INVESTIGATING THE INVESTIGATIONS:

Process and Policy Issues Relating to Bankruptcy Investigations by Examiners and Creditors' Committees, and Government Investigations
That May Overlap Bankruptcy Investigations

Dennis J. Connolly David A. Wender Alston & Bird LLP¹

© Dennis J. Connolly (all rights reserved) 09/10 ADMIN/12156153v12

The views or opinions expressed herein are the authors' and not those of Alston & Bird LLP or any client.

Section I: INTRODUCTION

Section II: BANKRUPTCY EXAMINERS

- A. Introduction
- B. Policy Issues Relative to the Appointment and Scope of Duties for Bankruptcy Examiners
- C. Process Issues Involving the Reports and Communications with the Court
 - 1. Budget and Work Plan
 - 2. Confidential Information
 - 3. The Debtor's Privilege
 - 4. Review by Constituencies
 - 5. Redaction and Sealing of the Report
 - 6. Document and Evidence Retention
 - 7. Press Issues
- D. Discovery and Privileges in Connection with the Examination
 - 1. Distinction Between the Examiner and the Creditor's Committee
 - 2. Confidentiality Agreements and Stipulations
 - 3. Formal and Informal Interviews
 - 4. Coordination with Other Parties
- E. Use of Examiners for Other Tasks
 - 1. Litigation
 - 2. Negotiation/Mediation
 - 3. Monitoring of Professionals

F. To Whom Does the Examiner Owe a Duty?

Section III: GOVERNMENTAL INVESTIGATIONS

- A. Introduction
- B. Types of investigations
- C. Issues In Connection With the Overlap
 - 1. Document Production/Witness Access
 - 2. Grand Jury Issues
- D. Process Issues and Turf Battles

Section IV: CONCLUSION

Section I: INTRODUCTION

Bankruptcy examiners have been utilized in a number of cases to investigate the debtor's prepetition conduct and transactions in an effort to provide some transparency to creditors, parties in interest and the general public as to the events leading up to the debtor's bankruptcy filing. Examples of this use of bankruptcy examiners include the bankruptcies of Enron Corp., WorldCom, Inc., Mirant Corp. and Metropolitan Mortgage & Securities Company. As discussed below, bankruptcy examiners have also been used to prosecute litigation claims, mediate settlements and monitor the activities of the professionals in Chapter 11 cases.

In the post-Enron bankruptcy landscape, examiners continue to be appointed in significant bankruptcy cases, including the Lehman Brothers, Tribune, Washington Mutual bankruptcies. The more recent cases have addressed issues of redaction, work plans and related process issues in particular. Accordingly, this article will focus, for the most part, on the issues arising in the context of the investigatory examiner, including confidentiality, privilege and interaction with investigations by the Securities and Exchange Commission (the "SEC") and others.

In public company cases, the SEC, Department of Justice and other regulatory bodies have become more aggressive in investigating alleged wrongdoing and in prosecuting the alleged wrongdoers. Following the collapse of Enron, Adelphia, WorldCom and other public companies, the enforcement activities of government agencies increased. The overlap with governmental investigations is relevant not only in the context of the investigation by a bankruptcy examiner but also in the context of an investigation by the debtor in possession, a creditors' committee or others. The issues involve coordination and "turf" battles, and these issues must be considered by any investigator in order to effectively address the power of the Department of Justice (the "DOJ") or the Securities and Exchange Commission (the "SEC") to, in essence, preempt or sidetrack the investigation. As discussed below, the investigator itself may become subject to a grand jury subpoena or other discovery device initiated by the DOJ.

Section II: BANKRUPTCY EXAMINERS

A. Introduction

Section 1104(c) of the Bankruptcy Code provides that on request of a party in interest, and where the court does not order the appointment of a trustee, the court $shall^2$ appoint an examiner, to investigate the debtor, as appropriate, where "(1) such

It is worth noting that the requirement that the court "shall" appoint an examiner has resulted in some disagreement among commentators and the courts. *Compare Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498 (6th Cir. 1990), with In re Shelter Res. Corp., 35 B.R. 304 (Bankr. N.D. Ohio 1983) (denying request for appointment of examiner even though financial requirements satisfied). See also Walton v. Cornerstone Ministries, Inc., 398 B.R. 72 (N.D. Ga. 2008) (applying Revco).

appointment is in the interests of creditors, any equity security holders, and other interests of the estate;" or "(2) the debtor's fixed, liquidated, unsecured debts, other than for goods, services, or taxes, or owing to an insider, exceed \$5,000,000."³

The statutory role of a bankruptcy examiner is unique; an examiner is the champion of no one.⁴ Instead, an examiner facilitates an independent investigation while debtors are allowed to remain in possession and operate the company. Under the existing statutory regime, an examiner is a neutral disinterested party, answerable only to the court, charged with investigating and reporting fully and fairly on the affairs of the debtors.⁵ As courts recognize, the role of a bankruptcy examiner is comparable to that of a "civil" grand jury designed "to ascertain legitimate areas of recovery and appropriate targets for recovery" for the debtor, its creditors and its shareholders.⁶

Section 1104 of the Bankruptcy Code provides bankruptcy courts with the power to appoint an examiner to "conduct such an investigation of the debtor as is appropriate." Such an appointment is apparently mandatory upon the request of a party in interest whenever certain of the debtors' obligations exceed \$5 million. Section 1106(a) provides the investigatory and reporting duties:

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

(4) as soon as practicable –

(A) file a statement of any investigation conducted under paragraph (3) of this subsection, including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, *or* to a cause of action available to the estate ¹⁰

⁴ See, e.g., In re Baldwin United Corp., 46 B.R. 314, 316 (Bankr. S.D. Ohio 1985) ("An Examiner's status is unlike that of any other court-appointed officer which comes to mind. He is first and foremost disinterested and nonadversarial. The benefits of his investigative efforts flow solely to the debtor and to its creditors and shareholders, but he answers solely to the Court.")

³ See Revco D.S., 898 F.2d 498.

⁵ See 11 U.S.C. § 1106(a)(4)(A).

⁶ Baldwin United, 46 B.R. at 316-17; see also Viet. Veterans Found. v. Erdman, No 84-0940, 1987 WL 9033, at *2 (D.D.C. Mar. 19, 1987).

⁷ 11 U.S.C. § 1104(c).

⁸ See supra note 1.

⁹ See 11 U.S.C. § 1104(c).

¹¹ U.S.C. § 1106(a)(3) through (4)(A) (emphasis added).

Once appointed, the legal status of a bankruptcy examiner is "unlike that of any other court-appointed officer which comes to mind." "A bankruptcy examiner is clothed by the statute with judicial powers; he acts at the behest of the federal bankruptcy court." A bankruptcy examiner is "first and foremost disinterested and nonadversarial," answering solely to the bankruptcy court. 13

Given this unique role, "[the Examiner] owes a continuing fiduciary responsibility to the bankruptcy court for which he served and . . . the fruits of his investigation in the . . . bankruptcy proceedings are 'amenable to no other purpose or interested party."¹⁴

B. Policy Issues Relative to the Appointment and Scope of Duties for Bankruptcy Examiners

Section 1106(b) of the Bankruptcy Code authorizes the examiner to perform "any other duties of the trustee that the court orders the debtor in possession not to perform." As a result of this language, a court may expand an examiner's duties beyond those specified in Sections 1106(a)(1) through (2) and (5) through (7), which include the duties to: (i) account for all property received; (ii) examine proofs of claim and object to the allowance of any claim that is improper; (iii) furnish information about the estate, including operation reports and a final account; (iv) file the lists, schedules, and statements required under Section 521(a) of the Bankruptcy Code; (v) file a plan, or an explanation why a plan will not be filed, and a recommendation as to whether the case should be dismissed or converted; (vi) furnish information to taxing authorities pertaining to years in which the debtor did not file a tax return; and (vii) file such reports as are necessary or as the court orders, following the confirmation of a plan of reorganization.

Section 1106(b) of the Bankruptcy Code does not, however, specify whether examiners may perform duties in addition to those specified in Section 1106(a)(1) through (7). However, a number of courts have interpreted Section 1106(b) of the

¹¹ Baldwin United, 46 B.R. at 316; see also Leonard L. Gumport, The Bankruptcy Examiner, 20 Cal. Bankr. J. 71 (1992).

¹² Viet. Veterans Found., 1987 WL 9033, at *2.

Baldwin United, 46 B.R. at 316; see also In re Big Rivers Elec. Corp., 213 B.R. 962, 977 (Bankr. W.D. Ky. 1997) (recognizing that the examiner is an independent third party and an officer of the court); In re Interco Inc., 127 B.R. 633, 638 (Bankr. E.D. Mo. 1991) ("[T]he Examiner's role is by its nature disinterested and non-adversarial.").

Viet. Veterans Found., 1987 WL 9033 at *2; see also Baldwin United, 46 B.R. at 316; In re Hamiel & Sons, 20 B.R. 830, 832 (Bankr. S.D. Ohio 1982); Harvey R. Miller et al., Overview of Chapter 11 of the Bankruptcy Code, in Directors' and Officers' Liability Insurance 1993: Impact of the Bankruptcy Laws, 659 PLI/COMM 97, 166 (1993) (recognizing that, given the limited, solely investigative functions of the examiner, the examiner is a fiduciary only to the court and not to the estate or its creditors) (available on Westlaw).

Bankruptcy Code to authorize expanding the role of the examiner beyond those specified in Section 1106(a)(1) through (7).¹⁵

For example, in In re Mirant Corp., 16 the bankruptcy court directed the United States Trustee to appoint an examiner (the "Mirant Examiner") to perform a number of tasks including: (i) investigating insider causes of action; (ii) investigating claims against committee members; (iii) investigating bases to seek the subordination of committee members' claims; (iv) ensuring that intercompany transactions among the debtors are fair; (v) coordinating discovery between the debtors and the committees; and (vi) facilitating communications among parties in interest. Three months later, the bankruptcy court, sua sponte, expanded the role and duties of the Mirant Examiner. In expanding the Mirant Examiner's duties, the court first noted its authority to act sua *sponte* and its discretion to define the examiner's role to fit the needs of the case. ¹⁷ The bankruptcy court then outlined the facts that it believed supported the Mirant Examiner's expanded role including the need of an independent third party to: (i) oversee creditors' and professionals' compliance with the court's prior orders; (ii) review inter-estate conflicts arising from the parties serving multiple roles; ¹⁹ (iii) ensure that parties continue to move toward reorganization despite the turnover of key management and committee members; (iv) police alleged unprofessional activities and nondisclosures among key constituents; and (v) inform the court of bad faith or wrongful conduct among the parties.

Under this expanded role, the Mirant Examiner became responsible for, among other things: (i) holding monthly status conferences to monitor the case; (ii) identifying issues of fact or law that might advance Mirant's bankruptcy case; (iii) taking positions with respect to items filed in Mirant's bankruptcy cases and advising the court as to

See, e.g., Williamson v. Roppollo, 114 B.R. 127, 129 (W.D. La. 1990) (examiner granted authority to perform the trustee's duty to file lawsuit); Franklin-Lee Homes, Inc. v. First Union Nat'l Bank of N.C., N.A. (In re Franklin-Lee Homes, Inc.), 102 B.R. 477 (E.D.N.C. 1989) (examiner authorized to file lawsuits on behalf of estate); In re Carnegie Int'l Corp., 51 B.R. 252, 254 (Bankr. S.D. Ind. 1984); In re Liberal Mkt., Inc., 11 B.R. 742 (Bankr. S.D. Ohio 1981) (examiner authorized to operate business). In addition, as discussed below, examiners may be appointed where there is a question of the enforceability of the D&O insurance policy. Many policies have an "insured versus insured" exclusion which would preclude the debtor in possession (and, potentially, the creditors' committee acting on behalf of the estate) from bringing a covered action against the directors and officers. Many policies now contain an exception to that exclusion where an individual such as a bankruptcy examiner is the plaintiff in the action. For discussion on the dangers of giving the examiner a prosecutorial role, particularly as it relates to independence and integrity, see Kit Weitnauer, Should An Examiner Prosecute Claims? A Response to Proposed Changes to the Role of Examiner Contained in the Second Report of SABRE, Am. Bankr. Inst. J., Mar. 2005, at 50.

¹⁶ In re Mirant Corp., No. 03-46590 (Bankr. N.D. Tex.) filed July 14, 2003.

¹⁷ See In re Mirant Corp., 314 B.R. 555, 557-58 (Bankr. N.D. Tex. 2004) (opinion withdrawn).

The court concluded that it required a monitor of committee members' compliance with the order permitting limited trading in debtor's securities. *Mirant Corp.*, No. 03-46590 ECF No. 4817 *Bankr. N.D. Tex., July 30, 2004).

The court recognized that the chair of one of Mirant's creditors' committees was also a potential defendant in securities litigation involving Mirant.

whether parties made a good faith effort to resolve their disputes;²⁰ (iv) investigating any aspect of Mirant's operations to ensure fair dealings among codebtors; (v) investigating any basis for pursuing litigation in connection with Mirant's bankruptcy cases; (vi) monitoring negotiations regarding a plan or plans of reorganization; (vii) continuing his investigation of various insiders and related parties; and (viii) monitoring compliance by members of the creditors' committee with the court's orders.²¹

The court's expansion of the examiner's power in the *Mirant* case illustrates some of the tensions involved in expanding the examiner's duties. The expansion of the examiner's duties beyond reporting may conflict with the ability to act independently and report on the debtor's prepetition transactions.²²

In *In re Tribune Co.*, et al.,²³ the bankruptcy court directed the appointment of an examiner to perform several tasks, including: (i) evaluating potential claims and causes of action in connection with the 2007 leveraged buy-out of Tribune, including actions against the debtors, the debtors' management, the board members, the lenders, and the debtors' advisors; (ii) evaluating claims that the Wilmington Trust Company violated the automatic stay by filing a complaint; (iii) evaluating assertions and defenses of parties in connection with JPMorgan's motion for sanctions against the Wilmington Trust Company; and (iv) otherwise performing the duties of an examiner set forth in Section 1106(a)(3) and (4).²⁴

Similarly, the examiner was tasked with investigating potential claims and causes of action in *In re Lehman Bros. Holdings.*²⁵ These claims included (i) administrative claims against LBHI resulting from certain cash sweeps of cash balances, (ii) claims against LBHI for insider preferences, (iii) claims against LBHI or any other entities for avoidable transfers or incurrences of debt, (iv) claims against officers and directors for breach of fiduciary duties, and (v) any causes of action that were created by the sale to Barclays Capital Inc.²⁶ In addition to investigating potential claims, the examiner was directed to investigate a number of specific transactions and carry out the duties specified in Sections 1106(a)(3) and (4).²⁷

5

While the examiner was cautioned to be neutral, he was authorized to initiate litigation over legal or factual issues.

Although both creditors' committees objected to the Mirant Examiner's expanded role, the bankruptcy court denied their objections; noting that after the Mirant Examiner's initial report, it was convinced that the best way to administer the case was through the involvement of an examiner with expanded powers.

²² 124 Cong. Rec. H11,103 (daily ed. Sept. 28, 1978); 124 Cong. Rec. S17,425 (daily ed. Oct. 6, 1978) (discussing the need to insure that the examiner's report proceed in expeditious and fair manner).

²³ In re Tribune Co., No. 08-13141 (Bankr. D. Del. Filed Dec. 8, 2008).

²⁴ *Id.* ECF No. 4120 (Nov. 20, 2010).

²⁵ In re Lehman Bros. Holdings, No. 08-13555 (Bankr. S.D.N.Y. filed Sept. 15, 2008).

²⁶ Id. ECF No. 2569 (Jan. 16, 2009).

²⁷ Id

The *Tribune* and *Lehman* cases, as well as other recent cases, show that the role of the examiner has continued in the post-*Enron* bankruptcy landscape. ²⁸

C. Process Issues Involving the Reports and Communications with the Court

Although an examiner is an officer of the court, appointed to perform independent investigations and to submit reports to the court, its role with respect to the court is unclear. Although it might be advantageous if the examiner, as an independent third party, should be allowed to communicate with the court *ex parte* to resolve certain issues in the case, pursuant to Rule 9002 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), examiners shall refrain from communicating with the court *ex parte* unless otherwise permitted by applicable law. In addition, because examiners are often privy to certain confidential information that would not typically be disclosed to the court, their *ex parte* communications with the court may disclose certain information that will prejudice the parties.

1. Budget and Work Plan

In some cases, as in *In re Washington Mutual*, ²⁹ the court will require the examiner to file a work plan. ³⁰ In *Washington Mutual*, the court required that the work plan include "a good faith estimate of the fees and expenses to be incurred by or on behalf of the Examiner in connection with the Investigation and a status report detailing the Examiner's efforts to date." The work plan filed by the examiner was comprised of four substantive sections: a summary of work completed by the examiner, a summary of areas to investigate, a proposed work plan, and an estimate of fees and expenses. ³¹ In naming areas to be investigated, the examiner used four broad categories: (1) claims against JPMorgan Chase, (2) issues related to the FDIC takeover and its duties and responsibilities, (3) avoidance claims, (4) third party claims. ³² This list provided notice to JPMorgan Chase that many claims involving it would be investigated, including any business tort claims and competing claims to tax refunds, disputed assets, and TPS securities. ³³ The work plan then set out the examiner's proposed strategy, which was to establish seven teams, one for each discrete area of the investigation, with frequent

²⁸ See In re DBSI, Inc., No. 08-12687, ECF No. 2974 (Bankr. D. Del. Mar. 25, 2009) (directing the examiner to investigate the circumstances surrounding all of the Debtors' inter-company transactions; all transactions with non-debtor affiliatesp; and transactions with insiders, officers, directors and principals, in addition to the duties set forth in 1106(a)(3) & (4)); see also In re Extended Stay Inc., No. 09-13764, ECF No. 311 (Bankr. S.D.N.Y. Sept. 24, 2009) (directing the examiner to investigate circumstances surrounding the acquisition of Extended Stay by DL-DW Holdings, the financial circumstances that led to the bankruptcy filing, and whether the Debtor had claims against any person with respect to that investigation).

²⁹ In re Wash. Mut., Inc., No. 08-12229 (Bankr. D. Del. Filed Sept. 26, 2008).

³⁰ See id., ECF No. 5120 (July 22, 2010).

³¹ *Id.*, ECF No. 5234 (Aug. 6, 2010).

³² *Id*.

³³ *Id*.

meeting between the team leaders and the examiner to coordinate activities.³⁴ In the work plan, the examiner also took the opportunity to plead for protection from discovery and the authority to issue subpoenas.³⁵ The bankruptcy court approved the work plan in its entirety.³⁶

2. Confidential Information

Pursuant to Section 1106(a)(4), an examiner must "file a statement of any investigation conducted . . . including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate."³⁷ A court-appointed examiner is also required to "transmit a copy or summary of any such statement to any creditors' committee or equity security holders' committee, to any indenture trustee, and to such other entity as the court designates."³⁸ Noticing the distinction between the full and "summary" report, courts recognize that certain information contained in an examiner's report may be withheld from parties in interest.³⁹ In particular, when an examiner's report incorporates privileged or confidential information subject to a protective order, courts will allow the examiner to either file/maintain the report under seal or redact the confidential portions in the public version. However, a party desiring to prevent the disclosure of its information must ensure that it obtains direction from the court (i.e., through the entry of a protective order) that expressly provides that privileged/confidential information will not be disclosed by the examiner or in the examiner's report.

As discussed below, strong privacy concerns underlie the entry of protective orders under Rule 26(c) of the Federal Rules of Civil Procedure. As a matter of process, the examiner must take into consideration the use of information designated as confidential pursuant to the terms of a protective order in reporting to the court and the public generally. These protective orders may assist the examiner in the context of requests by the government entities for information, as discussed below.

Even though an examiner may obtain direction from the court regarding the disclosure of privileged/confidential information, an examiner's possession of privileged/confidential information may result in his or her receipt of significant discovery requests. For example, as a result of the extensive investigation conducted by the examiner in Enron's bankruptcy case (the "Enron Examiner"), parties involved in

35 Id

³⁴ *Id*.

³⁶ *Id.*, ECF No. 5260 (Aug. 10, 2010).

³⁷ 11 U.S.C. § 1106(a)(4)(A).

³⁸ 11 U.S.C. § 1106(a)(4)(B).

³⁹ See, e.g, In re Apex Oil Co., 101 B.R. 92 (Bankr. E.D. Mo. 1989) (denying a newspaper's request for access to the unabridged, unedited report); see also In re FiberMark, Inc., No. 04-10463, (Bankr. D. Vt. Aug. 16, 2005) (allowing the redaction of certain confidential and privileged information from the examiner's report). See infra notes 55 through 62.

litigation arising out of Enron's bankruptcy case obtained subpoenas in an effort to obtain information in the Enron Examiner's possession. In particular, in the criminal action, *United States of America v. Kenneth Rice, et al.*, ⁴⁰ the defendants requested the issuance of a *Subpoena Duces Tecum*, pursuant to Rule 17 of the Federal Rules of Criminal Procedure, to be served on the Enron Examiner. In ruling on this request, and the Enron Examiner's Motion to Quash, the court found:

I think in order for an examiner who's appointed by the Court to be able to adequately perform his duties in the context of a bankruptcy case, that the Court must look at the fiduciary nature of the relationship and the fact that the examiner, as appointed, does serve as a quasi-judicial officer, answerable only to the bankruptcy court, and should be immune from outside discovery requests; . . . In this instance, I believe that the information at issue is available from other entities, that the defendant did not present the Court sufficient information indicating that the information was not available from other entities. . . . And in this instance, I believe that the documents and information in the possession of the bankruptcy examiner, which are only in his possession as a result of his courtappointed fiduciary role and protective order that was issued to assist him in gathering those documents, should not be produced pursuant to the subpoena that was issued in this case, and the motion of Neal Batson, the Enron Corp. examiner, to quash the Rule 17(c) subpoena issued by Michale Krautz granted. The Subpoena is quashed. 41

Since *Enron*, examiners have typically requested that the discharge order include protection from discovery requests.⁴² Perhaps the most compelling reason for this is that the examiner is an extension of the court, and, as such, the examiner owes its legal duties to the court. In related *Enron* litigation, at least two courts have held that it is

No. 03-0093 (S.D. Tex. 2003); see also United States of America v. Kenneth Rice, et al., No. 03-0093 (S.D. Tex. 2003).

⁴¹ *Id.* (Docket No. 250); *see also Vietnam Veteran*, 1987 WL 9033, at *2 ("The integrity of the judicial process is directly threatened when litigators are allowed to question directly a court officer about the reasoning behind his official actions, thus courts have prohibited such examination."); *Baldwin United*, 46 B.R. at 317 ("The Examiner shall not disclose, identify, or produce any document or item in his possession which was obtained or generated pursuant to or in connection with his investigation in these cases to any other person or entity without the approval of this Court or the United States District Court for the Southern District of Ohio. This prohibition shall extend to the list and summary of privileged documents to be prepared by the Examiner.")

⁴² See In re Tribune Co., et al., No. 08-13141, Docket No. 5541 (Bankr. D. Del. 2008) (relieving examiner from duty to respond to discovery requests, except in cases where party has demonstrated to bankruptcy court that materials cannot be obtained from another source or in a federal criminal case); In re Lehman Brothers Holdings Inc., et al., No. 08-13555, Docket No. 10,169 (Bankr. S.D.N.Y. 2008) (ordering the same); In re Extended Stay Inc., et al., No. 09-13764, Docket No. 1012 (Bankr. S.D.N.Y. 2009) (requesting the same); In re DBSI, Inc., et al., No. 08-12687, Docket No. 5386 (Bankr. D. Del. 2008) (ordering that discovery procedures, same as ordered in other cases, remain in place).

inappropriate for the examiner to be a witness or to provide discovery in connection with criminal cases. 43

3. The Debtor's Privilege

In bankruptcy, the analysis of whether a person or entity other than the debtor may waive the debtor's attorney-client privilege begins with the Supreme Court's decision in *Commodity Futures Trading Comm'n v. Weintraub*. ⁴⁴ In *Weintraub*, the Supreme Court held that a trustee appointed in bankruptcy to manage the corporation in bankruptcy has the authority to waive the corporation's attorney-client privilege with respect to prebankruptcy communications. ⁴⁵ The Court's reasoning is instructive:

In light of the lack of direct guidance from the [Bankruptcy] Code, we turn to consider the roles played by the various actors of a corporation in bankruptcy to determine which is most analogous to the role played by the management of a solvent corporation. Because the attorney-client privilege is controlled, outside of bankruptcy, by a corporation's management, the actor whose duties most closely resemble those of management should control the privilege in bankruptcy, unless such a result interferes with policies underlying the bankruptcy laws. 46

Recognizing that the "Bankruptcy Code gives the trustee wide-ranging management authority over the debtor," the Supreme Court reasoned that the "trustee plays the role most closely analogous to that of a solvent corporation's management." Because the trustee in *Weintraub* had power to manage the debtor's affairs, it also had power to waive the attorney-client privilege.

The Weintraub Court took special care to point out that the power of a trustee to waive the attorney-client privilege is subject to the fiduciary duties owed by the trustee to the shareholders and creditors.⁴⁸ It is well-recognized that the fiduciary duties imposed on a trustee include "the duty to maximize the value of the estate."⁴⁹ This duty makes sense under the statutory regime, because as the party vested with the authority to manage the debtor's affairs, the trustee's fiduciary duty to the estate comes with the power to maximize the estate's value. In the absence of a trustee, of course, this power

⁴³ See USA v. Rice, Criminal Action No. H-03-0093 (S.D. Tex. 2003) (order entered Apr. 20, 2004) (filed under seal); United States v. Bayly, et al., Case No. H-03-363 (S.D. Tex. 2004) (order entered Sept. 8, 2004).

⁴⁴ 471 U.S. 343 (1985); see also Gumport, The Bankruptcy Examiner, 20 Cal. Bankr. J. at 125-26.

⁴⁵ *Id.* at 358, 150 S. Ct. at 1996.

⁴⁶ *Id.* at 351-52 (citation omitted).

⁴⁷ *Id.* at 352-3.

⁴⁸ See id. at 355 & n.7.

⁴⁹ *Id.* at 352.

and duty remains with the debtor in possession.⁵⁰ To summarize, under the reasoning of *Weintraub*, the power to waive the attorney-client privilege goes hand in hand with the power to manage the affairs of the debtor and the duty to maximize the value of the estate.

a. Waiver of the Debtor's Privilege by the Examiner

There is nothing in the language or holding of *Weintraub* that suggests the power to waive the attorney-client privilege is severable from the power to manage the affairs of the debtor and the related duty to maximize the value of the estate. Although the *Weintraub* Court implicitly endorsed the Ninth Circuit's holding in *In re Boileau*,⁵¹ which involved an examiner's power to waive privilege, that implicit endorsement does not provide that an examiner is authorized to waive privilege when it lacks the power to manage the affairs of the debtor.⁵² Similar to the trustee in *Weintraub*, the examiner in *Boileau* was "empowered to perform a myriad of functions normally carried out by a trustee," whereas the debtor had "been removed from any substantial participation in the management of Boileau & Johnson." For this reason, subsequent cases analyzing the *Boileau* decision have recognized that the power the *Boileau* Court granted an examiner to waive the attorney-client privilege was linked directly to the expanded powers of the *Boileau* examiner.⁵⁴

Unlike the expanded powers granted to the *Boileau* examiner, the typical examiner does not have a fiduciary duty to maximize the value of the debtor's estate. Instead, an examiner has a fiduciary duty to the appointing court to file an objective, independent, and fair statement of his investigation with respect to the matters set forth in Section 1106(a)(4)(A) of the Bankruptcy Code. In particular, under Section 1106(b) of the Bankruptcy Code, which governs the duties of examiners, "[a]n examiner... shall perform the duties specified in paragraphs (3) and (4) of subsection (a) of this section, and, except to the extent that the court orders otherwise, any other duties of the trustee that the court orders the debtor in possession not to perform." The "duties specified in paragraphs (3) and (4) of subsection (a)" are confined to performing investigations and making reports. Thus, granting an examiner the authority to waive privilege, and the concurrent obligation to maximize the value of the debtor's estate (a power an examiner typically lacks), conflicts with an examiner's statutory obligations. An examiner cannot

See id. at 355 ("[I]f a debtor remains in possession . . . the debtor's directors bear essentially the same fiduciary obligation to creditors and shareholders as would the trustee for a debtor out of possession.").

⁵¹ 736 F.2d 503 (9th Cir. 1984).

⁵² See Weintraub, 471 U.S. at 347 n.3.

Boileau, 736 F.2d at 506. The debtor in *Boileau* was an individual doing business as "Boileau & Johnson." *See id.* at 504.

See, e.g., In re Gaslight Club, Inc., 782 F.2d 767, 771 (7th Cir. 1986) (noting that "debtor was removed entirely from business management and operations and an examiner with expanded powers was appointed"); Danning v. Donovan (In re Carter), 62 B.R. 1007, 1014 n.1 (Bankr. C.D. Cal. 1986) (noting that Boileau involved an "examiner with 'expanded powers'").

⁵⁵ See 11 U.S.C. § 1106(a)(3) & (4).

simultaneously (i) serve as an independent, neutral court fiduciary and (ii) report only facts (privileged or otherwise) for which a public airing will be in the "best interests of the estates."

The duties and purview of the examiner do not comport with the unfettered right to waive a debtor's attorney-client privilege. In certain circumstances, when the examiner has been granted additional powers (in essence a de facto trustee), an examiner has had that power to waive the privilege. In the *Enron* case, no waiver of the privilege would occur prior to review by the debtors and the creditors' committee. In the event of a dispute, the court would review the issue of waiver in light of the best interest of the bankruptcy estate.

b. Addressing the Debtor's Privilege in the Context of the Investigation.

However, the debtor's privilege should not bar an examiner from obtaining information subject to the debtor's privilege claim. As the *Weintraub* Court recognized, it "would often be extremely difficult" to investigate the conduct of prior management "if the former management were allowed to control the corporation's attorney-client privilege and therefore to control access to the corporation's legal files." In the context of a case of any complexity, this is an understatement.

Under the statute, an examiner is charged with investigating the full range of matters that a trustee would be charged with investigating if a trustee were appointed in the case. Those matters include "any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate." There is nothing in the statute or in *Weintraub* to suggest that although a trustee must have "access to the corporation's legal files" to conduct an appropriate examination, an examiner should be deprived of such access. Otherwise, the ability of an examiner to discharge its statutory investigatory duties would be systematically inferior to the ability of bankruptcy trustees to discharge those same duties – thus making the appointment of a trustee preferable to the appointment of an examiner in virtually all cases requiring a serious investigation.

The intent to place examiners on an inferior footing to trustees in investigating the matters set forth in 11 U.S.C. § 1106(a)(4)(A) is evident neither from the face of the statute nor from its legislative history. To the contrary, the sponsors of the provision making the appointment of an examiner mandatory upon request whenever certain of a debtor's obligations exceed \$5 million stated that this provision was designed "to insure that adequate investigation of the debtor is conducted to determine fraud or wrongdoing

⁵⁶ 471 U.S. at 353; *see also* Gumport, *supra* note 10, at 125-26.

⁵⁷ 11 U.S.C. § 1106(a)(4)(A) (emphasis added).

on the part of present management." As *Weintraub* recognizes, the effective conduct of such an investigation requires "access to the corporation's legal files."

Although it may be necessary in many cases for an examiner to have access to a debtor's privileged communications to conduct an effective examination, such a result readily can be accomplished without authorizing an examiner with power to waive the privilege under certain circumstances. Other courts have ensured that the examiner obtained the necessary access by ordering that the debtor's disclosure of privileged materials to the examiner shall not constitute a waiver of privilege and specifying whether and under what conditions the examiner may disclose privileged materials to third parties. Additionally, it has been suggested that if a debtor in possession declines to make privileged documents available to an examiner (thus frustrating the ability of the examiner to conduct the same quality of investigation that a trustee with such access could perform), the appropriate remedy is the appointment of a trustee.

Moreover, although an examiner does not typically have a direct interest in the determination of whether privileged information concerning a debtors' affairs is made available to the general public, an examiner does, however, have an interest in preventing the examination from being impeded by ancillary disagreements that have arisen and may arise in the future between debtors and the examiner concerning whether the examiner should propose to disclose the existence and/or contents of certain documents through his periodic reports or through examining witnesses in the course of his investigation. Given that such disagreements have the potential to interfere with an examiner's ability to fulfill his statutory mandate to report on "any fact ascertained" regarding the matters identified in 11 U.S.C. § 1106(a)(4)(A), it necessarily follows that an examiner will need to obtain direction from the court.

Despite the Supreme Court's decision in *Weintraub*, not all courts agree that an examiner, who lacks the power to manage the affairs of the debtor and the related duty to maximize the value of the estate, cannot waive privilege. In *In re Metropolitan Mortgage & Securities Co.*, 61 the court ordered the appointment of an examiner solely to investigate

⁵⁸ Gumport, *supra* note 10, at 94 (quoting 124 Cong. Rec. H11, 100 (daily ed. Sept. 28, 1978), *reprinted in* 1978 U.S.C.C.A.N. 6465; 124 Cong. Rec. S17,417 (daily ed. Oct. 6, 1978), *reprinted in* 1978 U.S.C.C.A.N. 6534).

See In re Leslie Fay Cos., Inc., Sec. Litig., 161 F.R.D. 274, 284 (S.D.N.Y. 1995) (rejecting argument that privilege was waived through disclosure to examiner when disclosure was made pursuant to prior court order providing that disclosure "shall not be deemed to be a breach of any available attorney/client or work product privilege"); Baldwin United, 46 B.R. at 315 (providing examiner with "access" to privileged materials, prohibiting examiner from disclosing the contents of privileged documents except in the examiner's reports, and specifying that such disclosure was not to be deemed a waiver of the privilege); see infra the discussion concerning Enron Access Order; In re Wash. Mut., Inc., No. 08-12229, ECF No. 5258 (Bankr. D. Del. Aug. 10, 2010) (stating that the delivery of documents by any of the parties to the examiner in connection with the investigation did not constitute a waiver of attorney-client privilege, attorney work product protection, confidentiality, or any other applicable privilege, protection, immunity, or confidentiality).

⁶⁰ See Gumport, supra note 10, at 94.

⁶¹ No. 04-00757 (Bankr. E.D. Wash. Filed Feb. 4, 2004).

and report on certain transactions involving the debtor and any entities controlled by the debtor. Despite the court's decision to appoint a traditional examiner, with no expanded authority to manage the debtor's operations, the court's order appointing the examiner provided that "the Examiner shall have the power to waive, on an issue-by-issue basis, the attorney-client privilege of the Debtors' estates with respect to prepeptition communications relating to matters investigated by the Examiner." 62

In contrast, in the case of *In re Refco Inc.*, ⁶³ the court entered an order appointing an examiner and directing the examiner to undertake certain investigatory activities; however, the order specifically did not require the debtor to provide privileged information to the examiner. In contrast to the orders in *Enron* and *Metropolitan Mortgage*, the *Refco* order provides that if the examiner seeks the disclosure of documents or information to which the debtors may assert a claim of privilege, and the debtors and the examiner are unable to agree, the matter may be brought to the court for resolution. Depending on the precise facts and circumstances, this may impose a significant burden on the examination as it would require, potentially, the court to address literally tens of thousands of documents (emails in particular) that may be subject to attorney-client privilege. ⁶⁴

4. Review by Constituencies

It is likely that information obtained by an examiner will be of interest to debtors, committees, government agencies and other parties in interest ("Requesting Parties"). As a result, examiners should expect that these parties will seek to gain access to the information obtained by the examiner or, if they are unable to obtain direct access, these parties may seek to propound duplicative discovery. Thus, to manage the sharing of information between parties, to encourage parties to comply with discovery requests, and to reduce costs incurred by the estate, an examiner may need to propose procedures that provide for the sharing of information. In fact, if the examiner refuses to share information with Requesting Parties, it is likely that the examiner's investigation will be delayed while it responds to the Requesting Parties' attempts to compel the examiner's production (either through Rule 2004 requests or the issuance of subpoenas).

In *In re Enron Corp.*, ⁶⁶ prior to the appointment of an examiner, the official committee of unsecured creditors (the "Enron Committee") recognized that parties in interest may have a legitimate right to information, including privileged information, obtained during its investigation. To ensure efficiency and to reduce the burden imposed on those targeted by its investigation, the Enron Committee obtained an order (the "Enron

⁶² *Id.*, ECF No. 535, at 3 (Apr. 9, 2004).

⁶³ No. 05-60006 (Bankr. S.D.N.Y. filed Oct. 17, 2005).

See Gumport, supra note 10, at 125-26.

⁶⁵ It should be noted that an examiner's decision to share information with other parties may be in his or her best interest because the other parties may have, or have access to, otherwise confidential/privileged information that is beneficial to the examiner.

⁶⁶ No. 01-16034 (Bankr. S.D.N.Y. filed Dec. 2, 2001).

Access Order") from the bankruptcy court regarding the sharing of information it gained through its Rule 2004 examinations.

Pursuant to the Enron Access Order, following a party's production of information (including privileged information), the Enron Committee updated a list available to parties in interest regarding the identity of the producing party. After receiving notice of the production, a party in interest could then request access to the information produced, provided that the requesting party affirm that it would use the information only in certain enumerated instances. Upon receiving this request, the Enron Committee was not obligated to provide immediate access to information requested. Instead, if the Enron Committee, the debtors, or the producing party objected to the requesting party's ability to access the information for any basis, including issues related to the confidentiality or privilege, the Enron Committee could properly refuse access. As a result, although the Enron Committee had the ability to waive Enron's privilege, before privileged information would be released Enron could object. If the requesting party believed that its access was improperly rejected, it could then seek redress from the bankruptcy court.

Following the appointment of the Enron Examiner, the debtor, and the Enron Committee agreed to a stipulated order that provided that the debtors and the Enron Committee could share documents with the Enron Examiner without waiving any right or claim to privilege or other protection from discovery. After the debtors and the Enron Committee agreed to the stipulated order, the Enron Examiner requested that the bankruptcy court modify the Enron Access Order to provide that the Enron Examiner be granted unlimited access to the information obtained by the Enron Committee as a result of its Rule 2004 requests.⁶⁸ Recognizing that the Enron Examiner could not efficiently pursue its investigation if it were required to follow the same procedures imposed on parties in interest, the court granted the Enron Examiner's request and provided that it would have equal access (except to certain objecting creditors) to information obtained by the Enron Committee pursuant to its Rule 2004 requests. Furthermore, because the modified Enron Access Order contemplated that the Enron Examiner would obtain information through its own investigation, the same procedures that governed the Enron Committee's sharing of information, including the ability to share privileged information, also applied to the Enron Examiner.

In addition to the coordination of access to information gleaned by the Enron examiner, the debtor and the creditors' committee, the parties also address the issue of review of the reports prior to their submission in order to determine privileged information and in order to allow the DOJ to review the reports. Pursuant to orders

To facilitate access to requested information, the Enron Access Order also provided the Enron Committee with the authority to create a depository or an electronically accessible database.

It is important to note that the Order appointing the Enron Examiner provided that any official committee shall cooperate with the Enron Examiner and that the Enron Examiner shall avoid, to the extent possible, duplication of efforts of any official committee appointed in Enron's bankruptcy case. However, despite agreeing that the Enron Examiner and Enron Committee would share access to information, pursuant to an agreement between the parties and the court's order certain information was not shared.

entered in January,⁶⁹ February,⁷⁰ June⁷¹ and September,⁷² the Enron examiner was directed to submit the report to the court and to the parties (including the DOJ) in order for a brief review process before actual filing with the Court. This obviated the need for redaction or sealing of the report once the review process had been completed.

5. Redaction and Sealing of the Report

Pursuant to Section 107(b) of the Bankruptcy Code, "[o]n request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy may – (1) protect an entity with respect to a trade secret or confidential research, development, or commercial information..." This section of the Bankruptcy Code is intended to protect parties from unnecessary public intrusion into their private affairs.

Bankruptcy Rule 9018 of the Bankruptcy Rules does not expand a court's ability to limit access to papers filed.⁷⁴ Rule 9018 provides that:

On Motion or on its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information, (2) to protect any entity against scandalous or defamatory matter contained in any paper filed in a case under the [Bankruptcy] Code, or (3) to protect governmental matters that are made confidential by statute or regulation. If an order is entered under this rule without notice, any entity affected thereby may move to vacate or modify the order, and after a hearing on notice the court shall determine the motion.

Because all papers filed are presumptively available for inspection by the public, the party seeking to seal or redact information from court filings, such as an examiner's report, bears the burden of proof. To satisfy its burden, the party seeking to seal a document or redact information must submit evidence that filing under seal outweighs the presumption of pubic access. It is not sufficient that the information sought to be withheld from the public might conceivably fall within a protected category; instead, the

⁶⁹ In re Enron Corp., No. 01-16034, ECF No. 8667 (Bankr. S.D.N.Y. Jan. 10, 2003).

⁷⁰ *Id.* ECF No. 9246 (Feb. 14, 2003).

⁷¹ *Id.* ECF Docket No. 11137 (June 11, 2003).

⁷² *Id.*, ECF No. 12696 (Sept. 10, 2003).

⁷³ 11 U.S.C. § 107(b)(1).

⁷⁴ In re Gitto/Global Corp., 321 B.R. 367, 373 (Bankr. D. Mass 2005), aff'd, No. 05-10334, 2005 WL 1027348 (D. Mass. May 2, 2005), aff'd, 422 F.3d 1 (1st cir. 2005).

⁷⁵ *Id*.

⁷⁶ *Id*.

material must, at the very least, be likely to fall within a protected category.⁷⁷ Despite this high bar, courts are not shy about sealing or limiting access to examiner's reports.⁷⁸

In *In re Apex Oil Co.*,⁷⁹ the debtors and a third party originally requested the entry of an order sealing the examiner's report. Recognizing that Section 1106 required the examiner's report be made available to creditors, the court rejected a newspaper's request to seal. Instead, recognizing that the examiner's report may include confidential and proprietary information, the court agreed to the entry of a protective order whereby the debtors and third parties were given five days following the submission of the examiner's report to review and raise objections to the disclosure of information that may be subject to a court-approved protective order.

In *In re FiberMark*, *Inc.*, 80 in connection with the examiner's (the "FiberMark Examiner") duty to investigate the activities and actions of the general unsecured creditors' committee (the "FiberMark Committee"), its members, and its professionals, the FiberMark Examiner served counsel to the FiberMark Committee with a letter requesting that: (i) the committee waive its claim of privilege; and (ii) produce virtually every document possessed by the FiberMark Committee related to the bankruptcy case. Although the FiberMark Committee quickly authorized its counsel to produce the majority of information requested, it informed the FiberMark Examiner that it would not produce privileged information without the entry of a protective order with respect to certain confidential/privileged information ("Protected Material"). Following this request, the FiberMark Examiner and counsel to the FiberMark Committee agreed to a stipulated protective order that provided that (i) all Protected Material would not be made available to parties not covered by the protective order and (ii) to the extent the FiberMark Examiner must disclose Protected Material in any interim or final examiner's report, he would use his reasonable best efforts to obtain authority to file the report under seal. Concluding that the protective order between the FiberMark Examiner and the FiberMark Committee was in the best interests of the estate, the court entered an order that: (i) sua sponte agreed that the examiner's report be filed under seal; and (ii) that the committee's production of documents would not destroy any claim or right to privilege that existed as to any third party.

The trend in post-*Enron* bankruptcies seems to be sealing the examiner's report upon filing and then unsealing it upon a motion and a hearing.⁸¹

⁷⁷ *Id*.

⁷⁸ But see id. at 376 (concluding that the examiner's report need not be sealed).

⁷⁹ No. 87-03804 (Bankr. E.D. Mo. 1987).

⁸⁰ No. 04-14063 (Bankr. D. Vt. Filed Mar. 30, 2004).

⁸¹ See In re Tribune Co., No. 08-13141, ECF No. 5252 (Bankr. D. Del. Aug. 3, 2010) (directing the examiner to publicly file the report after the examiner had filed the report under seal, provided parties with access to the materials with specific instructions to raise any confidentiality concerns, and a hearing); In re Lehman Bros. Holdings, No. 08-13555, ECF No. 7530 (Bankr. S.D.N.Y. Mar. 11, 2010) (unsealing the examiner's report after examiner had given parties notice of report, as filed under seal, negotiating resolutions to most objections, and a hearing).

6. Document and Evidence Retention

Upon the conclusion of an examiner's examination, it is important for the examiner, the debtor, and parties in interest to determine how information obtained during the examiner's investigation will be handled. First, an examiner will want court direction concerning materials obtained by the examiner because most examiners lack the storage capacity and desire to retain the information obtained during the investigation. Second, a debtor may want to ensure that information is handled properly out of concern that the examiner might inadvertently release privileged/confidential information. Third, parties in interest, such as creditors' committees, may want direction from the court to ensure that information obtained by the examiner during his or her investigation is not simply thrown away because this information is likely crucial to their potential causes of action.

In Enron's bankruptcy case, at the conclusion of his investigation, the Enron Examiner, requested an order: (i) relieving the Enron Examiner of his obligation to maintain the information obtained; (ii) authorizing the Enron Examiner to deliver his reports and "evidence binders" to the debtors; (iii) authorizing the Enron Examiner to destroy all other materials produced to the Enron Examiner; and (iv) precluding the production of the Enron Examiner's work product and/or privileged communications between the Enron Examiner and the Enron Examiner's professionals. Despite numerous objections to the Enron Examiner's request, the bankruptcy court ultimately entered an order granting the Enron Examiner's request to deliver his reports and evidence binders to the debtors and precluding the production of the Enron Examiner's work product and privileged communications with his professionals.⁸³ With respect to the Enron Examiner's request to dispose of materials obtained during his investigation, the Bankruptcy Court directed the Enron Examiner to return documents to the producing parties and file a notice of intended disposition with the Bankruptcy Court with respect to any documents or witness statements that the Enron Examiner intends to return, dispose of or destroy.⁸⁴ Although the bankruptcy court's orders did impose an additional obligation on the Enron Examiner to return documents to producing parties, the court relieved the Enron Examiner from maintaining volumes of data in perpetuity.

7. Press Issues

A. Discovery of Newspapers and Rating Agencies.

An issue implicated by the First Amendment is the potential for certain parties to be immune from discovery requests. In particular, the press has had some success in precluding discovery of information held by the press. The rating agencies, have all been successful in arguing, at least to some extent, that those entities are engaged in a

The term "evidence binder" referred to a series of three-ring binders that contain all of the supporting documentations referenced in the Enron Examiner's report.

⁸³ In re Enron Corp., No. 01-16034, ECF No. 16382 (Bankr. S.D.N.Y. Feb. 19, 2004).

⁸⁴ *Id.*, ECF No. 21245 (Oct. 5, 2004).

generalistic function and, as a result, are covered by the general principles of immunity from discovery and a "malice based" liability regime. These immunities from discovery may pose an impediment for an examiner (or other investigator).

Despite their desire to gain access to information, press and press-like entities, often take the position that they are immune from discovery. In certain instances this contention is effective. In *American Savings Bank FSB v. UBS PaineWebber, Inc.* (In re Fitch, Inc.), the Second Circuit recognized the press' freedom from discovery. 85

The ability of the press freely to collect and edit news, unhampered by repeated demands for its resource materials, requires more protection than that afforded by the disclosure statute. The autonomy of the press would be jeopardized if resort to its resource materials, by litigants seeking to utilize the newsgathering efforts of journalists for their private purposes, were routinely permitted. Moreover, because journalists typically gather information about accidents, crimes, and other matters of special interest that often give rise to litigation, attempts to obtain evidence by subjecting the press to discovery as a nonparty would be widespread if not restricted on a routine basis. The practical burdens on time and resources, as well as the consequent diversion of journalistic effort and disruption of newsgathering activity, would be particularly inimical to the vigor of a free press. 86

While it is clear that this freedom from discovery applies to true members of the press, such as newspaper reporters, this freedom may not apply to all press-like entities. For example in *American Savings*, the Second Circuit concluded that Fitch, Inc., an information gathering organization was not immune from discovery. In determining whether Fitch was entitled to immunity, the Second Circuit compared Fitch to Standard & Poors ("S&P"), a competitor. In *Delta Air Lines, Inc. v. Official Committee of Unsecured Creditors of Pan Am Corp. (In re Pan Am Corp.)*, the District Court for the Southern District of New York concluded that S&P functions as a journalist when it gathers information in conjunction with its ratings process and when it intends to disseminate information to the public. In *American Savings*, in contrast, the Second Circuit concluded that Fitch did not qualify for immunity because Fitch only analyzes and publishes ratings of paying clients and that Fitch took an active role in planning the transactions it analyzed.⁸⁷ Thus, because Fitch did not perform a true press-like function, the Second Circuit found that it was not immune from discovery.

Distinguishing Moody's from Fitch, a court in the Eastern District of Michigan held that Moody's was entitled to immunity. While acknowledging that Moody's may have only performed ratings upon solicitation, and thus failing the first prong of the *Fitch*

^{85 330} F.3d 104 (2d Cir. 2003).

⁸⁶ Id. at 108 (quoting O'Neill v. Oakgrove Constr., Inc., 71 N.Y.2d 521, 526-27 (1988)).

⁸⁷ Fitch, 330 F.3d at 109-10.

Q.

⁸⁸ Compuware Corp. v. Moody's Investors Servs., Inc., 324 F. Supp. 2d 860 (E.D. Mich. 2004).

test, the court found that Moody's did not take on an active role in structuring transactions, likening it more to S&P. 89 Since the onset of the subprime mortgage crisis, calls to hold ratings agencies responsible for their roles have increased in volume, but case law has not followed suit. 90

B. Requests for information by the press.

In addition to the Requesting Parties, noted above, it is likely that an examiner will receive requests from the press or press-like entities who desire access to the information obtained during the examiner's investigation or the examiner's unredacted report. 91 Although press and press-like entities are not true parties in interest, courts agree that the press has standing to intervene in an action in which it is not otherwise a party. 92 Typically, press and press-like entities demand access to information possessed by the examiner under the rubric that they are entitled to this information under the (i) First Amendment, as the public's spokesperson, (ii) the freedom of information action, or (iii) the common law right of access to judicial records. In determining whether the press should have access to this information, courts must balance the interests of the parties with thee parties' legal rights and interests. For example, if information was produced to the examiner pursuant to a court approved protective order, the court must determine whether the protective order was supported by good cause. 93 As a result, unless the press or press-like entity establishes that the protective order was entered without "good cause," the court will refuse access to the protected information. It is also worth noting, that the press' right to documents produced to an examiner is further limited. Although the common law recognizes the right of access to court documents, materials produced to an examiner will not be part of the court's record unless the examiner elects to submit those materials to the court.⁹⁴

⁸⁹ *Id.* at 862.

See Theresa Nagy, Credit Rating Agencies and the First Amendment: Applying Constitutional Journalistic Protections to Subprime Mortgage Litigation, 94 Minn. L. Rev. 140 (2009).

⁹¹ See, e.g, Apex Oil, 101 B.R. 92 (newspaper requested access to the documents underlying the examiner's report and the unabridged/unedited examiner's report). A number of examiner orders prohibit the examiner from discussing publicly the investigation until the submission of the examiner's report. These provisions may actually be helpful in that they provide a basis for the examiner to decline comment on the investigation until such time as the reports have been filed (and/or unsealed).

⁹² Id. at 96 (citing *United States v. Sierra (In re Tribune Co.)*, 784 F.2d 1518, 1521 (11th Cir. 1986)).

⁹³ *Id.* at 101-03.

⁹⁴ *Id.* at 99 (concluding that the examiner's role does not make him an officer of the court and that his or her review of materials does not elevate the materials to the status of judicial records subject to public access).

C. Discovery and Privileges in Connection with the Examination

1. Distinction Between the Examiner and the Creditor's Committee

Although the Bankruptcy Code authorizes several parties to conduct investigations and obtain discovery regarding potential causes of action, not all parties are created equally. In fact, the role of an examiner may enable him to conduct examinations in spite of the fact that another party in interest could not obtain the same information. ⁹⁵ For example, in the *Enron* case, the Enron Examiner sought to obtain Rule 2004 examinations with respect to five Arthur Andersen individuals who worked on the Enron engagement. In response to the Enron Examiner's request, Andersen and the Andersen individuals filed a motion for protection in the district court litigation in which three of the Andersen individuals named in the Enron Examiner's 2004 Request were named as defendants. 66 The motion for protection asserted, *inter alia*, that the Rule 2004 examinations were improper because the Enron Committee had already filed suit against Andersen and the Andersen individuals. In contesting the Enron Examiner's Rule 2004 request, Andersen and the Andersen individuals asserted that the Enron Examiner's request for depositions should be denied for the same reasons that the court denied the Enron Committee's Rule 2004 subpoena. 97 Although the district court recognized that Rule 2004 examinations are not proper when the requesting party has already commenced litigation, the court noted that the Enron Examiner and the Enron Committee are not one in the same. Thus, because the Enron Examiner was not a litigant against Andersen or any Andersen individual, and the order of appointment provided him with no authority to commence a lawsuit, the district court granted the Enron Examiner' Rule 2004 request, provided the Enron Examiner modify his sharing order with the Enron Committee to preclude the sharing of information gained by the Enron Examiner.

2. Confidentiality Agreements and Stipulations

During the course of an investigation, an examiner will seek documents and affidavits either voluntarily or through utilizing subpoenas. With certain exceptions the vast majority of information obtained by an examiner will purportedly be proprietary, confidential or otherwise subject to confidentiality agreements. Although parties who receive court-issued subpoenas are obligated to produce information, an examiner's

⁹⁵ See, e.g., Baldwin United, 46 B.R. at 317 ("[W]e believe that the Examiner, as a nonparty to any proceeding and a nonadversarial officer of the Court, is entitled to some immunity from the whirlwind of litigation commonly attendant to large Chapter 11 cases.").

In re Enron Corp. Securities, Derivative & "ERISA" Litigation, No. 4:02-md-01446, (S.D. Tex. Filed Apr. 16, 2003).

On December 12, 2002 (ECF No. 1184), the district court denied the Enron Committee's request to take Rule 2004 discovery after it initiated a lawsuit.

ability to obtain such information may be hampered by that party's refusal to produce documents or sit for a deposition without the entry of a protective order. 98

Typically, in recent cases, the examiner has negotiated confidentiality agreements with parties from whom the examiner wished to receive documents. Consenting to these agreements is one way for the examiner to negotiate for the voluntary production of documents without resorting to 2004 subpoena power. At times, however, third parties overreach when asking for confidentiality protection. Take, for example, the *Tribune* cases, where nearly every document produced was marked "confidential" or "highly confidential." Pursuant to his Work Plan, the Examiner required each party to identify those particularly documents believed *in good faith* to be entitled to protection from public disclosure. Despite this request, the responses were so wide-ranging that the examiner had to redact the entire factual narrative in Volume One of his Report and the substantive analysis in Volume Two. The examiner filed a motion with the court to address this issue and ultimately was able to have the entire report unsealed.

In contrast to the examiner's travails in the *Tribune* cases, the examiner in *Extended Stay* was able to reach an arrangement outside of court. Initially, the examiner sought documents on a consensual basis and negotiated numerous confidentiality agreements to this end. In order to make documents public, the examiner proposed a four-step process: (1) inform the parties of the process, the information at issues, and which excerpts from the Report that were relevant; (2) reach an arrangement outside of court; (3) hold a closed session in court to render the final determination with respect to disclosure; and (4) have the court enter a final order. The examiner was successfully able to negotiate a resolution to all disclosure issues.

In fact, examiners who properly recognize that their investigations must seek <u>all</u> information (including non-public information) may be able to advance their investigation by seeking the entry of a protective order that will serve as a "safety blanket" assuring parties that their "secrets" will not be aired to the public.

⁹⁹ See In re Lehman Bros. Holdings, No. 08-13555, ECF No. 7531 (Bankr. S.D.N.Y. Mar. 11, 2010); In re DBSI, Inc., No. 08-12687, ECF No. 4544 (Bankr. D. Del. Oct. 19, 2009); In re Extended Stay Inc., No. 09-13764, ECF No. 913 (Bankr. S.D.N.Y. Apr. 8, 2010).

¹⁰⁰ See Letter from Anton R. Valukas to Diana Adams (Apr. 1, 2010) (regarding Best Practices for Examiners). *In re Lehman Bros. Holdings Inc.*, No. 08-13555, ECF No. 8626 (Bankr. S.D.N.Y. Apr. 23, 2010).

¹⁰¹ See In re Tribune, No. 08-13141, ECF No. 5247, at 40 (Bankr. S.D.N.Y. Aug. 3, 2010).

¹⁰² *Id.* at 41.

¹⁰³ *Id*.

¹⁰⁴ ECF Docket No. 5252 (Aug. 3, 2010).

¹⁰⁵ In re Extended Stay Inc., No. 09-13764, ECF No. 913, at 4 (Bankr. S.D.N.Y. Apr. 8, 2010).

¹⁰⁶ *Id.* ECF No. 804 (Mar. 9, 2010).

¹⁰⁷ *Id.* ECF Docket No. 951 (Apr. 14, 2010).

Although Section 107 of the Bankruptcy Code provides that the public has a right of access to all court documents, upon a showing of good cause, parties may utilize protective orders to preclude unfettered access to information produced. In *Seattle Time Co.*, the Supreme Court held that there is no First Amendment right to access information made available only for the purposes of trying a lawsuit. Recognizing the abuse that could result if a litigant could publicize information obtained during discovery, the Supreme Court concluded that trial courts have the authority to issue protective orders pursuant to Rule 26(c) of the Federal Rules of Civil Procedure. The Supreme Court also raised concerns that excessive discovery could threaten a litigant's or third party's right to privacy. As a result, the Supreme Court concluded that protective orders may properly limit public access to information provided that the parties can establish good cause for the entry of such an order.

The policies supporting the issuance of Rule 26(c) protective orders also apply in bankruptcy cases. In particular, the broad scope of a Bankruptcy Rule 2004 investigation cautions against public disclosure. Furthermore, the prospect that an examiner may be required to indiscriminately produce investigative materials obtained in reliance upon a promise of confidentiality and the entry of a court order, would question the integrity of the examiner's role in the bankruptcy process. Its

Despite the protections afforded by protective orders and Section 107(b) of the Bankruptcy Code, the desire to keep information confidential (i.e., out of the public eye) may fall to an examiner's obligation to submit a report. For example, in *In re FiberMark*, the bankruptcy court concluded that its prophylactic decision to seal the FiberMark Examiner's report *sua sponte* was not a final determination as to whether the FiberMark Examiner's report would be sealed permanently. Instead, the court concluded that it must perform an analysis of the report to determine whether it contained privileged information and whether the report qualified for an exception to the general rule that court documents are public records. Following the court's review, it concluded that: (i) certain information contained in the report must be redacted based upon attorney-client and work-product privilege; (ii) certain purportedly privileged communications (i.e., communications solely between the FiberMark Committee professionals, not aimed at assisting the FiberMark Committee) were not privileged; ¹¹⁴ and (iii) that the report did not, in and of itself, qualify for an exception to the general rule that all court documents

See Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984).

¹⁰⁹ Id

¹¹⁰ *Id*.

¹¹¹ Id

¹¹² Apex Oil Co., 101 B.R. at 102.

¹¹³ *Id*.

The court concluded that when counsel to the FiberMark Committee conferred with co-counsel about the divergence of opinions regarding corporate governance issues, counsel was not advising its client and/or not pursuing legal issues on behalf of its clients. *See In re FiberMark, Inc.*, No. 04-10463, ECF No. 1758 (Bankr. D. Vt. Aug. 16, 2005).

should be public. Accordingly, with certain redactions, the court unsealed the FiberMark Examiner's report.

3. Formal and Informal Interviews

As noted above, an examiner is the champion of no one. In fact, in typical appointments, an examiner is charged with performing an independent investigation and reporting back to the court, the debtor and other parties in interest. In this unique role, an examiner may be able to gain access to information and witnesses that may not otherwise be available to other consituencies in a bankruptcy case. Moreover, an examiner who is protected from third party discovery requests and is not interested (or able) in asserting lawsuits on behalf of individuals or the debtor may be able to obtain access to and sworn statements from witnesses who would otherwise refuse to talk on the recod.

4. Coordination with Other Parties

In complex bankruptcy cases, involving numerous parties, there are often multiple entities charged with investigating the debtor and the debtor's operations (including the debtor, official and unofficial committees, individual creditors and parties in interest, examiners, and trustees). Although each of these entities may have different theories and may seek to investigate different individuals or transactions, typically there is an overlap of information sought. Recognizing that court-appointed entities and debtors often seek the same or similar information from the same parties, it is important that these entities be required to work in concert to ensure that the estate is not charged twice for the same work. For example, if a committee, examiner and a debtor each plan to serve discovery on the same witness and conduct examinations, it is in the estate's best interests (and often in the witness' best interests) if the committee, examiner, and debtor collaborate. In fact, an order from the court requiring coordination is most likely necessary to avoid duplication of document productions and oral examinations. To the extent that parties cannot coordinate with respect to information requests or witness examinations, the court may need to get involved to resolve disputes and compel order.

Confidentiality agreements between less than all investigators and all parties producing documents or sitting for depositions may also serve to prohibit the free exchange of information. However, in light of the need for investigators to share information it might be necessary for the court to authorize a procedure that will enable certain parties the ability to review information without violating a confidentiality agreement.

The lack of coordination between investigators may also hamper the ability of any investigator to pursue additional discovery. First, if one investigator has already obtained significant discovery through document production and witness examinations, the court may be less willing to allow duplicative (or purportedly duplicative) discovery. Second,

See Air Line Pilots Ass'n, Int'l v. Am. Nat'l Bank & Trust Co. of Chi. (In re Ionosphere Clubs, Inc.), 156 B.R. 414, 428, 433 (S.D.N.Y. 1993) (noting that information informally obtained by the examiner was not subject to discovery), aff'd, 17 F.3d 600 (2d Cir. 1994).

once an investigator has already initiated an adversary proceeding, and is seeking discovery independently, this might serve as a basis to deny an additional discovery request.

The Bankruptcy Court's order in Refco appointing the examiner requires careful and close coordination by the examiner in respect of the investigation. 116 First, the examiner is required to consult with the debtors and the creditors committee in developing a work plan which will avoid duplication and limit the investigation in certain areas. 117 Second, the examiner is directed to use its best efforts to avoid any interference with any investigations being conducted by the SEC, the DOJ, the CFTC or other governmental agencies. Thus the examiner is required to affirmatively consult with not only creditors and parties in interest in the case but also the applicable regulatory authorities to ensure that witnesses, documents and other materials are obtained in a nonduplicative manner and are obtained in a way so as not to interfere with ongoing criminal prosecutions and regulatory actions.

Use of Examiners for Other Tasks D.

1. Litigation

In a typical bankruptcy case, either the debtor or the creditors committee is in the best position to pursue litigation on behalf of the estate. In a growing number of cases, however, due to an actual or apparent conflict, an independent party (i.e., an examiner) is needed to bring actions on behalf of the estate. For example, debtors and members of the committee may be unable or unwilling to initiate/pursue litigation against the debtor's officers and directors, key trade creditors that sit on the committee, or banks that provide the debtor with needed capital. Because an examiner is uniquely situated as an independent investigator, he or she may be in the best position to pursue these causes of action.

In Williamson v. Ropollo, 118 three separate appeals were filed concerning the propriety of the bankruptcy court's appointment of an examiner with expanded powers. In particular, these appeals focused on whether a bankruptcy court may vest an examiner with the authority to prosecute avoidance actions on behalf of the estate. On appeal, the district court recognized that the legislative history of Section 1106 of the Bankruptcy Code provided that bankruptcy courts may entrust an examiner with additional duties typically given to trustees if the circumstances warrant. 119 The district court then proceeded to review the bankruptcy court's decision to authorize the examiner to pursue litigation on behalf of the estate. The court focused on the fact that (i) the bankruptcy court was advised that the debtor would not collect assets on behalf of the estate because the case was commenced as an involuntary bankruptcy, (ii) a creditors' committee had

In re Refco Inc., No. 05-60006, ECF No. 1487 (Bankr. S.D.N.Y. Mar. 16, 2006).

Id. ¶ 3, at 2.

¹¹⁴ B.R. 127 (W.D. La. 1990); see supra, note 14.

Id. at 129 (citing H.R. Rep. No. 95-595, at 404 (1977); S. Rept. 95-989, at 116 (1978).

not been formed, and (iii) parties in interest did not want to replace the debtor's management with a trustee. Under these extraordinary circumstances, the bankruptcy court empowered the examiner to pursue causes of action. Recognizing the unique circumstances involved and that an expansion of authority was not without precedent, the district court affirmed the bankruptcy court's decision.

Although several courts have concluded that an examiner may be authorized to pursue litigation on behalf of the estate, this view had not been adopted by all courts. In the Third Circuit, for example, an examiner may not serve as a substitute for either a trustee or a creditors' committee for the purposes of avoiding fraudulent transfers. Furthermore, because the court reasoned that an examiner's role in a Chapter 11 proceeding is to pursue an independent investigation to ensure an expeditious and fair examiner's report, it appears likely that the Third Circuit would also preclude examiners from pursuing other litigation on behalf of the estate.

2. Negotiation/Mediation

Courts have recognized that an examiner may be necessary where the constituencies in a case have reached a point of such adversity that the appointment of an independent fiduciary to mediate the disputes and to propose a plan would be appropriate. For example, in the case of Enron North America ("ENA") (a whollyowned subsidiary of Enron), the examiner for ENA was directed to participate in the plan negotiation process on behalf of the creditors of ENA in contrast with the creditors of Enron and the other Enron affiliates in the jointly-administered bankruptcy cases. 123

In re Carnegie Int'l Corp., 51 B.R. 252 (Bankr. S.D. Ind. 1984) (authorizing the appointment of an examiner to pursue causes of action on behalf of the estate); see also NBD Park Ridge Bank v. SRJ Enters., Inc. (In re SRJ Enters., Inc.), 151 B.R. 189, 195 (Bankr. N.D. Ill. 1993). In addition, some care should be taken to review the terms of D&O liability policies. For a certain time period, those policies had exceptions to the insured vs. insured exclusion that would allow certain fiduciaries, such as an examiner, to bring a claim but would prohibit the exception to apply to certain other fiduciaries (such as a creditors' committee). Thus, at the outset, it would be advisable for the creditors' committee and the examiner to determine the precise language in any potentially applicable D&O policy in order to make an assessment as to the advisability of authorizing the examiner to bring litigation. In the Enron case, the policy contained just such an exception and, by order dated August 29, 2002, the Enron examiner was authorized to bring litigation, and that authorization was immediately assigned to the creditors' committee. In re Enron Corp., No. 01-16034 (Bankr. S.D.N.Y. Aug. 29, 2002).

¹²¹ See Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery, 330 F.3d 548, 578 (3d Cir. 2003).

See, e.g., In re UNR Indus., Inc., 72 B.R. 789, 795-96 (Bankr. N.D. Ill. 1987) (appointing an examiner to determine whether negotiations towards a consensual plan of reorganization were at an impasse); In re Pub. Serv. Co. of N.H., 99 B.R. 177 (Bankr. D.N.H. 1989) (appointing examiner to assist with plan process); see also In re Marvel Entm't Group, Inc., 140 F.3d 463 (3d Cir. 1998) (appointing trustee due to acrimony between the parties); In re Bellevue Place Assocs., 171 B.R. 615 (Bankr. N.D. Ill. 1994 (appointing a trustee to foster negotiations between parties in interest).

¹²³ See In re A.H. Robbins Co., No. 85-1020 (Bankr. E.D. Va.) (court appointed an examiner to evaluate and suggest proposed elements of a plan of reorganization); In re UNR Indus., 72 B.R. at 795-96 (appointing an examiner to determine whether negotiations towards a consensual plan of reorganization were at an impasse).

Although most people view examiners as mere investigators, they can be used to provide various constituencies with confidence that the bankruptcy is being monitored by an entity with no direct stake. Accordingly, if the parties are unable to reach a consensual resolution, the court may be left with no other option than to appoint an examiner to assist in the negotiation process.

3. Monitoring of Professionals

As noted above, in *In re Mirant Corp.*, ¹²⁴ due to the bankruptcy court's concerns, the court directed the appointment of an examiner to perform certain investigative tasks. Three months later, the court expanded the role and duties of the Mirant Examiner *sua sponte* to ensure compliance with the court's orders, ¹²⁵ review inter-estate conflicts, ¹²⁶ ensure that parties continue to push toward reorganization, police alleged unprofessional activities, and to alert the court to bad faith or wrongful conduct among the parties. Then, at a hearing held on July 4, 2004, the court expressed its intent to enter an order further expanding the examiner's authority to commence and preside over monthly status conferences with the professionals in Mirant's bankruptcy case and to monitor the fee review committee. As a result, the role of the investigator was expanded beyond the traditional role of investigating the debtor yet again to monitor the professionals.

E. To Whom Does the Examiner Owe a Duty?

The principle that the proper role of an examiner is that of a disinterested, nonadversarial officer of the court has been so widely accepted that it can hardly be doubted. To that end, an examiner has a fiduciary duty to the court to file an objective, independent, and fair statement of his investigation with respect to the matters set forth in 11 U.S.C. § 1106(a)(4)(A). Under the arrangement envisioned by the statute, it is the examiner's duty to report the facts, and it is the duty of others (including the debtors in possession) to evaluate the facts and make a determination of whether a given claim is worth pursuing. The facilitation of an independent investigation while allowing the debtor to remain in possession is an important reason for the existence of the examiner option in the first instance. Put in slightly different terms, the appointment of an examiner instead of a trustee, and the preservation of the debtor's exclusivity, comes with

The court concluded that it needed someone to ensure that committee members complied with its order permitting limited trading in debtor's securities.

¹²⁴ In re Mirant Corp., No. 03-46590 (Bankr. N.D. Tex. Filed July 14, 2003).

The court recognized that the chair of one of Mirant's creditors' committees was also a potential defendant in securities litigation involving Mirant.

See, e.g., Kovalesky v. Carpenter, No. 95 CIV. 3700, 1997 WL 630144, at *3 (S.D.N.Y. Oct. 9, 1997) ("Examiners . . . play a chiefly information-seeking role and, like the court itself, must remain a neutral party in the bankruptcy process."); In re Big Rivers Elec. Corp., 213 B.R. 962, 977 (Bankr. W.D. Ky. 1997) (recognizing the examiner as "a party who is not an adversary but rather an independent third-party and an officer of the Court"); In re Interco, Inc., 127 B.R. 633, 638 (Bankr. E.D. Mo. 1991) ("[T]he Examiner's role is by its nature disinterested and non-adversarial. There is no doubt that the Examiner is a neutral party in a bankruptcy case."); Baldwin United, 46 B.R. at 316 ("[The Examiner] is first and foremost disinterested and nonadversarial. . . . [H]e answers solely to the Court.").

certain consequences. One of these consequences is an investigation conducted by a neutral, disinterested party (an examiner) instead of a party interested in prosecuting causes of action available to the estate (a trustee). More fundamentally, the examiner should not be expected to behave like a Chapter 11 trustee might behave, for the simple reason that the powers and duties of trustees differ from the powers and duties of examiners.

Section III: GOVERNMENTAL INVESTIGATIONS

A. Introduction

In recent years, the public and the SEC have increased their focus on corporate malfeasance and mismanagement. As a result, because many questions regarding corporate malfeasance do not come to light until after (or immediately before) a company commences its bankruptcy case, an examiner is often required to conduct its investigation concurrently with criminal investigations/prosecutions, SEC enforcement actions, and other similar governmental investigations (i.e., well-publicized congressional hearings). As a result, there are often multiple competing parties and claims for documents and or witnesses.

B. Types of Investigations

The bankruptcy filing of WorldCom in 2002 provides an example of the various investigations and proceedings that may run parallel to the bankruptcy case. First, shortly after the commencement of WorldCom's bankruptcy case, a criminal prosecution and SEC enforcement action were filed against WorldCom. Second, recognizing the rumors swirling around the largest insolvency in American history, Congress threw its hat into the ring by subpoening WorldCom employees and other related individuals. These proceedings challenged the bankruptcy court's ability to control WorldCom and the flow of information. In particular, through the SEC enforcement proceeding, the District Court appointed a "corporate monitor" to oversee WorldCom's business operations and report back to the District Court.

Recognizing its statutory requirements, and the nonbankruptcy developments, the United States Trustee sought the appointment of an examiner. The bankruptcy court granted the United States Trustee's request; however, the court concluded that the role of the examiner should be somewhat limited. Instead of following the recent trend to appoint examiners with expansive powers, the bankruptcy court directed the WorldCom examiner to coordinate his actions with the Department of Justice, the SEC, and the corporate monitor.

C. Issues in Connection with the Overlap

In recent history, large Chapter 11 bankruptcy cases are often accompanied by, if not preceded by, allegations concerning possible accounting fraud, embezzlement, and

_

¹²⁸ See In re WorldCom, Inc., No. 02-13533, ECF No. 53 (Bankr. S.D.N.Y. July 23, 2002).

other crimes against the debtor and its creditors. As a result, in addition to the commencement of criminal/regulatory investigations into the voracity of these allegations, creditors may seek the appointment of an independent examiner to investigate the company in its bankruptcy case.

While there is no law or regulation that precludes concurrent criminal, regulatory, and examiner investigations, there are a number of issues that may arise. First, if the examiner takes control of the investigation prior the involvement of a criminal investigator/prosecutor, it is possible that the examiner's actions may preclude the introduction of evidence in subsequent criminal actions. For example, if the investigating parties, the witnesses, and documents are located in different forums, or if different parties possess the information, the sharing of evidence will likely be hampered. In particular, as discussed in greater detail below, if certain evidence is critical to the allegations of a criminal complaint, the prosecutors will often refuse to share that information with other parties until that information is no longer critical to their investigations/prosecutions. Moreover, the presence of two or more parties investigating the same events will likely result in a duplication of efforts or other waste of resources.

Another conflict arises due to each investigator's inherent authority to investigate. Prosecutors generally have the most power among investigating parties. They are charged by the government to investigate and punish criminal acts. Prosecutors can also use the threat of litigation to induce cooperation and encourage the production of information. Furthermore, prosecutors can obtain court authority to act before the issuance of an indictment.

Shortly behind prosecutors come regulatory investigators. These investigators often have significant independent power over business and associated individuals because they can issue administrative subpoenas for testimony, require the production of documents or impose fines. Finally, they can obtain first access to information by operating in tandem with prosecutors.

The bankruptcy of WorldCom in 2002 provides an example of how bankruptcy court proceedings and government actions may be intertwined. After WorldCom filed its petition for relief, a criminal prosecution and an SEC enforcement were commenced in the Southern District of New York. Through the SEC enforcement proceeding, the district court appointed a corporate monitor to oversee WorldCom's ongoing operations and to report back to the court.

At virtually the same time, the United States Trustee requested that the bankruptcy court appoint an examiner to investigate the debtor. Recognizing the issues presented, the bankruptcy court appointed an examiner to investigate WorldCom and submit reports to the bankruptcy court. Furthermore, despite the trend to provide examiners with broad authority, the bankruptcy court directed the examiner to coordinate his efforts with the Department of Justice (the "DOJ"), the SEC, and the corporate

_

Congress initiated its own investigation by subpoening a number of WorldCom's employees and questioning other related individuals.

monitor. As a practical matter, because the United States Trustee requested the appointment of the examiner, two separate divisions of the Department of Justice were required to determine how to manage its two needs in addition to the needs of regulators, Congress, creditors and other interested parties. Not surprisingly, because the Department of Justice's primary mission is the enforcement of federal law – with an emphasis on criminal enforcement – the Department of the Attorney General decided that the criminal investigation received first priority, followed by the parallel SEC regulatory investigation.

As noted above, in the *Refco* bankruptcy case, the Court required that the examiner use its best efforts to avoid any duplication of effort with respect to the ongoing investigations of the SEC, DOJ and other regulatory agencies. Moreover, the examiner is required to avoid interference with those investigations which may, ultimately, compel the examiner to defer witness interviews, depositions or document productions in order to avoid any interference with an ongoing criminal or regulatory investigation.

1. Document Production/Witness Access

Due to the various investigations concerning WorldCom, the Attorney General developed its own guidelines on how information would be shared with the various constituencies involved. First, because there were several constituencies that each had a right to obtain information concerning WorldCom, the Attorney General agreed that it would share information if that information was not necessary for a higher priority investigation. Second, the Attorney General entered into an agreement with the SEC, apparently without the consent of the examiner, whereby the criminal prosecutors could determine whether a given witness could speak (i) only to the criminal investigators, (ii) to the criminal investigators and the SEC, or (iii) to the criminal investigators, the SEC and the Examiner. As a result, the Attorney General reserved the right to review the examiner's report to ensure that the reports did not disclose information prematurely. Although the Attorney General's reservation enabled the examiner to obtain access to government witnesses, in several instances the examiner promised to delay the publication of information obtained until its release would not impair the government's investigations.

2. Grand Jury Issues

directing the examiner to "avoid any unnecessary duplication of, any investigations conducted by the U.S. Department of Justice, the Securities and Exchange Commission ('SEC'), other governmental agencies, or the corporate monitor appointed by order of the United States District Court for the Southern District of New York ('Corporate Monitor')"); see also In re Refco Inc., No. 05-60006 (Bankr. S.D.N.Y. filed Oct. 17, 2005) (examiner order required affirmative cooperation and coordination with the agencies). The examiner should be cognizant, however, of the risks that cooperation may be deemed to create the situation whereby the examiner is part of the DOJ investigation. At one point during the Enron proceedings, Ken Lay and Jeff Skilling took the position that under Brady v. Maryland, 373 U.S. 83 (1963), the DOJ had an affirmative obligation to disclose exculpatory evidence not only in the case files of the DOJ but also the Enron Examiner. That request was denied; however, it illustrates at least an issue for the examiner to consider in terms of coordination with the U.S. Attorney or the DOJ.

Although recent cases indicate that government entities and the examiner should and do work together when there are parallel/related investigations, it is important to note that the presence of criminal causes of action and potential criminal indictments may preclude the open exchange/sharing of all information obtained. In particular, Rule 6 of the Federal Rules of Criminal Procedure provides a general rule of secrecy with respect to grand jury proceedings that prohibits grand jurors, interpreters, stenographers, operators of recording devices, typists, government attorneys, and governmental personnel from discussing matters before the grand jury. This limitation precludes the disclosure of any information developed through criminal subpoenas, including grand jury testimony, in addition to any information directly derived from testimony proffered or documents produced. Accordingly, if a criminal investigation obtains evidence from a proceeding before a grand jury, it will be precluded from sharing such information with the examiner.

As discussed immediately below, in certain cases the examiner may be subject to discovery requests by the criminal investigators at the DOJ. In addition, the examiners, representatives (and representatives of the creditor's committee for that matter) should be cognizant of the fact that the Grand Jury may issue a subpoena for the appearance of those representatives in order to provide testimony to the Grand Jury relative to the conduct of the debtors, directors and officers or others. Obviously, this potential requires careful consideration as the tension between any protective order and/or non-disclosure order entered by the court, may require some guidance from the appointing court so as to avoid any waiver or breach of any applicable duty to maintain the integrity of the investigatory materials.

D. Process Issues and Turf Battles

Although prosecutors are vested with significant authority, they are not omnipotent. For example, if an examiner is in place before a prosecutor gets involved or a regulatory investigation is initiated, the examiner may be able to refuse their requests for information held by the examiner. In addition, an examiner with vital information may be able to use information in his possession as a bargaining chip in his efforts to obtain information held by the prosecutor or regulatory investigator.

In *United States v. Doe (In re Grand Jury Subpoena Duces Tecum Dated April 19, 1991)*, ¹³¹ the Second Circuit was asked to address a motion to quash a grand jury subpoena filed by the court-appointed examiner in Eastern Airlines' bankruptcy proceeding (the "Eastern Examiner"). The Eastern Examiner was appointed to investigate and review purportedly fraudulent transactions involving Eastern Airlines and Continental Airlines. In response to requests by the Eastern Examiner to investigate these transactions, Continental Airlines refused to produce information unless the information would be kept confidential and used only in the bankruptcy proceeding. Because this information was necessary to the Eastern Examiner's investigation, the United States Trustee, the Eastern Examiner, and the respective counsel agreed to a

¹³¹ 945 F.2d 1221 (2d Cir. 1991).

stipulated confidentiality agreement before taking depositions.¹³² In accordance with Rule 9018 of the Bankruptcy Rules, the court entered an order sealing those matters covered by the stipulation.

In 1991, the United States Attorney obtained a grand jury subpoena commanding the Eastern Examiner to produce all deposition transcripts. The Eastern Examiner moved to quash the subpoena before the district court, but his request was denied. The district court concluded that the bankruptcy court's protective order was an express agreement to withhold evidence of fraud from the United States Attorney. On appeal, the Second Circuit concluded that the district court made no finding that the bankruptcy court improvidently entered the protective order and that the court improperly shifted the burden to the Eastern Examiner to establish why the subpoena should be quashed. Finally, although the Second Circuit recognized that a party seeking to modify a protective order can do so through subpoenaing information subject to the protective order, it recognized that it might be more provident to seek relief from the court that originally issued the subpoena.

Section IV: CONCLUSION

The bankruptcy examiner can perform a very useful service for creditors, other parties in interest and the general public in conducting a thorough and independent investigation of the debtor's pre-petition transactions and conduct. This would involve not only the conduct of the debtor, but also those with which the debtor dealt, including financial institutions, accounting firms, law firms, investment banks and others. As noted above, part of the goal of the process is to provide some transparency for the general public. The process of the investigation requires careful consideration of competing policy concerns, including maintenance of the debtor's attorney-client privilege and confidentiality concerns where they are relevant and well-founded.

The potential for overlap of any investigation, whether conducted by the examiner, the creditors' committee or otherwise in the context of a bankruptcy case, with the investigation of the debtor and its employees by the DOJ, SEC or other government agencies must also be carefully considered. Depending on timing, the government may be ahead of the examiner or creditors' committee. The government may also wait for the examiner to conduct the investigation in order to generate material that may be reviewed and utilized in connection with a criminal prosecution. The examiner or creditors' committee must be cognizant of this potential in structuring the investigation and in

¹³² It should be noted that the Eastern Examiner also conducted numerous depositions without the entry of the stipulated confidentiality agreement.

See, e.g., In re PRS Ins. Group, Inc., 274 B.R. 381, 385 (Bankr. D. Del. 2001); Austrian v. Williams, 198 F.2d 697, 702 (2d Cir. 1952) ("[O]ne of the purposes for conferring upon the trustee [or an examiner] in reorganization broad investigatory powers" is "the exposure of corporate abuses."); Weissman v. Hassett, 47 B.R. 462, 467 (S.D.N.Y. 1985) (citing Austrian and noting that "[t]he courts recognize that dissemination of a judicial opinion or report may serve an important public purpose"); Keene Corp. v. Coleman (In re Keene Corp.), 164 B.R. 844 (Bankr. S.D.N.Y. 1994); In re First Am. Health Care of Ga., Inc., 208 B.R. 992 (Bankr. S.D. Ga. 1996).

addressing witnesses and documents. Moreover, the court, in appointing an examiner, may explicitly require cooperation (and, in some cases, deference to the criminal investigators).