

I N S I D E   T H E   M I N D S

# Chapter 7 Commercial Bankruptcy Strategies

*Leading Lawyers on Analyzing the Trends,  
Strategies, and Risks in Chapter 7 Liquidations*

2012 EDITION



ASPATORE

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The Duty of Chapter 7 Trustees  
to Perform Obligations of an  
ERISA Plan Administrator:  
Jurisdictional and Practical  
Considerations

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## **Introduction**

Bankruptcy trustees are fiduciaries. A Chapter 7 trustee’s primary obligation is to “collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest[.]” 11 U.S.C. § 704(a)(1) (2012). As an officer of the court and as a representative of a debtor’s creditors, the trustee has a duty to protect and preserve estate property, and to realize the maximum return for the estate for distribution to the debtor’s creditors.

In furtherance of these broad objectives, Section 704 of Title 11 of the United States Code (the Bankruptcy Code) enumerates the specific obligations of the Chapter 7 trustee, which include marshaling assets of the debtor for distribution to creditors, objecting to the allowance of filed claims, filing tax returns as required under relevant non-bankruptcy statutes, and making a final report and filing with the Bankruptcy Court a final account of the administration of the estate. 11 U.S.C. § 704(a).

Most of these obligations are in furtherance of the collection and distribution of estate assets for the benefit of creditors, but trustees have been given additional obligations under the Bankruptcy Code that are not specifically tied to this function.

This chapter focuses on one such obligation imposed upon Chapter 7 trustees under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) (BAPCPA). To the laundry list of enumerated trustee duties, BAPCPA added section 704(a)(11) to the Bankruptcy Code, which provides that a trustee shall:

[I]f, at the time of the commencement of the case, the debtor (or any entity designated by the debtor) served as the administrator (as defined in section 3 of the Employee Retirement Income Security Act of 1974)(“ERISA”) of an employee benefit plan, continue to perform the obligations required of the administrator.

11 U.S.C. § 704(a)(11)

Regrettably, although Congress expanded the required role of Chapter 7 trustees in order to expressly include that of an ERISA fiduciary, it did not prescribe the extent to which bankruptcy courts are to exercise jurisdiction over the trustees in fulfillment of that responsibility. As a result, bankruptcy courts have been left to define the reach of such jurisdiction for themselves, with markedly divergent results.

For the reasons discussed in this chapter, those bankruptcy courts finding bankruptcy jurisdiction over the trustee's fulfillment of ERISA-based employee benefit plan obligations have the better view of the interrelationship between ERISA and the Bankruptcy Code. The substance of a Chapter 7 trustee's duties under section 704(a)(11) emanates from ERISA, a non-bankruptcy statute. But the trustee at all times remains a creature of the Bankruptcy Code, and all of the relevant provisions of the Bankruptcy Code and bankruptcy procedural and jurisdictional rules should apply to the trustee regardless of whether the trustee's conduct is subject to other non-bankruptcy law.

## **Fundamental Principles**

### *ERISA Rules and Regulations Provide the Substance of Section 704(a)(11) Trustee Obligations*

Section 704(a)(11) imposes upon the Chapter 7 trustee another layer of fiduciary obligations under the ERISA laws. Section 3 of ERISA defines a "fiduciary" as a person or entity having "any discretionary authority or discretionary responsibility in the administration of a retirement plan." 29 U.S.C. § 1002(21)(A)(iii). Although a bankruptcy trustee is not specifically included in the definition of "administrator" under ERISA, a bankruptcy trustee will be considered an ERISA fiduciary to the extent the trustee exercises discretion over how the plan is terminated. *Beddall v. State St. Bk. & Trust Co.*, 137 F.3d 12, 18 (1st Cir. 1998). As a practical matter, in Chapter 7 cases, administration of a plan will equal termination of the plan, because there will not be a surviving entity to administer it beyond the conclusion of the case.

A plan administrator is required in order to assume fiduciary responsibility for the plan in furtherance of the goal of ERISA to "prevent the misuse

and mismanagement of plan assets.” *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 n.8, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985). The Bankruptcy Code is clear that funds withheld by a debtor-employer from employee wages for payment as contributions to an ERISA plan do not constitute property of the debtor’s bankruptcy estate. *See* 11 U.S.C. § 541(b)(7). By virtue of section 704(a)(11) of the Bankruptcy Code, an additional fiduciary responsibility to protect and properly manage non-estate assets in compliance with ERISA rests with the bankruptcy trustee. The bankruptcy trustee is also charged with following the relevant ERISA statutes applicable to plan administrators and adhering to the obligations imposed upon the plan administrator under the plan documents. The standards for plan termination are found in the ERISA rules and regulations.

In one respect, Section 704(a)(11) is unique in that it imposes upon the Chapter 7 trustee additional fiduciary obligations regarding assets that are not property of the debtor’s bankruptcy estate. At the same time, however, Section 704(a)(11) is hardly the only provision that requires the trustee to comply with non-bankruptcy statutes. For example, all bankruptcy trustees are charged with complying with the relevant requirements under the Internal Revenue Code and must file tax returns on behalf of the respective debtors. Similarly, under section 704(a)(12), bankruptcy trustees must transfer patients from closing health care businesses to appropriate health care businesses, in compliance with any applicable health and safety regulations. The fact that the trustee is charged with following non-bankruptcy law in discharging those duties set forth in the Bankruptcy Code does not remove the trustee from the reach of the Bankruptcy Court’s jurisdiction in those instances. There is no reason to treat the obligations arising under section 704(a)(11), although governed by ERISA and not bankruptcy law, any differently.

### *“Core” and “Non-Core” Jurisdiction in Bankruptcy Proceedings*

The scope of a bankruptcy court’s jurisdiction is set forth in 28 U.S.C. §§ 1334 and 157(a). The bankruptcy court has jurisdiction over all cases under title 11 and all “civil proceedings arising under title 11, or arising in or related to cases under title 11.” 28 U.S.C. §§ 1334(a) and (b), 157(a). Once the bankruptcy court acquires jurisdiction over a bankruptcy case, the bankruptcy court’s power to adjudicate a matter in a bankruptcy case is

further refined depending on whether the proceeding is “core” or “non-core.” 28 U.S.C. § 157(b), (c).

In core proceedings, defined as those that “aris[e] under title 11” or “aris[e] in a case under title 11,” the bankruptcy court has the power to hear and to enter a final order. In contrast, in non-core proceedings, defined as those that are “otherwise related to a case that is under title 11,” absent consent, the bankruptcy court must submit findings of fact and conclusions of law to the appropriate U.S. District Court for final determination. 28 U.S.C. § 157(c)(1). The bankruptcy court determines, in the first instance, whether a proceeding is core or non-core.

It is generally understood that a proceeding “arises under” title 11, and is therefore within the bankruptcy court’s core jurisdiction, if it concerns substantive rights created by the Bankruptcy Code itself. *In re Housecraft Industries USA Inc.*, 310 F.3d 64, 70 (2d Cir. 2002) (stating that “[b]ecause the plaintiffs’ § 548 and 549 claims clearly invoke substantive rights created by bankruptcy law, they necessarily ‘arise under’ title 11”); *In re Mid-States Express Inc.*, 433 B.R. 688 (Bankr. N.D. Ill 2010) (Arising under jurisdiction exists where the “Bankruptcy Code, in a strong sense, is the source of the right or remedy, rather than just the procedural vehicle for the assertion of a right conferred by some other body of law.”).

Core jurisdiction over a proceeding “arising in a case under title 11” is less well defined. Courts often construe “arising in” to refer to matters “that are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy” such as the filing of a proof of claim or an objection to the discharge of particular debt. *Wood v. Wood (In re Wood)*, 825 F.2d 90, 97 (5th Cir. 1987); *see also Mid-States Express*, 433 B.R. 688; *In re NSCO Inc.*, 427 B.R. 165 (Bankr. D. Mass 2010).

Finally, the bankruptcy court maintains non-core jurisdiction over proceedings that are “related to” the bankruptcy case. 28 U.S.C. § 157(c)(1). A proceeding is “related to” a bankruptcy case where the “outcome [of the proceeding] might have any ‘conceivable effect’ on the bankruptcy estate,” or any “significant connection” with the bankruptcy estate. *Publicker Indus. Inc. v. United States (In re Cuyaboga Equip. Corp.)*, 980 F.2d 110, 114 (2d Cir. 1992); *Pacor, Inc. v. Higgins (In re Pacor, Inc.)*, 743 F.3d 984, 994 (3d Cir. 1984).

### *Discharge of the Trustee from His or Her Duties at Conclusion of Case*

After an estate is fully administered and the court has discharged the trustee, the court shall close the Chapter 7 case. 11 U.S.C. § 350(a). Two requirements are necessary before a case may be closed. First, the case must be “fully administered,” meaning that the assets available for liquidation must be liquidated and the obligations of the estate paid in accordance with the Bankruptcy Code’s distribution scheme found at section 726 of the Code. Second, the trustee must be discharged.

The discharge of a bankruptcy trustee relieves him or her from further obligations under section 704(a). It is a recognition, based on the facts put before the court in a trustee’s final report and final accounting, that the case has been fully administered. 11 U.S.C. § 704(a)(9).

### **The Case Law Conflict on Bankruptcy Court Jurisdiction Over Section 704(a)(11) Obligations**

There still remains little reported case law addressing a bankruptcy court’s jurisdiction with respect to a Chapter 7 trustee’s ERISA obligations, and there is a split in the case law that exists. *Compare In re Mid-States Express Inc.*, 433 B.R. 688 (finding no bankruptcy court jurisdiction), and *AB&C Group Inc.*, 411 B.R. 284 (Bankr. N.D. W. Va. 2009) (same) with *In re Franchi Equip. Co. Inc.*, 452 B.R. 352 (Bankr. D. Mass. 2011) (finding that bankruptcy court had core jurisdiction); *In re Robert Plan Corp.*, 439 B.R. 29 (Bankr. E.D.N.Y. 2010) (same) and *In re NSCO*, 427 B.R. 165 (Bankr. D. Mass. 2010) (same). *See also Allard v. Coenen (In re Trans-Industries, Inc.)*, 419 B.R. 21 (Bankr. E.D. Mich. 2009) (taking a third approach by finding that the bankruptcy court had “related to” jurisdiction).

### *Cases Holding that Bankruptcy Court Lacks Jurisdiction Over Section 704(a)(11) Issues*

In *AB&C Group*, 411 B.R. 284 (Bankr. N.D. W.Va. 2009), the first case to consider a bankruptcy court’s jurisdiction over fees paid from retirement plan assets following enactment of BAPCPA, the Chapter 7 trustee sought to employ the bank that had acted as the third party plan administrator for the debtor to assist him in terminating the debtor’s 401(k) plan and to compensate the bank out of plan assets. Although the United States

Department of Labor (DOL) agreed that the bankruptcy court had jurisdiction over the trustee's retention of professionals, even those to be retained to perform services in connection with a plan under ERISA, it argued that the bankruptcy court lacked jurisdiction to rule on the reasonableness of fees payable to those professionals. The *AB&C Group* court agreed, concluding that any dispute over fees paid from plan assets, which are not assets of the bankruptcy estate, would arise under ERISA, not the Bankruptcy Code, because any entitlement to those fees "does not depend upon bankruptcy for its existence, nor does it involve an administrative matter that arises only in bankruptcy cases." *Id.* at 292.

In *Mid-States Express Inc.*, 433 B.R. 688 (Bankr. N.D. Ill. 2010), the bankruptcy trustee sought permission to liquidate the debtor's retirement plan and distribute the assets to the plan participants. The trustee also sought payment from the retirement plan's assets of his expenses for administering the plan. The *Mid-States Express* court, citing *AB&C Group*, concluded that it lacked jurisdiction to determine the fees to be paid from the retirement plan's assets.

The court described the responsibilities conferred on a bankruptcy trustee under § 704(a)(11) as follows:

In the context of the Bankruptcy Code, section 704(a)(11) is simply an additional duty that the trustee must perform. It is, however, quite different from the trustee's other duties because it confers non-estate responsibilities on the trustee. All of the trustee's pre-BAPCPA duties relate to the trustee's role as representative of the bankruptcy estate. This court undoubtedly has jurisdiction to oversee the trustee's actions when he is acting in that capacity. Section 704(a)(11), however, requires the trustee to disburse assets that do not belong to the bankruptcy estate, for the benefit of persons that are not creditors. In other words, the trustee is required to administer the assets of an entity that is not in bankruptcy. (*internal citations omitted*)

*Id.* at 693.

The court rejected the trustee’s argument that it had “arising under” jurisdiction to authorize the trustee to liquidate the plan and receive fees out of the plan’s assets. The court concluded that “section 704(a)(11) does not confer ‘arising under’ jurisdiction . . . because the substantive rights at issue are provided by ERISA and not the Bankruptcy Code.” *Id.*

Similarly, the *Mid-States* court rejected the trustee’s assertion that it had “arising in” jurisdiction because the trustee was fulfilling one of his numerous statutory responsibilities under the Bankruptcy Code in administering the plan. Rejecting the notion that a trustee’s performance of his duties confers such jurisdiction, the court stated that “[t]he trustee does not carry around ‘arising in’ jurisdiction with him.” *Id.* Rejecting the trustee’s argument that but for the existence of section 704(a)(11) the trustee would not administer the retirement plan, the court determined that using a “but for” standard to determine jurisdiction would expand bankruptcy court jurisdiction beyond what is constitutional. *Id.*

Finally, the *Mid-States* court held that it lacked “related to” jurisdiction, because there would likely be no effect on the bankruptcy estate or distributions to creditors. The court found that when the retirement plan’s assets were liquidated, “most, if not all, of the actual claims would be satisfied and the liability eliminated.” *Id.* Moreover, the court concluded that the debtor’s liability as the former plan fiduciary would be extremely limited and that whatever that liability might turn out to be, it would be unaffected by the distribution of the plan’s assets to the participants. *Id.*

#### *Cases Holding that Bankruptcy Court Has Jurisdiction Over Section 704(a)(11) Issues*

In *In re NSCO Inc.*, 427 B.R. 165 (Bankr. D. Mass. 2010), the Chapter 7 trustee sought bankruptcy court approval of plan termination procedures and payment of administrative fees from plan assets. The trustee asked the court to establish a deadline for asserting claims against the trustee for ERISA fiduciary liability, and a determination that the trustee’s actions in regard to the plan had satisfied section 704(a)(11) of the Bankruptcy Code.

The *NSCO* court found that it did have jurisdiction over these issues, although it declined to grant some of the requested relief. Critically, the

court determined that the source of the trustee's duties is section 704 of the Bankruptcy Code, not ERISA. The court stated:

His duties originate in § 704(a) and only draw in ERISA because of § 704(a)(11). When Congress amended the Bankruptcy Code in 2005, that it chose to place the statutory obligation solely in the Bankruptcy Code, rather than in ERISA or in both statutes, is some indication that Congress intended ERISA responsibilities to fit within the framework of the Bankruptcy Code, not the other way around. If the court were convinced that the two statutes are irreconcilable, it is cognizant of the maxim that where two statutes conflict 'the latter in time prevails over the former'. . . [t]herefore the Code is controlling.

While the court determined that it had jurisdiction (likely "core," although the court did not expressly say so), it declined to grant the trustee's request for declaratory relief for two reasons. First, the court found that it did not have authority to shorten the six-year statute of limitations under ERISA for claims against the trustee arising from the exercise of his fiduciary duties. Second, the entry of a discharge for the trustee was premature. As discussed above, bankruptcy courts will issue an order discharging a trustee of all of his or her duties when the case is fully administered and closed pursuant to 11 U.S.C. § 350(a). Thus, the court determined that "[t]he duty imposed by § 704(a)(11) should be treated no differently than other § 704(a) duties. The Trustee will receive the same order indicating he has satisfied his statutory obligations as he receives in all Chapter 7 cases."

Importantly, however, the court stated that even after discharge, it would retain control over whether ERISA-related claims could be brought against the trustee. If, after the case was closed, the DOL wished to assert claims for breach of fiduciary duty against the trustee, it would first have to move to reopen the bankruptcy case, which, as the court noted, is not automatic, but rather is based upon the equitable discretion of the court.

The *NSCO* court therefore declined to provide the trustee with a specific "comfort order" or release from liability in connection with the termination of the plan and performance of his duties under ERISA. However, the

court also made it clear that, in its view, section 704(a)(11) provides bankruptcy courts with jurisdiction to determine whether trustees have complied with their duties to administer retirement plans, as part and parcel of the final discharge and closing of the case. The bankruptcy court also ruled that it would act as the “gatekeeper” through which any party seeking to challenge the trustee’s actions would have to seek permission to proceed.

In *Allard v. Coenen (In re Trans-Industries Inc.)*, 419 B.R. 21 (Bankr. E.D. Mich. 2009), the Chapter 7 trustee brought suit in bankruptcy court against the trustees of the debtor’s ERISA qualified plan for breach of their fiduciary duties. One of the defendants, arguing that any recovery would benefit only the retirement plan and not the bankruptcy estate, moved to dismiss the adversary proceeding for lack of jurisdiction. The Chapter 7 trustee asserted that the adversary proceeding fell within the court’s core jurisdiction.

The court rejected the Chapter 7 trustee’s argument, concluding that the proceeding arose neither in nor under a case under Title 11 because the complaint involved causes of action not created by the Bankruptcy Code and that could have arisen outside of bankruptcy. The court, however, found that it did have “related to” jurisdiction because even though the retirement plan permitted the trustee and his professionals to be compensated out of plan assets for their services in connection with the suit against the retirement plan trustees, to the extent those assets were insufficient to pay the fees and expenses incurred, the Chapter 7 trustee and his professionals could seek to be compensated from the bankruptcy estate. The possibility that fees would be paid from bankruptcy estate assets created the potential for a direct effect on the bankruptcy estate, so the *Trans-Industries* court concluded it had non-core “related to” jurisdiction over the trustee’s lawsuit.

In *In re The Robert Plan Corp.*, 439 B.R. 29 (Bankr. E.D.N.Y. 2010), the bankruptcy court determined that it had core jurisdiction over a Chapter 7 trustee’s request for fees incurred in connection with administering the assets of a pension plan even though, at least according to the DOL, there would be sufficient assets in the retirement plan to pay the costs of administering the plans. The court rejected the approach of the cases that analyzed jurisdiction based on the source of the funds intended to pay the

trustee and his professionals, and instead focused on the source of the trustee's duties. In the court's view:

[w]hile § 704(a)(11) imposes upon the Trustee the requirement to comply with ERISA laws in fulfillment of his duties thereunder, one can find no support for concluding that the Trustee is therefore divested of his obligations as the Chapter 7 Trustee when acting in the role of plan administrator. For the same reason there is no support for the conclusion that this section divests the Bankruptcy Court of its jurisdiction over the Trustee's actions as Administrator. He is a creature of the Bankruptcy Code and but for his appointment under the Code, he would have no role as administrator of the Plan. To the extent that the Trustee's duties over the Plan arise out of ERISA, they do so only by operation of § 704(a)(11). Thus, § 704(a)(11), not ERISA, is the source of the Trustee's obligations. The Trustee's § 704(a)(11) duties are an essential part of the total administration of the Debtors' cases.

*Id.* at 37.

Both the *Trans-Industries* and *Robert Plan* courts identified a critical distinction between the administration of a bankruptcy *case*, which is the trustee's responsibility, and an administration of the debtor's *estate*, which is also the trustee's responsibility but a narrower one. As was first stated in *Trans-Industries* and repeated in *Robert Plan*:

A Chapter 7 trustee's performance of his duty to administer an ERISA plan under § 704(a)(11) is 'beneficial toward the completion of' the bankruptcy case, within the meaning of § 330(a)(3)(C), because the case cannot be 'completed' without such performance. Similarly, a trustee's performance of this duty is also 'necessary to the administration of' the bankruptcy case, within the meaning of § 330(a)(3)(C), because 'administration of' the 'case' includes the trustee's performance of all of his duties

under § 704(a). In this sense, the phrase ‘administration of the ‘case’ as used in § 330(a)(3)(C) is broader than the phrase ‘administration of the estate.’...

*In re Trans-Industries Inc.*, 419 B.R. at 38; *In re Robert Plan Corp.*, 439 B.R. at 42.

As of this writing, the most recent case addressing these jurisdictional issues is *In re Franchi Equip. Co.*, 452 B.R. 352 (Bankr. D. Mass. 2011). In *Franchi Equipment*, the Chapter 7 trustee filed a motion with the bankruptcy court to authorize his payment of certain expenses from the assets of a 401(k) retirement plan that had been administered by the debtor. The DOL objected to the trustee’s motion. At issue was whether the court had jurisdiction to approve the fees of the trustee and his counsel for services rendered in connection with the termination of a retirement plan established under § 401(k) of ERISA, and to authorize payment of those fees from the assets of the retirement plan.

Previously, the court had entered an order that authorized the Chapter 7 trustee to:

- i. Retain the third party service provider that had provided plan administration services to the debtor, to assist him in terminating the 401(k) plan.
- ii. Make distributions to the 401(k) plan participants.
- iii. Execute documents necessary to terminate the plan. In addition, the prior order authorized the Chapter 7 trustee to establish a reserve out of plan assets for the costs of administering and terminating the plan.

The Chapter 7 trustee established a reserve of \$10,000. It is this \$10,000 that the trustee sought to disburse in payment of his and his counsel’s fees.

The court found that, without question, the possibility of a pension plan’s insufficiency of assets creates the potential that a bankruptcy estate will be called upon to compensate a Chapter 7 trustee and his professionals for their plan administration services, and this potential confers upon the bankruptcy court, at the very least, “related to” jurisdiction over the fee requests.

The court elected to go further, however, and followed *Robert Plan* in holding that the bankruptcy court has core jurisdiction over the award of fees—regardless of the payment source—to a Chapter 7 trustee and his professionals for performing, or assisting the trustee in performing, his duties under § 704(a)(11) of the Bankruptcy Code. As the court observed:

Congress recognized the critical need to provide retirement plan administration when employers filed bankruptcy. Any number of workable solutions could have been legislated that maintained a wall of separation between the domains of bankruptcy and ERISA. Instead, by enacting § 704(a)(11) Congress chose, quite reasonably, to confer this responsibility on bankruptcy trustees who are, body and soul, creatures of the Bankruptcy Code. Trustees literally “arise under” the Bankruptcy Code. Their oversight and compensation are, without significant exception, within the core federal bankruptcy power delegated to the bankruptcy court.

*Id.* at 360.

## **Conclusion**

Of the relatively few cases addressing the ability of a bankruptcy court to exercise oversight and protection of Chapter 7 trustees in the performance of their section 704(a)(11) duties, those—*NSCO*, *Robert Plan*, and *Franchi Equipment*—that recognize that the Bankruptcy Code, not ERISA, is truly the direct source of those duties have the better side of the debate. The courts taking the contrary view take an overly narrow view of what Chapter 7 trustees do. Certainly, it is the job of the Chapter 7 trustee, first and foremost, to administer a bankruptcy estate through liquidation of estate property and distribution of the proceeds therefrom to creditors. But in addition to administering bankruptcy *estates*, Chapter 7 trustees are charged with the responsibility of administering and closing bankruptcy *cases*. Closing a case entails functions that may not have a bearing on the debtor’s estate *per se*, and in section 704(a)(11) Congress has added performing the duties of an ERISA plan administrator to the list of potentially non-estate related functions. Chapter 7 trustees therefore should be no less governed

or protected by bankruptcy courts in the fulfillment of that duty than they are in connection with other “estate” specific duties. If Congress has not drawn an estate/non-estate distinction in assigning responsibilities to trustees, then there is no good ground on which to impose an estate/non-estate distinction in finding bankruptcy jurisdiction.

Using the principles of *NSCO*, *Robert Plan*, and *Franchi Equipment* as a guide in pleading, Chapter 7 trustees should seek relief in the bankruptcy court as to their section 704(a)(11) ERISA related obligations in much the same manner as they would in the course of fulfilling other statutory obligations. A trustee should seek bankruptcy court approval of the retention of professionals to assist him or her in terminating or otherwise administering the debtor’s ERISA plan, as well as approval of compensation of such professionals. The source of the funds, whether plan assets or general estate assets, should not be determinative of whether bankruptcy court jurisdiction is proper.

The discharge order entered by the bankruptcy court under section 350 of the Bankruptcy Code to close the Chapter 7 case should expressly find that the trustee’s obligations under section 704(a)(11) have been fulfilled. The entry of such an order should be sought on notice to the DOL among other required parties in interest. While perhaps the bankruptcy court lacks the power to grant prospective “comfort orders” specific to ERISA plan fiduciary issues or to shorten the six-year limitations period in which claims may be asserted against the trustee for breach of ERISA fiduciary duties, the bankruptcy case should still be closed on a timely basis and the onus placed on the DOL or other party in interest to seek a reopening of the case by the bankruptcy court before such claims may be asserted. In this way, the bankruptcy court will maintain a critical “gatekeeper” role even after the bankruptcy case is closed.

The key for Chapter 7 trustees, in arguing in support of bankruptcy jurisdiction over their performance of section 704(a)(11) obligations, is to emphasize the trustee’s broader statutory role in administering and closing bankruptcy cases, not just administering a bankruptcy estate. In enacting section 704(a)(11) of the Bankruptcy Code, Congress made clear that performance of ERISA plan administrative functions is a central part of

what it means to administer and close a bankruptcy case. Congress looked to the Chapter 7 trustee as best situated to ensure that an ERISA plan is terminated properly after the “lights go out” for a Chapter 7 debtor. There is no reason to believe that in this substantive area, unlike the many others in which trustees must play an active role, trustees were meant to be shut out from the bankruptcy court’s jurisdictional umbrella.

## Key Takeaways

- Section 704(a)(11) of the Bankruptcy Code imposes a somewhat unusual obligation upon Chapter 7 trustees in that it requires a trustee to continue to perform the debtor’s obligations as administrator of an ERISA plan, which generally does not constitute property of the debtor’s bankruptcy estate.
- Using the principles of the *NSCO*, *Robert Plan*, and *Franchi Equipment* cases as a guide, a Chapter 7 trustee should seek relief in the bankruptcy court as to his or her section 704(a)(11) ERISA related obligations in much the same manner as he or she would in the course of fulfilling other statutory obligations.
- Such relief would include bankruptcy court approval of the retention of professionals to assist the Chapter 7 trustee in terminating or otherwise administering the debtor’s ERISA plan, as well as approval of compensation of such professionals.
- A trustee should seek entry of a discharge order by the bankruptcy court to close the Chapter 7 case that expressly finds that the trustee’s obligations under section 704(a)(11) have been fulfilled. The entry of such an order should be sought on notice to the US Department of Labor, among other required parties in interest.
- A “comfort order” by the bankruptcy court that is specific to the trustee’s ERISA related obligations may be sought, but will not likely be granted.
- The key, in arguing in support of bankruptcy court jurisdiction over a trustee’s performance of section 704(a)(11) obligations, is to emphasize the trustee’s broader statutory role in administering and closing bankruptcy cases, not just administering a bankruptcy estate.

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