Politicians should have the strength and moral fibre to bring about such changes.

After all, why waste time and money formulating various insolvency reform bills when we can readily install a system already proven for 27 years in the United States? Suitably adjusted for New Zealand purposes, Chapter XI of the United States' Bankruptcy Code could be installed with huge benefits for the business community and the general economy.

CHAPTER XI
A Precis

By way of introduction...

When Chapter XI was drafted by lawmakers in the United States, a significant decision was made to forgo the automatic appointment of a trustee or receiver. It was believed that the displacement of pre-problem management is a traumatic event at a time when the business is already traumatized by financial and other problems, and that in almost every case creditors, shareholders and other parties are better served by continuing the debtor in possession (DIP) rather than appointing an independent trustee.

Any business entity, whether individual, partnership, or corporate, is eligible for relief under Chapter XI. Most who file for reorganization do so voluntarily.

On the filing of a voluntary or involuntary bankruptcy petition, a stay against collection of pre-bankruptcy obligations automatically comes into effect. The stay petition applies equally to secured and unsecured creditors.

A committee of unsecured creditors is appointed – normally the seven largest – and charged with a number of duties, including investigating the business operations of the debtor and the causes of the organisation's financial problems, requesting the appointment of a trustee should the committee decide so, and formulating a plan of reorganization, and assisting its confirmation.

The primary function of the committee is to rehabilitate the business entity as quickly and with as little cost as possible, and enable all creditors secured and unsecured to obtain payment of their debt.

A little history

The United States Bankruptcy Code was established in 1979. Various adjustments made over ensuing years resulted in the recognition of Chapter XI of the code as the business rehabilitative device of choice, combining all 'reorganization' chapters into just that one chapter, which became an authority available for individuals, partnerships, corporations and other business entities regardless of the size of the debtor.

Businesses such as insurance companies, banks, savings and loan associations and railways (handled separately) are not eligible.

Voluntary petitioners need a resolution of the debtor's directors. Involuntary petitions can be filed by three creditors having a collective total owing of at least US$5,000.00 and alleging that the debtor is not paying its debts.

Bad-faith holdings are covered by the system, which ensures that no such holding can succeed.

Filing of voluntary or involuntary bankruptcy petitions launches an automatic stay against collection of pre-bankruptcy obligations. The stay applies equally to secured and unsecured creditors but does not extend to third persons.

Chapter XI reorganization recognizes the norm of debtor-in possession (DIP) – who is nothing more than the debtor with enhanced powers. He operates the business in the absence of any management change by the board of directors.

An order for relief under Chapter XI brings about the appointment of a committee of representatives of the seven largest unsecured creditors, which is naturally charged with a number of duties. To assist it, the committee may employ professionals, who may include lawyers, accountants and investment bankers.

Additional committees are sometimes appointed, each of which may hire professionals to assist.

A disinterested trustee may be appointed; or an 'examiner' in cases where the debtor's obligations exceed US$5 million.

A United States trustee supervises the administration of Chapter XI cases, but in small districts the trustee merely makes sure that cases are satisfactorily moving along.

Various mechanisms are in place to finance the restructuring business, to satisfy the secured creditor, and for the debtor to deal with executory contracts and unexpired leases (see the fuller version of Chapter XI attached).

Exclusivity

To begin with, only the debtor could propose a plan of action, but most interested parties believed that this gave the debtor too much bargaining leverage. A compromise was reached. Only the debtor may file a plan within the first 120 days of the case. He has 180 days (the 'exclusive period') after filing to seek acceptance. This period can be extended or shortened by order of court. Many courts have partially terminated exclusivity, permitting a creditors' committee to file in addition to the debtor.

Contents of a Plan

After the business has been placed back on an even keel the debtor discusses the terms of the plan of reorganization with secured creditors and the committee of unsecured creditors, with the goal of reorganization-plan confirmation. Creditors are classified by class in accordance with their relative rights and a process of assignment of property etc begun. Creditors of both kinds can be paid in cash or part in cash, in full or over time. The debtor has the absolute right in a plan to reinstate debt that has gone default in the past.

Disclosure and solicitation

Once a plan has been proposed a disclosure statement is prepared (and disseminated) which must contain enough information about the nature and history of the debtor, his books and records to enable a reasonable investor to make an informed judgement about the plan. After the disclosure statement has been approved it is mailed to all affected persons with a copy of the plan and a ballot soliciting the recipient's vote. A plan is accepted or not according to certain guidelines, involving thirteen confirmation standards. For instance, a plan can be confirmed only if it provides for the payment in cash...of all administrative expenses. Thus legal and other professional fees of the case must be paid as of the effective date. Post-petition lending must also be paid as of the effective date, and payment of tax claims made in cash or over time.

The two most important confirmation standards are the 'best interests' and 'feasibility' tests, both designed to protect the rights of all creditors, especially ensuring that they will receive at least as much as if the debtor were to be liquidated, and also ensuring that the debtor will in future be able to operate profitably. In larger cases, investment bankers are required to testify about the projected earnings of the debtor and his ability to pay his bills and make payments called for in the plan of reorganization.

A plan can be confirmned even if one or more classes of the disadvantaged votes against the plan. The minimum requirement is that the plan has been accepted by at least one class of claimants.

'Fair and equitable' provisions are clearly set down. For instance, the claim of a creditor secured by collateral is a secured claim to the extent of the value of the collateral. A plan may provide that a secured claim of US$2 million will be paid over five years and carry a rate of interest of 10%. As long as the court finds that 10% is a market rate of interest for the risk, and amount and type of collateral involved, the fair and equitable standard will have been met.

Fair and equitable treatment of classes of non-consenting unsecured claims require one of two treatments: either it must be paid in full reorganizational values or old equity is receiving nothing under the plan – that is, if the debtor is insolvent a plan can be confirmed under 'cram down' powers only if old equity received nothing under the plan. This requires a valuation of the debtor, which in turn requires the testimony of such experts as investment bankers.

Discharge

Confirmation results in the discharge of all obligations incurred prior to confirmation of the plan. Unless the plan provides otherwise, the only obligations which the post-confirmation debtor will have will be those expressly set down in the plan.

Chapter XI

A Fuller Version

1. A little history

The Bankruptcy code part of the United States scheme of bankruptcy administration became effective on October 1,1979, and applies to cases seeking bankruptcy relief on or after that date. It superseded the Bankruptcy Act of 1898 which, among other things, contained three chapters dealing with business rehabilitation. Chapter X, entitled "Corporate reorganizations" dealt, as its title indicates, with corporations in need of bankruptcy relief. It was originally designed to deal with large corporations in what was then the big cases. Any party in interest could propose a plan, which could bind secured and unsecured creditors and stockholders. It had two significant drawbacks: first, a trustee was appointed to displace management in almost every case and, secondly, it adopted the "absolute priority" rule, of which more later, the effect of which in this context was to discourage the prompt and efficient reaching of compromises so that the bankruptcy proceeding could be terminated within a reasonable period of time.

Chapter XI, entitled "Arraignments", thought originally to be the organization vehicle for smaller-sized businesses, had different drawbacks. It was available to corporations, partnerships and individuals, but a plan could not bind secured creditors (although frequently compromises were reached with secured creditors as part of the plan negotiations). From the debtor's perspective, Chapter XI was much more attractive than Chapter X because in most cases management remained in possession of the debtor's business and was not displaced by a disinterested trustee and, secondly, the debtor had "plan exclusivity", that is, only the debtor could file a plan of arraingnment.

It should not be too surprising to be told during the next decade of the regime of the Bankruptcy Act, Chapter X as a vehicle for reorganization was only infrequently used, thus Chapter XI was the rehabilitative processing of choice.

Finally, Chapter XII, entitled"Real Property Arrangements By Persons Other Than Corporate", dealt with debtors whose primary assets were real estate and who were able to forgo the more complicated Chapter X which was available only to corporations not partnerships, and the Chapter XI proceeding, in which secured creditors could not be dealt with. During the real estate recessions of the 1970s Chapter XII found frequent Employment.

One of the major decisions made by the drafters of the Bankruptcy Code was to combine all of the reorganizations chapters into ONE chapter, "XI",entitled "Reorganisation" The drafters attempted to pull out the best features of Chapters X,XI, and XII and combine them into one reorganization chapter which is available for individuals, partnerships, corporations, and other business entities, and which is available irrespective of the size of the debtor. The other significant decision was to forgo the automatic appointment of a trustee It was believed that the displacement of the management is a traumatic event at a time when the business entity is already traumatized by its financial and other problems, and that in almost every case creditors, shareholders and other parties in interest are better served by continuing the debtor in possession rather than appointing an independent trustee.

The Bankruptcy Code is now completing its 27th year. For the most part, Chapter XI has worked relatively well. This is not to say that improvements are not needed; they are. Indeed, at present time the National Bankruptcy Conference is well into the third year of a broad-based study of various aspects of the Bankruptcy Code in an attempt to determine that amendatory legislation might be desirable to enhance the administration of bankruptcy cases in the United States, with a particular focus on reorganisation proceeding under Chapter XI.

II. The Organic Bankruptcy Law.

The Bankruptcy Code is codified in Title XI, United States Code. Title XI, entitled "Bankruptcy", codifies the substantive law of bankruptcy. It contains eight chapters. Chapters, I, III, and V contain provisions regarding borrowing of money, sale of assets, executor contracts, and provisions dealing with the duties of trustees when they are appointed, which apply in all bankruptcy cases. The remaining chapters of the Code set out the various types of bankruptcy proceedings, and the provisions contained in those chapters apply only to the proceeding under the chapter in which the section appears. For example, a section contained in Chapter VII applies only in Chapter VII liquidation proceedings. A section found in Chapter XI applies only in Chapter XI reorganisation..
Chapter VII deals with liquidating or " straight" bankruptcy cases. In Chapter XII, the non-exempt assets of the debtor are liquidated and the proceeds distributed among creditors in order of priorities. Chapter IX deals with municipal bankruptcies, while Chapter XI deals with reorganisations. Chapter XII, added in 1986, deals with the problems of "family farmers", while Chapter XIII, available only to individuals, concerns "individuals with regular income", and deals with plans for individuals who need debt relief but who wish to devote a portion of the post-petition income to the payment of pre-petition obligations.
The provisions dealing with the jurisdiction of bankruptcy-courts, the venue of bankruptcy cases, appeals and other procedural and jurisdictional matters are found in Title 28, United States Code.
As mentioned above, Title XI contains only substantive provisions. The drafters' intent was to remove as much procedure from organic bankruptcy law as was possible and to leave the procedure in bankruptcy cases to the rulemaking power of the Supreme Court. Thus, the procedure followed in bankruptcy cases is to be found in the rules which, after significant amendments which will become effective in August 1991, will be known as Federal Rules of Bankruptcy Procedure. These rules, along with the Official Forms, both of reorganisations which are drafted by a committee on rulemaking appointed by the United States Supreme Court, and promulgated by the Supreme Court, govern all aspects of bankruptcy procedure. The rulemaking power, as codified, is quite clear that the rule are to be procedural, not substantive, and are not to conflict with the statute. Although from time to time the rulemakers have trangressed and have had some rules declared illegal, this does not occur with frequency and, for the most part the rulemakers have restricted themselves, as is their assignment, to matters of procedure.
Thus to practice bankruptcy in the United States, one needs a copy of Title XI, a copy of Title XXVIII, and a copy of the Rules. Thus armed, one can face the vicissitudes of a reorganisation proceeding.

III. Chapter XI: The Early stages

A. Opening stages

Any business entity, whether corporate, partnershiip, or individual, is eligible for relief under Chapter XI. Some business entities, such as insurance companies, banks, and savings and loan associations are not eligible for relief under Title XI at all, but instead are liquidated under applicable state or federal non-bankruptcy law. Commodity brokers and stockbrokers, while eligible for relief under Title XI, are not eligible for relief under Chapter XI. In addition, railroad reorganisations are handled under sub-chapter of Chapter XI.

A Chapter XI case can be initiated by a voluntary or an involuntary petition. The only requirement for the filing of a voluntary petition is a resolution of the debtor's board of directors authorising same. No particular financial condition is necessary to file a voluntary petition.

An involuntary petition can be filed by three creditors who, among them, have unsecured claims against the debtor totalling at least $5,000.00. The involuntary petition must allege that the debtor is not paying its debts as they mature (equitable insolvency). It is not sufficient to demonstrate that the debtor is insolvent on a balance sheet basis. With respect to partnership debtors, an involuntary petition can also be filed by fewer than all the general partners of the partnership (in order for a partnership petition to be voluntary, it must be agreed by all of the general partners). The only party in interest in a partnership case not eligible to file a petition is a limited partner. (One can question the inability of limited partners to file an involuntary petition when they may have the most significant economic stake involved.)

Most involuntary petitions are never tried. The debtor has the right to convert an involuntary Chapter VII or Chapter XI petition to a voluntary Chapter XI case, and usually does.

Although there is no requirement that a voluntary petition must be filed in good faith in the courts, adopting case law that developed under the Bankruptcy Act, has uniformly held that a petition can he dismissed if it is filed in bad faith. Almost every bad faith case involves a partnership filing, and most of those are single asset real estate cases. One type of bad faith filing is so-called "new debtor" syndrome. This arises when a business entity has a perfectly solvent and money making business but has one piece of property which is in trouble and faces foreclosure. The troublesome property is spun off to a new corporation or partnership which immediately files a Chapter XI case. The courts have almost uniformly held in such situations that if an entity wishes to take advantage of a bankruptcy proceeding it is obliged, as a matter of good faith, to submit all of its assets and businesses to the regime of the bankruptcy court.

A second, less frequently encountered, type of bad faith holding is when a partnership with a single real estate asset files on the eve of a foreclosure. Some courts have mistakenly held that this kind of filing is also in bad faith. Certainly there is nothing wrong with attempting to negotiate with a foreclosing secured creditor until it becomes apparent that no deal is to be made and foreclosure is imminent. Why courts have held such filings to be in bad faith is unclear and probably, as a general rule, bad

law. The filing of a voluntary petition and the successful prosecution of an involuntary petition constitutes an "order for relief", from which point the case in chief gets under way.

B. The Automatic Stay.

Upon the filing of a voluntary or involuntary bankruptcy petition, a stay against collection of pre-bankruptcy obligations automatically comes into effect without court order. The drafter of the legislation announced in the Committee Reports which accompanied the Bankruptcy Code that the automatic stay was fundamental to bankruptcy relief and was to be broadly interpreted so as to prevent the chaotic dismemberment of the debtor's assets or businesses, or both, to the detriment of creditors and equity security holders.

The stay applies equally to secured as to unsecured creditors. Any foreclosure proceeding is stayed upon the filing of a petition, as is any attempt by an unsecured creditor to collect a pre-petition debt. In accordance with Congressional mandate, the stay has been interpreted very broadly. As the current aphorism has it, "if it's worth doing, it's probably stayed" The automatic stay does not extend to third persons.
Sometimes the court, using its equitable powers, will enjoin suits against third persons such as officers who are also guarantors so that they can focus their energies on the case.

C. The Major Players

1. The Debtor in Possession.

The discussion in Part I adverted to the fact that in Chapter X reorganisations, the appointment of a disinterested trustee was the norm, while in Chapter XI, the debtor was usually permitted to remain in possession of its business and assets. It was also mentioned that the drafters of the Code adopted the Chapter XI approach to the appointment of trustees, and that the debtor is in possession is the norm. A trustee may be appointed in Chapter XI only for the 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." Absent such circumstances, upon the filing of a bankruptcy petition the debtor becomes the "debtor in possession". It is unclear what a debtor in possession really is, other than the debtor operating its business in a Chapter XI case. Basically, the debtor in possession is nothing more than the debtor with enhanced powers, such as the ability to reject or assume executor contracts, grant super-priority liens to lenders, and the like. Debtor's management continues to operate the business absent any change in management by the board of directors.
Once a Chapter XI petition is filed, the debtor is permitted to operate its business in ordinary course without the necessity of court order. A court order is required, however, if the debtor's business operation are to be terminated.

2. Committees.

Upon the entry of an order for relief in a Chapter XI case, a committee of unsecured creditors is to be appointed. The committee is normally to consist of holders of the seven largest unsecured claims who are willing to serve. The committee has fiduciary obligations to the constituency of unsecured creditors which it represents, and is charged with a number of duties. Among these are the duty to investigate the business and operations of the debtor and the causes of its financial problems, to request the appointment of a trustee should it decide that such is necessary, and to participate in the formulation of the plan and to assist in its confirmation. In larger cases, it is relatively easy to form committees inasmuch as creditors with significant economic stakes in the rehabilitation of the debtor are frequently willing to invest the time necessary to fulfil the duties of committee members.
While committee expenses are normally reimbursed, committee members are not entitled to compensation from the estate for their services in the case.

To assist it in its endeavours, committee is entitled to employ professionals which, depending upon the size and needs of the case, will include attorneys, accountants and investment bankers.
Additional committees are sometimes appointed. Such additional committees may consist of unsecured creditors (for example, there may be one committee of unsecured trade creditors and another committee of unsecured institutional lenders); secured creditors (although this is infrequently done); or equity security holders (a committee frequently found in the large LBO-type of case).
Each of these committees is invested with the fiduciary obligation of representing its constituency in the investigator and plan functions described above. Subject to court supervision, each of the additional committees is also authorised to hire professionals to assist it in the performance of its duties, although courts of late have attempted to reduce the number and duplication of professionals in the larger cases to prevent a professional feeding frenzy.

3. Trustees and Examiners

As discussed, a disinterested trustee may be appointed upon a showing of cause and following a motion by a party in interest. Alternatively, if cause for the appointment of a trustee cannot be demonstrated, an "examiner" can be appointee. The stature makes an examiner mandatory if in the interests of creditors or if the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services or taxes, exceed $5 million.
An examiner's duties can be as broad as the court prescribes, but for the most part are investigatory in nature. The appointment of an examiner is becoming more prevalent, particularly where an investigation needs to be made in the LBO- type of case of allegations that the transaction is subject to avoidance as a fraudulent conveyance.

4. The United States Trustee.

When the Code was drafted, there was a dispute as to whether an independent agency,

located either in the executive or judicial branch, was necessary to assist in the administration of bankruptcy cases. One of the complaints that various parties in interest had under the Act was that the bankruptcy judge intruded himself or herself too much into the administration of the case, the trustee also to decide controversies involving that trustee. Thus, one of the principal purposes of bankruptcy reform was to remove the judge, insofar as was possible, from administrative duties. These duties were instead to be reposed in a governmental agency. Because of the controversy, a so-called "pilot program" was enacted in 1979 in which certain judicial districts in the United States were participating in an experimental United States trustee system. In 1986, that system was expanded nation-wide. There is now a U. S. trustee in every judicial district (save Alabama and North Carolina which, for political reasons, have never become subject to the system).

The United States trustee has, among other duties, the duty to supervise the administration of Chapter XI cases, which includes monitoring applications for compensation of professionals, monitoring plans and disclosure statements, monitoring creditors' committees, and, in general, assisting in the expeditious and inexpensive administration of Chapter XI cases.

In smaller districts and smaller cases where it is sometimes difficult to find unsecured creditors willing to serve on a creditors' committee, the United States trustee performs the important function of making sure that the case is moving along, that it belongs in Chapter XI as opposed to Chapter VII, and in other ways assisting in the efficient administration of the bankruptcy case. In larger cases, where creditors' committees are involved and well represented, the United States trustee has a smaller role to play.

D. Financing the Business

The debtor in Chapter XI needs operating capital. If, as is usually the case, all the debtor's assets, including receivable and inventory, are encumbered, the Bankruptcy Code provides that the proceeds of these assets (such as collections on accounts receivable) are so called "cash collateral" and cannot be used without either the consent of the secured creditor or an order of court. The debtor frequently will have negotiated with its secured creditor before filing its petition and have arranged for the consent to the post-petition use of cash collateral. If such is not the situation, and the secured creditor is hostile to the reorganisation efforts of the debtor, the debtor will make a motion to the court for permission to use cash collateral. The motion will be granted only if the debtor can demonstrate to the satisfaction of the court that the pre-petition secured creditor is "adequately protected"; that is to say, will not be damaged by the debtor's use of cash collateral and the continuation of its business.

The other method of financing the debtor in possession's operations is the so-called "DIP financing", in which a lender (usually the pre-petition lender) and the debtor agree upon the continuation of the pre-petition lender's financing of the debtor in possession after the petition has been filed. The Code and the courts are quite generous in protecting the DIP lender. While a lender can agree to advance credit on an unsecured basis (with an administrative priority), the lender will almost always insist upon receiving a lien in post-petition collateral to secure post-petition loans. The making of DIP loans has become quite a profitable business for banks which, after all, have made the credit decision that their debtor is worth lending to. Correctly viewed, the debtor ought to be a very good credit risk because it has no unsecured

debt. The debtor is precluded by the Code from paying any pre-petition unsecured claims (except as part of a plan of reorganisation) and thus has only secured debt on its balance sheet.
Moreover, pre-petition lenders are often willing to make DIP loans as a device to maximise the value of their pre-petition collateral. If the debtor continues to operate its business, even if on a reduced level, it is far more likely that pre-petition account debtors will continue to pay on the receivable and that inventory, rather than being liquidated, can be turned into finished goods and sold at something approaching retail price.
A combination of these factors (the debtor in possession is a good credit risk; maximising the value of pre-petition collateral) makes DIP financing a most attractive proposition.
The pre-petition lenders are sometimes unwilling to extend any post-petition financing. In that event, Bankruptcy Code authorises the court to grant a super priority or "priming" lien to a post-petition lender who is given a position ahead of pre-petition liens. The most common illustration of such lending is a partially completed real estate project where, for a relatively minor investment, the value of the structure will increase dramatically when it is completed. As was the case with the use of cash collateral, the court can grant a priming lien only if it is demonstrated to the court's satisfaction that the pre-petition lender whose lien is being primed is adequately protected. In the real estate illustration given immediately above, adequate protection consists of the fact that the increase in value of the partially completed construction project exceeds the amount of the loan that is necessary to complete it.
Any post-petition financing (whether it be consensus use of cash collateral or DIP financing) is accomplished only after a notice of hearing, with notice to the large creditors and other parties in interest, who have an opportunity to object to the post-petition financing.

E. The Secured Creditor

The impact of a bankruptcy case on a secured creditor is varied and diverse. As mentioned above, cash collateral cannot be used without its consent or without court order. If the creditor is under-secured, interest ceases to accrue upon the filing of a petition. On the other hand, if the creditor is over-secured, interest continues to accrue, and the creditor is entitled to add to its secured claim any out-of-pocket or other expenses that it incurs as a consequence of the bankruptcy. Courts have, for the most part, permitted the over-secured creditor to charge interest at a default rate if so provided in the agreement with the debtor.
On frequent occasions, the debtor's collateral can be invaded to repay administrative expenses that benefited the secured creditor or its collateral. A direct tangible benefit to the secured creditor must be demonstrated. Fortunately, the courts have been sparing in permitting the debtor in possession to invade the secured creditor's collateral for this purpose.

F. Executory Contracts and Unexpired Leases.

Among the debtor's major powers in a Chapter XI case concerns its dealings with the executory contracts and unexpired leases. The debtor is given almost unfettered discretion to assume or reject these agreements. Assumption means that the debtor

has determined that the contract is beneficial to it and agrees to be bound by its terms going forward. A debtor will reject an executory contract or unexpired lease if its continuation is of no benefit to the estate. The test by which a debtor assumes or rejects the contract, which requires court order, is the business judgement rule; that is to say, would a prudent business person make the determination that the debtor has made with respect to the contract or lease in question.
The business judgement rule is in opposition to the "burdensome" rule which appertained for a short period of time under the regime of the Bankruptcy Act. Under that rule, a debtor could not reject executory contract or unexpired lease unless it was burdensome to the estate. A simple illustration will suffice to show the difference between the two rules: Suppose the debtor has agreed to sell coal to a buyer at $1.50 per ton and the price of coal is $2.00 per ton. At $1.50 the debtor still makes a profit. Under the burdensome rule, the debtor could not reject the contract because the debtor made a profit at $1.50 per ton. Under the business judgement rule, the contract could be rejected because the debtor could turn around and sell the coal for $.50 more per ton. The disappointed coal buyer would only have unsecured claim for whatever damages it suffered as a result of the rejection.
In Chapter XI, the debtor usually need not make the decision to assume or reject the tendency of the case. The reason for this is simple: if the debtor assumes a contract at an early stage in the case, before it is clear whether the Chapter XI proceeding will be successful, and the case thereafter is unsuccessful and the contract is breached, the claim of the other party to the contract is afforded status as a first priority administrative claim. As mentioned above, a disappointed party to an executory contract rejected by a debtor normally has a garden-variety pre-petition unsecured claim. The debtor (and the committee of unsecured creditors, to be sure) are therefore very reluctant to have the debtor make assume/reject decision before it becomes certain that the case is going to be successful. Although non-debtor parties sometimes attempt to force the debtor to an early decision, these attempts almost always prove to be fruitless.
The non-debtor party to the contract suffers in other ways. It is generally obliged to continue to perform under the contract according to its terms during the case even though the debtor has not made the decision to assume or reject the contract or lease. If the non-lender ceases performance, it can be held to have breached its contract. The court might protect the non-debtor party by not forcing it to extend credit to the debtor. For example, if the coal seller were the non-debtor, and had agreed in the contract to sell coal to the debtor on 30 day terms, a court probably would force the coal seller to continue to sell coal but only on COD or cash in advance basis.
The court in passing upon a debtor's motion to reject an executory contract does not take into account the harm that the non-debtor party would suffer as a result of the rejection. The most egregious example of this non-necessity of balancing the equities accrued in a case involving a licence of technology in which a rejection of the license by the debtor would cause substantial harm to the non-debtor party. Nevertheless, because the debtor could license the technology at a higher price, the court permitted the debtor to reject the contract, holding that it was not required to take into account the harm by the non-debtor party. (This decision led to an amendment to the Code protecting licensees of intellectual property against some of the consequences of rejection.)
The section dealing with executory contracts provides protection for certain groups or types of contracts (in addition to intellectual property). Thus, special protection is

afforded lessees of real property, contract vendees for the purchase of land, certain types of time share purchasers and owners of shopping centres.
To assume a contract, a debtor must cure defaults, reimburse the non-debtor party for damages (such as attorneys' fees) suffered as a consequence of its default and provide the non-debtor party with adequate assurance of future performance.
The debtor may assign the contract or lease to a third party irrespective of a provision in the agreement that the contract may not be assigned. The only exceptions to this general rule are contracts with respect to which non-bankruptcy law precludes the non-debtor party from being forced to accept performance from or render performance to, a party other than the debtor (generally called "personal services contracts") and contracts under which the debtor has agreed to extend financial accommodations to, or to issue a security of, the debtor.

IV. The Chapter XI Plan.

A. Exclusivity

It was previously mentioned that under Chapter X of the Bankruptcy Act, any party could propose a plan of reorganisation, although the trustee was given the first opportunity so to do. In a Chapter XI case, in contra-distinction, only the debtor could propose a plan (the Chapter X model) and only permitting the debtor to file a plan (the Chapter XI model) which most parties believed afforded the debtor too much bargaining leverage. The result was a compromise. During the first 120 days of the case, only the debtor may file a plan, and the debtor has the first 180 days after the case is filed within which to seek acceptances of that plan. This period of time, the so-called "exclusive period", can be extended or shortened by order of court, for cause shown. It is rather common for courts, at least in the first few months or perhaps a couple of years into the larger type of case, to extend exclusivity. These courts hold that, to some extent, the mere size of the case is cause for the extension of exclusivity. These courts believe that it takes much more than 120 days to bring the businesses of the debtor into some sort of reasonable financial shape and to negotiate with the various constituencies for an acceptable plan of reorganisation.
In some of the smaller cases, where the court finds that the debtor is using its exclusive period to try to blackjack creditors into accepting a plan which is not acceptable, the court will find that cause exists for terminating (or at least not extending) exclusivity which automatically terminates upon the appointment of Chapter XI trustee. Loss of exclusivity does not mean that the debtor cannot file a plan; it only means that other parties in interest can.
Although not explicitly permitted by the statute, many courts have terminated exclusivity partially; that is, they permit a creditors' committee to file in addition to the debtor, but maintain exclusivity, that is the debtor's recalcitrance, but not open the case to competitive bidding by any party in interest who wishes to propose a plan.

B. Contents of a Plan.

After the business of the debtor has been placed back on an even keel, it is then time for the debtor (which is usually the proponent of the plan) to discuss the terms of the plan of reorganisation with its various constituencies.

Generally, discussions will take place between the debtor and its secured creditors and with the creditors committee,representing the class of unsecured creditors. In a case where an equity committee exists, negotiations will go forward with that committee as well. The goal of these negotiations is the proposal and confirmation of a plan of reorganisation.
The plan is the contract among the various constituencies with respect to the reallocation of their rights as against the debtor and its property. (If exclusivity has been terminated, a plan may be filed by any party in interest.)
Because, as shall be seen, a plan is confirmed with the affirmative vote to certain classes of creditors, voting is by class. The first task, therefore, in proposing a plan of reorganisation is to classify creditors in accordance with their relative rights as against the debtor. Because each secured creditor has a unique right as against property of the debtor (that is, a first mortgage on Property A is different from a first mortgage on Property B; likewise, a first mortgage on a Property A differs from a second mortgage on Property A), each secured creditor is classified in a separate class.
That much is clear and free from doubt. Controversy has surrounded the classification of unsecured creditors. The question here has been whether unsecured creditors, each of whom has the same legal rights against the debtor, can be placed in separate classes. There are a number of reasons why this might be done. The reason most frequently advanced for separate classification of unsecured creditors is that trade creditors generally prefer a different treatment than institutional creditors. By way of illustration, institutional creditors may be amenable to a long term payout of their claim while trade creditors have little interest at all in a long term note and would be much more interested in an immediate or short term cash pay out, even if institutional creditors will, over the long run, receive a greater percentage of their claim. Many of the cases that have considered the issue have permitted separate classification of unsecured creditors so long as the treatment of the separate classes is not unfairly discriminatory.
Once classification is achieved the plan can be prepared. The Code mandates the inclusion of certain types of provisions and permits the inclusion of others. Among the mandatory provisions of any plan are the designation of classes; the specification of classes of claims or interests that are not impaired (of which more later); the treatment of impaired classes of claims or interests; and provision of adequate means for implementation of the plan, such as the retention by debtor of all or any part of its property; the transfer of all or part of its property to other entities; the merger or consolidation of the debtor with one or more other entities; the sale of all or any property of the estate; and so forth.
Among the discretionary provisions which may be included in a plan of reorganisation are decisions to impair or leave unimpaired any classes of claims or interests; the assumption, rejection or assignment of executory contracts or unexpired leases; and finally a catchall -- the plan may "include any other appropriate provision not inconsistent with the applicable provisions of this title."
One matter of importance should be noted. A plan may contain these provisions "notwithstanding any otherwise applicable non-bankruptcy law". For example, it was observed above that a plan may provide for the sale of all or any part of the debtor's property. Even if state corporate law provided that a debtor could sell all of his property (or merge or take over other organic corporate action) only with the consent

of the corporation's shareholders, such a provision has no place in the regime of a bankruptcy proceeding and shareholders only have the ability to vote their interests for or against the plan in accordance with the provision of the Code, to be discussed hereinafter. Moreover, under the so-called "cram down powers", a merger or sale of all the debtor's assets can take place, assuming certain criteria are met, even if the debtor's shareholders vote against the plan.

That being out of the way, it can fairly be said that a plan can contain almost any provision with respect to the readjustment of the rights of the parties in interest, so long as the classes involved vote in favour of the plan. The treatment of secured and unsecured creditors can involve payment in full in cash, payment of part in cash, payment in full or in part over time; satisfaction of claims by a combination of debt instruments, cash, and equity; or any other resolution of the respective rights of creditors and equity security holders to which they agree and which form the basis of the plan of reorganisation.

The concept of impairment was mentioned briefly above. Under the Code, only impaired classes of claims or interests vote on a plan. The debtor has the absolute right in a plan to reinstate debt which has gone default in the past if the debtor chooses so to do. For example, suppose that the debtor has a low interest rate mortgage which it would like to keep but has defaulted in the payment of interest and principal both before and during the bankruptcy case. So long as the debtor has the cash on hand to cure all monetary defaults, it will be permitted to reinstate the mortgage and its favourable terms, just as if no termed "unimpaired" and not ispermitted to vote upon a plan. A creditor who is cashed out-- that is, has its claim paid in full--is also considered to be unimpaired.

C. Disclosure and Solicitation

Once a plan of reorganisation has been proposed, the next step on the road to confirmation is the preparation, approval, and dissemination of a disclosure statement. Votes for or against a plan cannot be solicited unless the court has approved a disclosure statement. The standard for approval is the disclosure statement contain "adequate information", defined as

> "information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgement about the plan ...."

The drafters of the Code believed that the crux of the confirmation process was to insure that creditors of the debtor knew what they were voting on. Thus, the disclosure statement should include the history of the debtor, the reasons for the bankruptcy, the progress of the Chapter XI case, and a detailed explanation of the provisions and effect of the proposed plan of reorganisation. The idea of Congress was that a disclosure statement should be understandable by the class of creditors to whom it was addressed. In almost every case, the unsecured creditors, such as the trade creditors and the like, will be called upon to vote on the plan. Unfortunately, disclosure statements have tended to read more and more like registration statements

filed under the Securities Act and tend to obfuscate and obscure the few words that might give the reader an idea of what was going on. In that sense, in a case of any size, the disclosure statement fails of its purpose

Nevertheless, if one has the time and the inclination to plow through the legal jargon, one might finally come to an understanding of precisely what it is that the plan is intended to do.

The section of the Code dealing with disclosure statements also contains a "safe harbour", providing that a person soliciting a vote for or against a plan in good faith and who complies with the disclosure statement requirements, cannot be held liable for the violation of any applicable securities laws dealing with the offer, issuance, sale or purchase of securities. Basically, the safe harbour is an exemption from the anti-fraud provisions of the securities laws.

Once a disclosure statement has been approved as containing adequate information, it is mailed to every member of all impaired classes, accompanied by a copy of the plan and a ballot soliciting the recipient's vote. As indicated earlier, unimpaired classes are conclusively presumed to have accepted the plan and are not entitled to vote.

A plan is accepted by a class of creditors if two-thirds in amount and more than 50% of those vote to accept the plan. A plan is accepted by a class of interests if it is accepted by two-thirds in amount of allowed interests in the class that have voted to accept or reject the plan. If the relevant class acceptances are obtained, the final step in the confirmation process is the confirmation hearing itself.

The statute contains thirteen separate confirmation standards which must be satisfied if the plan is to be confirmed. Most of these are boiler-plate, but some are worthy of comment. First, a plan can be confirmed only if it provides for the payment in cash at the effective date of the plan of all administrative expenses, unless the holder of an administrative claim elects less favourable treatment. Thus, the legal and other professional fees which have been run up during the case, insofar as they were not paid on an interim basis during the case, must be paid as of the effective date. Any post-petition lending must be paid as of the effective date, unless the lender agrees to a different treatment (which is normally done by permitting the ongoing financing of the post-confirmation debtor).

A plan also can be confirmed so long as it provides for the payment of tax claims either in cash or over time. The debtor has the absolute right in the plan to pay tax claims over a period not to exceed six years from the time that the tax is assessed, so long as the payout carries a market rate of interest. The taxing authority is not permitted to vote on such treatment.

The two most important confirmation standards are the so-called "best interests" and "feasibility's" tests. The best interests test, designed to protect the rights of the minority in a consenting class, sets a minimum economic standard for every creditor in a class which must be satisfied if the plan is to be confirmed. As codified, the best interests test requires that each member of an impaired class receive under the plan at least as much as that creditor would receive if the debtor were to be liquidated under the Chapter VII of the Bankruptcy Code. Satisfaction of this test is demonstrated by a liquidation analysis, which runs through a hypothetical Chapter VII liquidation, contains an explanation of what the liquidation values of the debtor's assets are, what claims might be expected to be filed in a liquidation case (such as claims which result from the rejection of executory contracts or unexpired leases which are being assumed in the plan), and guesses with respect to expenses of administration in the

Chapter 7 case. The result of this analysis is a demonstration of the dividend that the creditor in question might expect to receive in a liquidation.
This then compared with the dividend being received by the creditor in the Chapter XI case, and so long as the latter is at least as much as the former (it is generally more, much more) the best interests test is satisfied.
The feasibility test is designed to ensure that the debtor, once the plan is confirmed, will be able to operate profitably outside of the environment of the Chapter XI case. The feasibility standard requires that a demonstration be made that "confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganisation, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganisation is proposed in the plan."
This standard is satisfied by testimony with respect to the projected earnings, cash flow and other financial information of the post-confirmation debtor. In a larger case, investment bankers will testify with respect to the projected earnings of the debtor and its ability to pay its ongoing business obligations as well as to make the payments, if any, called for in the plan of reorganisation.
Once these showings have been made, the plan can be confirmed by the court without the necessity of valuing the debtor.
What has been described above as a so-called consensus plan; that is, one in which each class of impaired claims and interests has voted by the requisite majority to accept the plan. However, a plan can be confirmed even if one or more classes of impaired claims or interests votes against the plan under the "cram down" powers of the Bankruptcy Code. The minimum requirement to invoke the cram down powers is that the plan has been accepted by at least one class of impaired claims. Without that minimum level of acceptance of a plan, the proponent cannot invoke the cram down powers.
In order for a plan which does not have universal acceptance to be confirmed under the cram down powers, the plan must not "discriminate unfairly" and must be "fair and equitable" with respect to each class of claims or interests that is impaired under and that has not accepted the plan. The "fair and equitable" language carries with it a lot of baggage and we must go back again to the regime of Bankruptcy Act. Under Chapter X, which also required that a plan be "fair and equitable", the Supreme Court had held that a plan could be confirmed only if what it termed the "absolute priority rule" were followed. This meant that senior secured creditors had to be paid in full (in cash or securities or a combination) before junior secured classes could receive any consideration under the plan. Likewise, all secured creditors had to be paid in full before unsecured creditors could receive anything. Finally, old equity could not receive anything under the plan unless all creditors were paid in full. In order for equity to receive anything, the debtor had to be found to be solvend at the time of the confirmation of the Chapter X plan, which did not happen with great frequency. The absolute priority rule prevented confirmation of a plan even if every class voted in favour of it. A dissenting creditor who believed that value were being distributed to old equity while unsecured creditors were not being paid in full had the absolute right to block confirmation of the plan even if by overwhelming majorities the creditors believed that it was to their advantage to keep old equity in place. The absolute priority rule prevented deals from being made, prolonging the case, and came under harsh criticism.
Old Chapter XI did not contain a fair and equitable rule, and thus the absolute priority rule was not invoked in Chapter XI cases, another reason for its popularity.

The Bankruptcy Code has adopted a modified absolute priority rule; that is to say the absolute priority rule needs to be followed only from cases of dissenting creditors down.
The Code contains illustration of the way in which a plan can be "fair and equitable" with respect to classes of secured claims, classes of unsecured claims, and classes of interests.
In order to be fair and equitable with respect to a class of secured claims, the plan must provide that the holder receive a stream of payments which has a current value equal to the amount of its secured claim. The Code provides that the claim of a creditor secured by collateral is a secured claim to the extent of the value of the collateral, the claim of the secured creditor is bifurcated into a secured claim (equal in amount to the value of collateral) and an unsecured claim (equal to the difference between the debt owed by the debtor to the creditor and the value of the collateral). If the claim is oversecured, post-petition interest can be added to the claim, with the entire amount being treated under the plan.
The requirement that the stream of payments being received by the creditor be equal to the amount of its secured claim merely means that the claim must carry a market rate of interest. For example, a plan may provide that a secured claim of $2 million will be paid over five years and will carry a rate of interest of 10%. So long as the court finds that 10% is a market rate of interest for the risk, amount and type of collateral involved, the fair and equitable standard will have been met with respect to the class of secured claims.
A second and equitable way to treat a class of secured claims is to sell the property under the plan subject to the ability of the secured creditor to 'bit' in its claim. Finally, the plan can provide for the realisation by the holders of the secured claims in the non-consenting class of the "indubitable equivalent" of their claims. No one is quite sure what constitutes "indubitable equivalence" and it is not often used in plans as a substitute for either of the two treatments summarised immediately above. It does provide room from time to time for some imaginative treatment of classes of secured claims, such as by returning the collateral in full satisfaction of their claims
Fair and equitable treatment of classes of non-consenting unsecured claims is quite different. One of two treatments must be afforded to such a class: either it must be paid in full in reorganisation values (that means not necessarily in cash), or, secondly old equity is not receiving anything under the plan. That is to say, if the debtor is insolvent on a reorganisation basis, a plan can be confirmed under the cram down powers only if old equity receives nothing under the plan. This requires a valuation of the debtor to demonstrate either that it is solvent or insolvent on a reorganisation basis, depending upon your point of view. This again requires testimony of experts, such as investment bankers, who already have testified on feasibility with respect to the projected earnings of the company. This second branch of their testimony requires them to estimate the value the market place upon the stream of earnings so that the value of the company can be determined
Let us assume that a plan provides for the issuance of one 1 million shares of common stock to creditors and shareholders, and the creditors have objected that shareholders are not receiving anything under the plan. Suppose that the investment banker testifies that each of the 10 million shares will earn $4 a share for the foreseeable future and that the stock will be valued at ten times earnings (or $40,000,000) by the market place. If the entire package of rights, including the common stock, indicates that the creditors are receiving payment in full of their claims, then the plan properly can

provide that some of the common stock can be received by old equity, because the company is solvent.
So long as the value of the stock being received by old equity does not exceed the amount by which the company is solvent, fair and equitable rule has been satisfied and the plan can be confirmed over the dissenting vote of the class of unsecured claims.
Finally, cram down can be imposed upon a class of equity so long as its liquidation preference is paid in full or, as was the case with the classes of unsecured claims, no junior interest is receiving anything under the plan.

D. Discharge

The effect of a plan is to substitute the obligations contained in the plan for those which existed before its confirmation. Thus, the Code provides that confirmation results in the discharge of all obligations that were incurred prior to confirmation of the plan. This includes pre-petition secured and unsecured obligations, as well as obligations which were incurred during the pendency of the Chapter XI. Unless the plan provides otherwise, the only obligations which the post-confirmation debtor will have will be those expressly set forth in the plan itself.
A controversy has arisen with respect to whether a plan can provide for the discharge of third person. The Bankruptcy Code provides quite explicitly that a discharge of a debtor does not result in a discharge of guarantors or other secondarily liable parties. Some plans, particularly in large cases, provide for either the discharge of or an injunction against suing officers, directors, insurers, lawyers, accountants and other parties upon whom some blame might have been cast for the financial distress of the debtor. While most cases have condemned such treatment and have held that such plans cannot be confirmed, in the very large toxit tort cases (such as Manville and Robins) such provisions have been approved under a theory which seems to be one of necessity; that is, the plan could not be confirmed without this type of a provision. No statutory authority exists for such a proposition and one of the interesting developments to be watched under Chapter XI practice is how this doctrine is taken by the courts.