# OF EXCLUSIVITY AND *FOR CAUSE*: 11 U.S.C. SECTION 1121(d) RE-EXAMINED

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## I. INTRODUCTION

The general decline of the economy, the proliferation of massive tort claims,[1] and the rebirth of labor disputes[2] have produced an unprecedented volume of bankruptcy petitions.[3] Among the various forms of relief available

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1. *See* Roe, *Bankruptcy and Mass Tort*, 84 COLUM. L. REV. 846, 922 (1984) ("whether or not bankruptcy institutions like it, mass tort disasters have now become bankruptcy problems").

2. *See, e.g.* Bordewieck & Countryman, *The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors*, 57 AM. BANKR. L.J. 292, 293 (1983); Hermann & Neff, *Rush to Judgment: Congressional Response to Judicial Recognition of Rejection of Collective Bargaining Agreements Under Chapter 11 of the Bankruptcy Code*, 27 ARIZ. L. REV. 617, 621 (1985).

3. In calendar year 1978, 202,951 bankruptcy petitions were filed. Federal Judicial Workload Statistics for the twelve-month period ending December 31, 1981, at 28 (Admin. Off. U.S. Courts). In calendar year 1982, 519,063 petitions were filed. *Id.* A total of 16,613 Chapter 11 reorganizational petitions were filed during September 1981 and September 1982. Federal Judicial Workload Statistics for the twelve-month period ending September 30, 1984, at 20 (Admin. Off. U.S. Courts). The number of Chapter 11 filings jumped to 23,374 during calendar year

under the Bankruptcy Code (viz, Chapter 7, Chapter 9, Chapter 11, Chapter 12, and Chapter 13), Chapter 11 filings provide debtors with an opportunity to restructure their debts. The major goals of such reorganizational proceedings[4] are the formulation, filing, and consummation of a plan to restructure debts. In an effort to provide debtors with sufficient time and flexibility to formulate plans,[5] Congress confers on the debtor an exclusive right to file a plan within the first 120 days after the order for relief.[6] These 120 days are commonly referred to as the "exclusivity period."

Section 1121(d) of the Bankruptcy Code authorizes the bankruptcy court to reduce or extend the exclusivity period "for cause."[7] Although the Bankruptcy Code does not define the term "for cause,"[8] case law has developed a spectrum of interpretations.[9] These varying definitional approaches tend to deviate from the policy goals espoused by Congress in enacting § 1121(d).[10] The purposes of this Article are to collect and analyze the existing decisional law on the subject, and to suggest a more refined approach that is consistent with the Congressional goal.

Part II of this Article briefly analyzes the origin of and the legislative history supporting the exclusivity concept.[11] Part III collects and categorizes the body of case law interpreting 11 U.S.C. § 1121(d).[12] The deficiencies of the current judicial interpretation are then identified in Part IV,[13] and an analytical framework more consistent with congressional goals is proposed in Part V.[14]

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1985. Federal Judicial Workload Statistics during the twelve-month period ending December 31, 1985, at 28 (Admin. Off. U.S. Courts).

4. A liquidation proceeding filed under Chapter 7 of Title 11 of the United States Code is commonly referred to as a "straight bankruptcy." In contrast, a proceeding filed under Chapter 11 of Title 11 is commonly referred to as a "reorganization."

5. *See infra* text accompanying note 44.

6. The terms "order for relief" and "commencement of a case" are temporally not synonymous: "The commencement of a voluntary case under . . . title [11] constitutes an order for relief." 11 U.S.C. § 301 (1979). On the other hand, the mere filing of an involuntary petition does not constitute an order for relief. Typically, if an involuntary petition is contested, a trial will be held, and the court will enter an order for relief if it finds that "the debtor is generally not paying such debtor's debts." 11 U.S.C. § 303(h)(1) (1979). Therefore, the 120-day period runs from the initial filing date of a voluntary petition but does not begin to run from the filing of an involuntary petition.

7. 11 U.S.C. § 1121(d) (1986).

8. *In re* Tony Downs Foods Co., 34 Bankr. 405, 406 (Bankr. D. Minn. 1983).

9. *See infra* notes 55-122 and accompanying text.

10. *See infra* notes 123-142 and accompanying text.

11. *See infra* notes 15-54 and accompanying text.

12. *See infra* notes 55-122 and accompanying text.

13. *See infra* notes 123-142 and accompanying text.

14. *See infra* notes 143-150 and accompanying text.

## II. 11 U.S.C. Section 1121

### A. *The Statute*

As originally enacted in 1978,[15] 11 U.S.C. section 1121 provided:

> 1121. Who may file a plan
> (a) The debtor may file a plan with a petition commencing a voluntary case, or at any time in a voluntary case or an involuntary case.
> (b) Except as otherwise provided in this section, *only the debtor may file a plan until after 120 days after the date of the order for relief under this chapter.*
> (c) Any party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may file a plan if and only if—
> (1) a trustee has been appointed under this chapter;
> (2) the debtor has not filed a plan before 120 days after the date of the order for relief under this chapter; or
> (3) the debtor has not filed a plan that has been accepted, before 180 days after the date of the order for relief under this chapter, by each class the claims or interests of which are impaired under the plan.
> (d) On request of a party in interest and after notice and a hearing, the court may *for cause* reduce or increase the 120-day period or the 180-day period referred to in this section.[16]

In July 1984, Congress passed the Bankruptcy Amendment and Federal Judgeship Act.[17] This Act made a cosmetic and technical change to section 1121(c)(3)[18] and rewrote section 1121(d) as follows:

> On request of a party in interest *made within the respective periods specified in subsection (c) of this section* and after notice and a hearing, the court may for cause reduce or increase the 120-day period or the 180-day period referred to in this section.[19]

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15. P.L. 95-598, 92 Stat. 2631 (1978). This enactment became effective on October 1,1979. *Id.*

16. 11 U.S.C. § 1121 (1978) (emphasis added).

17. P.L. 98-353, Title III, Subtitle H, § 506, 98 Stat. 385 (1984). This amendment became effective "to cases filed 90 days after" July 10, 1986. *Id.*

18. *Compare* 11 U.S.C. § 1121(c)(3) (1978) *with* 11 U.S.C. § 1121(c)(3) (1984) (the phrase "each class the claims or interests of which are impaired" was amended to read "each class of claims or interests that is impaired under the plan").

19. 11 U.S.C. § 1121(d) (1984) (emphasis added). Before this 1984 amendment, an extension request filed *after* the expiration of the initial exclusivity period might have received favorable treatment. For example, in *In re* Ravenna Indus., Inc., 20 Bankr. 886 (Bankr. N.D. Ohio 1982), previously-granted extensions preserved exclusivity for the debtor through May 19, 1982. On May 20, 1982, the debtor filed a motion for a nunc pro tunc order for yet another extension through July 30, 1982. *Id.* at 887. While denying the extension request at bar on its merits, *id.* at 888-90, the court did observe that were "excusable neglect" demonstrated, a nunc pro tunc order could conceivably have been issued. *See id.* at 890.

With the 1984 amendment, *see supra* text accompanying note 17, stating that the request must be "made within the [initial] respective periods," the *Ravenna* "excusable neglect" ap-

Section 1121(d) was again amended in October 1986.[20] It now provides:

> On request of a party in interest made within the respective periods specified in *subsections (b) and (c)* of this section and after notice and a hearing, the court may for cause reduce or increase the 120-day period or the 180-day period referred to in this section.[21]

In the definitional sections[22] of the Bankruptcy Code, the term "for cause" is not defined. The 1984 and 1986 amendments likewise offer no legislative direction.

### B. *Legislative History*

Two concepts govern a debtor's ability to file a plan: (1) the debtor's *right* to file a plan and (2) the time within which such right must be exercised. Under the Bankruptcy Act of 1898,[23] the right to file a plan in some situations was conferred on only the debtor, and no other party in interest was granted such a right.[24] In other situations, both the debtor and other parties in interest had the right to file a plan, but the debtor could, exclusive of any other party in interest, exercise the plan-filing right within a time certain.[25] In yet other situations, the debtor did not have the exclusive right to file any plan.[26] The outcomes among these three scenarios were based on whether relief was sought under Chapters X,[27] XI,[28] or XII.[29]

In Chapter X proceedings, the following scheme was provided:

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proach will no longer be viable. *See In re* Westgate Gen. Partnership, 55 Bankr. 562, 563-64 (Bankr. E.D. Pa. 1985). Indeed, it would appear that a second extension request filed before the expiration of a previously extended exclusivity but after the original § 1121(c) 120-day period could not be granted. *See id.* at 564. Stated otherwise, the 1984 amendment to § 1121(d) may have precluded multiple, successive extension requests and in effect limited litigants to only one opportunity to seek an extension.

20. P.L. 99-554, 100 Stat. 3119 (1986). This amendment became effective on November 26,1986. *See id.* § 302(a).

21. 11 U.S.C. § 1121(d) (1986).

22. 11 U.S.C. §§ 101, 102, 1101 (1986).

23. Act of July 1, 1898, Chapter 541, 30 Stat. 544, codified at 11 U.S.C. §§ 1-1255 (1978), repealed on October 1, 1979, by P.L. 95-598 § 401. This 1898 legislation is commonly referred to as the Bankruptcy Act, whereas the 1978 legislation, *see supra* note 15, is commonly referred to as the Bankruptcy Code. For a detailed discussion of the exclusivity concept under the 1898 Bankruptcy Act, see Rosen & Rodriguez, *Section 1121 and Non-Debtor Plans of Reorganization*, 56 Am. Bankr. L. J. 349, 349-57 (1982) [hereinafter Rosen & Rodriguez].

24. *See infra* text accompanying note 36.

25. *See infra* text accompanying notes 37-40.

26. *See infra* text accompanying notes 30-35.

27. *See, e.g.* 11 U.S.C. §§ 501, et seq. (1898).

28. *See, e.g.* 11 U.S.C. §§ 701, et seq. (1898).

29. *See, e.g.* 11 U.S.C. §§ 801, et seq. (1898).

| *Who May File* | *When to File* |
|---|---|
| Trustee, if one is appointed[30] | Within period ordered by the court[31] |
| Debtors, creditors, and indenture holders, if trustee is appointed[32] | After expiration of court-ordered time period for trustee[33] |
| Debtors, creditors, stockholders and indenture holders, if no trustee is appointed.[34] | Anytime[35] |

Under Chapter X, therefore, the debtor enjoyed neither the exclusive right to file a plan nor an exclusive time period within which only it could propose a plan.

In a Chapter XI proceeding, only the debtor was allowed to file a plan.[36] The debtor therefore enjoyed "pure" exclusivity: the exclusive right to file a plan and the exclusive time period within which to do so.

In a Chapter XII proceeding, the debtor was allowed to file a plan only within the time fixed by the court.[37] Once that time had expired, the debtor lost its right to file a plan.[38] Secured creditors of a Chapter XII debtor were then allowed to file a plan at any time,[39] but unsecured creditors of a Chapter XII debtor could never file a plan.[40]

Because any party in interest had the right to propose a plan, debtors disfavored Chapter X proceedings, contending that they "lost control over the future of the enterprise."[41] On the other hand, creditors complained of the "undue bargaining leverage" resulting from the "pure" exclusivity granted the debtors operating under Chapter XI.[42] Recognizing these tensions between creditors' remedies and debtors' rights under the old Act,[43]

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30. Chapter X, Rule 10-202(a) (1983).
31. Chapter X, Rule 10-301(b) (1983).
32. Chapter X, Rule 10-301(c)(1) (1983).
33. Chapter X, Rule 10-301(c)(1) (1983).
34. Chapter X, Rule 10-301(c)(2) (1983).
35. Chapter X, Rule 10-301(c)(2) (1983).
36. 11 U.S.C. § 723 (1970); Chapter XI, Rule 11-36(a).
37. Chapter XII, Rule 12-36(a).
38. *Id.*
39. Chapter XII, Rule 12-36(b).
40. *See* D. COWANS, BANKRUPTCY LAW & PROCEDURE § 1077 (2d ed. 1978).
41. Commission on the Bankruptcy Laws of the United States, Report, H. R. Doc. No. 137, 93d Cong., 1st Sess., 244 (1973).
42. *See Bankruptcy Act Revision, Part 3: Hearings on H.R. 31 Before the Subcomm. on Civil and Constitutional Rights of the House Committee on the Judiciary* 94th Cong., 2d Sess. 1875 (1976).
43. *See In re* Barker Estates, Inc., 14 Bankr. 683, 684 (Bankr. W.D.N.Y. 1981); H.R. REP. No. 595, 95th Cong., 2d Sess. 231, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6190.

section 1121 of the new Code was drafted to accommodate both interests:

> Proposed [§ 1121] recognizes the need for the debtor to remain in control to some degree, or else debtors will avoid the reorganization provisions in the bill until it would be too late for them to be an effective remedy. At the same time, the bill recognizes the legitimate interests of creditors, whose money is in the enterprise as much as the debtor's, to have a say in the future of the company. The bill gives the debtor an exclusive right to propose a plan for 120 days . . . . The court is given the power . . . to increase or reduce the 120-day period depending on the circumstances of the case.[44]

Pursuant to section 1121, therefore, any creditor or party in interest[45] may file a plan.[46] During the initial 120 days[47] after the entry of the order for

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44. H.R. REP. No. 595, 95th Cong., 2d Sess. 231-32, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6190-91.

45. Unlike the term "creditor," which is defined at 11 U.S.C. § 101(9) (1982), the term "party in interest" is not comprehensively defined in the Bankruptcy Code. *Compare* 11 U.S.C. § 101 (1982) (no definition) *with* 11 U.S.C. § 1109 (1982) (providing a definition for Chapter 11 purposes only). The legislative history suggests that the determination of who is a "party in interest" is a matter for the exercise of judicial discretion. *See* H.R. REP. No. 595, 95 Cong. 2d Sess. 107-08, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6068-70. Because the "for cause" standard applies to "creditors" as well as "parties in interest," no distinction will be made between the two terms, and reference will only be made to "creditors."

46. Indeed, "[a]ll of the proposed revisions of the Act which Congress considered prior to passage of the Code contained provisions eliminating the debtor's exclusive right to file a plan." *In re* Lake of the Woods, 10 Bankr. 338, 343 (E.D. Mich. 1981). The elimination of the debtor's exclusive right to file a plan enables creditors and other parties in interest to propose plans of their own. The opportunity to propose non-debtor plans was clearly a congressional goal sought to be achieved by § 1121. In the Western District of Missouri, at least, the congressional goal was not met: in an empirical study, an author concluded that "there was no evidence that provisions of the new Code which permits creditors to propose plans of reorganization had any real impact on the balance of power between the Chapter 11 debtor and its creditors." LoPucki, *The Debtor in Full Control—System Failure Under Chapter 11 of the Bankruptcy Code? (Part I)*, 57 Am. Bankr. L.J. 99, 100 (1983) [hereinafter LoPucki].

47. To be precise, reference should also be made to the 180-day period provided in § 1121(c)(3). Indeed, technically two exclusive periods are involved: the initial 120 days and the subsequent 60 days. Even if the debtor complies with the first 120-day period by filing a plan within that time, exclusivity is preserved only if the debtor procures acceptance of its plan within 180 days after the order for relief. H. MILLER & M. COOK, A PRACTICAL GUIDE TO THE BANKRUPTCY REFORM ACT, 557 (1979). For example, if the debtor files a plan on the 120th day after entry of the order for relief, to preserve exclusivity it must procure plan acceptance by the 180th day. If the debtor files a plan at the time of entry of the order for relief, it will have 180 days to procure acceptance. Because the "for cause" language qualifies both the 180-day and 120-day periods, no distinction will be made in the text between these two different periods. Instead, reference has been and will be made generically only to the 120-day period.

While perhaps beyond the scope of this Article, the 180-day plan acceptance period may be unrealistic. As illustrated, if a debtor files a plan and disclosure statement on the 120th day, it must procure plan acceptance in 60 days. Assuming that upon filing the disclosure statement is then immediately noticed to all parties in interest, F.R.B.P. 2002(b)(1) permits a 25-day objection period. Assuming that no objection is filed, a hearing may then be held on the 26th day

relief, however, only the debtor may exercise the right to file a plan. If the debtor has neither filed a plan during nor sought an extension of this 120-day period,[48] then on the 121st day any creditor may file a plan.[49] By the same token, a creditor may request the court to reduce the 120-day exclusivity.[50]

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after the disclosure statement filing date. Further assuming that the disclosure statement is approved, the plan must then be noticed to all creditors, and another 25-day objection period is allowed. If this timetable is followed, the earliest a plan may be considered by the court will be on the 52nd day after the 120-day exclusive period, i.e., on the 172nd day. The § 1121(c)(3) 180-day period thus permits only an eight-day buffer. Even under ideal scheduling parameters, such an eight-day buffer is unrealistic. Indeed, given the crowded dockets, the § 1121(c)(3) 60-day plan acceptance period and the F.R.B.P. 2002(b) notice period cannot be reconciled. *See, e.g.* LoPucki, *supra* note 46, at 123 (in the Western District of Missouri, a debtor's plan on the average was confirmed *ten months* after the order for relief). Assuming the propriety of the F.R.B.P. 25-day notice, the 60-day plan acceptance period should therefore be amended to provide for a more realistic timetable. *But see* F.R.B.P. 9006(c) (F.R.B.P. 2002(b) period may be reduced). Alternatively, an argument can be made that if the debtor meets the initial 120-day plan filing requirement, the unrealistic time constraints and the crowded docket constitute sufficient "cause" to extend the 60-day plan acceptance period.

48. The choice of 120 days, as opposed to a longer period, was apparently not based on any particular empirical findings. *Cf.* 132 Cong. Rec. S15075-76 (daily ed. 10/3/86) (Statement of Sen. Grassley) (original Chapter 12 bill, eventually amended, debated, and passed by Congress and signed by the President as P.L. 99-554, 100 Stat. 3119 (1986) as the Bankruptcy Judges, United States Trustees, and Family Farmers Bankruptcy Act, contained a 240-day exclusivity period). In the House Report, the drafters, without citing any support or authority, simply stated that "[i]n most cases, 120 days will give the debtor adequate time to negotiate a settlement, without unduly delaying creditors." H.R. Rep. No. 595, 95th Cong., 2d Sess. 232, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6191. The Senate Report simply provided no analysis for the origin of the 120-day rule. *See* S. Rep. No. 989, 95th Cong., 2d Sess. 118, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5904.

49. When filing an application for a § 1121(d) extension or reduction, the cautious applicant would seek extension or reduction of *both* the 120-day and 180-day periods. This is so because there exist divergent views on the issue whether an extension of the 120-day period automatically extends the 180-day period as well. *Compare In re* Trainer's, Inc., 17 Bankr. 246, 248 (Bankr. E.D. Pa. 1982) (extension of the 120-day deadline does not automatically extend the 180-day deadline) *with In re* Ravenna Indus., Inc., 20 Bankr. 886, 891 (Bankr. N.D. Ohio 1982). For a discussion of, and debate over, this split of authority, see *In re* United Press, Int'l., Inc., 60 Bankr. 265 (Bankr. D.D.C. 1986).

50. *E.g., In re* Crescent Beach Inn, Inc., 22 Bankr. 155, 161 (Bankr. D. Me. 1982). The debtor's right is also affected by the appointment of a trustee: 11 U.S.C. § 1121(c)(1) provides that any party in interest may file a plan "if . . . a trustee has been appointed." *See also* 11 U.S.C. § 1104 (1982). Any discussion of the operation of the trustee appointment device deserves more detailed treatment, and is beyond the scope of this Article. Suffice it to say that exclusivity under Chapter 11 is determined by status (i.e., whether the debtor remains in possession, *see* 11 U.S.C. §§ 1107-1108 (1982), or whether a trustee is appointed) and by the running of time (i.e., the expiration of the exclusivity periods). A situation may arise, of course, where before the expiration of either the 120- or 180-day exclusivity, a trustee is appointed under 11 U.S.C. § 1104. *E.g., In re* American Resources, Ltd., 54 Bankr. 245, 246-47 (Bankr. D. Haw. 1985) (trustee appointed for Chapter 11 debtor 25 days after petition filed). In such a scenario, parties in interest will not have to await the expiration of the exclusivity periods before filing a plan. *Cf. In re* Kun, 15 Bankr. 851, 852 (Bankr. D. Ariz. 1981) (debtor applica-

In deciding whether to grant an extension or reduction of the 120-day exclusivity, the court is governed by the "for cause" language of section 1121(d). Five clues for determining "cause" may be found in the House and Senate reports: (1) unusually large or unusually small case; (2) delay by the debtor; (3) recalcitrance among creditors; (4) promise of probable success in reorganization; and (5) tactical advantage in pressuring creditors to yield to a plan.[51]

In sum, section 1121 was enacted to accomplish two legislative goals: (1) to balance the bargaining power between the debtor and its creditors[52] and (2) to provide flexibility that was not available under the Act.[53] While legislative history provides an analytical background for evaluating "cause," the Code itself provides no definition.[54] Decisional law must therefore fill the statutory void. The spectrum of judicial decisions will be discussed next.

## III. Interpretive Case Law

The burden of proof in demonstrating "cause" to justify an extension or reduction of exclusivity rests on the party making the request.[55] Mere recitations[56] or allegations unsupported by evidentiary presentation do not satisfy the burden.[57] Decisions construing the "for cause" language may be synthesized into five major[58] categories: passage of time; size and complexity of

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tion to extend exclusivity denied because trustee appointed); *In re* Vincent, 4 Bankr. 23, 25 (Bankr. M.D. Tenn. 1980) (same).

51. S. Rep. No. 989, 95 Cong., 2d Sess. 118, *reprinted in* 1978 U.S. Cong. & Admin. News 5787, 5904; H.R. Rep. No. 595, 95 Cong., 2d Sess. 232, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6191-92.

52. *In re* Lake in the Woods, 10 Bankr. 338, 344 (E.D. Mich. 1981); *see* Rosen & Rodriguez, *supra* note 23, at 357-58.

53. First American Bank of New York v. Century Glove, Inc., 64 Bankr. 958, 960 (D. Del. 1986); H.R. Rep. No. 595, 95th Cong., 2d Sess. 232, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6191.

54. *See In re* Lake in the Woods, 10 Bankr. at 345.

55. *In re* Tony Downs Foods Co., 34 Bankr. 405, 407 (Bankr. D. Minn. 1983); *In re* Ravenna Indus., Inc., 20 Bankr. at 889.

56. Two commentators have criticized, applicants for their "boilerplate recitations" when applying for exclusivity extension. Rosen & Rodriguez, *supra* note 23, at 364.

57. *In re* Tony Downs Foods Co., 34 Bankr. at 408 (extension application presented "nothing special" to justify relief); *see In re* Ravenna Indus., Inc., 20 Bankr. at 889.

58. One minor category of decisions focuses on perhaps the emotional, rather than the legal, relationships between the party requesting an extension and the one opposing it. For example, in *In re* Crescent Beach Inn, Inc., 22 Bankr. 155 (Bankr. D. Me. 1982), one of the creditors was the uncle of the debtor's sole stockholder. *Id.* at 156. The uncle moved for *reduction* of the debtor's exclusivity. *Id.* Noting *inter alia* the principal parties' "acrimonious relations," the bankruptcy court *shortened* the exclusivity to approximately 60 days. *Id.* at 160-61; *accord In re* Texas Extrusion Corp., 68 Bankr. 712, 725 (N.D. Tex. 1986). Likewise, the debtor in *In re* Parker Street Florist & Garden Center, Inc., 31 Bankr. 206 (Bankr. D. Mass. 1983), sought an extension simply "to prevent a small creditor from interfering with its reorganization and proposal of a plan." *Id.* at 207. The court rejected this argument and denied the extension

the case; progress demonstrated; pendency of related litigation; and the nature of the debtor's business.

### A. *Time*

One factor frequently cited by judges attempting to ascertain "cause" is the "time which has elapsed since the filing of the Petition."[59] In *In re Swatara Coal Co.*,[60] the first three months after the petition filing date were consumed by a management and ownership dispute.[61] Noting that these first three months were "wasted," the court granted the debtor's exclusivity extension request.[62] Similarly, in *In re Manville Forest Products Corp.*,[63] the initial 120 days and five subsequent extensions were sanctioned by the district court on appeal, because the preservation of exclusivity "allowed time for the smoke to clear."[64]

An extension request was denied by the court in *In re Ravenna Industries, Inc.*[65] The debtor presented no evidence at the exclusivity extension hearing.[66] The passage of 435 days during which the debtor proposed no plan was cited by the court as "cause" for not granting any further extension.[67]

### B. *Size and Complexity*

In August 1982, the Manville Corporation and twenty of its subsidiaries petitioned for Chapter 11 relief under the Bankruptcy Code.[68] One of the twenty subsidiaries was Johns-Manville Corporation, the world's largest producer of asbestos.[69] Another subsidiary, Manville Forest Products Corporation, filed for Chapter 11 protection, even though it was "a financially healthy company, with a net worth of over half a billion dollars."[70] Five exclusivity extensions were granted by the bankruptcy court in the Manville Forest Products Chapter 11 case, despite the creditors' argument that "reorganization of that healthy and wealthy company was a simple matter which did not warrant an extension."[71] Reviewing these extensions granted by the

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request. *Id.* at 207-08. Because such emotional disputes do not tend to supplement the legal analysis, they will not be analyzed further.

59. *In re* Ravenna Indus., 20 Bankr. at 890.
60. 49 Bankr. 898 (Bankr. E.D. Pa. 1985).
61. *Id.* at 899.
62. *Id.*
63. 31 Bankr. 991 (S.D.N.Y. 1983).
64. *Id.* at 995.
65. 20 Bankr. 886, 891 (Bankr. N.D. Ohio 1982).
66. *Id.* at 890.
67. *Id.*
68. *In re* Manville Forest Products Corp., 31 Bankr. at 992.
69. *Id.*
70. *Id.*
71. *Id.* at 993.

bankruptcy court, the district court found no error.[72] Specifically, District Judge Leval held that the "sheer mass, weight, volume, and complication of the Manville filings undoubtedly justify a shakedown period. The overall complication has perhaps itself constituted 'cause' up till now for extensions."[73]

In contrast to the complexity cited in the *Manville Forest Product* decision, relative *simplicity* of a reorganization has led to denial of exclusivity extension. In *In re Gagel & Gagel*,[74] the creditor urged the denial of the debtor's exclusivity extension request, contending that the case involved only one asset and two creditors.[75] The bankruptcy court agreed with the creditor and denied the extension request, holding that to allow the extension would be "fruitless and counterproductive."[76]

### C. *Progress*

Finding a "reasonable possibility that proposed negotiations [with creditors] will be commenced and concluded within a reasonable period of time," the court in *Swatara Coal* granted the debtor's extension request.[77] In *Swatara Coal*, the debtor, pursuant to a court-approved stipulation, was required to commence and conclude negotiations with its major creditor within a five-month period.[78] Likewise, extension was granted in *In re Manzey Land and Cattle Co.*,[79] where the court found "some promise of probable success."[80] Similarly, a bankruptcy court's finding that a debtor was "making some progress" justified an exclusivity extension order.[81] In *In re Pine Run Trust, Inc.*,[82] the debtor's chief executive officer testified that "substantial progress" had been made in its negotiations with a creditors' committee.[83] This testimony was supported by the court's finding that "these negotiations were to be concluded shortly."[84] The debtor's exclusivity extension request was granted.[85]

Lack of progress has also been cited by courts in denying extension requests. For example, in *Ravenna Industries*, the court considered the "deterioration in the cash position of the debtor over the past four months" in

72. *Id.* at 995.
73. *Id.*
74. 24 Bankr. 674 (Bankr. S.D. Ohio 1982).
75. *Id.* at 674.
76. *Id.* at 675.
77. *In re* Swatara Coal Co., 49 Bankr. at 899.
78. *Id.*
79. 17 Bankr. 332 (Bankr. D.S.D. 1982).
80. *Id.* at 338.
81. *In re* Manville Forest Products Corp., 31 Bankr. at 995.
82. 67 Bankr. 432 (Bankr. E.D. Pa. 1986).
83. *Id.* at 435.
84. *Id.*
85. *Id.* at 435-36.

denying extension.[86] Similarly, because the "debtor has made no showing that it can successfully reorganize if the exclusive periods are extended," the court in *In re American Federation of Television & Radio Artists*[87] refused to extend exclusivity.[88]

### D. *Pendency of Related Litigation*

In *In re Scott*,[89] the debtor sought to justify its extension request on the basis that a plan could not be formulated until a related preference litigation[90] had been resolved.[91] Finding that the pendency of the preference complaint would not "be permitted to stand as a substitute for the filing of a debtor's plan," the court denied the extension request.[92] Similarly, the debtor in *In re Lake in the Woods*,[93] sought extension on the theory that the existence of a real estate title dispute between it and a creditor provided cause to extend exclusivity.[94] Indeed, the debtor contended that "no feasible plan can be filed by any party until the bankruptcy court rules on the title question."[95] The bankruptcy court agreed with the debtor and granted the extension request.[96] On appeal, the district court found "it was erroneous as a matter of law for the bankruptcy court to conclude that a dispute between the parties over title to real estate constitutes cause to extend the debtor's exclusive filing period."[97] Rejecting the debtor's contention, the district court held that the "existence of a dispute between the debtor and creditor over title to real estate does not constitute cause to extend the exclusive period."[98]

A succinct response to the debtor's argument that no plan can be filed until resolution of pending litigation is also found in Judge Glennon's opinion in *In re Parker Street Florist & Garden Center, Inc.*[99] In that case, the debtor was engaged in an adversary complaint regarding payment of insurance proceeds.[100] To support its extension request, the debtor contended that it could not propose a feasible plan until the insurance dispute was

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86. *In re* Ravenna Indus., 20 Bankr. at 890.
87. 30 Bankr. 772 (Bankr. S.D.N.Y. 1983).
88. *Id.* at 774.
89. 37 Bankr. 184 (Bankr. W.D. Ky. 1984).
90. *See* 11 U.S.C. § 547 (1982).
91. *In re* Scott, 37 Bankr. at 185.
92. *Id.* at 186.
93. 10 Bankr. 338 (E.D. Mich. 1981).
94. *Id.* at 341.
95. *Id.* at 342.
96. *Id.* at 339.
97. *Id.* at 342.
98. *Id.* at 345.
99. 31 Bankr. 206 (Bankr. D. Mass. 1983).
100. *Id.* at 208.

resolved by the court.[101] Rejecting this argument, the court held that where an adversary proceeding is under advisement, the debtor may propose its plan, taking into consideration the possible results of that action.[102] Accordingly, the extension motion was denied.[103]

In *In re American Federation of Television & Radio Artists*,[104] a judgment in excess of $10 million was entered against the debtor approximately five months before the filing of the bankruptcy petition.[105] The debtor appealed this judgment entry.[106] As of the date of the hearing on the debtor's exclusivity extension request, no final determination of the appeal had been rendered.[107] The court held that "the pendency of an appeal from an adverse judgment does not constitute 'cause' for an extension of the exclusivity periods."[108]

### E. *Nature of Debtor's Business*

The debtor in *In re Crescent Beach Inn, Inc.*,[109] operated an ocean-front motel containing fifteen overnight rooms, a main dining area, function room and two bars, plus several cabins rented on a yearly basis.[110] The Chapter 11 petition was filed on March 15, 1982.[111] Focusing on the exclusivity granted by section 1121(c)(3),[112] the court observed that the exclusivity period would not expire until after Labor Day, "the traditional final week-end of the summer season."[113] While the exclusivity period was eventually *reduced* pursuant to a creditor's request,[114] the court in ascertaining "cause" did consider the "seasonal" feature of the debtor's business.[115] Evidently, the court weighed the debtor's contention that it simply had no time during the height of its business season to formulate a plan.

The Chapter 11 petition in *In re Manzey Land & Cattle Co.* was filed in May 1981.[116] The debtor was a corporation engaged in farming.[117] The individual stockholders and officers of the farm corporation also eventually

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101. *Id.*
102. *Id.*
103. *Id.*
104. 30 Bankr. 772 (Bankr. S.D.N.Y. 1983).
105. *Id.* at 773-74.
106. *Id.* at 774.
107. *See id.*
108. *Id.* (following *In re* McLaury, 25 Bankr. 30 (Bankr. N.D. Tex. 1982)).
109. 22 Bankr. 155 (Bankr. D. Me. 1982).
110. *Id.* at 156.
111. *Id.*
112. *See supra* note 47 and accompanying text.
113. *In re* Crescent Beach Inn, Inc., 22 Bankr. at 160.
114. *Id.* at 161.
115. *Id.* at 160.
116. *In re* Manzey Land & Cattle Co., 17 Bankr. 332, 334 (Bankr. D.S.D. 1982).
117. *Id.*

petitioned for Chapter 11 relief.[118] The individual and corporate cases were then consolidated.[119] The debtors' exclusivity extension requests were granted, because "farm work previously hindered Debtors' efforts to formulate Plans."[120] Along the same vein is the decision in *In re Ault*.[121] The *Ault* debtors were farmers, and the court noted that "[d]uring [the initial] six month period the Debtors not only had to proceed with their bankruptcy proceeding, but had to plant their 1986 crop as well."[122] Underlying the *Ault* and *Manzey* decisions is the reasoning that if the debtors, due to legitimate business concerns, were too busy to formulate a plan, more time should be granted for the debtors to devise a plan.

## IV. Defects in the Current Case Law

Among the five "causes" offered by exclusivity extension applications, pendency of related litigation has been consistently rejected as a justification for granting extensions.[123] On the other hand, extensions have been granted when, in the court's opinion, allowing debtors more time is necessary under the circumstances.[124] Likewise, a debtor's business may be so seasonable or complex that an exclusivity extension or reduction is necessary.[125] Finally, if the court is satisfied that sufficient progress toward reorganization has been demonstrated, exclusivity extension requests will be granted.[126]

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118. *Id.*

119. *Id.* at 336-38.

120. *Id.* at 138. As mentioned briefly at note 48 and accompanying text, *supra*, new Chapter 12 provisions dealing with agricultural bankruptcies became effective on November 26, 1986. Other than the debtor, no party in interest, including the Chapter 12 trustee, *see* H.R. Rep. No. 958, 99th Cong., 2d Sess. 49 (1986), may file a Chapter 12 plan. *See* 11 U.S.C.A. §§ 1201-1231 (1987). Pursuant to § 1221, the debtor is given 90 days to file a plan. 11 U.S.C.A. § 1221 (1987). Unlike § 1121(d), no *reduction* of the Chapter 12 90-day period may be requested. An extension is obtainable (obviously upon request by the debtor because no creditor can file a plan), but only if it "is *substantially justified*." *Id.* (emphasis added). The penalty for failure to file a plan timely is dismissal. 11 U.S.C.A. § 1208(c)(3) (1987). This severe penalty is not present under Chapter 11. *See In re* Powell Bros. Ice Co., 37 Bankr. 104, 106 (Bankr. D. Kan. 1984) (§ 1121 statutory time periods are "not deadlines;" § 1121 provides ground for dismissal "only if *the Court* has fixed a time within which the plan must be filed" and then the debtor fails to so comply); *see also* 11 U.S.C. § 1112(b)(4) (1982).

The "substantially justified" language of § 1221 appears to connote a stronger barrier against extension than the "for cause" language in § 1121(d). Also, unlike the Chapter 11 concerns of democratizing the bargaining process and for flexibility, *see supra* text accompanying notes 52-53, the 90-day plan-filing deadline is designed to "get these cases moving." 132 Cong. Rec. S15,075-76 (daily ed. 10/3/86) (statement of Sen. Grassley). The exact contours of "substantially justified" extensions must await judicial construction.

121. 63 Bankr. 638 (Bankr. C.D. Ill. 1986).

122. *Id.* at 640.

123. *See supra* text accompanying notes 89-108.

124. *See supra* notes 59-67 and accompanying text.

125. *See supra* text accompanying notes 68-76 and 108-122.

126. *See supra* text accompanying notes 77-88.

The relationship between these five "causes" and the two congressional goals sought to be achieved by section 1121 (viz., adjustment of the bargaining power between debtors and creditors and flexibility) will now be analyzed.

The rejection of pendency of litigation as a "cause" is a proper approach. The pendency of a dispute under advisement and the delay caused by a hobbled docket do not typically diminish the debtor's ability to file a plan.[127] Particularly in situations where the debtor instituted the litigation,[128] any delay and resultant inability to formulate plans are engendered by the debtor. A debtor's extension request under these circumstances should therefore be denied.

Also consistent with congressional policy is the denial of extension requests when a substantial amount of time has elapsed beyond the original 120 days.[129] Extension grants based solely on the imposition of a "shakedown"[130] period beyond the initial 120 days is inconsistent with legislative intent. This is so because such mechanically imposed "shakedown" periods tend to abrogate the "case by case" approach espoused by Congress. Indeed, the tolerance of such a "shakedown" period approach has relegated initial extension requests to be composed of "boilerplate recitations."[131] Stated otherwise, extension applicants, recognizing the pattern of tolerance exhibited by some courts, will undoubtedly allege the necessity of such a "shakedown" period as "cause" to justify an extension grant. The continued focus on the mechanical "shakedown" period approach encourages such "boilerplate recitations," and should therefore be abolished.

The nature of the debtor's operation and the accompanying complexity of the reorganizational process are two exclusivity extension or reduction "causes" identified by Congress.[132] Consistent with the legislative history, "unusually large"[133] reorganizing debtors typically request and receive exclusivity extensions.[134] By the same token, an "unusually small"[135] operation

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127. *See In re* Parker Street Florist & Garden Center, Inc., 31 Bankr. at 208 (a debtor could file a plan taking into consideration the possible results of a pending suit).

128. *See In re Scott*, 37 Bankr. at 185 (discussion of litigation that is causative, as opposed to symptomatic, of Chapter 11 proceedings).

129. *Cf.* H.R. REP. No. 595, 95th Cong., 2d Sess. 232, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6191. ("[i]n most cases, 120 days will give the debtor adequate time to negotiate a settlement, without unduly delaying creditors").

130. *See, e.g., In re* Manville Forest Products Corp., 31 Bankr. at 995.

131. Rosen & Rodriguez, *supra* note 23, at 364.

132. *See* H.R. REP. No. 595, 95th Cong., 2d Sess. 232, 406, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6191, 6362.

133. H.R. REP. No. 595, 95th Cong., 2d Sess. 232, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6191.

134. *E.g., In re* Manville Forest Products, 31 Bankr. at 995.

135. H.R. REP. No. 595, 95th Cong., 2d Sess. 406, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6362.

should have its exclusivity reduced.[136] In a similar vein, when there is "nothing special" about the case, extension requests have been denied.[137] Such differentiation in the treatment of "unusually large," "unusually small," and "nothing special" cases also furthers the congressional goal of case-by-case flexibility,[138] and should be encouraged.

The legislative history accompanying section 1121 also suggests that extension requests should be granted "on a showing of some promise of probable success."[139] The case law's emphasis on progress toward reorganization as a "cause" therefore follows the legislative lead. Such a "progress" approach should continue to be viable.

The five factors identified in this article analytically stem from concerns for the debtor. Indeed, the judicial analysis views the exclusivity extension and reduction requests from the debtor's standpoint. For example, if the *debtor* is a large company, an extension of the exclusivity period may be granted. Conversely, if the *debtor* has a small operation, exclusivity may be reduced. If the *debtor* has demonstrated progress toward reorganization, exclusivity can be extended. When a *debtor's* business is so seasonal that the 120-day time table cannot be followed, the exclusivity period will be extended. On the other hand, if an inordinate amount of time has elapsed without the *debtor* procuring a negotiated settlement, extension requests will be denied. The decisional law's analytical starting point is clearly the debtor. In enacting section 1121, Congress sought to balance and equalize the bargaining power between the debtor *and* its *creditors*. Analytically, the bargain cannot be struck by focusing on the debtor's interest only.[140] Empirically, the balance has not been achieved: For example, two commentators have suggested that exclusivity extensions were "too easy to obtain."[141] An-

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136. *See In re* Gagel & Gagel, 24 Bankr. at 674-75.

137. *In re* Tony Downs Foods Co., 34 Bankr. at 408.

138. H.R. REP. No. 595, 95th Cong., 2d Sess. 232, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6191.

139. S. REP. No. 989, 95th Cong., 2d Sess. 118, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5904.

140. An argument may be made that analyzing exclusivity from a debtor's perspective intrinsically addresses creditor sensitivity as well. For example, a finding that too much time has passed since petition filing necessarily implies that the debtor has overstayed its welcome *and* that the *creditor* has been unjustifiably deprived. Similarly, a finding that the debtor has made no progress connotes that the *creditor's* patience should not be stretched any further. Despite the accuracy of such a "flip-side" argument, the conclusion is nonetheless inescapable that the current decisional framework elevates debtor concerns over creditor agony. As discussed in the text, the congressional goal is to democratize the plan- filing process and permit meaningful creditor and debtor participation. At a minimum, therefore, analytically a creditor's concern must receive equal weight with a debtor's concern, and one should not *ipso facto* outweigh the other. Stated otherwise, the fallacy of the "flip-side" argument as described herein is that it places the initial focus on the debtor. If equality of bargaining power is to be achieved, primary focus, at least at the outset of an exclusivity analysis, must be accorded to both creditor's and debtor's concerns.

141. Rosen & Rodriquez, *supra* note 23, at 364.

other study concluded that "the gap between the legal power to propose a plan and practical ability to muster even a credible threat of one is wide indeed."[142] An approach that more closely coincides with the congressional goal should therefore contain a component that addresses creditor-specific and creditor-oriented concerns.

## V. A Suggested Approach

As observed by Congress, section 1121 recognizes "the legitimate interests of creditors, whose money is in the enterprise as much as the debtor's, to have a say in the future of the company."[143] The following "legitimate interests" may be identified: The amount of a creditor's investment, the history of debt service, the continuing deterioration of collateral and erosion of an equity cushion, the nature of the creditor's business, the secured (vis-a-vis unsecured) status of the creditor, and the interest of the stockholders. As with the situation where exclusivity extensions have been justified when a debtor is unusually large, a creditor who is owed a relatively larger debt should be given relatively more control, such as an early opportunity to file a plan, in the reorganizational process. If such creditor objects to an exclusivity extension request, the debtor should bear a high burden of proof to demonstrate cause. By the same token, if such creditor seeks reduction of exclusivity, the request should be favorably considered.

In a situation where debt service has been nonexistent for a significant period of time, any extension request will deprive creditors of the opportunity to file plans. Such deprivation is a tactical device used by the debtor to pressure creditors to yield to the debtor's plan.[144] If the debtor has not serviced a debt over an extended period of time, any further delay may cause the creditor to write off the debt and to lose the incentive to participate further in the reorganizational process. Such evaporation of a debt will benefit the debtor and erode the creditor's bargaining power. Extensions should, therefore, be denied and reductions be granted when a debtor's debt service record evidences a seriously delinquent pattern.

When collateral is rapidly deteriorating, courts should view extension requests with disfavor. This is so because a creditor's remedies to counter deteriorating collateral are limited to the following: move to dismiss,[145] move

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142. LoPucki, *The Debtor in Full Control—Systems Failure Under Chapter 11 of the Bankruptcy Code? (Part II)*, 57 Am. Bankr. L.J. 247, 254 (1983).

143. H.R. Rep. No. 595, 95th Cong., 2d Sess. 231-32, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6190-91.

144. S. Rep. No. 989, 95th Cong., 2d Sess. 118, *reprinted at* 1978 U.S. Code Cong. & Admin. News 5787, 5904.

145. 11 U.S.C. § 1112(a)-(b) (1982).

to convert,[146] or move for adequate protection.[147] To provide the creditor with more bargaining power than that available through such motions, it should be allowed a timely opportunity to file a plan. By the same token, if a creditor's business survival is dependent on approval of a plan, consideration should be extended to the creditor's needs.

Unlike a secured creditor who may petition for stay relief[148] or adequate protection,[149] an unsecured creditor's remedies to counter delaying reorganizational tactics are even more limited. Procedurally, the unsecured creditor speaks through a Committee,[150] and the complaints of an individual unsecured creditor are typically ignored. The ability to file a plan, the contents of which are disfavored by the debtor, is therefore a very effective weapon. Granting exclusivity extensions will effectively deprive the unsecured creditor of the utility of its plan-filing rights.

## VI. Conclusion

Both the language and the purpose of 11 U.S.C. section 1121 require that exclusivity extension requests not be granted routinely.[151] Instead, the statute "should be faithfully interpreted, to limit the delay that makes creditors hostages of Chapter 11 debtors."[152] Some of the five "causes" identified in this article admittedly do follow the legislative mandate. These "causes" for extension or reduction of the exclusivity period have not, however, completely attained the congressional goal of providing flexibility and balancing the competing interests of debtors and creditors. A more creditor-oriented approach is required to meet the ideals suggested by the legislative history. Further, such heightened considerations of creditor needs will also quiet the criticism that exclusivity extensions have been "too easy to obtain."[153] Similarly, a more creditor-oriented approach may generate greater interest and utility in requesting exclusivity reductions. Hopefully, the analytical framework suggested in this Article will produce the desired result.

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146. *Id.*; *but see* 11 U.S.C. § 1112(c) (1982) (creditor may not move to convert a Chapter 11 proceeding to one under Chapter 7 if the debtor is a farmer).

147. *See* 11 U.S.C. § 361 (1982); *but see* 11 U.S.C.A. § 1205 (1987) (adequate protection concept contained in § 361 not applicable to a family farm reorganization under Chapter 12).

148. *See* 11 U.S.C. § 362 (1982).

149. *See* 11 U.S.C. § 361 (1982).

150. *See* 11 U.S.C. § 1102 (1982). *See, e.g.*, DeNatale, *The Creditors' Committee Under the Bankruptcy Code—A Primer*, 55 Am. Bankr. L.J. 43, 44 (1981).

151. *In re* Pine Run Trust, Inc., 67 Bankr. 432, 434 (Bankr. E.D. Pa. 1986).

152. *In re* Timbers of Inwood Forest Assoc., 808 F.2d 363, 372 (5th Cir. 1987)(en banc), *aff'd*, ___ U.S. ___, 108 S. Ct. 626 (1988).

153. Rosen & Rodriguez, *supra* note 23, at 364.