

# NOTES

## BANKRUPTCY EXAMINERS UNDER SECTION 1104(b): APPOINTMENT AND ROLE IN COMPLEX CHAPTER 11 REORGANIZATIONS OF FAILED LBOs

The appointment of examiners in Chapter 11 bankruptcy cases merits increased attention as the explosion of leveraged buyouts (“LBOs”)<sup>1</sup> in the 1980s<sup>2</sup> threatens to force unsuccessful LBO companies into bankruptcy reorganization in the 1990s.<sup>3</sup> As LBOs grew in popularity over the last decade,<sup>4</sup> scholars lauded the concept of the leveraged buyout as an effective financial mechanism.<sup>5</sup> Today, however, many targeted companies saddled with asset-poor balance sheets cannot meet their sizeable debt obligations,<sup>6</sup> and must seek bankruptcy protection from creditors and equity holders.<sup>7</sup>

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1. “An LBO, or leveraged buyout, is a business transaction in which a company is sold under a financial arrangement whereby the purchasers borrow all, or substantially all, of the purchase price which is secured by mortgages on the assets of the selling company.” *In re Ohio Corrugating Co.*, 91 B.R. 430, 432 n.1 (Bankr. N.D. Ohio 1988).

2. One hundred twenty of the ‘Forbes 1990 List of the 400 Largest Private Firms in the United States’ became private in the 1980s. Sabin Russell, *Forbes 400 Private Firms Grow, but at Slower Pace*, S.F. CHRON., Nov. 26, 1990, at C2. One hundred and one of these firms became private since 1985. *Id.* As of 1990, revenues from the 400 largest private businesses totaled \$609 billion. *Id.*

3. Richard E. Mendales, *The New Junkyard of Corporate Finance: The Treatment of Junk Bonds in Bankruptcy*, 69 WASH. U. L.Q. 1137, 1139 (1991). See also Mary Goulet, *The Rights of Debtholders When a Leveraged Corporation Fails*, 15 J. CORP. L. 257 (1990) (explaining that due to the inability to service the debt, highly leveraged companies are ripe candidates for business failure in the next recession).

4. Fifty-six percent of the high-yield LBO market, which amounted to \$211 billion in 1990, was created in 1988 and 1989. *Financial Advisor Says Bankruptcy Laws Fail to Protect LBO-Related Bondholders*, 22 Sec. Reg. & L. Rep. (BNA) No. 5, at 166 (Feb. 2, 1990). Over 50% of LBO transactions occurred after 1987. *Id.*

5. Several scholars have suggested that LBOs are economically efficient and benefit creditors. See Douglas G. Baird & Thomas H. Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 VAND. L. REV. 829 (1985). But see David A. Kaplan, *M&As: Should Congress Act? Public Says the Process is Corrupt*, NAT’L L.J., Feb. 27, 1989, at 1 (describing the results of a National Law Journal/Lexis poll in which 84% of Americans surveyed considered the mergers and acquisitions environment corrupt and disturbing).

6. See Margaret Sheneman et al., *Property of the Estate and Avoiding Powers, in UNDERSTANDING BUSINESS BANKRUPTCY - HOW TO HANDLE EVERYDAY PROBLEMS, A SATELLITE PROGRAM 7, 26-27* (PLI Com. L. & Practice Course Handbook Series No. 576, 1990).

7. See *id.* at 26. In a typical leveraged buyout, the purchaser (“Buyout Group”) acquires the stock of a targeted company (“Target”). *Id.* Unlike a conventional acquisition, the buyer does not

When a corporation files Chapter 11 reorganization bankruptcy, the Bankruptcy Code<sup>8</sup> specifically authorizes the bankruptcy court to appoint a trustee to operate the business and displace the debtor's management, which acts as "debtor-in-possession" from the commencement of the bankruptcy.<sup>9</sup> However, most parties in interest will not request a trustee because the debtor-in-possession is usually better situated to continue operating the business throughout the reorganization process.<sup>10</sup>

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purchase the company's assets. *Id.* Instead, the Buyout Group forms a sparsely capitalized corporation ("Acquisition") for the sole purpose of acquiring Target's stock. Sally S. Neely, *Leveraged Buyouts: Fraudulent Conveyances of What?*, in *THE FAILED LBO: HOW TO RESTRUCTURE THE TROUBLED BUSINESS UNDER CHAPTER 11* 561, 565 (ALI-ABA Course of Study Materials, 1990). Risking little, if any, equity capital, the Buyout Group finances the purchase primarily by issuing debt. *Id.* The public or financial institutions customarily purchase the debt through junk bonds. *Id.* Alternatively, the Buyout Group may sell or exchange the debt to the selling shareholders. Sheneman et al., *supra* note 6, at 26. The Buyout Group usually secures the debt with a lien on the assets of the targeted corporation. *Id.* Next, the Buyout Group uses the proceeds from the sale of various debt instruments and any loan proceeds to compensate the selling stockholders. *Id.* at 27. The targeted company receives little, if any, of the loan proceeds. *Id.* Instead, because the Buyout Group financed the acquisition with financing secured by the targeted company's assets, the Buyout Group creates a debt-loaded targeted company with a highly leveraged balance sheet. Neely, *supra*, at 565.

Shortly after financiers created the LBO concept, some scholars praised those who utilized LBO transactions. Sheneman et al., *supra* note 6, at 27. See *supra* note 5. These commentators believed that debt benefitted a company and maximized its profitability. In reality, many leveraged buyout transactions proved unsuccessful. Joseph H. Levie, *Financing the Debtor-in-Possession: Superpriorities and Financing Orders*, N.Y. L.J., July 11, 1991, at 5. After overloading the amount of debt in the LBO, many of these newly private companies filed bankruptcy. *Id.* In addition, the creditors of the unsuccessful targeted companies have often attacked the LBOs as fraudulent conveyances. Sheneman et al., *supra* note 6, at 28-30.

The effect of a fraudulent conveyance attack is beyond the scope of this Note. For a general discussion of fraudulent conveyances and LBOs, see Kathryn V. Smyser, *Going Private and Going Under: Leveraged Buyouts and the Fraudulent Conveyance Problem*, 63 *IND. L.J.* 781 (1988); Kevin J. Liss, Note, *Fraudulent Conveyances and Leveraged Buyouts*, 87 *COLUM. L. REV.* 1491 (1987).

8. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101-1330 (1988)) [hereinafter Bankruptcy Code or Code].

9. 11 U.S.C. § 1104(a) (1988). The Bankruptcy Code permits the bankruptcy court to appoint a trustee any time after commencement of the case only if such appointment is in the creditors' best interests or if "cause" exists. *Id.* The Code defines "cause" as "fraud, dishonesty, incompetence or gross mismanagement of the affairs of the debtor." 11 U.S.C. § 1104(a)(1) (1988). If the court appoints a trustee, he displaces the debtor's current management. 11 U.S.C. §§ 1101, 1108 (1988). If the court chooses not to appoint a trustee, the debtor, as "debtor-in-possession," continues to run the company. 11 U.S.C. § 1107 (1988). A "debtor-in-possession" means the "debtor except where a person . . . is serving as trustee in the case." 11 U.S.C. § 1101 (1988). The trustee possesses broad powers, including operating the debtor's business, filing schedules and confirmation plans, investigating the debtor and issuing reports to the court. 11 U.S.C. § 1106 (1988 & Supp. 1991).

10. Peter F. Coogan, *Confirmation of a Plan Under the Bankruptcy Code*, 312 *CASE W. RES. L. REV.* 301, 322 (1988). Most creditors prefer the debtor to continue to operate the business. *Id.* The creditors indicate this preference when they accept the debtor's decision to file Chapter 11, instead of

The Code and the courts consider the trustee's appointment as both an extraordinary remedy and a drain on essential assets of the bankruptcy estate.<sup>11</sup> Therefore, if the bankruptcy court decides not to appoint a trustee, the Code allows for the appointment of an examiner.<sup>12</sup> The appointment of an examiner in failed LBO cases as a less restrictive, more cost-effective alternative to a trustee is growing in importance. However, the bankruptcy examiner's appointment and powers in the Chapter 11 reorganization process remain unclear<sup>13</sup> because of the sparse amount of case law concerning examiners.<sup>14</sup>

This Note contends that Congress should revise the Bankruptcy Code provisions to clarify the role of examiners in the reorganization process. Bankruptcy courts need more guidance regarding the examiner's powers and duties as his role in complex Chapter 11 reorganizations of failed

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Chapter 7 liquidation. *Id.* See, e.g., *In re Anchorage Boat Sales, Inc.*, 4 B.R. 635, 644 (Bankr. E.D.N.Y. 1980) (appointing a trustee in a Chapter 11 case is an extraordinary remedy, which may preclude an effective reorganization because the trustee imposes substantial burdens on the financially strapped debtor). See also H.R. REP. NO. 595, 95th Cong., 1st Sess. (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 5963 [hereinafter *House Report*]. The House Report notes that "very often the creditors will be benefitted by continuation of the debtor in possession, both because the expense of a trustee will not be required, and the debtor, who is familiar with his business, will be better able to operate it during the reorganization case." *Id.* at 6192.

11. Michael S. Lurvey & Robert J. Rosenberg, *The Battles for Confirmation of Chapter 11 Plans*, in *DOING BUSINESS WITH TROUBLED COMPANIES* 505, 522 (PLI Com. L. & Practice Course Handbook No. 582, 1991). The trustee ousts the debtor's management and operates the business. *Id.* However, often the creditors object to the trustee's appointment because his appointment results in additional expenses to the estate. *Id.*

12. Lawrence K. Snider, *The Examiner in the Reorganization Process: A Need to Modify*, 45 *BUS. LAW.* 35 (Nov. 1989). The drafters of the Code based the examiner provision on the examiner section in Chapter X of the former Bankruptcy Act. *Id.* at 35 (citing Chandler Act, 52 Stat. 840 (1938) (originally enacted as Bankruptcy Act of 1898, ch. 541, 30 Stat. 561 (1898) (repealed by 11 U.S.C. §§ 101-1330 (1988))).

13. Snider, *supra* note 12, at 35. The Code fails to provide the bankruptcy court with standards to consider when determining whether to appoint an examiner. *Id.* at 36.

14. In 1988, Revco D.S., Inc. filed Chapter 11 bankruptcy. *Revco Files Amended Plan in Bid to Stay Independent*, Reuters, Jan. 22, 1992 (available in LEXIS, Nexis Library, Wires File). The company filed bankruptcy only two years after going private in an LBO. *Id.* In 1990, the Bankruptcy Court for the Southern District of Ohio appointed an examiner to investigate the LBO. *Revco Revisited*, NAT'L L.J., Jan. 13, 1992, at 30. Revco was the first case in which a bankruptcy court ordered the appointment of an examiner to investigate an LBO transaction. *Revco Bankruptcy Examiner Finds Basis for Legal Claims Against Management, Advisors and Lenders*, PR Newswire, Jan. 2, 1991 (available in LEXIS, Nexis Library, PR News File).

After an unsuccessful LBO, Interco, Inc. filed Chapter 11 bankruptcy in January 1991. Kim Foltz, *Business People, Difficult Task Described by Examiner of Interco*, N.Y. TIMES, Oct. 26, 1991, at 35. In March 1991, the Bankruptcy Court for the Eastern District of Missouri appointed an examiner to investigate Interco's LBO. *Id.*

LBOs increases in importance. Part I examines the statutory language and legislative history of the Code's section 1104(b), which provides two alternative methods for the bankruptcy court to appoint an examiner in a reorganization case. Part II analyzes the judicial controversy and hostility surrounding section 1104(b) of the Code. Part III investigates the statutory language and judicial development of the duties, powers and role of an examiner in a failed LBO case. Finally, Part IV argues that Congress should revise the Code to reflect its policy of efficient administration of business reorganizations. In the absence of congressional rescue, the bankruptcy courts should formulate more appropriate guidelines for an examiner's role in a failed LBO case. This Note concludes that the nature of the economic climate and the increasing volume of Chapter 11 cases necessitate either revision of the provisions regarding examiners or a more liberal judicial approach to examiners, who serve as cost-effective alternatives to trustees.

#### I. APPOINTMENT OF EXAMINERS—STATUTORY LANGUAGE AND LEGISLATIVE HISTORY

Congress enacted the Bankruptcy Reform Act of 1978<sup>15</sup> to overhaul the bankruptcy system in the United States.<sup>16</sup> The new Bankruptcy Code repealed the Bankruptcy Act of 1898.<sup>17</sup> In section 1104(b), the Code provides two alternative methods for the appointment of examiners.<sup>18</sup> However, the statutory language regarding the appointment of examiners is ambiguous.<sup>19</sup> In addition, only scant legislative history exists

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15. Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101-1330 (1988)).

16. See 1 ALAN N. RESNICK & EUGENE N. WYPYSKI, *BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY* at preface (1979) (describing the Bankruptcy Act as the most significant bankruptcy law development in the United States in recent decades).

17. See Robert E. Ginsburg, *Introduction to the Symposium: The Bankruptcy Reform Act of 1978 - A Primer*, 28 DEPAUL L. REV. 923 (1979). The new bankruptcy laws introduced vast reforms in bankruptcy proceedings. *Id.* at 923. The new Chapter 11 for business reorganizations combined Chapters X, XI, and XII into one single chapter. *Id.* at 928. See 11 U.S.C. §§ 1101-1174 (1988). The former Bankruptcy Act provided Chapter X (Corporate Reorganizations) for public company reorganizations, Chapter XI (Arrangements) for smaller business reorganizations, and Chapter XII (Real Property Arrangements). Robert J. Berdan & Bruce G. Arnold, *Displacing the Debtor in Possession: The Requisites for and Advantages of the Appointment of a Trustee in Chapter 11 Proceedings*, 67 MARQ. L. REV. 457, 457-58 (1984). The consolidation of the three chapters into one integrated chapter represented one of the most significant reforms of the new Code. *Id.* at 457 n.2.

18. 11 U.S.C. §§ 1104(b)(1), 1104(b)(2) (1988).

19. See *infra* note 22 for text of § 1104(b).

for sections 1104(b)(1) and 1104(b)(2).<sup>20</sup> Thus, courts vary in interpreting the two sections regarding discretionary and mandatory appointment of examiners in business reorganization cases.<sup>21</sup>

Under section 1104(b)(1), the Bankruptcy Code provides that the bankruptcy court shall order the appointment of an examiner if it is in the best interests of the creditors, any equity holders, or other parties in interest in the estate.<sup>22</sup> Alternatively, under section 1104(b)(2), the Code provides that the bankruptcy court should grant a request to appoint an examiner in any case in which the debtor's specific, statutorily enumerated liabilities exceed five million dollars. Congress drafted the statutory language of section 1104(b) as the result of last minute compromise.<sup>23</sup> The legislators based the provision on the position that the examiner held in cases filed under Chapter X of the former Bankruptcy Act.<sup>24</sup>

20. See *infra* note 25 and accompanying text.

21. See *infra* Part II for a discussion of a judicial reaction to § 1104(b).

22. Section 1104 (b) provides:

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

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

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

11 U.S.C. § 1104(b) (1988).

23. 3 COLLIER ON BANKRUPTCY ¶ 1104.03 at 1104-40 (15th ed. 1987). The drafters intended to appease those legislators who favored retaining the multi-chapter reorganization system of the old Bankruptcy Act. Lawrence P. King & Susan K. Bart, *Appointment of Examiner*, in CRITIQUE OF THE FIRST DECADE UNDER THE BANKRUPTCY CODE AND AGENDA FOR REFORM 341, 344 (ALI-ABA Williamsburg Conference on Bankruptcy 1988). The drafters attempted to appease those who favored retention of the former Bankruptcy Act's dual reorganization scheme. *Id.* The Act provided for one system of bankruptcy reorganizations for companies holding public debt or equity holders and a separate system for non-public companies. *Id.* See Berdan & Arnold, *supra* note 17, at 466 n.35 (explaining that numerous organizations and individuals influenced the synthesis of the chapters into one integrated chapter).

24. Snider, *supra* note 12, at 35. In 1898, Congress enacted Chapter X of the Bankruptcy Act. See Bankruptcy Act of 1898, ch. 541, 30 Stat. 561 (1898) (*amended by* Chandler Act, 52 Stat. 840 (1938) (*repealed by* 11 U.S.C. §§ 101-1330 (1988))). Chapter X established the reorganization process for corporations with complicated debt structures and many stockholders. King & Bart, *supra* note 23, at 344-45 (citing *In re GHR Cos.*, 43 B.R. 165, 171-72 (Bankr. D. Mass. 1984), *aff'd*, 792 F.2d 478 (5th Cir. 1986)). In contrast, Congress also enacted Chapter XI of the Bankruptcy Act for reorganizing individuals or small businesses with few, if any, stockholders.

Under § 156 of Chapter X of the former Bankruptcy Act, Congress required the court to appoint a trustee whenever the debtor's indebtedness exceeded \$250,000. Snider, *supra* note 12, at 35 n.3

Section 1104(b)'s legislative history is entrenched in controversy.<sup>25</sup> It offers courts virtually no insight into the discretionary appointment of an examiner under section 1104(b)(1).<sup>26</sup> In addition, the Bankruptcy Code provides very little information about mandatory appointment pursuant to section 1104(b)(2).<sup>27</sup>

Congress enacted the discretionary standard for the appointment of an examiner to investigate allegations of fraud, dishonesty, or mismanagement without displacing the current management.<sup>28</sup> The drafters intended to allow courts "greater flexibility" in handling the debtor during the reorganization process.<sup>29</sup> Specifically, the drafters wanted to avoid the mandatory trustee presumption which existed under Chapter X of the former Bankruptcy Act.<sup>30</sup> In adopting a flexible standard for the appointment of an examiner when the creditors' or equity holders' interests require an investigation, the drafters of the new Code intended to promote the increased use of an examiner.<sup>31</sup> However, Congress failed to establish criteria for the courts to follow when appointing examiners.<sup>32</sup>

Because the statutory language does not provide clear standards,

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(citing Chandler Act, § 156, 52 Stat. 888 (1938) (*repealed* 1978)). See also 5 COLLIER ON BANKRUPTCY ¶ 1104.01[2] at 1104-4 (15th ed. 1987). Chapter X Rule 10-202(a) required the court to appoint a trustee whenever the liquidated, noncontingent debts in the case equalled or exceeded \$250,000. *Id.* If the debtor's debts totaled less than \$250,000, the court could exercise its discretion to appoint a trustee. *Id.* Alternatively, Chapter X authorized the court to retain the debtor-in-possession and appoint an examiner to fulfill enumerated duties. Snider, *supra* note 12, at 35 n.3. However, very few debtors with less than \$250,000 debt filed cases under Chapter X. *Id.* Thus, the court almost always appointed a trustee under the mandatory provision. King & Bart, *supra* note 23, at 5. Because courts routinely appointed trustees, they rarely appointed examiners under Chapter X of the prior Act. *Id.* In addition, the former Bankruptcy Act contained no provisions regarding the appointment of an examiner in Chapter XI cases. King & Bart, *supra* note 23, at 5.

25. Kenneth N. Klee, *Legislative History of the New Bankruptcy Law*, 28 DEPAUL L. REV. 941, 942 (1979). In 1970, Congress formed a commission to study and analyze the bankruptcy laws in the United States. *Id.* at 942-43 (citing Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468 (1970)). After numerous changes and revisions during the debates in the House and Senate, Congress enacted a new bankruptcy system eight years later. Berdan & Arnold, *supra* note 17, at 457 n.2. For a general description of the organization of the Code, see Ginsburg, *supra* note 17.

26. See *infra* note 32 and accompanying text.

27. Snider, *supra* note 12, at 35-36.

28. King & Bart, *supra* note 23, at 343.

29. *Id.* (quoting *House Report*, *supra* note 10, at 6359).

30. *House Report*, *supra* note 10, at 6191-94. See *supra* note 24 for an explanation of appointing a trustee under Chapter X of the former Bankruptcy Act.

31. See *infra* notes 40-41 and accompanying text.

32. King & Bart, *supra* note 23, at 1. See also Snider, *supra* note 12, at 36. Neither the Bankruptcy Code nor its legislative history offers standards for a court to consider when determining whether to appoint an examiner under § 1104(b)(1). *Id.*

courts refer to the Code's legislative history for guidance. However, the legislative history of section 1104(b)(1) fails to define or clarify the standards of discretionary appointment of an examiner in a reorganization case. The legislative history surrounding the controversial "mandatory" appointment provision of section 1104(b)(2) offers a little more insight into the drafters' intentions.<sup>33</sup> Section 1104(b)(2)'s language, specifically the use of the words "bankruptcy court shall," appears to require the bankruptcy court to appoint an examiner when the debtor's debts exceed five million dollars.<sup>34</sup> The product of legislative compromise, the section resulted from the House and Senate each introducing separate bills during the Bankruptcy Code's formulation.<sup>35</sup> Specifically, the House and Senate approached the revision of corporate reorganizations of "public companies" differently.<sup>36</sup>

The House bill, H.R. 8200,<sup>37</sup> provided that if the court chose not to appoint a trustee, it could appoint an examiner.<sup>38</sup> H.R. 8200 authorized the appointment of an examiner to investigate the debtor if: (1) an examiner was needed; and (2) the costs of the examiner did not disproportionately exceed the benefits to the estate.<sup>39</sup> The House bill favored

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33. Snider, *supra* note 12, at 41. See also *House Report*, *supra* note 10, at 6359.

34. 11 U.S.C. § 1104(b)(2) (1988). See *supra* note 22 for the text of § 1104(b)(2). In order for a bankruptcy court to appoint an examiner pursuant to § 1104(b)(2), a party in interest or the United States Trustee must request the examiner. *Id.* Cf. *In re UNR Indus.*, 72 B.R. 789 (Bankr. N.D. Ill. 1987) (appointing an examiner *sua sponte*).

35. Snider, *supra* note 12, at 41.

36. See *infra* note 39 for text of H.R. 8200; see *infra* note 44 for text of S. 2266. See also King & Bart, *supra* note 23, at 348; Snider, *supra* note 12, at 41; Berdan & Arnold, *supra* note 17, at 466 nn.35-36. In the 1970s, Congress established the Commission on the Bankruptcy Laws of the United States to investigate a complete reform of the bankruptcy system. Klee, *supra* note 25, at 943. See also Act of July 24, 1970, Pub. L. No. 91-354, 894 Stat. 468 (1970).

The Commission consisted of nine members, three of whom the President appointed. Klee, *supra* note 25, at 943. The House, Senate and the Chief Justice of the United States Supreme Court each appointed two members. *Id.* Both the House and Senate considered the Commission's findings and recommendations before introducing H.R. 8200 and S. 2266. See H.R. 8200, 95th Cong., 2d Sess. (1978), reprinted in 16 RESNICK & WYPYSKI, *supra* note 16, at Doc. 51 [hereinafter H.R. 8200]; S. 2266, 95th Cong. 2d Sess. (1977), reprinted in 16 RESNICK & WYPYSKI, *supra* note 16, at Doc. 53 [hereinafter S. 2266].

37. H.R. 8200, *supra* note 36.

38. *Id.*

39. *Id.* As adopted by the House, § 1104(b) of H.R. 8200 provided:

If the court does not order the appointment of a trustee under this section, then at any time before the commencement of a plan, on request of a party in interest or the United States Trustee, and after notice and a hearing the court may order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investiga-

discretionary appointment of a trustee or examiner.<sup>40</sup> Yet, the House recognized that appointing an examiner constituted a less restrictive alternative than displacing the debtor with a trustee.<sup>41</sup>

Compared to H.R. 8200, the Senate bill, S. 2266,<sup>42</sup> was a more conservative approach to the reform of corporate reorganizations.<sup>43</sup> Section 1104(a) of the Senate bill retained the mandatory appointment of a trustee in all public company reorganizations consistent with the former Bankruptcy Act.<sup>44</sup> The Senate introduced section 1104(c), which allowed the court to appoint an examiner in a non-public reorganization only if the requesting party showed "cause."<sup>45</sup> The Senate favored the

tion of any allegations of fraud, dishonesty, incompetence, or gross mismanagement of the debtor or by current or former management of the debtor, if-

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

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

H.R. 8200, *supra* note 36, at 183.

40. The drafters refused to mandate that a court appoint a trustee or examiner. *See House Report, supra* note 10, at 6192-93.

41. *House Report, supra* note 10, at 6193. The House of Representatives acknowledged that appointing an examiner was less restrictive than displacing the debtor with a trustee. *Id.* Furthermore, the House recognized that the court should only appoint an examiner when the benefits of his investigations outweighed the costs associated with his appointment. *Id.* at 6194. *See also* Snider, *supra* note 12, at 41. *See also* King & Bart, *supra* note 23, at 359.

42. S. 2266, *supra* note 36.

43. Section 1104(a) of S. 2266 provided: "In the case of a public company, the court, within ten days after the entry of an order for relief under this chapter, shall appoint a disinterested trustee." S. 2266, *supra* note 36, at 512. Section 1104(b) of the Senate bill provided for appointment of a trustee in the case of a nonpublic company for cause if such appointment would be in the interests of the estate and security holders. *Id.* at 513.

44. S. 2266, *supra* note 36. Section 1104(c) of S. 2266 provided:

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

S. 2266, *supra* note 36, at 513.

45. Snider, *supra* note 12, at 42. Unlike the House, the Senate refused to eliminate the safeguards that it expected a trustee to provide public investors during the reorganization. *Id.* *See also* King & Bart, *supra* note 23, at 353. The Senate declined to explain its reasoning for introducing § 1104(c). *Id.* at 354. The Senate introduced two standards to govern a trustee's appointment, depending upon whether the debtor was a public or nonpublic company, not whether the debtor was small or large. *Id.* *See* S. REP. NO. 989, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.A.N. 5787, 5795-96 [hereinafter *Senate Report*]. "[I]nvestor protection is most critical when the company in which the public invested is in financial difficulties and is forced to seek relief under the bankruptcy laws." *Id.* at 5796.



use of trustees instead of examiners,<sup>46</sup> while the House preferred examiners.<sup>47</sup>

Congress eliminated section 1104(c) of the Senate bill when it finally enacted the new bankruptcy system in 1978.<sup>48</sup> The drafters deleted section 1104(c)<sup>49</sup> in order to gain the support of the Securities and Exchange Commission.<sup>50</sup> Congress replaced section 1104(c) with section 1104(b)(2)<sup>51</sup> to appease those who feared that public investors would suffer when a large company declared Chapter 11 bankruptcy.<sup>52</sup>

Section 1104(b)(2) appears to provide for mandatory appointment of an examiner in all Chapter 11 cases where the court has declined to appoint a trustee, and the debtor's unsecured liabilities exceed five million dollars.<sup>53</sup> Alternatively, section 1104(b)(1) provides for discretionary

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46. See Notes of Senate Committee on the Judiciary, S. REP. NO. 989, 95th Cong., 2d Sess. (1978), reprinted in *BANKRUPTCY CODE, RULES AND OFFICIAL FORMS: LAW SCHOOL AND C.L.E. EDITION* § 1104 at 288 (West 1986). Section 1104(a) of S. 2266 provides for the mandatory appointment of a disinterested trustee. *Id.* See *supra* note 44 and accompanying text.

47. See Notes of House Committee on the Judiciary, H. R. REP. NO. 595, 95th Cong., 1st Sess. (1977), reprinted in *BANKRUPTCY CODE, RULES AND OFFICIAL FORMS: LAW SCHOOL AND C.L.E. EDITION* § 1104(a) at 288 (West 1986).

48. Section 1104(a) of S. 2266 provided for the mandatory appointment of a trustee in all public company reorganization cases. See *supra* note 44 and accompanying text.

49. Snider, *supra* note 12, at 42. Congress substituted the \$5 million provision of § 1104(b)(2) for the provision of S. 2666 § 1104(a) mandating the appointment of trustees in public company reorganization cases. *Id.* at 42-43. The drafters of the compromise bill also deleted the requirement that the court consider the costs associated with the appointment of an examiner. King & Bart, *supra* note 23, at 24 n.41 (citing 5 *COLLIER ON BANKRUPTCY* ¶ 1104.03[3] (15th ed. 1987)).

50. Aaron Levy, *The Role of the Securities and Exchange Commission and the Judicial Functions under the Bankruptcy Reform Act of 1978*, 54 *AM. BANKR. L.J.* 29, 29-34 (1980). The SEC favored retaining the protection that a mandatory trustee afforded stockholders of large public corporations under Chapter X of the former Bankruptcy Act. *Id.* at 30. See *Hearings Before the Subcommittee on Improvements in Judicial Machinery on S. 2266 and H.R. 8200*, 95th Cong., 1st Sess. 622 (1977).

51. The drafters designed § 1104(b)(2) to provide for the mandatory appointment of examiners in all cases where debtor's unsecured liabilities exceeded \$5 million. See 11 U.S.C. § 1104(b)(2) (1988). *But see infra* notes 114-28 and accompanying text.

52. Snider, *supra* note 12, at 42-43. Acknowledging concern for public investors, Rep. Edwards explained Congress's reasons for enacting a mandatory appointment provision for examiners in all cases where certain enumerated liabilities of the debtor exceeded \$5 million:

In order to insure that adequate investigation of the debtor is conducted to determine fraud or wrongdoing on the part of present management, an examiner is required to be appointed in all cases in which the debtor's fixed, liquidated, and unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed \$5 million. This should adequately represent the needs of public security holders in most cases.

Snider, *supra* note 12, at 43 n.29 (quoting 124 *CONG. REC.* 32,403 (1978) (statement of Rep. Edwards)).

53. See 11 U.S.C. § 1104(b)(2) (1988). Although the language implies mandatory appoint-

appointment, based on the best interests of creditors, equity holders, and other interests of the estate, when the debtor's liabilities are less than five million dollars.<sup>54</sup> Yet, some courts and scholars have vehemently rejected the statutory language and legislative history.<sup>55</sup> These courts applied different standards when determining whether to appoint an examiner in certain cases.<sup>56</sup>

## II. JUDICIAL INTERPRETATION OF SECTION 1104(b)

### A. *Discretionary Appointment of Section 1104(b)(1)*

Under section 1104(b)(1)'s discretionary standard of appointment, the bankruptcy court should appoint an examiner when the interests of the estate or creditors require the examiner's investigation.<sup>57</sup> The Bankruptcy Code offers no guidance concerning which circumstances justify the discretionary appointment of an examiner.<sup>58</sup> Thus, courts vary in determining the standards for such appointment.<sup>59</sup> Several courts have concluded that the standards governing the appointment of an examiner are identical to those regarding the appointment of a trustee.<sup>60</sup> Other courts have established a less stringent standard when deciding whether to appoint an examiner.<sup>61</sup>

#### 1. *Standards Identical to Trustees*

Section 1104 provides one provision for the appointment of trustees and a separate section to govern the appointment of examiners.<sup>62</sup> De-

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ment, some courts have interpreted the language as non-mandatory. See, e.g., *In re GHR Cos.*, 43 B.R. 165 (Bankr. D. Mass. 1984), *aff'd*, 792 F.2d 476 (5th Cir. 1986). See also *infra* part II.B.2.

54. See *supra* note 22.

55. See *infra* part II.

56. King & Bart, *supra* note 23, at 366 n.41. See also *infra* part II.

57. 11 U.S.C. § 1104(b)(1) (1988). See *supra* note 22 for text of § 1104(b)(1).

58. See Snider, *supra* note 12, at 36.

59. *Id.*

60. See, e.g., *In re Table Talk, Inc.*, 22 B.R. 706 (Bankr. D. Mass. 1982); *In re American Bulk Transp. Co.*, 8 B.R. 337 (Bankr. D. Kan. 1980).

61. See, e.g., *In re Gilman Servs., Inc.*, 46 B.R. 322 (Bankr. D. Mass. 1985); *In re 1243 20th St., Inc.*, 6 B.R. 683 (Bankr. D.D.C. 1980).

62. Section 1104(a) provides for the appointment of a trustee:

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

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement

spite this distinction,<sup>63</sup> in *In re American Bulk Transport Co.*,<sup>64</sup> the Bankruptcy Court for the District of Kansas concluded that identical standards govern the appointment of trustees and examiners.<sup>65</sup> Similarly, in *In re Table Talk, Inc.*,<sup>66</sup> the Bankruptcy Court for the District of Massachusetts held that the standards for the appointment of an examiner match those applicable to the appointment of a trustee.<sup>67</sup> In addition, in *In re Tyler*,<sup>68</sup> the Bankruptcy Court for the Southern District of Florida held that because the appointment of a trustee did not serve the interests of creditors under section 1104(a)(2), the appointment of an examiner did not serve the interests of creditors within the meaning of section 1104(b)(1).<sup>69</sup>

In determining that identical criteria existed for determining whether to appoint a trustee or an examiner, these courts focused on the nearly indistinguishable language in sections 1104(a) and 1104(b)(1).<sup>70</sup> However, the courts did not consider the differences between the roles of the

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of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or

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

11 U.S.C. § 1104(a) (1988). For the text of § 1104(b) providing for the appointment of an examiner, see *supra* note 22.

63. Section 1104(a) provides that the court shall appoint a trustee (1) for cause, or (2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate. 11 U.S.C. § 1104(a) (1988). See *supra* note 62. Section 1104(b) provides that the court shall appoint an examiner (1) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, or (2) if the debtor's fixed, liquidated, unsecured debts exceed \$5 million. *Id.* § 1104(b).

64. 8 B.R. 337 (Bankr. D. Kan. 1980).

65. *American Bulk*, 8 B.R. at 341.

66. 22 B.R. 706 (Bankr. D. Mass. 1982).

67. *Table Talk*, 22 B.R. at 710.

68. 18 B.R. 574 (Bankr. S.D. Fla. 1982).

69. *Tyler*, 18 B.R. at 578-79. "Subsection (1) of [§ 1104](b) is similar to subsection (2) of § 1104(a)." *Id.* at 578. In *Tyler*, the court concluded that a trustee was not in the creditors' best interests. *Id.* The court reasoned that a trustee was unnecessary because the moving party failed to demonstrate that the debtor's management was disloyal or committed any wrongdoing. *Id.* The court discounted both the management's complex interpersonal and intercorporate cash transactions and its post-commencement use of a bank account to "float" funds. *Id.* at 576. The court further noted that § 1104(b)(2) did not mandate an examiner because the debtor's unsecured liabilities did not exceed \$5 million. *Id.* at 578-79.

70. See *supra* note 62. See also Snider, *supra* note 12, at 37. The "for cause" language in § 1104(a)(1) creates a presumption that displacing management by appointing a trustee is not in the creditors' best interests. *Id.* In contrast to a trustee's appointment, a court should not infer that § 1104(b)(1) creates the presumption that an examiner is adverse to the creditors' interests. *Id.*

trustee and examiner. While courts routinely acknowledge that appointing a trustee is an extraordinary remedy, which displaces the debtor and drains the bankruptcy estate of much-needed assets,<sup>71</sup> the appointment of an examiner produces less cumbersome consequences to the debtor, the creditors and the estate.<sup>72</sup>

## 2. *Factual Basis Standard*

Other courts apply a lesser standard for the appointment of an examiner.<sup>73</sup> In *In re 1243 20th Street, Inc.*,<sup>74</sup> the Bankruptcy Court for the District of Columbia appointed an examiner when sufficient evidence supported allegations of the debtor's possible mismanagement or misconduct.<sup>75</sup> The court held that a debtor's suspicious transfers of corporate funds warranted the appointment of an examiner.<sup>76</sup> Similarly, in *In re Gilman Services, Inc.*,<sup>77</sup> the Bankruptcy Court for the District of Massachusetts appointed an examiner under section 1104(b)(1) when the debtor's misconduct supported the need for an independent investigation by an examiner.<sup>78</sup> The court found that the debtor's pre-bankruptcy sale

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71. Tyler, 18 B.R. at 577. Authorities agree that the appointment of a trustee is an "extraordinary remedy." *Id.*

72. Snider, *supra* note 12, at 37. The examiner is "less intrusive" to the debtor. *Id.* For example, the debtor's management continues to operate the business despite the examiner's appointment. *Id.* In contrast, a court-appointed trustee ousts the debtor's management. See 11 U.S.C. §§ 1101, 1108 (1988).

73. See, e.g., *In re Tyler*, 18 B.R. 574, 577 (Bankr. S.D. Fla. 1982) (requiring clear and convincing evidence to support the appointment of a trustee or an examiner); *In re Lenihan*, 4 B.R. 209, 212 (Bankr. D.R.I. 1980) (refusing to appoint an examiner until the evidence illustrates that he is necessary); *In re Bel Air Assocs.*, 6 B.R. 284 (Bankr. W.D. Okla. 1980) (arguing that mere naked allegations of fraud or mismanagement are insufficient to warrant the examiner's appointment; allegations must have at least some factual basis).

74. 6 B.R. 683 (Bankr. D.D.C. 1980).

75. *1243 20th St.*, 6 B.R. at 686.

76. *Id.* at 685-86. The court found that the debtor's related corporations did not, *per se*, constitute a factual basis for the examiner's appointment. *Id.* at 685. However, the debtor's transfer of funds to another entity under its control convinced the court to order the examiner to investigate the debtor's activities. *Id.*

77. 46 B.R. 322 (Bankr. D. Mass. 1985).

78. *Gilman Servs.*, 46 B.R. at 327. The court ordered an examiner to investigate unexplained losses of assets occurring after the commencement of the bankruptcy case. *Id.* at 328.

Three years earlier, in *In re Table Talk, Inc.*, 22 B.R. 706 (Bankr. D. Mass. 1982), the Bankruptcy Court for the District of Massachusetts held that the standards for appointing a trustee are identical to those for an examiner. See *supra* notes 66-68 and accompanying text. The *Gilman Servs.* court did not mention the standard previously articulated in *Table Talk*. In both *Gilman Servs.* and *Table Talk*, the debtors failed to accurately report pertinent financial information. *Gilman Servs.*, 46 B.R. at 328; *Table Talk*, 22 B.R. at 711. In *Table Talk*, the court denied the motion to appoint an

of assets to a related corporation constituted sufficient cause to appoint an examiner.<sup>79</sup> In addition, the court concluded that the debtor's failure to file accurate financial statements during the reorganization necessitated the examiner's investigation.<sup>80</sup>

### 3. Cost-Benefit Analysis Standard

When determining if the "interest of creditors" of section 1104(b)(1) includes the appointment of an examiner,<sup>81</sup> several courts have considered a cost-benefit analysis. These courts appoint an examiner only when the benefits to the interested parties outweigh the cost and delay associated with the examiner's investigations. In *In re Gilman Services*,<sup>82</sup> the bankruptcy court granted the creditors' motion to appoint an examiner to investigate the debtor's post-filing transactions.<sup>83</sup> The court concluded that the benefit to both the estate and the protection the examiner's investigation offered to creditors and the estate outweighed the expense and delay of his appointment.<sup>84</sup>

In contrast, in *In re American Bulk Transport Co.*,<sup>85</sup> the Bankruptcy Court for the District of Kansas declined to appoint an examiner to investigate the debtor's post-commencement transactions and untimely an-

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examiner. 22 B.R. at 713. In contrast, in *Gilman Servs.*, the court granted the motion. 46 B.R. at 329. In *Table Talk*, the creditors' committee previously hired an auditor to investigate the debtor. 22 B.R. at 710. Although each court purportedly adopted a different standard to govern the appointment of an examiner, perhaps the costs associated with the examiner's investigations actually motivated the *Table Talk* court. See *Table Talk*, 22 B.R. at 711 ("It is not clear . . . precisely what it is that the creditors' committee wants an examiner to ascertain that [the auditor] is not capable of doing.").

79. *Gilman Servs.*, 46 B.R. at 327.

80. *Id.* The court also ordered the examiner to investigate certain deficiencies in the debtor's records, certain transfers of real estate, and potential litigation pursuant to the fraudulent transfers of the real estate. *Id.* at 328.

81. See *supra* note 22.

82. 46 B.R. 322 (Bankr. D. Mass. 1985).

83. *Gilman Servs.*, 46 B.R. at 329.

84. *Id.* at 327-28. When the examiner's appointment does not deplete the estate, the delay which accompanies his investigation is not detrimental. *Id.* at 328 (citing *In re Shelter Resources Corp.*, 35 B.R. 304 (Bankr. N.D. Ohio 1983)). See also *In re Hamiel & Sons, Inc.*, 20 B.R. 830, 832 (Bankr. S.D. Ohio 1982) ("[A] court must weigh cost/benefit considerations and a cost/protection analysis before the appointment of either a trustee or examiner."). Cf. Snider, *supra* note 12, at 38 (explaining that although courts often consider costs and benefits, the legislative history arguably supports the opposite conclusion because the final version of § 1104(b)(1) deleted the express provision of H.R. 8200 calling for a cost/benefit inquiry). See *supra* note 39.

85. 8 B.R. 337 (Bankr. D. Kan. 1980).

nual reports filings.<sup>86</sup> The court held that to appoint an examiner, the court must find that the examiner's costs and expenses are not "disproportionately high."<sup>87</sup>

Similar to *American Bulk*, in *In re Table Talk*,<sup>88</sup> the court denied the appointment of an examiner.<sup>89</sup> The court first concluded that the standards for appointment of an examiner are identical to those for the appointment of a trustee.<sup>90</sup> The *Table Talk* court ruled that a court should only grant a motion for a trustee or examiner when his expenses do not disproportionately impose a burden on the bankruptcy estate.<sup>91</sup>

### B. Mandatory Appointment of Examiners - Section 1104(b)(2)

Although the legislative history and statutory language of section 1104(b)(2) provide that a court must appoint an examiner when the debtor's specified liabilities exceed five million dollars, courts do not unanimously agree that section 1104(b)(2) requires such an appointment. Even when the debtor met the debt level of section 1104(b)(2), some courts have refused to appoint an examiner.

#### 1. "Mandatory" Appointment

To date, *In re Revco D.S., Inc.* is the only LBO case addressing the issue of the appointment of an examiner.<sup>92</sup> In *Revco*, the Sixth Circuit reversed the bankruptcy court's ruling that section 1104(b)(2) does not impose an affirmative duty upon the bankruptcy court to order an examiner's appointment when the debt exceeds five million dollars.<sup>93</sup> The

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86. *American Bulk*, 8 B.R. at 341-42.

87. *Id.* at 341 (citing *House Report, supra* note 10, at 6359).

88. 22 B.R. 706 (Bankr. D. Mass. 1982).

89. *Table Talk*, 22 B.R. at 713.

90. *Id.* at 710. See *supra* notes 66, 67 and 78.

91. *Table Talk*, 22 B.R. at 710. The court cited H.R. REP. NO. 595, 95th Cong., 1st Sess. (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 6359 ("[P]rotection must be needed and the costs and expenses must not be disproportionately high . . ."). *Table Talk*, 22 B.R. at 710. In reaching its conclusion, the court noted that the House Report emphasized the protection and costs associated with an examiner. *Table Talk*, 22 B.R. at 710. The court's reliance on this language is questionable. When Congress finally enacted § 1104(b) in 1978, it deleted the "protection" and "cost" language of the House Report. See *supra* note 84.

92. 898 F.2d 498 (6th Cir. 1990). *Revco D.S., Inc.*, operated 1150 drug stores in the United States. *Revco Files Amended Plan in Bid to Stay Independent, supra* note 14. The company took itself private in a \$1.25 billion LBO in 1986. *Id.* The debt-stricken company earned the distinction of becoming the first of the billion-dollar LBOs of the 1980s to seek bankruptcy protection from its creditors. *Revco Revisited, supra* note 14. In June 1988, *Revco* filed Chapter 11 bankruptcy. *Id.*

93. *Revco*, 898 F.2d at 500-01. In *Revco*, the Sixth Circuit reversed *In re Revco, D.S., Inc.*, 93

Sixth Circuit held that section 1104(b)(2) requires mandatory appointment when the United States Trustee or a party in interest requests an examiner and the debtor's unsecured, fixed, and liquidated liabilities exceed five million dollars.<sup>94</sup>

In *Revco*, the debtor owned a national chain of drug stores.<sup>95</sup> The debtor formed a holding company and acquired all of its outstanding shares of common stock in a leveraged buyout.<sup>96</sup> The LBO failed, forcing the debtor to seek Chapter 11 bankruptcy protection.<sup>97</sup> The debtor unpersuasively claimed that mandatory appointment of an examiner invited abuse of the bankruptcy system and needlessly delayed confirming a reorganization plan.<sup>98</sup> The court focused on the "ordinary, contemporary, common meaning"<sup>99</sup> of the word "shall" in the statute.<sup>100</sup> The court concluded that unless section 1104(b)(2) required mandatory ap-

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B.R. 119 (Bankr. N.D. Ohio 1988) [hereinafter *Revco I*]. In *Revco I*, the United States Trustee moved for the appointment of an examiner to investigate the LBO. *Revco I*, 93 B.R. at 120. The bankruptcy court held that § 1104(b)(2) does not mandate the appointment, even when debtor's unsecured debt exceeds \$5 million. *Id.* at 126. The court based its reasoning on other recent decisions in which other courts held that § 1104(b)(2) does not require mandatory appointment. *Id.* at 124-25. See *In re GHR Cos.*, 43 B.R. 165 (Bankr. D. Mass. 1984), *aff'd*, 792 F.2d 476 (5th Cir. 1986); *In re Shelter Resources Corp.*, 35 B.R. 304 (Bankr. N.D. Ohio 1983).

In *Revco I*, the bankruptcy court denied the motion to appoint an examiner. 93 B.R. at 126. The bankruptcy court concluded that appointing an examiner would duplicate services and impose unnecessary fees upon the debtor's estate. *Id.* In addition, the court found that the examiner's appointment would hinder the debtor's merchandising activities. *Id.* The court reasoned that the examiner was unnecessary because the creditors' committee previously had hired accountants and auditors to investigate the debtor's activities. *Id.* at 126.

94. *Revco*, 898 F.2d at 501. When the U.S. Trustee moved for the appointment of an examiner, he did not allege or prove that an examiner was warranted for "cause" under the discretionary appointment standard of § 1104(b)(1). *Revco I*, 93 B.R. at 124. Thus, the court only considered the appointment under § 1104(b)(2). *Id.*

95. *Revco*, 898 F.2d at 499. See also *Revco Files Amended Plan in Bid to Stay Independent*, *supra* note 14 (*Revco*, based in Twinsburg, Ohio, operated 1150 drug stores).

96. *Revco*, 898 F.2d at 499. The holding company acquired the outstanding shares of *Revco*'s common stock in a typical leveraged buyout transaction. See generally Neely, *supra* note 7, at 572-73.

97. *Revco*, 898 F.2d at 499. Only two years after the LBO, the reorganized company filed for bankruptcy protection. See Sherry R. Sontag, *Revco Battle Revs Up for Court Hearing*, NAT'L L.J., Jan. 13, 1992, at 1.

98. *Revco*, 898 F.2d at 501. The debtor asserted that if a party in interest demanded an examiner pursuant to § 1104(b)(2) at the last minute, that creditor would create a needless delay for the reorganization. *Id.*

99. *Revco*, 898 F.2d at 500 (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

100. See *supra* note 22 for the language of § 1104(b)(2). The court also emphasized that "shall" is defined as a "word of command and one which . . . must be given a compulsory meaning." *Id.* at 501 (citing BLACK'S LAW DICTIONARY 1233 (5th ed. 1979)).

pointment of an examiner, the section was identical to section 1104(b)(1) and was superfluous.<sup>101</sup> Ordering an examiner's mandatory appointment,<sup>102</sup> the bankruptcy court reasoned that its broad discretion over the examiner's duties and powers removed any risk of potential abuse posed by last minute demands for an examiner.<sup>103</sup> The court completely ignored the debtor's claims that the examiner constituted a needless expense and a drain on the estate.<sup>104</sup>

Similar to *Revco*, courts in other bankruptcy cases<sup>105</sup> have held that section 1104(b)(2) mandates the appointment of an examiner whenever the debtor satisfies the five million dollar debt threshold.<sup>106</sup> In *In re 1243 20th Street, Inc.*,<sup>107</sup> the court considered the discretionary appointment of an examiner under section 1104(b)(1).<sup>108</sup> In dictum, the court as-

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101. *Revco*, 898 F.2d at 501. The court found that the contrast between § 1104(b)(1) and § 1104(b)(2) "could not be more striking." *Id.*

102. *Id.* On remand, the Sixth Circuit ordered the bankruptcy court to appoint an examiner pursuant to § 1104(b)(2) of the Code. *Id.* In June 1990, the bankruptcy court appointed the examiner. *Revco Revisited*, *supra* note 14, at 30.

103. *Revco*, 898 F.2d. at 501. The court declined to address the issues of potential abuse, unnecessary delay and inefficiency. *Id.* The court acknowledged only that the bankruptcy court may direct an examiner's investigation under § 1104(b). *Id.* Section 1104(b) provides that the court should appoint an examiner "to conduct such investigation of the debtor as is appropriate." 11 U.S.C. § 1104(b) (1988). On the issue of abuse, the court noted only that the Attorney General may remove any U.S. Trustee from office. *Revco*, 898 F.2d at 501. *See* 28 U.S.C. § 581(c) (1988).

104. *Revco*, 898 F.2d. at 501. The bankruptcy court had already approved the creditors' committee's motion to appoint a private accounting firm to audit the LBO and the debtor. *Id.* at 499 n.1. Because most LBO cases are large reorganizations, courts commonly appoint accountants or auditors to investigate the LBO or the debtor's transactions.

105. These bankruptcy cases do not involve failed LBOs.

106. For decisions holding that § 1104(b)(2) is mandatory in nature, see *In re Bible Speaks*, 74 B.R. 511, 514 (Bankr. D. Mass. 1987); *In re San Juan Hotel Corp.*, 71 B.R. 413, 418 n.3 (Bankr. D.P.R. 1987) (holding that where debtor's fixed, liquidated and unsecured debts exceed five million dollars, the court must appoint an examiner under § 1104(b)(2)); *In re 1243 20th St., Inc.*, 6 B.R. 683, 685 n.3 (Bankr. D.D.C. 1980); *In re Lenihan*, 4 B.R. 209, 211 (Bankr. D.R.I. 1980) (holding that the court is required to appoint an examiner).

In addition to these courts, some scholars have concluded that § 1104(b)(2) requires a court to appoint an examiner whenever the debtor's fixed, liquidated, and unsecured debts exceed \$5 million. *See Berdan & Arnold*, *supra* note 17, at 462 n.19 ("[A]n examiner *must* be appointed" under 1104(b)(2)). *Cf.* HARVEY M. LEBOWITZ, *BANKRUPTCY DESKBOOK* 300 (1986) (arguing that the appointment of an examiner becomes mandatory not upon satisfying the \$5 million debt level, but only when the court finds it appropriate for an examiner to undertake an investigation under the facts and circumstances of the case).

107. 6 B.R. 683 (Bankr. D.D.C. 1980).

108. *1243 20th St.*, 6 B.R. at 685-86. The court did not address the appointment of an examiner under § 1104(b)(2). *Id.*



sumed that section 1104(b)(2) required an examiner's appointment.<sup>109</sup> Similar to *1243 20th Street*, in *In re Bible Speaks*,<sup>110</sup> the court addressed whether to appoint a trustee or an examiner to investigate the debtor's questionable behavior and management.<sup>111</sup> The court found that the debtor's conduct justified appointing a trustee.<sup>112</sup> Attempting to justify the trustee's expense, the court posited that if it did not appoint a trustee, it would have to appoint an examiner under section 1104(b)(2) because the debtor's liabilities exceeded six million dollars.<sup>113</sup>

## 2. "Non-mandatory" Appointment

Despite section 1104(b)(2)'s language, several courts have refused to appoint an examiner when the debtor's specified liabilities exceeded five million dollars. In *In re GHR Companies, Inc.*,<sup>114</sup> the United States Trustee moved for the appointment of an examiner pursuant to section 1104(b)(2) because the debtor's liabilities exceeded the statutorily defined monetary threshold.<sup>115</sup> The Bankruptcy Court for the District of Massa-

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109. *Id.* at 685 n.3. ("It should be noted, *of course*, that the appointment of an examiner is mandatory" under § 1104(b)(2)).

110. 74 B.R. 511 (Bankr. D. Mass. 1987).

111. *Bible Speaks*, 74 B.R. at 514. An allowed secured claimant, who held a claim of \$6 million against the debtor, moved for the trustee's appointment under § 1104(a). *Id.* at 511-12. Prior to the bankruptcy and as a result of debtor's undue influence, the creditor donated \$6 million to the debtor's religious organization. *Id.* at 512. The court found that the debtor filed bankruptcy under Chapter 11 primarily to avoid this creditor's claim. *Id.* In an effort to recoup some of his losses, the creditor moved to appoint a trustee and displace the debtor. *Id.*

112. *Id.* at 514. The bankruptcy court appointed a trustee to curb the "costly and legalistic bickering" between the creditor and the debtor. *Id.* at 512-14. The debtor and its counsel constantly threatened to appeal the amount of the allowed secured claim "to the Supreme Court if necessary." *Id.* at 513. In addition, the court found that the debtor's counsel desired to sabotage any possibility of confirming a reorganization plan by arguing that confirmation of a plan was impossible because of a lack of funds to pay debtor's accrued legal expenses. *Id.* The court determined that the debtor's dishonesty merited the trustee's services. *Id.* at 513-14.

113. *Id.* at 514. The court assumed that the Code required it to appoint either a trustee or an examiner if the court did not appoint a trustee because of the debtor's \$6 million debt. *Id.* The bankruptcy court reasoned that the estate faced substantial expense whether a trustee or an examiner was appointed. *Id.* After concluding that an examiner lacked the requisite powers to accomplish an effective reorganization, the court appointed a trustee. *Id.* Cf. Harvey R. Miller & Jaqueline Marcus, *The Crumbling Debtor Leverage in Chapter 11 Cases—An Implementation or Perversion of the Bankruptcy Reform Act of 1978*, in *THE FAILED LBO: HOW TO RESTRUCTURE THE TROUBLED BUSINESS UNDER CHAPTER 11*, at 3, 24 (ALI-ABA Course of Study Materials 1990) (citing *In re A.H. Robins Co.*, No. 85-01307-R (Bankr. E.D. Va. Aug. 7, 1986), a case where a bankruptcy court appointed an examiner with extremely broad powers).

114. 43 B.R. 165 (Bankr. D. Mass. 1984), *aff'd*, 792 F.2d 476 (5th Cir. 1986).

115. *GHR*, 43 B.R. at 167. The U.S. Trustee moved for the appointment of an examiner in the cases of six of eight affiliated private-company debtors, relying on § 1104(b)(1). *Id.* The United

chusetts held that section 1104(b)(2) does not impose mandatory appointment.<sup>116</sup> The court found that the Code did not provide a clear expression of the rationale behind the mandatory examiner provision.<sup>117</sup> The court concluded that the legislative history failed to establish a congressional intent to protect the creditors of privately-held corporations such as the *GHR* debtors.<sup>118</sup> Finding a contrasting congressional intent, the *GHR* court reasoned that Congress enacted section 1104(b)(2) to protect equity holders.<sup>119</sup>

Similar to *GHR*, in *In re Shelter Resources Corp.*,<sup>120</sup> the Securities and Exchange Commission and a substantial creditor,<sup>121</sup> requested the appointment of an examiner to investigate the debtor.<sup>122</sup> The Bankruptcy Court for the Northern District of Ohio denied the motion.<sup>123</sup> First, the court found that the parties' settlement of the case mooted the arguments favoring the need for an examiner to investigate a pending shareholder derivative suit.<sup>124</sup> Second, the court noted that the fact that the debtor's fixed, liquidated and unsecured liabilities exceeded five million dollars constituted the SEC's only reason for requesting the examiner's appointment.<sup>125</sup> Finally, the court concluded that the examiner's appointment would delay administration of the reorganization and impose substantial,

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States Trustee relied on § 1104(b)(2) in only one case. *Id.* The court did not decide the § 1104(b)(1) issue. *Id.* at 176.

116. *Id.* at 170.

117. *Id.* at 175. The court reviewed the legislative history to determine that Congress intended to protect creditors and equity security holders of public companies. *Id.* at 170. However, the court found no congressional intent to protect privately held companies. *Id.* But see *In re Revco, D.S., Inc.*, 898 F.2d 498 (6th Cir. 1990). In *Revco*, the Sixth Circuit rejected the bankruptcy court's reliance on the *GHR* court's reasoning, and held that § 1104(b)(2) required an examiner's appointment in an LBO case where the debtor's liabilities exceeded \$5 million. *Id.* at 501. See *supra* notes 92-104 and accompanying text.

118. *GHR*, 43 B.R. at 170. The court recognized that the legislative history did not mention the number of equity holders as a prerequisite to mandatory appointment. *Id.* In addition, the court found that the legislative history did not imply that the court must appoint an examiner in a nonpublic corporate bankruptcy proceeding. Snider, *supra* note 12, at 43-44 (citing *GHR*, 43 B.R. at 175).

119. *GHR*, 43 B.R. at 170.

120. 35 B.R. 304 (Bankr. N.D. Ohio 1983).

121. *Shelter Resources*, 35 B.R. at 304. The Code allows any "party in interest" to seek appointment of an examiner. 11 U.S.C. § 1104(b) (1988). Thus, the SEC did not need the creditors' intervention before moving for the examiner's appointment. See 11 U.S.C. § 1109(a) ("The [SEC] may raise and may appear and be heard on any issue in a case under this chapter. . . .").

122. *Shelter Resources*, 35 B.R. at 304.

123. *Id.* at 305.

124. *Id.*

125. *Id.* at 303.

unnecessary costs and burdens on the estate.<sup>126</sup> The court implicitly found that when a bankruptcy court considers a motion to appoint an examiner under section 1104(b)(2), the court should not merely consider the amount of debt.<sup>127</sup> Indicating judicial hostility toward section 1104(b)(2), the court stated that "to slavishly and blindly follow the so-called mandatory dictates of section 1104(b)(2) is needless, costly and nonproductive and would impose a grave injustice on all parties."<sup>128</sup>

### III. THE EXAMINER'S ROLE IN AN LBO BANKRUPTCY REORGANIZATION

Once the bankruptcy court has approved the examiner's appointment, the nature of the examiner's powers and duties determines his effectiveness as an alternative to a trustee. As more failing LBOs burden the bankruptcy courts with large, complex reorganizations,<sup>129</sup> significant judicial controversy and uncertainty surrounds the scope of the examiner's duties. In the large LBO context, the broader the examiner's powers, the greater the effect on the creditors' committee, bankruptcy estate, and other parties in interest in the reorganization.<sup>130</sup>

To date, no LBO cases have specifically addressed the issue of the expanded role of the examiner.<sup>131</sup> Yet, several bankruptcy courts have ex-

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126. *Id.* at 305. The court found no evidence of fraud, mismanagement, or irregularities by the debtor's current management. *Id.* The court concluded that an examiner was unnecessary because it had already appointed a committee with full investigative powers. *Id.*

127. *Id.* See also Snider, *supra* note 12, at 45 (arguing that a court should consider other facts and circumstances before appointing an examiner).

128. *Shelter Resources*, 35 B.R. at 305. The court found that an examiner would serve no useful or beneficial purpose. *Id.* The bankruptcy court concluded that an examiner would not further the best interests of the estate. *Id.* The court's conclusion virtually collapsed §§ 1104(b)(1) and 1104(b)(2), rendering § 1104(b)(2) meaningless. See Snider, *supra* note 12, at 45.

129. See *supra* notes 2, 3. See also David Gray Carlson, *Leveraged Buyouts in Bankruptcy*, 20 GA. L. REV. 73 n.3 (1985) ("[T]he more leveraged takeovers and buyouts today, the more bankruptcies tomorrow.") (quoting John Shad, *The Leveraging of America*, Statement Before the New York Financial Writers Ass'n (June 7, 1984), quoted in CONGRESSIONAL RESEARCH SERVICE, SUBCOMM. ON TELECOMMUNICATIONS, CONSUMER PROTECTION, AND FIN. OF THE HOUSE COMM. ON ENERGY AND COMMERCE, 98TH CONG., 2D SESS., MERGER ACTIVITY AND LEVERAGED BUYOUTS: SOUND CORPORATE RESTRUCTURING OR WALL STREET ALCHEMY? 5 (Comm. Print 1984)).

130. Neal Batson & Lee Brooks Rivera, *Role of Creditors' Committees, in THE FAILED LBO REVISITED: RESTRUCTURING TROUBLED BUSINESSES IN A RECESSION* 47, 57 (ALI-ABA Course of Study Materials 1991).

131. Although no LBO cases have confronted this exact issue, a recent LBO case addressed the related issue of the meaning of the word "disinterested" under 11 U.S.C. §§ 101(13)(E), 1104(c). See *In re Interco, Inc.*, 127 B.R. 633, 638 (Bankr. E.D. Mo. 1991) (holding that an examiner was "disin-

panded an examiner's powers in non-LBO cases.<sup>132</sup> Future courts attempting to define the parameters of an examiner's duties in the failed LBO context must rely on ambiguous statutory language, minimal legislative history, and non-LBO judicial decisions regarding examiners. Because the Code and the legislative history fail to define clearly the scope of an examiner's powers, courts disagree on the issue of approving an examiner with expanded powers.

When the court appoints an examiner under section 1104(b), the Bankruptcy Code requires the examiner to investigate the debtor.<sup>133</sup> Section 1106 provides that, unless the court orders otherwise, the examiner must issue a report outlining fraud, dishonesty, incompetence, misconduct, mismanagement, irregularity in management of the debtor's affairs or in any cause of action available to the estate.<sup>134</sup> The legislative history implies that Congress envisioned an examiner who possessed the trustee's

terested" within the meaning of the Code even though her law firm previously and contemporaneously handled unrelated legal matters for the debtor's investment banking firm).

In June 1990, the bankruptcy court for the Northern District of Ohio appointed an independent examiner to investigate the Chapter 11 bankruptcy of Revco D.S., Inc. *Revco Revisited*, *supra* note 14, at 30. He was the first examiner ever appointed to investigate a billion dollar junk-bond-financed LBO. *Id.* See *supra* note 93.

132. See *In re Public Serv. Co. of New Hampshire*, 99 B.R. 177 (Bankr. D.N.H. 1989); *In re Great Barrington Fair & Amusement, Inc.*, 53 B.R. 237, 241 (Bankr. D. Mass. 1985); *In re Carnegie Int'l Corp.*, 51 B.R. 252 (Bankr. S.D. Ind. 1984).

133. 11 U.S.C. § 1104(b) (1988). Section 1104(b) provides that "the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegation of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor. . . ." *Id.*

134. Section 1106 of the Code provides:

(a) A trustee shall -

....

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

(4) as soon as practicable -

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

(B) transmit a copy or a 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;

....

(b) An 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.

11 U.S.C. § 1106 (1988).

investigative powers.<sup>135</sup> In addition, Congress intended bankruptcy courts to have the flexibility to order additional duties for the examiner.<sup>136</sup> Although most commentators believe that Congress did not intend for sections 1104(b) and 1106(b) to authorize an examiner with broad powers, courts are split on the issue.<sup>137</sup> Some courts have authorized examiners with expansive powers, including the authority to operate the debtor's business, file a confirmation plan, and initiate a lawsuit on behalf of the debtor. In sharp contrast, other courts limit the examiner's role to that of an investigator.

### A. Expanded Role

In *In re Carnegie International Corp.*,<sup>138</sup> the Bankruptcy Court for the Southern District of Indiana extended the scope of the examiner's authority.<sup>139</sup> Specifically, the court allowed the examiner to initiate a lawsuit on behalf of the estate.<sup>140</sup> The court concluded that section 1106's language and legislative history<sup>141</sup> empowered a bankruptcy court to appoint an examiner when a trustee would be inappropriate, and to assign such examiner any of the trustee's duties.<sup>142</sup> First, the court discounted the creditor's objection by stating that allowing an examiner to pursue causes of action would not conflict with the examiner's statutorily defined role.<sup>143</sup> The court determined that Congress intended to grant the

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135. The legislative history indicates that Congress intended to give the trustee's investigative duties to the examiner. King & Bart, *supra* note 23, at 367.

136. *Id.*

137. *Id.* at 368.

138. 51 B.R. 252 (Bankr. S.D. Ind. 1984).

139. *Carnegie*, 51 B.R. at 258.

140. *Id.*

141. *Id.* at 255-56. Noting the nearly identical language in §§ 1104 and 1106 of the Code, compared to § 567 of the former Bankruptcy Act, the court reasoned that Congress intended to retain the broad powers that the examiner possessed in Chapter X cases under the Act. *Id.* The court concluded that Congress intended to vest the bankruptcy court with the power to extend an examiner's duties beyond mere investigations. *Id.* at 255. *But see* King & Bart, *supra* note 23, at 347 (explaining that since the courts routinely appointed trustees in Chapter X cases, courts rarely appointed examiners).

142. *Carnegie*, 51 B.R. at 256.

143. *Id.* at 254. The objecting creditors contended that expanding the examiner's powers undermined the intent behind §§ 321(b) and 327(f). *Id.* Section 321(b) prohibits one who has served as an examiner from serving as a trustee in the same case. *Id.* See 11 U.S.C. § 321(b) (1988). Similarly, § 327(f) forbids the trustee from employing one who has served as an examiner in the case. *Carnegie*, 51 B.R. at 256. See 11 U.S.C. § 327(f) (1988). The purpose underlying both sections is: (1) to insure that the examiner conducts his investigations in an objective manner, and (2) to prevent the examiner from filing an overly critical report anticipating that the court will hire him to litigate

bankruptcy court discretion to expand the examiner's duties as circumstances mandate.<sup>144</sup> The court vested the examiner with all of the powers of a trustee to minimize expenses while deriving maximum benefit from the resources expended.<sup>145</sup> Because the examiner already had completed numerous hours of research and investigations, the court found that appointing a trustee, hiring special counsel, or authorizing the committees to bring suit constituted needless expenses for the estate.<sup>146</sup>

Similarly, in *In re Public Service Company of New Hampshire*,<sup>147</sup> the Bankruptcy Court for the District of New Hampshire appointed an examiner with broad powers.<sup>148</sup> The court appointed an examiner to serve as a mediator in breaking an impasse between the parties in interest, refusing to limit the examiner's role to investigations of fraud and other irregularities.<sup>149</sup> In *Public Service*, the debtor, a large public utility company, handled intricate rate structures and complex regulatory matters in the course of its business.<sup>150</sup> The court appointed an examiner to mediate the confirmation process of a reorganization plan, instruct the court about utility regulatory matters, and assist in questioning expert wit-

actions arising out of the report. *Carnegie*, 51 B.R. at 254. The court noted that the creditors' committees and equity holders moved jointly to expand the examiner's powers. *Id.* Thus, the court found that appointing an examiner did not undermine the Code because the very parties Congress intended to protect in §§ 321(b) and 327(f) agreed to expand the examiner's power. *Id.* at 254-55.

144. *Carnegie*, 51 B.R. at 255. Section 1106 "grants the court discretion to 'give the examiner additional duties as the circumstances warrant.'" *Id.* (quoting *House Report*, *supra* note 10, at 6360; *Senate Report*, *supra* note 45, at 5902).

145. *Carnegie*, 51 B.R. at 256. The court expressed concern for the costs and benefits involved if the court did not grant the examiner the power to initiate lawsuits on the estate's behalf. *Id.* If the examiner could not bring the suits, the court would have to appoint a trustee or someone else to do so, at great additional expense. *Id.* *But cf. In re Revco D.S., Inc.*, 898 F.2d 498 (6th Cir. 1990); *In re 1243 20th St., Inc.*, 6 B.R. 683 (Bankr. D.D.C. 1980). In both *Revco* and *1243 20th St.*, the courts concluded that the Code requires a court to appoint an examiner whenever the debtor's liabilities exceed \$5 million. *Id.* These courts appointed an examiner, despite the possibility that he would duplicate services that others previously investigated. *See supra* notes 92-109 and accompanying text.

146. *Carnegie*, 51 B.R. at 256. The court authorized the examiner to initiate "litigation in order to collect and reduce to money property of the estate in the form of causes of action which the estate [held] against third parties." *Id.* at 254.

147. 99 B.R. 177 (Bankr. D.N.H. 1989).

148. *Public Serv.*, 99 B.R. at 182.

149. *Id.* at 178, 182. In a large, complex reorganization of a public utility company, the debtor, the creditors' committee, some equity holders, and the State of New Hampshire all objected to the examiner's appointment under § 1104(b)(1). *Id.* at 179-81. The equity committee and the U.S. Trustee supported the examiner's appointment. *Id.* The court appointed an examiner because of the complexity of the utility case. *Id.* at 182. In addition, the court reasoned that even if cause did not exist, an examiner was mandatory under § 1104(b)(2). *Id.*

150. *Id.* at 179.

nesses.<sup>151</sup> The court reasoned that section 1106's broad language allowed a court to expand the role of the examiner in complex cases.<sup>152</sup> The court concluded that appointing an examiner with extensive powers would expedite the reorganization process and assist in resolving many complex regulatory matters.<sup>153</sup>

In addition to *Carnegie* and *Public Service*, in *In re Great Barrington Fair & Amusement, Inc.*,<sup>154</sup> the Bankruptcy Court for the District of Massachusetts also expanded an examiner's powers.<sup>155</sup> During a Chapter 11 reorganization of an amusement company, the court authorized an examiner to formulate a confirmation plan for the reorganization.<sup>156</sup> Despite a creditor's vehement objections, the court confirmed the examiner's plan.<sup>157</sup> Without citing where the Code or case law grants an

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151. *Id.* The court repeatedly commented on the complexity of the technical matters underlying the reorganization. *Id.* at 182-83. At a minimum, the court wanted the examiner to serve, if nothing else, as an "interpreter" of the technical terms in the "utility regulatory world." *Id.* at 182-83. The creditors claimed that the appointment of examiner was not in the interests of the estate. *Id.* at 179-81. However, the court quickly rebutted this charge. *Id.* at 182-83.

The court believed that it possessed the power to appoint an examiner *sua sponte*. *Id.* at 182. See 11 U.S.C. § 105(a) (1988):

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

*Id.* See also *In re UNR Indus., Inc.* 72 B.R. 789 (Bankr. N.D. Ill. 1987) (explaining that a court may, on its own motion, appoint an examiner to monitor the status of the negotiations among the parties); *In re Landscaping Servs.*, 39 B.R. 588 (Bankr. E.D.N.C. 1984) (holding that if an examiner is necessary, the court, by itself, may initiate the request).

152. *Public Serv.*, 99 B.R. at 182-83. In order to justify granting the examiner's expanded powers, the court referred to a number of other large reorganization cases where courts appointed examiners with expanded powers. *Id.* See *In re Boileau*, 736 F.2d 503 (9th Cir. 1984) (explaining that parties stipulated to the examiner's appointment to avoid the appointment of a trustee); *In re John Peterson Motors, Inc.*, 47 B.R. 551 (Bankr. D. Minn. 1985) (appointing an examiner in lieu of a trustee, and vesting the examiner with all of the powers of a trustee to enable the debtor to continue to operate the debtor's business); *In re Carnegie Int'l Corp.*, 51 B.R. 252 (Bankr. S.D. Ind. 1984) (granting the examiner expanded powers to initiate lawsuits on behalf of the debtor).

153. *Public Serv.*, 99 B.R. at 182-83. In reality, the examiner may not expedite the reorganization. Snider, *supra* note 12, at 51. However, appointing an expert in regulatory matters to serve as an examiner may eliminate the potential for needless and expensive litigation of the complicated technical issues involved. *Public Serv.*, 99 B.R. at 182-83.

154. 53 B.R. 241 (Bankr. D. Mass. 1985).

155. *Great Barrington*, 53 B.R. at 244.

156. *Id.* at 242. The examiner's reorganization plan created six classes of creditors. *Id.* The claims filed against the debtor totaled approximately \$600,000. *Id.* at 243.

157. *Id.* at 244. A large secured creditor, impaired under the examiner's plan, objected. *Id.*

examiner the authority to propose a plan of reorganization,<sup>158</sup> the court stated that the debtor, through the examiner, can take any corporate action necessary to effectuate the consummation of the plan. The court ruled that an examiner possessed the authority to file a plan for the estate, because the examiner is a "party in interest" under section 1121 of the Code.<sup>159</sup>

Recently, in *In re A.H. Robins Co.*<sup>160</sup> and *In re Eastern Airlines, Inc.*,<sup>161</sup> the bankruptcy courts for the Eastern District of Virginia and Southern District of New York each appointed examiners with extensive powers.<sup>162</sup> In *A.H. Robins*, the court authorized the examiner to investigate and evaluate the debtor, monitor the debtor's business, review financial data, interview creditors and employees and initiate any lawsuits on behalf of the estate.<sup>163</sup> The court also granted the examiner the authority to "take all other necessary and appropriate actions in furtherance of assisting to bring this cause to a just, prompt and economic disposition."<sup>164</sup> Similarly, in *Eastern Airlines*, the court authorized broad powers for the examiner.<sup>165</sup> Specifically, the bankruptcy court ordered the examiner to determine the issues that needed resolution, to propose a plan of reorganization, and to evaluate each major creditor's position.<sup>166</sup>

### B. Limited Role

In contrast to courts that have expanded the examiner's powers, at least one court has recognized the distinct roles of the trustee and the examiner. In *In re International Distribution Centers, Inc.*,<sup>167</sup> the credi-

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The court approved the plan because it met the requirements of § 1129(b)(2)(A). *Id.* at 244. See 11 U.S.C. § 1129(b)(2)(A) (1988).

158. *Great Barrington*, 53 B.R. at 244.

159. *Id.* at 244 n.3. *But see* 11 U.S.C. § 1121 (1988). Section 1121(c) provides: "Any party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee may file a plan." 11 U.S.C. § 1121(c) (1988). The section does not provide that a "party in interest" includes an examiner. *Id.*

160. No. 85-01307-R (Bankr. E.D. Va., Aug. 7, 1988), *reprinted in* Miller & Marcus, *supra* note 113, at 59.

161. No. 89-B-10449 (Bankr. S.D.N.Y. Mar. 30, 1989), *cited in* Snider, *supra* note 12, at 50-51.

162. Miller & Marcus, *supra* note 113, at 59-62; Snider, *supra* note 12, at 50-51.

163. *A.H. Robbins*, No. 85-01307-R (Bankr. E.D. Va. Aug. 7, 1988), *reprinted in* Miller & Marcus, *supra* note 113, at 59-62.

164. *Id.* at 61.

165. *Eastern Airlines*, No. 89-B-10449 (Bankr. S.D. N.Y. Mar. 30, 1989), *reprinted in* Miller & Marcus, *supra* note 113, at 50-51.

166. *Id.* at 50.

167. 74 B.R. 221 (S.D.N.Y. 1987).



tors sought to expand the examiner's powers to include duties identical to those of a trustee.<sup>168</sup> The District Court for the Southern District of New York refused to expand the examiner's powers.<sup>169</sup> First, the court noted that Congress intended to afford the court flexibility to determine the examiner's role in the reorganization case.<sup>170</sup> However, the court held that Congress did not intend for the examiner to become a "pseudo-trustee."<sup>171</sup> The court noted that the legislative history illustrated that Congress intended separate and distinct roles for the trustee and the examiner.<sup>172</sup> Reasoning that the trustee is accountable for the administration of the estate, the court found that investigative duties compose the majority of the examiner's powers.<sup>173</sup> The court held that if a court exercises its discretion to expand the examiner's role in the reorganization, then the examiner's additional duties must remain confined within the "investigative rubric" of section 1106(b).<sup>174</sup>

#### IV. PROPOSED REFORMS FOR EXAMINERS IN FAILED LBO CHAPTER 11 REORGANIZATIONS

If a bankruptcy court appoints an examiner in a Chapter 11 case involving a failed LBO corporation, the examiner may facilitate the com-

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168. *International Distrib.*, 74 B.R. at 221. The debtor was a large trucking company serving the garment industry. *Id.* The creditors' committee initially moved for the appointment of a trustee after the debtor failed to pay state and federal payroll taxes and incurred continuing financial losses. *Id.* Instead of granting the creditors' motion for a trustee, the bankruptcy court appointed an examiner pursuant to § 1104(b)(1). *In re International Distrib. Ctrs., Inc.*, No. 85-B-11140 (Bankr. S.D.N.Y. June 24, 1986). Later, the creditors moved to extend the examiner's powers under § 1106. *Id.* Granting the motion the bankruptcy court ordered "that the examiner in this matter will have the duties of a trustee as outlined in [§] 1106(a)."

169. *International Distrib.*, 74 B.R. at 224.

170. *Id.*

171. *Id.* The court held that in the first hearing, the bankruptcy court abused its discretion when it expanded the examiner's powers to equal those of a trustee. *Id.*

172. *Id.*

173. *Id.* The court noted that § 1106 outlines the powers of trustees and examiners. *Id.* See 11 U.S.C. § 1106 (1988). Section 321(b) of the Code precludes one who has served as a trustee from acting as an examiner in the same case. See 11 U.S.C. § 321(b) (1988). The court reasoned that a court must interpret § 1106 in conjunction with § 321. *International Distrib.*, 74 B.R. at 224. The court determined that Congress enacted § 321 to eliminate any appearance of impropriety or conflict of interest. *Id.* at 223. The court recognized that Congress wanted to forbid the examiner from issuing a critical report in hopes of being appointed trustee. *Id.* In addition, the court also noted that when Congress enacted § 321, the drafters specifically eliminated the dual examiner-trustee role "peremptorily," not only where a conflict of interest actually existed. *Id.*

174. *Id.* The court held that the Code authorized the bankruptcy court to confer additional duties upon the examiner as circumstances warrant. *Id.* However, the court cautioned that a court may not allow an examiner to step into the shoes of a trustee. *Id.*

pany's speedy reorganization. He may also encourage diverse parties to resolve intricate relationships and disputes. Because of the expense and the difficulties associated with appointing a trustee,<sup>175</sup> courts increasingly favor the intermediate approach of an examiner.<sup>176</sup> Yet, for an examiner to fulfill his duties and achieve maximum effectiveness, Congress should revise the Bankruptcy Code to clarify the process of appointment and the examiner's role in Chapter 11 reorganization cases.<sup>177</sup>

## A. Reforms in the Appointment of Examiners

### 1. Section 1104(b)(1)

Congress must clarify section 1104(b), which governs the examiner's appointment in a Chapter 11 business reorganization bankruptcy case. First, when a party moves for the appointment of an examiner under section 1104(b)(1),<sup>178</sup> the statute should define criteria for the courts to consider. At a minimum, the court should refrain from appointing an examiner unless sufficient evidence exists that the debtor committed some impropriety.<sup>179</sup> However, courts must not assume that the criteria for the trustee's appointment match the factors considered for the examiner's appointment.<sup>180</sup> If the parties in interest believe that the court will not appoint an examiner until the standards to appoint a trustee are met, then Congress effectively created a disincentive to move for an

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175. ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS* 476 (2d ed. 1991). The fight over the trustee's appointment often becomes a "life-or-death struggle" when determining whether the business survives the reorganization. *Id.* at 474. The trustee is a drastic measure. *Id.* He displaces the current management. *See* 11 U.S.C. § 1108 (1988). In addition, he must begin to operate the business immediately with little or no knowledge of the debtor's entity. WARREN & WESTBROOK, *supra*, at 474. Finally, the trustee imposes an additional expense on the financially strapped bankruptcy estate. *Id.* at 474-76.

176. WARREN & WESTBROOK, *supra* note 175, at 476. When a court appoints an examiner, it avoids displacing the debtor's current and knowledgeable management. *Id.* Also, the examiner provides comfort to the parties in interest as he conducts a disinterested examination and monitors the debtor's past and present status, relationships, and activities. *Id.* at 474-76.

177. Committees in Congress have expressed concern that the current statutory provisions in the Bankruptcy Code are not designed to protect interested parties in massive Chapter 11 LBO bankruptcies. *See P.M. Briefing: Bush Prodded on Buyout Curbs*, L.A. TIMES, Jan. 30, 1990, at P3. Industry leaders have recently expressed their concerns before congressional committees. *Financial Advisor Says Bankruptcy Laws Fail to Protect LBO-Related Bondholders*, 22 Sec. & Reg. L. Rep. (BNA) No. 5, at 166 (Feb. 2, 1990). However, to date, Congress has declined to formally address the concerns in the industry and public.

178. *See supra* note 22 for text of § 1104(b)(1).

179. Snider, *supra* note 12, at 37-38.

180. *See supra* part II.A.1.

examiner.<sup>181</sup>

Courts which appoint an examiner in situations that do not warrant appointment of a trustee focus on Congress' intent that an examiner should provide a flexible, cost-effective alternative to a trustee.<sup>182</sup> Furthermore, these courts recognize that when a case warrants an examiner, the less stringent evidentiary standard creates an incentive for a party to move earlier in the case for the appointment of an examiner.<sup>183</sup> If the courts force the parties to continue to wait until the case requires a trustee, then the courts frustrate the congressional intent favoring the examiner.<sup>184</sup>

Congress should adopt less stringent standards for an examiner's appointment than those governing a trustee. A less restrictive appointment standard encourages parties to move for the examiner's appointment earlier in the case, rather than seeking the appointment of independent auditors, accountants, and other fiduciaries in a piecemeal fashion. If each party in interest moves to appoint his own investigators, the court may needlessly delay the reorganization. In addition, if the court grants each party's motion, the court excessively burdens the bankruptcy estate and wastes the debtor's limited assets. The appointment of one examiner to conduct all the investigations benefits every party to the proceeding by saving judicial resources and avoiding duplication of services.<sup>185</sup>

In addition, several courts have weighed the costs and benefits associated with an examiner before ordering his appointment.<sup>186</sup> Congress did not include language in the statute regarding the costs and benefits resulting from the examiner's appointment.<sup>187</sup> This failure confuses courts

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181. Snider, *supra* note 12, at 38.

182. See *House Report, supra* note 10, at 6193 ("The court may also adopt the less restrictive alternative of ordering the appointment of an examiner. . ."). See *supra* part II.A.2.

183. Snider, *supra* note 12, at 38. If Congress and the courts require a higher standard, they create a disincentive to move for an examiner. *Id.* Thus, a party may not move for an examiner early in the bankruptcy process. *Id.* If this disincentive is created, the court and the parties will fail to derive any benefit from the examiner's findings. *Id.*

184. See *id.* Because the examiner is less costly for the estate, the court should favor appointing an examiner instead of a trustee.

185. See Snider, *supra* note 12, at 37-39.

186. See *In re Gilman Servs., Inc.*, 46 B.R. 322 (Bankr. D. Mass. 1985); *In re Table Talk, Inc.*, 22 B.R. 706 (D. Mass. 1982); *In re American Bulk Transp. Co.*, 8 B.R. 337 (Bankr. D. Kan. 1980). See also *supra* part II.A.3.

187. As originally introduced, § 1104(b)(2) of H.R. 8200 directed the bankruptcy court to consider the costs involved with the examiner's appointment. See *supra* note 39 for the text of H.R. 8200. However, when Congress finally adopted § 1104(b) in 1978, the drafters eliminated the provisions concerning costs. See 11 U.S.C. § 1104(b) (1988).

that rely on legislative history to formulate the cost-benefit analysis.<sup>188</sup> Yet, because section 1104(b)(1) is "discretionary," perhaps a cost-benefit analysis is warranted and within the court's discretionary domain.<sup>189</sup>

## 2. Section 1104(b)(2)

Congress should delete section 1104(b)(2)'s<sup>190</sup> so-called mandatory appointment provision.<sup>191</sup> Besides containing ambiguous language, which some courts have acknowledged with hostility,<sup>192</sup> the provision is inconsistent with the underlying policies of the Code.<sup>193</sup> The Bankruptcy Code encourages efficient management of the estate's resources.<sup>194</sup> However, the mandatory provision frustrates the Code's purpose by forcing the court to appoint an examiner, even if it previously appointed other fiduciaries to investigate the LBO.<sup>195</sup>

## 3. Proposed Changes and Recommendations

As the number of LBOs in the bankruptcy courts begins to rise to unprecedented levels in the 1990s,<sup>196</sup> courts may refuse to wait for Congress to clarify the ambiguities of section 1104(b). The bankruptcy

188. Snider, *supra* note 12, at 38. Since § 1104 excluded the "costs" test of H.R. 8200, perhaps the court should not consider the costs involved in determining whether the examiner's appointment is in the creditors' interests. *Id.*

189. *Id.* In reality, a court may find it difficult not to consider the costs involved in any judicial determination. *Id.*

190. *See supra* note 22 for text of § 1104(b)(2).

191. *See* Snider, *supra* note 12, at 41. Section 1104(b)(2) is the most "troublesome and controversial" provision of the Code dealing with the examiner. *Id.*

192. *See, e.g., In re GHR Cos., Inc.*, 43 B.R. 165 (Bankr. D. Mass. 1984), *aff'd*, 792 F.2d 476 (5th Cir. 1986) (holding that a court should consider facts and circumstances surrounding the case as well as the amount of the debtor's leverage). *See also supra* part II.B.2.

193. "The overall objectives [of the Bankruptcy Code] are to make bankruptcy procedures more efficient, to balance more equitably the interests of different creditors, . . . and to give the debtor a less encumbered 'fresh start' after bankruptcy." S. REP. NO. 1106, 95TH CONG., 2D SESS. (1978), *reprinted in* 17 RESNICK & WYPYSKI, *supra* note 16, at Doc. 54.

194. "Judicial caution dictates that an intermediate procedure be first explored." *In re Hamiel & Sons, Inc.*, 20 B.R. 830, 833 (Bankr. S.D. Ohio 1982).

195. The Code allows the creditors' committee to move for the appointment of fiduciaries to investigate or audit the debtor. 11 U.S.C. § 1103(a) (1988). Section 1103(a) provides: "a committee . . . with the court's approval, . . . may select and authorize the employment . . . of one or more attorneys, accountants, or other agents, to represent or perform services for such committee." *Id.*

196. Gregory Crouch, *Q&A: William N. Lobel; The Boom in Bankruptcies, Law that Allows Debtors to Buy Time Subject to Abuse*, L.A. TIMES, Apr. 16, 1990, at D6. "We are all expecting the bankruptcy business in the area of large Chapter 11s to get very busy because the heyday of junk bond financing of leveraged buyouts lasted five years, and those junk bonds are just now starting to come due." *Id.* (quoting Mr. Lobel).

courts should liberally appoint examiners under section 1104(b)(1) whenever the moving party demonstrates that the debtor committed some act to satisfy the "cause" requirement.<sup>197</sup> When a party moves for the appointment of an examiner under section 1104(b)(2) pursuant to a monetary threshold, the court should not limit its inquiry to the debtor's debt level.<sup>198</sup> As the courts in *GHR*<sup>199</sup> and *Shelter Resources*<sup>200</sup> reasoned, the bankruptcy courts should consider other facts and circumstances, including the role of the examiner and of other fiduciaries already conducting investigations.<sup>201</sup>

In addition, whenever a party moves for the appointment of a trustee or an examiner, the court should conduct a cost-benefit analysis.<sup>202</sup> In failed LBOs and other large reorganizations, the existence of numerous creditors and other parties in interest increases the possibility that the examiner will duplicate tasks previously delegated to another party.<sup>203</sup> Some courts argue that the possibility of duplication is minimal because the bankruptcy court retains plenary control over the examiner's powers.<sup>204</sup> However, when large creditors exist or the court previously approved a motion to appoint a private accounting firm, auditor, or other fiduciary entity to investigate the LBO, an examiner's mandatory appointment may not assist the reorganization.<sup>205</sup> Instead, the examiner may needlessly drain the estate and the debtor's limited funds.<sup>206</sup> To conserve the estate's resources, the court should at least refuse to grant the examiner any duties delegated to other investigators or experts.

### B. Reforms in the Duties and Role of an Examiner

Similar to the controversy surrounding the examiner's appointment, Congress must clarify the role and scope of his duties. Most courts favor

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197. See 11 U.S.C. § 1104(b)(1) (1988). See *supra* notes 28-32 and accompanying text.

198. See *supra* note 127 and accompanying text.

199. *In re GHR Cos.*, 43 B.R. 165 (Bankr. D. Mass. 1984), *aff'd*, 792 F.2d 478 (5th Cir. 1986).

200. *In re Shelter Resources Corp.*, 35 B.R. 304 (Bankr. N.D. Ohio 1983).

201. See *supra* part II.B.2. See also Snider, *supra* note 12, at 44.

202. A cost-benefit analysis forces the courts to further the policies of the Code. See *In re Hamiel & Sons, Inc.*, 20 B.R. 830, 832 (Bankr. S.D. Ohio 1982). The court envisioned the bankruptcy process to reorganize companies in a cost-effective manner. See *id.* at 833.

203. See *Shelter Resources*, 35 B.R. at 305. See *supra* 120-28 and accompanying text.

204. See *Revco*, 898 F.2d at 501. In *Revco*, the court reasoned that the potential for abuse is minimal because the bankruptcy court directs the examiner's investigation, including its nature, extent and duration. *Id.* See *supra* note 103.

205. See Snider, *supra* note 12, at 45.

206. *Id.*

expanding the examiner's powers.<sup>207</sup> This judicial sentiment reflects a trend toward decreasing the debtor's role as the operator of the business, without forcing the estate to expend resources in appointing a trustee to displace the debtor.<sup>208</sup> Although this judicial inclination may assist the bankruptcy courts in resolving complex matters, introducing an independent fiduciary, such as an examiner, greatly affects and impacts all of the interested parties.<sup>209</sup> As the examiner's role and powers in the reorganization process increase through judicial intervention, creditors may either lose influence over the case or become subjected to a plan which the examiner proposed.<sup>210</sup>

Despite the competing concerns, the examiner is a cost-efficient intermediate method of policing the debtor-in-possession.<sup>211</sup> If a court appoints a trustee, the trustee replaces the debtor and assumes complete control of the debtor's enterprise.<sup>212</sup> On the other hand, an examiner keeps his finger on the pulse of the business to protect the creditors' interests, while also investigating the debtor's alleged improprieties or fraud.<sup>213</sup> If the court appoints an examiner, the examiner may calm the creditors' fears and curb further depletion of the assets.<sup>214</sup>

However, as the judiciary attempts to expand the examiner's powers,

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207. See *supra* part III.A.

208. Miller & Marcus, *supra* note 113, at 24. As the trend continues, courts may erode the presumption that the debtor should continue to operate and manage his business. *Id.* at 24. The courts may begin to favor appointing an independent fiduciary to control the reorganization as under the former Bankruptcy Act. *Id.* at 24-25. If the court appoints an independent entity, the court should appoint an examiner, rather than a trustee, because he is less intrusive. See *In re Bible Speaks*, 74 B.R. 511, 512 (Bankr. D. Mass. 1987) (appointing a trustee is the exception rather than the rule); *In re Anchorage Boat Sales*, 4 B.R. 635 (Bankr. E.D.N.Y. 1980) (holding that a trustee is an extraordinary remedy).

209. Batson & Rivera, *supra* note 130, at 57. The examiner may "encroach" upon the creditors and greatly influence the court. *Id.*

210. *Id.*

211. See *In re Mako, Inc.*, 102 B.R. 809, 814 (Bankr. E.D. Okla. 1988).

212. See 11 U.S.C. §§ 1106, 1108 (1988). A trustee may be undesirable because he is unfamiliar with debtor's business. See *In re Mako, Inc.*, 102 B.R. 809, 813-14 (Bankr. E.D. Okla. 1988) (holding that a trustee's appointment was not in the creditors' best interests because the debtor possessed greater ability to manage its complex business); *In re Macon Prestressed Concrete Co.*, 61 B.R. 432, 439 (Bankr. M.D. Ga. 1986) (presuming that, absent a showing of fraud, the debtor should remain in possession because the trustee imposes a substantial financial burden on the estate and may preclude an effective reorganization); *In re Parker Grande Dev., Inc.*, 64 B.R. 557, 560 (Bankr. S.D. Ind. 1986) (describing appointment of a trustee as an extraordinary remedy which a court should not grant lightly because he may impose substantial burdens on the reorganization).

213. *Mako*, 102 B.R. at 814. When a trustee is not warranted, an examiner is the proper remedy to keep control over the estate during the reorganization proceedings. *Id.*

214. *Id.*

the courts erode the distinctions between sections 1104 and 1106.<sup>215</sup> Providing the examiner with too many powers allows him to step into the trustee's shoes, without displacing the debtor. Perhaps Congress did not envision such a crucial role for the examiner in effectuating a successful corporate reorganization. If so, Congress should amend the Code to evince its intentions in response to the judicial expansion of the examiner's duties. Absent congressional directive, the bankruptcy courts should continue to appoint an examiner with sufficient powers, support the current management, and attempt to maximize the benefits an examiner provides for the court and the estate.

Although an examiner with expansive investigatory power constitutes an essential element in a failed LBO's successful reorganization,<sup>216</sup> Congress should clarify the Code to emphasize the distinct functions of the trustee and the examiner. Courts should liberally grant the examiner broad investigatory powers, and allow the examiner to ascertain the positions of the parties involved. A court must permit an examiner to guide the court on complex technical matters, and assist in expediting confirmation of the plan.<sup>217</sup> However, recognizing the distinct roles of trustee and examiners, the courts should not allow the examiner to become a "pseudo-trustee."<sup>218</sup>

As more and more LBOs file for bankruptcy in the future, the courts desperately need congressional guidance in interpreting the statutory provisions regarding the examiner. However, in the absence of any congressional command, the courts will likely continue the trend of ordering expansive powers for the examiner.<sup>219</sup> The Bankruptcy Code encourages relief for the debtor and emergence out of bankruptcy as a healthier,

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215. See *supra* note 174 and accompanying text.

216. See, e.g., *Revco Bankruptcy Examiner Finds Basis for Legal Claims Against Management, Advisors and Lenders*, *supra* note 14. In the Revco Chapter 11 bankruptcy, the examiner filed a final report of over 300 pages. *Id.* The examiner reviewed more than 200,000 pages of documents and interviewed over 50 people. *Id.* His report to the bankruptcy court suggested potential causes of action available to Revco which would enable the bankruptcy estate to meet its creditors' claims. *Id.*

The examiner in the Interco bankruptcy filed a 556-page report. Kim Foltz, *Business People: Difficult Task Described by Examiner of Interco*, N.Y. TIMES, Oct. 26, 1991, § 1 at 35. The examiner researched over 370,000 pages of documents and interviewed many executives. *Id.* In October 1991, she filed her final two volume, three-inch thick report with the Bankruptcy Court for the Eastern District of Missouri. *Id.*

217. See *supra* notes 147-53 and accompanying text.

218. See *supra* notes 167-74 and accompanying text.

219. See *supra* notes 175-77 and accompanying text.

more efficient corporate entity.<sup>220</sup> Provided that the courts do not undermine the Code's policies, the bankruptcy courts should grant the examiner abundant investigatory and administrative powers.<sup>221</sup>

## V. CONCLUSION

As the explosion of LBOs on Wall Street in the 1980s impacts the bankruptcy courts in the 1990s, the courts will most likely continue to favor appointing examiners.<sup>222</sup> Today, the bankruptcy courts are only beginning to handle the vestiges of failed LBOs.<sup>223</sup> Tomorrow, recessionary times will compound the sizeable debt of LBOs, and force a greater number to seek bankruptcy protection.<sup>224</sup> Thus, more bankruptcy courts will grapple with the ambiguous statutory language, scant legislative history, and conflicting judicial interpretations regarding the examiner's appointment and duties.

Although the courts and failing businesses may wish for congressional clarification,<sup>225</sup> the bankruptcy courts should actively formulate a more comprehensive and efficient approach to the use of an examiner. The courts should recognize that an examiner may serve a vital function as a cost-efficient and intermediate approach to policing the debtor and investigating the LBO transaction. In addition, the courts must continue the trend toward ordering expansive powers for the examiner. Yet, the court should cautiously avoid allowing the examiner to duplicate services performed by other investigative fiduciaries previously appointed during the reorganization. While appointing a trustee constitutes an extraordinary remedy, the appointment of an examiner should become the ordinary remedy in a failed LBO Chapter 11 reorganization.

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220. See Legislative Statements, reprinted in BANKRUPTCY CODE, RULES AND OFFICIAL FORMS: 1986 LAW SCHOOL & C.L.E. EDITION Ch. 11, at 281 (West 1986). "One cannot overemphasize the advantages of speed and simplicity to both creditors and debtors." *Id.* The success of a corporation emerging from bankruptcy depends upon the ability to attract and retain skilled management, the ability to obtain credit, and the ability to project a public image of vitality. *Id.* at 280.

221. See *supra* note 193 and accompanying text.

222. See *supra* note 106 and accompanying text.

223. See *supra* notes 1-7 and accompanying text.

224. "A[n] LBO is a creature of time. In most cases its success or failure can't be determined for three, four, five, or even seven years." BRYAN BURROUGH & JOHN HELYAR, BARBARIANS AT THE GATE: THE FALL OF RJR NABISCO, at x (1990).

225. See *supra* note 177.