

**CLARIFYING THE AUTHORITY OF LITIGATION TRUSTS: WHY POST-
CONFIRMATION TRUSTEES CANNOT ASSERT CREDITORS' CLAIMS
AGAINST THIRD PARTIES**

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ABSTRACT

Defining the scope of a bankruptcy trustee's authority is important—to the bankruptcy estate, to individual creditors, and to the third parties who are sued when a company fails. These claims against third parties can be massive, particularly in bankruptcies that occur amid allegations of fraud or mismanagement. The estate and its creditors (who are the investors in the failed company) have separate claims, though often against the same third parties. Bankruptcy trustees want to control as much of this litigation as possible, so they have tried to assert the claims of the creditors as well as the claims of the estate. This arrangement changes the dynamic of the litigation. It forces the third-parties to defend themselves against a trustee rather than against the real party in interest: the individual creditors who will pocket any recovery. And it enables those creditors to pursue their own personal interests under the banner of a bankruptcy-related trustee. But it also sets up possible conflicts between the estate and the individual creditors.

Forty years ago the Supreme Court ruled that bankruptcy trustees cannot assert creditors' claims. Over the last decade, however, some bankruptcy trustees have tried to escape this prohibition by simply changing to the role of post-confirmation trustee.

Courts have split about whether this change in role enables the trustee to assert the claims of creditors. But no opinion provides a thorough analysis of the issue. This article fills that gap. It argues that the Bankruptcy Code, supported by other interpretive considerations, dictates that the prohibition on pursuing creditor claims continues to apply. It then explains why the prohibition's rationale applies after plan confirmation just as much as before. For example, the reasons for preventing a trustee from acting simultaneously for the estate and for individual creditors do not disappear because a bankruptcy trustee converts to a post-confirmation trustee. Finally, the article explains why the bright-line structure of the prohibition is reasonable. This bright line reduces decision-making costs and enables the relevant actors to identify their rights at the outset of a bankruptcy.

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INTRODUCTION AND SUMMARY

In their zeal, bankruptcy trustees naturally try to expand their power. So trustees carrying out some major bankruptcy plans have recently asserted the right to pursue claims for specific estate *creditors*. Courts are split over whether that expansion is legal. This article explains why it is not.

The question is who can pursue the lawsuits that often are a primary source of assets for a bankruptcy estate and its creditors. These claims typically target the company's outside professionals: attorneys, accountants, bankers, and the like. The

lawsuits can be huge, sometimes seeking billions of dollars. Often the bankruptcy estate and the failed company's investors want to sue the same third parties. Because these investors are creditors of the estate, estate and creditors often compete for the same recovery. These creditors also may have claims against third parties who are not liable to the estate; those claims can recover money for creditors without competing with the estate.

Bankruptcy trustees have long wanted to control as much of this litigation as possible. But the Bankruptcy Code rules that out because it does not permit bankruptcy trustees to assert the claims of creditors. This has been the law for four decades.

Over the last ten years or so, however, trustees have tried to escape this limitation by litigating the claims as *post-confirmation* trustees. Some courts have held that the Bankruptcy Code prohibits this tack. Others have disagreed. This split in authority has created uncertainty about the power of trustees—and the rights of all parties—in these high-stakes lawsuits. This situation also means broader uncertainty about the permissible contents of the plans in some very large bankruptcies.

A bankruptcy trustee—that is, a trustee appointed under Bankruptcy Code chapter 7 or chapter 11—can litigate claims only if they belong to the estate. This limitation exists because the trustee's role is to gather the estate's assets for the benefit of all of the creditors, then distribute those assets according to a distribution scheme set out in a bankruptcy plan. This limitation is established by the Bankruptcy Code and explained in a 1972 decision of the United States Supreme Court, *Caplin v Marine Midland Grace Trust Co. of New York*.¹

But many estate claims against third parties are not litigated by bankruptcy trustees. Many claims are transferred to trusts created by bankruptcy plans, then litigated by *post-confirmation* trustees. Typically, the same person who was the pre-confirmation trustee becomes the post-confirmation trustee. This is the change that is the subject of this article. These post-confirmation trustees often contend that, when they file the same lawsuits that they could have filed as bankruptcy trustees, the limitation discussed in *Caplin* no longer applies to them.

The split in the courts

Some courts have held that the *Caplin* limitation does continue to apply. For example, the Delaware Chancery Court held, in *Trenwick American Litigation Trust v. Ernst & Young, LLP* that a litigation trust and trustee established by a chapter 11 plan could not bring claims that creditors assigned to a post-confirmation trust.² The

¹ 406 U.S. 416 (1972).

² *Trenwick Am. Litig. Trust v. Ernst & Young, LLP*, 906 A.2d 168, 191 (Del. Ch. 2006), *aff'd sub nom.*, *Trenwick Am. Litig. Trust v. Billett*, 931 A.2d 438 (Del. 2007). The Supreme Court has cast this issue as one of standing, *Caplin* 406 U.S. at 416, while at least one court of appeals cast it as solely a matter of the trustee's authority, *Grede v. Bank of N.Y. Mellon*, 598 F.3d 899, 900 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 418 (2010).

court reached this conclusion even though the plan and trust documents expressly gave the trustee this authority.³ The court held that the Bankruptcy Code establishes, and limits, the authority of bankruptcy plans.⁴ The opinion's author was the well-respected Vice Chancellor Leo Strine. At least three federal district courts have reached the same conclusion.⁵

Other courts have disagreed.⁶ In one recent decision, *Grede v. Bank of New York Mellon*,⁷ the United States Court of Appeals for the Seventh Circuit held that the Bankruptcy Code ceases to apply at the time of confirmation, so that a trustee under a bankruptcy plan can pursue claims on behalf of assigning creditors.⁸ This was so, the court held, even though any recovery from the claims would go to the assigning creditors rather than to the estate.⁹ The court's rationale was that post-confirmation trustees act "after bankruptcy," so that the scope of the trustee's authority did not depend on the terms of the Bankruptcy Code.¹⁰ This opinion's author was another influential jurist, Judge Frank Easterbrook.

The Bankruptcy Code's limitation applies after plan confirmation

This article explains why the *Trenwick American Litigation Trust* side of this split got it right: The *Caplin* limitation does continue to apply after plan

³ *Trenwick*, 906 A.2d at 189–90 (quoting *Trenwick's* chapter 11 reorganization plan).

⁴ *Id.* at 191.

⁵ See *Kipperman v. Onex Corp.*, 411 B.R. 805, 831 n.21 (N.D. Ga. 2009) (stating, in dictum, that post-confirmation trustees "do not have standing to directly pursue claims on behalf of creditors and creditors may not assign their claims to a litigation trust"); *Torch Liquidating Trust v. Stockstill*, No. 07-133, 2008 WL 696233 at *6 n.4 (E.D. La. Mar. 13, 2008) (holding that "Litigation Trusts . . . do not have standing to pursue the direct claims of creditors"); *aff'd*, 561 F.3d 377 (5th Cir. 2009); *Mukamal v. Bakes*, 383 B.R. 798, 811 (S.D. Fla. 2007) (holding that litigation trust lacked standing to bring creditor claims that were expressly assigned to the trust), *aff'd*, 378 Fed. Appx. 890 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 1785 (2011)).

⁶ *Grede*, 598 F.3d 901. *Grede* favorably cites to *Semi-Tech Litig., LLC v. Bankers Trust Co.*, 272 F. Supp. 2d 319 (S.D.N.Y. 2003), *aff'd*, 450 F.3d 121 (2d Cir. 2006). *Grede*, 598 F.3d at 901. Like *Grede*, *Semi-Tech Litig.* rests on the assertion that post-liquidation trusts exist "outside the bankruptcy context." *Semi-Tech Litig.*, 272 F. Supp. 2d at 323–24. The *Semi-Tech Litig.* court made this assertion without explanation and without addressing the Bankruptcy Code. *Id.* A later Second Circuit case, however, characterized *Semi-Tech* as implicitly holding that "a trustee may assert claims assigned to it by a bankrupt's creditors for the benefit of the estate." *Bankr. Servs., Inc. v. Ernst & Young (In re CBI Holding Co.)*, 529 F.3d 432, 459 (2d Cir. 2008) (emphasis added). The Third Circuit has referred with approval, but without further discussion, to the use of a single post-confirmation trust that litigates the claims of the estate and "all" creditors. *LaSala v. Bordier*, 519 F.3d 121, 127 (3d Cir. 2008). The parties in that case did not contest the appropriateness of the assignments by the creditors, and the court did not consider the issue. See generally *id.* See also *Zazzali v. Hirschler Fleischer, P.C.*, No. 11–614, 2012 U.S. Dist. LEXIS 118090, *18–*24 (D. Del. Aug. 21, 2012) (permitting post-confirmation trustee to assert assigned claims of creditors); *In re Tribune Company*, 464 B.R. 126, 193 (Bankr. D. Del. 2011) (permitting post-confirmation trustee to assert assigned claims of creditors, citing *Grede*, and stating that trustee "is not acting as a representative of the estate, is not a successor to the estate, and is wholly independent from the estate" and "is not acting under authority granted to estate representatives under § 1123(b)(3)(B)").

⁷ 598 F.3d 899 (7th Cir. 2010).

⁸ *Id.* at 902.

⁹ *Id.*

¹⁰ *Id.*

confirmation, so that post-confirmation trustees operate under the same limitations as bankruptcy trustees. This article also explains why the "after bankruptcy" rationale, set out most squarely in *Grede*, misunderstands the Bankruptcy Code and related law. None of the cases provide detailed analysis. This article tries to fill that gap.

Here is the argument in a nutshell.¹¹ The Code restricts bankruptcy trustees to asserting claims of the estate. The Code also permits a bankruptcy trustee to defer litigating the estate's claims against third parties by transferring those claims to a trust created by the bankruptcy plan but the Code imposes a condition: this shift cannot change the rules for the litigation. In particular, the post-confirmation trustee must, like the bankruptcy trustee, be dedicated solely to pursuing the claims of the estate.

Several provisions of the Code produce this result. Certain provisions limit trustees to acting on behalf of the estate, and one provision specifically applies that limitation to bankruptcy plans. This is section 1123, titled "Contents Of The Plan." Then, several related Code provisions indicate that section 1123 continues to govern the authority of trustees *after* plan confirmation.

Other interpretive considerations support this conclusion

This result is supported by a series of additional interpretive considerations. First, this reading of the Code maintains consistency between the rules that govern claims pursued before and after plan confirmation. By contrast, the *Grede* approach breaks this consistency. It permits bankruptcy trustees to avoid the *Caplin* limitation through the simple means of deferring litigation until plan confirmation, switching titles from bankruptcy trustee to post-confirmation trustee, then pursuing the claims in that new role. Nothing in the Bankruptcy Code suggests that Congress intended this inconsistency. To the contrary, it would be anomalous if the *Caplin* limitation on the role of trustees ceased to apply simply because litigation against a third party is delayed until a plan is confirmed.

This inconsistency is especially hard to justify because the logic of the after-bankruptcy rule would generate still other inconsistencies between pre and post-confirmation rules for litigation against third parties. Those changes arguably extend even to the substance of the claims. For example, post-confirmation trustees argue that this logic enables them to avoid the powerful defense of *in pari delicto*.¹²

The *Grede* rule also raises questions about fairness to the targets of the post-confirmation lawsuits. Under *Caplin*, a creditor who wants to sue a third-party cannot pursue that claim under the banner of a bankruptcy-related trustee.¹³

¹¹ The Bankruptcy Code provisions summarized in this and the following paragraph are set out below *infra* section III.B.

¹² Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., Inc., 267 F.3d 340, 357 (2001) (noting Tenth Circuit's refusal to accept bankruptcy trustee's argument of exemption of *in pari delicto*).

¹³ See *Caplin*, 406 U.S. at 434 (holding that bankruptcy trustee cannot sue third party on behalf of creditors).

Under the *Grede* rule, however, the creditor can do exactly that, simply by waiting until a bankruptcy plan is confirmed.¹⁴ This forces the third-party defendant to defend itself, not against a private party, but against a bankruptcy-related trustee. From the perspective of the third-party defendant, that is far more difficult than litigating against the creditor whose interest really is at stake.

The second supporting consideration is statutory purpose. Under the Bankruptcy Code, the purpose of bankruptcy plans and bankruptcy trustees is to gather assets *for the estate* so that the trustee can distribute the assets according to the applicable distribution scheme. Limiting trustees to acting for the estate aligns with this purpose.

Third, other provisions of the Bankruptcy Code indisputably apply after plan confirmation, thus lending support to the conclusion that section 1123 also applies after confirmation. The continuing force of these provisions contradicts the generalization that the post-confirmation phase is entirely "after bankruptcy."

The limitation's substance and form make sense

Two other considerations also help here. Though they are not, strictly speaking, aids to interpretation, they show that this limitation on the authority of post-confirmation trustees is neither arbitrary nor harsh. First, the concerns that *Caplin* discussed in the pre-confirmation context apply with equal force after plan confirmation. In fact, even more concerns come into play when considering the *Grede* approach. *Caplin* addressed a trustee's possible litigation of creditor claims where the estate did not have competing claims.¹⁵ Under the *Grede* rule, though, a post-confirmation trustee can accept assigned creditor claims even where those claims compete with the estate's claims.¹⁶ That arrangement triggers problems that exceed those discussed in *Caplin*. All of these concerns exist after plan confirmation just as much as before it.

Second, a review of these problems helps to explain the structure of this rule: why the Bankruptcy Code uses a bright-line limit on trustee authority rather than some kind of context-sensitive standard. This bright-line rule may reflect the judgment that, while permitting post-confirmation trustees to serve in dual roles might benefit the estate in some cases, it is better to forbid the dual role in all cases. This is because the beneficial cases probably are few and the cost of identifying them is high—for trustees, for creditors, for the third-party targets of and for the courts.¹⁷ And the answer often would not be apparent at the outset of a proposed representation. Absent this bright line, uncertainty would exist about the scope of

¹⁴ See *Grede*, 598 F.3d at 902.

¹⁵ See *Caplin*, 406 U.S. at 417–19.

¹⁶ See *Grede*, 598 F.3d at 902.

¹⁷ See Bryan D. Hull, *A Void In Avoidance Powers? The Bankruptcy Trustee's Inability to Assert Damages Claims On Behalf Of Creditors Against Third Parties*, 46 U. MIAMI. L. REV 263, 288 (1991) (listing reasons why relying on creditors to assert their claims would not maximize bankruptcy estate's assets).

trustee authority until the case-by-case and claim-by-claim analyses were completed and, if necessary, litigated. A bright-line rule avoids these problems.¹⁸

The importance of this issue is growing

The importance of this question—whether post-confirmation trustees can pursue assigned claims for individual creditors—has grown over the last decade. During that time, the number and the sheer scale of bankruptcies has grown.¹⁹ So has the proportion of bankruptcy litigation that is pursued after plan confirmation. Debtors tend to reach plan confirmation more quickly than in the past and, at least partially as a result, often defer litigation against third parties until a plan is confirmed.²⁰ If the limitations on trustee authority ceases to apply at confirmation, as the *Grede* approach holds, then the limitation articulated in *Caplin* ceases to apply to much of today's bankruptcy-related litigation.²¹ In the meantime, the continuing uncertainty about the state of the law makes planning difficult, invites still more litigation, and subjects third-party defendants to claims by post-confirmation trustees who, I contend, lack the legal authority to bring them.

I. WHY TRUSTEES WANT TO ASSERT THE CLAIMS OF CREDITORS, AND WHY CREDITORS OFTEN LET THEM

Assume that a failed company has claims against a professional firm that advised it before bankruptcy. If the bankruptcy trustee pursues these claims, the trustee distributes any recovery to creditors according to the plan's distribution scheme. The failed company's investors also might file their own direct claims

¹⁸ FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 34–37, 47–52 (1991) (explaining that bright-line rules provide benefit of clarity and precision in application, though at cost of over-inclusiveness). For a more forceful version of this argument, see Justice Antonin Scalia's dissent in *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) (advocating for bright line rather than "test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th' ol' 'totality of the circumstances' test").

¹⁹ See *In re Lindsey*, 453 B.R. 886, 904 (Bankr. E.D. Tenn. 2011) ("Over the past decade, the number of bankruptcy filings has nearly doubled . . .").

²⁰ A primary reason for achieving plan confirmation as rapidly as possible is to enable the debtor to return to operating without the reporting and financial burden of the chapter 11 process. Other factors include time limits contained in the Bankruptcy Abuse Protection and Consumer Protection Act of 2005, Pub. L. 109-8, § 317, 119 Stat. 23, 92 (codified at 11 U.S.C. § 1324 (2006)). See also 11 U.S.C. § 1121(d)(2) (stating that bankruptcy courts cannot extend exclusivity period to more than eighteen months after petition date or solicit plan acceptances more than twenty months after petition date).

²¹ On the recent acceleration of the plan-confirmation process, see David R. Kuney, *Liquidation Trusts and the Quagmire of Postconfirmation Jurisdiction: The Case of the Disappearing Estate*, 14 NORTON J. OF BANKR. L. & PRAC. 85 (2005). For a discussion of some of the reasons for the increasing use of post-confirmation litigation vehicles, see Andrew M. Thau, et al., *Postconfirmation Liquidation Vehicles (Including Liquidating Trusts and Postconfirmation Estates): An Overview*, 16 NORTON J. BANKR. LAW & PRAC. 201, 211–14 (2007). On the shortened path to confirmation and the growing preference for litigation through post-litigation trusts, see Michael Venditto, *The Dash For Cash: Suits By Post-Confirmation Trusts*, 25 ANDREWS BANKR. LITIG. REP. 1, 1–4 (2008).

against the professional firm. These investors might allege, for example, that when they invested they relied on a statement authored by the professional firm. The investors are creditors of the estate, but they are competing with the estate for the recovery from the third party. In addition, the creditors also might have other claims that do not compete with the estate: claims against third parties that owe nothing to the estate. In *Caplin*, for example, the company's creditors had paid a bank to monitor the debtor company for them, so that the bank's duty ran to the creditors but not to the debtor.²² When the debtor failed, the creditors sued the bank directly.²³

Bankruptcy trustees have consistently tried to assert the creditors' claims as well as the estate's claims. To do so, they have tried several approaches. One is reflected in *Caplin*, where a bankruptcy trustee simply asserted the claims of creditors.²⁴ We also see this approach in a recent decision in the Madoff cases, rebuffing efforts by the Madoff trustee to assert claims for creditors.²⁵ This approach is forbidden by the *Caplin* rule, as I explain in part II.A. below. In other cases, bankruptcy trustees accept assignments of creditor claims. Courts generally have ruled out this approach as well, as explained in part II.C. Another approach is the subject of this article: creditors make these assignments to a trust created by the bankruptcy plan. Typically in those cases, any recovery remains outside the estate and goes directly to the specific individual creditors.²⁶

The assignments by creditors raise the question of incentives. If the estate will receive none of the recovery on the creditors' claims, why does the trustee go the trouble of taking them on? And why do the creditors want to assign their claims to be litigated by the same trustee who is working for the estate?

Trustees like the dual arrangement because it enables them to present a united front against third-party targets. And as a practical matter, this arrangement gives the trustees significant control over both tracks of litigation. When the estate and creditors are competing for the assets of the same third party, the arrangement enables the trustee to engineer the inevitable compromises between the interests of the estate and those of the individual creditors.²⁷ From the perspective of the trustee, this is preferable to resolving these estate-versus-creditor conflicts in an

²² *Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416, 417–18 (1972).

²³ *Id.* at 421 n.12.

²⁴ *Id.* at 434.

²⁵ Recently the Southern District of New York rejected efforts by the Madoff trustee to assert claims not owned by the estate. *See Picard v. J.P. Morgan Chase & Co.*, 460 B.R. 84, 91–94 (S.D.N.Y. 2011) (citing *Caplin* and holding that trustee under Bankruptcy Code and Securities Investor Protection Act trustee lacked authority to sue for Madoff customers); *see also Picard v. HSBC Bank PLC*, 454 B.R. 25, 28, 30 (S.D.N.Y. 2011). For a recent discussion of this practice, see Russell C. Silberglied & Cory D. Kandestin, *Can The Claims Of Individual Creditors Be Assigned To A Litigation Trust?; Part One of a Two-Part Article*, 26 THE BANKRUPTCY STRATEGIST 3 (2009) (outlining history and process of assigning claims to litigation trusts).

²⁶ *See Grede v. Bank of N.Y. Mellon*, 598 F.3d 899, 902 (2010).

²⁷ Some creditors could choose not to assign their claims and bring separate lawsuits. *See id.* (showing no risk of conflicting dispositions).

arrangement where the creditors have their own trustee who is committed only to them.

The assigning creditors also have some incentives to support the arrangement. It enables them to use the trustee for the estate claims as a kind of private plaintiff's lawyer—critically, as a plaintiff's lawyer who wears the white hat of a bankruptcy-related trustee championing the rights of many injured investors. This has decided advantages over appearing in court as a private plaintiff who merely seeks to collect on a personal claim. Another possible benefit is efficiency. By assigning their claims to the trustee who already is suing the same defendant for the estate, the creditors can lower their litigation costs. The estate sometimes lowers those costs even further by funding the creditors' litigation, as an inducement for creditors' support of the plan. The trade-off for many creditors is that they are entrusting their claims to the same trustee who is obligated to maximize the interests of the estate, so that the trustee is undertaking duties that conflict.

At least one set of parties may be unhappy with the assignment of the creditor claims: the third-parties who are the litigation targets. These defendants would contend that it is unfair to permit creditors to sue them under the flag of a bankruptcy-related trustee.

II. THE LIMITED AUTHORITY OF PRE-CONFIRMATION TRUSTEES

A. *Under The Bankruptcy Code and Caplin v. Marine Midland Grace Trust Co. of New York, Bankruptcy Trustees Can Assert Claims Only For The Estate*

To define the scope of the authority of trustees after plan confirmation, the starting point is the scope of authority of trustees before plan confirmation. According to the Bankruptcy Code, every trustee is a "representative of the estate."²⁸ The Code specifically addresses the trustee's power to bring claims. It states that one of the "[d]uties of a trustee" is to "*collect and reduce to money the property of the estate* for which such trustee serves."²⁹ The "estate," the Code explains, comprises "all legal or equitable interests *of the debtor* in property as of the commencement of the case."³⁰

Despite this language, bankruptcy trustees have long wanted to file lawsuits for the creditors as well as for the estate. Beginning more than forty years ago, bankruptcy trustees began to assert the power to bring those claims.

In 1972, the Supreme Court rejected this effort. In *Caplin v Marine Midland Grace Trust Co. of New York*, the Court held that the bankruptcy statute (a

²⁸ 11 U.S.C. § 323(a) (2006).

²⁹ *Id.* at § 704(a)(1) (emphasis added).

³⁰ *Id.* at § 541(a)(1) (defining "estate") (emphasis added). At its core, the estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the case" and similar interests identified by the Code. *Id.* It does not include the interests or property of anyone other than the debtor. *Id.* But it does not include "any power that the debtor may exercise solely for the benefit of an entity other than the debtor." *Id.* at § 541(b)(1).

predecessor to the Bankruptcy Code) limited trustees to asserting claims only for the estate.³¹ *Caplin* warrants a careful look, because the concerns that it identifies are important after plan confirmation as well as before.³² In *Caplin*, a reorganization trustee brought suit "for the benefit of a specific class of creditors," against a bank that had committed to ensure that the company would pay debentures issued to these creditors.³³ The Court held that, while the debenture holders could sue the bank directly, the trustee did not have standing to sue it for them.³⁴

The first reason the Court gave for this was the "statutory scheme," which was a predecessor to the Bankruptcy Code.³⁵ Although the Court saw no "specific legislative statement on this issue" it concluded that the statute did not authorize the trustee to pursue the creditor claims.³⁶ The Court analyzed several statutory provisions addressing the trustee's authority, and it found "nothing" that "enables [the trustee] to collect money not owed to the estate."³⁷

Because the statute did not authorize the trustee to bring claims for creditors, the Court explained, the trustee could not assume that power.³⁸ The Court rested this limitation, in part, on the statute's comprehensiveness: "Congress has established an elaborate system of controls with respect to . . . reorganization proceedings, and nowhere in the statutory scheme is there any suggestion that the trustee in reorganization is to assume the responsibility of suing third parties on behalf of" creditors.³⁹ Rather, under that scheme, the trustee's task was "simply to 'collect and reduce to money the property of the estates for which [he is trustee].'"⁴⁰ The Court

³¹ 406 U.S. 416, 428–29 (1972) (stating that bankruptcy trustee's task is limited to collecting and reducing to money property of the estate).

³² Other federal courts of appeals have applied the *Caplin* principle (that a trustee who is charged by statute to bring claims on behalf of an estate cannot also bring claims directly for a subset of creditors) to settings that are similar but do not involve the Bankruptcy Code. For instance, the First Circuit cited *Caplin* when it held that a receiver, appointed under a federal statute, lacked standing to bring claims on behalf of individual investors in the failed firm's investment pools. See *Boston Trading Grp. v. Burnazos*, 835 F.2d 1504, 1514 (1st Cir. 1987). Then-Judge Breyer explained that the court saw "no relevant distinction between *Caplin* and the case before us," so that the receiver could not expand its standing beyond that stated in the statute. *Id.* at 1515. Similarly, the Fifth Circuit cited *Caplin* when it denied standing to an insurance-company liquidator that sought to pursue claims on behalf of policyholders against a third-party. See *Fla. Dep't of Ins. v. Chase Bank of Texas Nat'l Assoc.*, 274 F.3d 924, 929–31 (5th Cir. 2001).

³³ *Caplin*, 406 U.S. at 421 n.12.

³⁴ *Id.* at 428–29.

³⁵ *Id.* *Caplin* addressed Section 70e of the Bankruptcy Act (11 U.S.C. § 110 (repealed 1978)). *Id.* at 424 n.14. This section became, in substance, section 544 of the Bankruptcy Code. 11 U.S.C. § 544 (2004). The adoption of the U.S. Bankruptcy Code in 1978 did not alter the rule articulated in *Caplin*, see, e.g., *Williams v. Cal. 1st Bank*, 859 F.2d 664, 666 (9th Cir. 1988) ("*Caplin* remains the law under the revised bankruptcy code"); *Mixon v. Anderson (In re Ozark Rest. Equip. Co.)*, 816 F.2d 1222, 1227–28 (8th Cir. 1987) (noting *Caplin* to be good law).

³⁶ *Caplin*, 406 U.S. at 422.

³⁷ *Id.* at 428.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 428–29.

explained that whether to confer standing to sue for creditors was "a policy decision [that] must be left to Congress and not to the judiciary."⁴¹

The *Caplin* Court also identified some policy considerations underlying the statutory limit on trustee power.⁴² It pointed to the practical difficulties that might arise if trustees were given the authority to sue third parties on behalf of creditors.⁴³ One concern was that the claims would not add to the estate and therefore would be wasteful. The Court explained that, in cases where the trustee alleges that the debtor is as much at fault as the defendant, the defendant "would be entitled to be subrogated" to the claims of the creditors, so that defendant could simply turn around and sue the estate.⁴⁴ The effect would be a wash, only worse, because of the wasteful cost of an added layer of litigation.

The Court next noted that the trustee's filing of direct claims for some creditors complicates the damages picture because an estate's creditors suffer losses only to the extent the estate cannot pay those creditors.⁴⁵ Permitting the trustee to bring the direct claims of creditors puts the cart (of creditors' losses once the final value of the estate is known) before the horse (of resolving the claims that determine that final value).⁴⁶

B. Congress's Implicit Ratification Of The Caplin Limitation

Congress effectively confirmed this outcome six years later, in 1978, when it adopted the Bankruptcy Code. During the legislative process, Congress considered and rejected a proposal that would have authorized trustees to bring certain claims on behalf of creditors.⁴⁷ Even that proposal, however, placed several limits on this ability, in an effort to ensure that the trustees would bring these claims only when doing so would benefit the estate. But Congress rejected the proposal.⁴⁸ Courts have found Congress's decision a strong expression of Congressional intent to continue to limit trustees' authority to the limits articulated in *Caplin*.⁴⁹

⁴¹ *Id.* at 434.

⁴² *See id.* at 428–32.

⁴³ *See id.* at 429–31 (discussing second of three problems mentioned by *Caplin* Court that would result from expanding bankruptcy trustee's powers).

⁴⁴ *Id.* at 430.

⁴⁵ *Id.* at 431.

⁴⁶ Fla. Dep't of Ins. v. Chase Bank of Tex. Nat'l Ass'n, 274 F.3d 924, 930 & n.21 (5th Cir. 2001) (explaining *Caplin*).

⁴⁷ *See* proposed Code section 544(c) as set out in *Mixon v. Anderson (In re Ozark Rest. Equip. Co.)*, 816 F.2d 1222, 1227 n.9, 1227–28 (8th Cir. 1987). The proposal would have limited the nature of those creditor claims even further, for example permitting a trustee to bring those claims only if the trustee could not have recovered against the defendant other than through the creditors' claims; if the creditors' claims would not create a subrogation claim; and if any judgment would bind "all" creditors. *Id.* at 1227–28.

⁴⁸ *Id.*

⁴⁹ In an opinion that is cited regularly for its analysis of this legislative history, the Eighth Circuit explained that "in declining to explicitly authorize such standing in the wake of *Caplin*, it is difficult to ascertain how congressional intent could be stronger." *Id.* at 1229. That court also explained that Congress's intention applies not only to reorganization trustees, the specific subject of *Caplin*, but to all trustees under the Bankruptcy Code. *Id.* at 1228. That court concluded that Congress sent a "message" that is "clear": that

C. Courts' Application Of Caplin To Prevent Trustees From Accepting Assignments Of Creditor Claims

Some bankruptcy trustees have tried to avoid *Caplin* by accepting assignments of claims from creditors. But the logic of *Caplin* rules this out, and most courts have rejected it. In the leading case on the issue, the Ninth Circuit held that a chapter 7 trustee could not sue a bank on behalf of estate creditors who had assigned their claims to him.⁵⁰ The court emphasized that the trustee would have distributed any proceeds directly to the assigning creditors, not to the estate, so that "the investors plainly remain the real parties in interest."⁵¹ Other courts have reached the same conclusion, though some have permitted assignment of claims as long as the benefit of the assignment goes to the estate as a whole and is not limited to the assigning creditors.⁵²

III. WHY THE SAME LIMITATION APPLIES TO *POST*-CONFIRMATION TRUSTEES

A. The Language Of Bankruptcy Code Section 1123 Limits Trustees To Asserting Claims That Belong To The Estate

Caplin and related cases address the authority of chapter 7 and chapter 11 trustees. Today, however, much of the litigation on behalf of a bankruptcy estate is brought *after* plan confirmation, when the chapter 7 or chapter 11 trustee no longer is in place. Typically, a plan establishes a state-law trust to hold the estate's claims against third parties and appoints the bankruptcy trustee as the post-confirmation

"no trustee, whether a reorganization trustee as in *Caplin* or a liquidation trustee as in the present case, has power under [the predecessor to Chapter 11] of the Code to assert" causes of action on behalf of "the bankrupt estate's creditors." *Id.* (The Court referred to Section 544 of the Code, a section addressing the power of trustees including chapter 11 trustees. 11 U.S.C. § 544 (2006); *see also* 11 U.S.C. § 103(a) (applying provisions of chapter 5 to cases under chapter 11). *Williams v. Cal. 1st Bank*, 859 F.2d 664, 666 (9th Cir. 1988) (citing discussion of congressional intent in *In re Ozark Rest. Equip. Co.*).

⁵⁰ *Williams*, 859 F.2d at 666–67 (noting that assignment of claims does not avoid *Caplin*).

⁵¹ *Id.* at 666. In the same vein, the Eleventh Circuit also held that a trustee lacks the authority to pursue claims where the recovery would go to fewer than all creditors. *See E.F. Hutton & Co. v. Hadley*, 901 F.2d 979, 986 (11th Cir. 1990) (citing *Williams*).

⁵² Holding that the assignment is not permitted, *see, e.g., Breeden v. Kirkpatrick & Lockhart LLP (In re Bennett Funding Grp., Inc.)*, 336 F.3d 94, 99–100 (2d Cir. 2003) (explaining that because bankruptcy trustee cannot sue third parties on behalf of estate's creditors, assignment of creditor claims did not confer standing on trustee). For a case permitting assignment of creditor claims where the assignment would benefit the entire estate, *see Logan v. JKV Real Estate Serv. (In re Bogdan)*, 414 F.3d 507, 513–14 (4th Cir. 2005). That court distinguished *Caplin* and *Williams* because the recovery in *Bogdan* would not go directly to the assigning creditors, and therefore would not bypass the estate's distribution scheme. Rather, the creditors would "recover, if at all, by sharing from the general assets of the estate on a pro rata basis with all other creditors." *Id.* at 513. Under this arrangement, the estate was "the real party in interest." *Id.* The same is true of *Bankr. Servs., Inc. v. Ernst & Young, LLP (In re CBI Holdings Co.)*, 529 F.3d 432, 459 (2d Cir. 2008).

trustee who is charged to litigate those claims.⁵³ Some of these post-confirmation trustees contend that the rule articulated in *Caplin* does not apply to them. Based on this contention, some bankruptcy plans permit the same trustee who is asserting the estate's claims to assert the claims of creditor as well—including claims that will never pass through the estate but will remain the claims of the specific assigning creditors.⁵⁴

This takes us to the question that currently divides the courts: whether post-confirmation trustees are, in fact, free to act in both roles. Again, the starting point is the statute.

A bankruptcy plan is a creation of the Bankruptcy Code.⁵⁵ The plan is expressly required to comply with the Code.⁵⁶ One Code subchapter, titled "The Plan," governs a plan's structure and contents.⁵⁷ Another subchapter, titled "Postconfirmation Matters," addresses the effect of plan confirmation and governs activities that take place after confirmation.⁵⁸

The first subchapter includes a section, titled "Implementation Of Plan," that authorizes the creation of a post-confirmation trust to carry out the plan.⁵⁹ Another section, titled "Contents of Plan," limits the authority of the trustee for that trust. This is section 1123, which sets out the required and permitted elements of a plan.

Section 1123 specifically addresses the post-confirmation trustee's authority to bring lawsuits.⁶⁰ It says that a trustee can assert claims only if they belong to the estate: that a plan "may . . . provide for (A) the settlement or adjustment of any claim or interest *belonging to the debtor or to the estate*; or (B) the retention and enforcement by the debtor, by *the trustee*, or by a representative of *the estate* appointed for such purpose, of any such claim or interest[.]"⁶¹

This does not leave room for the trustee *also* to litigate claims belonging to anyone else, because section 1123's list of the post-confirmation trustee's authority is exhaustive. This conclusion follows from use of the verbs "shall" and "may" within the detailed architecture of section 1123.⁶² The section lists seventeen things

⁵³ See James Gallagher, *Creditor Trusts: Maximizing Creditor Recoveries*, AM. BANKR. INST. J., April 2006 at 24, 25. For an overview of post-confirmation liquidation vehicles, see Robert J. Keach & Máire B. Corcoran, *Afterlife, Reincarnation or Purgatory (Revisited): Liquidation And Litigation Trusts And Post-Confirmation Jurisdiction, Standing, And Claims Preservation (and a post script on Stern v. Marshall)*, ABI/NCBJ Conference Roundtables (Oct. 12, 2011); see also Andrew M. Thau, et al., *Postconfirmation Liquidation Vehicles (Including Liquidating Trusts and Postconfirmation Estates): An Overview*, 16 NORTON J. BANKR. LAW & PRAC. 201, 203–04 (April 2007).

⁵⁴ See *supra* note 52 and accompanying text discussing *In re Bogdan*.

⁵⁵ See 11 U.S.C. § 1121 (2006) ("Who May File A Plan").

⁵⁶ *Id.* at § 1129(a)(1).

⁵⁷ *Id.* at Ch. 11, subchapter II.

⁵⁸ See *id.* at Ch. 11, subchapter III.

⁵⁹ *Id.* at § 1142(a) provides that "an entity" can be organized "for the purpose of carrying out the plan." *Id.*

⁶⁰ *Id.* at § 1123(b)(3).

⁶¹ *Id.* (emphasis added). This activity includes pursuing claims on the condition that they constitute the property of the estate or the debtor. See 7 COLLIER ON BANKRUPTCY ¶ 1123.02[3][a] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. 2004) (citing authorities)

⁶² See 11 U.S.C. § 1123(a), (b) (2006).

that a plan "shall" do, and seven more that a plan "may" do—indicating that the section lists all of the permissible contents of a plan.⁶³ In *Caplin*, the Court reasoned that, because Congress had established a "statutory scheme" for reorganization proceedings that was "elaborate," but had not authorized the activity at issue, the statutory scheme should not be read to permit that action.⁶⁴ This is an application of the basic interpretive canon *expressio unius est exclusio alterius*.⁶⁵ Consistent with that canon, it would make no sense for Congress to generate this detailed list of authorized activities of trustees if the statute nonetheless permitted trustees also to do anything else they chose.

B. Section 1123 Applies While The Trustee Is Carrying Out the Bankruptcy Plan

1. The language of the Bankruptcy Code applies after plan confirmation

So section 1123, which applies to bankruptcy plans, limits post-confirmation trustees to the same scope of authority that the Code gives to liquidation trustees. No case appears to dispute this conclusion. What some cases do dispute is whether section 1123 continues to apply after a court confirms a plan.⁶⁶

The Bankruptcy Code indicates that it does. The Code provisions that I just reviewed dovetail to support this conclusion. They provide that: A court may confirm a plan only if the plan complies with all provisions of the Code (11 U.S.C. § 1129); that under the Code, a post-confirmation trustee is limited to pursuing claims owned by the estate (11 U.S.C. § 1123(b)(3)(B)); and that post-confirmation trustees must comply with the plan and the court's order confirming it (11 U.S.C. § 1142 ("Implementation Of The Plan")).⁶⁷ These provisions cannot be squared with the view that the limitations of section 1123 do not apply to post-confirmation trustees.

To date, none of the case law addresses these provisions.⁶⁸ And certainly no opinion suggests a way to give section 1123 a fair reading that causes its force to disappear at the point of plan confirmation.

⁶³ *Id.*

⁶⁴ *Caplin v. Marine Midland Grace Trust Co. of N.Y.*, 406 U.S. 416, 428 (1972) (stating that "nowhere in the statutory scheme is there any suggestion that the trustee in reorganization is to assume the responsibility of suing third parties on behalf of debenture holders").

⁶⁵ NORMAN J. SINGER, 2A SUTHERLAND ON STATUTORY CONSTRUCTION § 47.23 (7th ed. 2000).

⁶⁶ For decisions that dispute this conclusion, see cases cited *supra* note 5.

⁶⁷ 11 U.S.C. § 1129(a)(1); *id.* at § 1123(b)(3)(B); *id.* at § 1142.

⁶⁸ See *Zazzali v. Hirschler Fleischer, P.C.*, No. 11-614, 2012 U.S. Dist. LEXIS 118090, *18-*24 (D. Del. Aug. 21, 2012); *Trenwick Am. Litig. Trust v. Ernst & Young, LLP*, 906 A.2d 168, 191 (Del. Ch. 2006), *aff'd sub nom.*, *Trenwick Am. Litig. Trust v. Billett*, 931 A.2d 438 (Del. 2007) (holding that litigation trusts lack standing to pursue claims of creditors); *Torch Liquidating Trust v. Stockstill*, No. 07-133, 2008 WL 696233 at *6 n.4 (E.D. La. Mar. 13, 2008) ("[P]rior case law is explicit that Litigation Trusts such as Plaintiff do not have standing to pursue the direct claims of creditors"); *Mukamal v. Bakes*, 383 B.R. 798, 811-14 (S.D. Fla. 2007) (holding that post-confirmation trustee lacked authority to assert assigned claims of creditors), *aff'd on other grounds*, 378 F. App'x 890 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 1785 (2011).

2. Other considerations support this reading of the statute

a. *This reading preserves consistency between rules governing claims pursued before and after plan confirmation*

The interpretation that gives section 1123 force after plan confirmation thus respects that section's language and structure. It also makes sense of the Bankruptcy Code as whole, because it maintains logical integrity in the overall bankruptcy scheme. By applying the limitation on trustee authority to the post-confirmation period, it establishes consistent treatment of claims against third parties whether the claims are filed before plan confirmation or after. It is hard to justify a scheme that does not maintain this consistency. For all the detail in the Bankruptcy Code, nothing suggests that Congress intended to restrict the rule described in *Caplin* to pre-confirmation trustees.

By contrast, the *Grede* approach breaks the logical consistency that permits the free movement of these claims to the post-confirmation period. The *Grede* approach permits bankruptcy trustees to evade the *Caplin* rule merely by delaying a lawsuit until plan confirmation, changing roles from bankruptcy trustee to post-confirmation trustee, then filing suit.⁶⁹ Because of the trend to earlier plan confirmation, this change eliminates the *Caplin* limitation for a great many bankruptcies. Indirectly but in one fell swoop, this approach renders decades of authority irrelevant.

This outcome is particularly hard to defend because we know that Congress has twice looked at relevant Code provisions but did not make this change. The first time was 1978, when Congress considered and rejected the proposal to soften the *Caplin* rule.⁷⁰ The second was in 2005, when Congress passed the Bankruptcy Abuse Prevention And Consumer Protection Act.⁷¹ That legislation encouraged, and in some contexts required, faster confirmation of plans.⁷² The obvious effect of this faster confirmation was to move more litigation against third parties from the pre- to the post-confirmation phase of the bankruptcy process. But Congress said nothing about permitting this post-confirmation litigation to take place under different rules from pre-confirmation litigation.⁷³

The logic of the *Grede* approach also generates other inconsistencies between rules that govern litigation before and after plan confirmation, because that logic suggests other changes to the rules for lawsuits that trustees pursue after plan

⁶⁹ *Grede v. Bank of N.Y. Mellon*, 598 F.3d 899, 901–02 (7th Cir. 2010).

⁷⁰ See *Mixon v. Anderson (In re Ozark Rest. Equip. Co.)*, 816 F.2d 1222, 1227 n.9, 1228 n.10 (discussing Congress's rejection of proposed statute provision).

⁷¹ See *supra* text accompanying note 20.

⁷² See 11 U.S.C. § 1121(c), (d). For example, it limits a debtor's exclusive period to file a plan of reorganization to 18 months. *Id.* at § 1121(d)(2)(A).

⁷³ See Bankruptcy Abuse Protection and Consumer Protection Act of 2005, 119 Stat. 23 at § 438 (2005) (codified as amended at 11 U.S.C. § 1121(e)).

confirmation. The full implications must be worked out as this logic ripples through the law, but we already can identify some of the issues raised.

For example, post-confirmation trustees have argued that this logic changes the *substance* of the claims assigned to the post-confirmation trust by the *estate*.⁷⁴ Before plan confirmation, claims asserted by bankruptcy trustees are subject to the defense of *in pari delicto*, because a bankruptcy trustee "stands in the shoes" of the debtor for the purpose of certain defenses to the trustee's claims.⁷⁵ Post-confirmation trustees have argued that, because they operate "after bankruptcy," the estate claims that they assert are no longer subject to *in pari delicto*.⁷⁶ If accepted, this argument would render much of the extensive law of *in pari delicto* irrelevant, because bankruptcy trustees could avoid this potentially fatal defense through the simple means of postponing litigation until plan confirmation. Again, however, nothing suggests that Congress intended to permit plan confirmation to effect such a significant change in bankruptcy litigation.

Some other implications of the *Grede* approach are unfavorable to post-confirmation trustees, including trustees who limit their role to advancing claims of the estate. If post-confirmation trustees are not bound by the Bankruptcy Code, then they have a weak claim to the same public-oriented status as pre-confirmation bankruptcy trustees. An "after bankruptcy" trustee could not demand the procedural advantages sometimes afforded bankruptcy trustees. One of those is relaxed pleading standards. Some courts permit bankruptcy trustees to plead claims, including fraud, without meeting the usual stringent requirement to plead fraud with particularity, sometimes even without pleading the "facts" required by *Twombly*, *Iqbal*, and similar cases.⁷⁷ If the law holds that post-confirmation trustees operate "after" bankruptcy, however, then it follows that post-confirmation trustees—whether advancing estate claims or creditor claims—would lose this pleading privilege.

One might argue that it makes sense for different rules to apply after plan confirmation because, where the pre-confirmation phase of bankruptcy is a creature of the Bankruptcy Code, a bankruptcy plan is more like a contract between the debtor and its creditors. But that objection overstates the contractual character of a bankruptcy plan. Although a plan is the product of a process that includes bargaining, the bargain is heavily regulated. The bargaining process is created by statute and governed by statute. It may, for example, include such non-contractual elements as a cram-down.⁷⁸ The Bankruptcy Code also limits the permissible

⁷⁴ See e.g., Dan Schechter, *Liquidation Trustee is Empowered to Assert Claims Assigned by Estate's Creditors Against Third Party Tort-feasors*, 2010 COMM. FIN. NEWS 28 (2010).

⁷⁵ See, e.g., *Official Comm. of Unsecured Creditors v. R.R. Lafferty & Co.*, 267 F.3d 340, 355–56 (3d Cir. 2001). The Second Circuit classifies the issue as one of standing. See *Shearson Lehman Hutton Inc. v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991).

⁷⁶ This argument may fail even if one accepts that post-confirmation trustees operate "after bankruptcy," because the genealogy of the claims remain unchanged: The claims originated as claims of the debtor, and therefore are subject to defenses that were available against the debtor.

⁷⁷ See, e.g., *In re USDigital, Inc.*, 443 B.R. 22, 33–34 (Bankr. Del. 2011) (collecting cases).

⁷⁸ 11 U.S.C. § 1129(b)(1) (2006) (stating pre-requisites for cram-down).

content of the plan; this is the exhaustive list set out in section 1123.⁷⁹ The theory that a bankruptcy plan is somewhat like a contract does not, therefore, appear to defeat the continuing force of requirements of section 1123.

b. Applying the section 1123 limitation while the plan is carried out advances the purpose of section 1123 and any bankruptcy plan

The conclusion that section 1123 applies until a plan is executed also advances that section's purpose. Section 1123 says that a post-confirmation trustee may assert claims if they "belong[] to the debtor or to the estate."⁸⁰ This limitation advances the collective purpose of a bankruptcy plan, which is to marshal the assets of the estate and distribute it to creditors who will receive a recovery through it.⁸¹ To achieve this purpose, though, the Code must apply while a bankruptcy plan is being carried out.

Conversely, the pursuit of the personal claims of creditors often lies outside this purpose. It is true that some creditor claims against third parties could benefit the estate by bringing in assets that reduce creditor losses and thus reduce claims on the estate. But that is so only where two conditions are present. First, the estate cannot also have a claim against same third party; this condition ensures that estate and creditor are not competing for the same funds. And second, a successful creditor claim must not lead to a claim by the third-party back against the estate; this ensures that the creditor litigation does not simply replace the creditors' claim on the estate with the third-party's claim on the estate. These conditions are not easily met. And absent these two conditions, creditor claims are either a pass-through (but one that generates litigation costs), or they actively cut against the interests of the estate.

This explains the limitations in the Bankruptcy Code; it explains the Supreme Court's discussion in *Caplin*; and it explains Congress's 1978 decision to stick with the existing rule. And it is consistent with the rule that jurisdiction over creditor claims against third parties generally does not lie in the bankruptcy court in the first place. In sum, no basis exists to appoint a trustee through a *bankruptcy* plan if the trustee's task is to pursue claims that never pass through the bankruptcy estate. Creditors do not need bankruptcy law to pursue their claims against third parties. Creditors are free to create a state-law trust, independent of the bankruptcy process, to pursue those claims. Creditors that follow this course obtain the efficiency benefits of a single trustee. What they do not get is the advantages of suing to put money in their own pockets while litigating in the name of a bankruptcy-related trustee.

⁷⁹ See *id.* at § 1123(b)(3)(B).

⁸⁰ *Id.* at § 1123(b)(3)(A).

⁸¹ See THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 7–19 (2001).

c. *Other provisions of the Bankruptcy Code apply until a bankruptcy plan is fully executed*

These arguments are grounded in the Bankruptcy Code. The *Grede* court, however, brushed the entire Bankruptcy Code aside with the statement that plan execution takes place "after bankruptcy."⁸² The Court's discussion indicates that any limitation that the Bankruptcy Code imposed on trustee authority does not apply once a court confirms a bankruptcy plan.⁸³ The court was correct that certain aspects of the bankruptcy process do end at the point of plan confirmation. Plan confirmation generally ends the existence of the estate, and it constitutes a final judgment as to matters that a court has decided up to that point.⁸⁴ Also at that time, a debtor that is reorganizing will regain control of its property and return to managing its own affairs.⁸⁵

But significant elements of the bankruptcy process continue.⁸⁶ The debtor still may, for example, pursue preference actions for the estate.⁸⁷ And some Code provisions do not even begin to apply until plan confirmation. For instance, one provision establishes procedures for modifying a plan during the post-confirmation phase.⁸⁸ Another section provides that a post-confirmation trust "shall carry out the plan and shall comply with any orders of the court," and that "the court may direct" any party "to perform any other act" that is "necessary for the consummation of the plan."⁸⁹

To the extent necessary to enforce these sections, the jurisdiction of the Bankruptcy Court continues.⁹⁰ The Bankruptcy Rules provide that, "[n]otwithstanding the entry of the order of confirmation, the court may issue any

⁸² *Grede v. Bank of N.Y.*, 598 F.3d 899, 902 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 418 (2010).

⁸³ *See id.* (holding that Bankruptcy Code does not govern trustee after bankruptcy).

⁸⁴ 11 U.S.C. § 1141 ("Effect of Confirmation"); *id.* at § 1141(a) (addressing preclusive effect of confirmed plan); *id.* at § 1141(c) (providing that confirmation discharges claims against property that is subject of plan). *Grede* apparently refers to property that is returned to the debtor and thus essentially separated from property addressed by a bankruptcy plan. *See Grede*, 598 F.3d at 902.

⁸⁵ 11 U.S.C. § 1141(c).

⁸⁶ For a review of some of the primary effects of confirmation, *see generally* David A. Lander & David A. Warfield, *A Review And Analysis Of Selected Post-Confirmation Activities In Chapter 11 Reorganizations*, 62 AM. BANKR. L.J. 203 (1988). For additional discussion, *see also* Kuney, *supra* note 38, at 85; David S. Kupetz, *It's Not Over Until It's Over: Chapter 11 Plan Confirmation*, Bankruptcy (West 2004) (Aug. 27, 2004), http://www.sulmeyerlaw.com/images/ps_attachment/attachment18.pdf.

⁸⁷ *See* 11 U.S.C. § 547(b).

⁸⁸ *See id.* at § 1127 ("Modification Of Plan").

⁸⁹ *Id.* at § 1142(a) & (b).

⁹⁰ *Id.* at § 1142(b) (authorizing court to direct steps to effect confirmed plan); FED. R. BANKR. P. 3020(d) ("Retained Power")2006) ("Notwithstanding the entry of the order of confirmation, the court may issue any other order necessary to administer the estate"). *See also* Montana v. Goldin (*In re Pegasus Gold Corp.*), 394 F.3d 1189, 1194 (9th Cir. 2005) (holding that "related to" jurisdiction exists where close nexus to bankruptcy plan exists); John Ayer et al., *Confirmation is Not the End of the Case*, 24 AM. BANKR. INST. J., May 2005 at 32, 57 (discussing implications of bankruptcy courts' retention of jurisdiction after plan -confirmation).

other order necessary to administer the estate."⁹¹ Although the precise scope of this post-confirmation jurisdiction is not entirely settled, it is settled that jurisdiction continues over the execution of the plan until an "order for final decree."⁹² The oversight of the United States Trustee also continues, though on a reduced basis.⁹³ Cases adopting the after-bankruptcy approach do not address, much less account for, these continuing aspects of the bankruptcy process. Nor do they suggest a reading of the Code that cuts off the effect of the provisions governing bankruptcy plans at the time a plan is confirmed.

3. Still other considerations show that the bright-line limitation on the authority of post-confirmation trustees makes sense in substance and form

a. The concerns that the Supreme Court discussed in Caplin—and more—apply after plan confirmation

Still other considerations provide insights into the rationale behind the rule—into why Congress adopted the limitation on trustee authority in the first place. The Supreme Court discussed some of these considerations in *Caplin*. That case involved creditor claims against a third party, where the estate did not also have a claim against the third party.⁹⁴ As I summarized above (in section II.A), the Court gave some reasons why, on those facts, the limitation on trustee authority made sense. None of these concerns go away because litigation moves to a post-confirmation trust.

Additional complications arise if the estate and creditor have claims against the same third party. In those cases, estate and individual creditors compete for the finite funds of that third party. Indeed, the only reason for individual creditors to file their own claims is to divert some of the possible recovery from the estate as a whole. In these cases, a single trustee who acts for both estate and creditors inevitably makes compromises between the two sides' interests.⁹⁵ As in any competition, a single player cannot advance the best interests of *both* sides.

Another kind of conflict arises in Ponzi-type schemes. In those cases, the trustee for the estate often sues individual investors to recover payments made to

⁹¹ FED. R. BANKR. P. 3020(d) ("Retained Power").

⁹² FED. R. BANKR. P. 3022 ("Final Decree in Chapter 11 Reorganization Case") provides: "After an estate is fully administered in a Chapter 11 reorganization case, the court . . . shall enter a final decree closing the case."

⁹³ 28 U.S.C. § 1930(a)(6) (requiring payment of fee until case is converted or dismissed). During this time, the U.S. Trustee retains the authority to reassert itself as guardian if the post-confirmation entity created by the plan breaches its duties. *See, e.g., Pioneer Liquidating Corp. v. United States Tr. (In re Consol. Pioneer Mortg. Entities)*, 264 F.3d 803, 808–09 (9th Cir. 2001) (granting post-confirmation motion of U.S. Trustee to convert case to chapter 7).

⁹⁴ *Caplin v. Marine Midland Grace Trust Co. of N.Y.*, 406 U.S. 416, 416 (1972).

⁹⁵ The *Caplin* Court pointed out this problem. The Court noted the practical concern that the calculation of damages to an estate's creditors is always difficult, because the creditors suffer losses only to the extent that the estate cannot pay them in full. *Id.* at 431.

them before the fraudulent scheme collapsed. In that case, the same person actually sues one master on behalf of the other.⁹⁶

The law prevents these conflicts from arising before plan confirmation, because the *Caplin* rule limits bankruptcy trustees to one role. And again, nothing about these problems changes because the claims are pursued by post-litigation trustees. Yet bankruptcy courts in some cases already have approved plans that appoint the same trustee for estate and individual-creditor claims and, therefore, build these conflicts into the structure of the post-confirmation trusts.⁹⁷ Even under the *Grede* rule, however, under which the Bankruptcy Code does not limit the authority of post-confirmation trustees, these conflicts still trigger legal questions about the permissible scope of trustee authority. These trusts are state-law trusts, and their trustees owe the familiar state-law duties, such as loyalty and impartiality.⁹⁸ In many cases, it would be hard for a single trustee for the estate claims and for the individual creditors to comply with these state-law duties.

It is not apparent, though, that courts that have approved these plans have been asked to address the conflicts. Obviously the parties to plans that have been approved have decided that the arrangement was in their interests. They may have waived these conflicts, even if the waivers were implicit. It appears, however, that the parties that will be affected by the conflicts often cannot recognize them at the time of confirmation, because confirmation may take place before the litigation is filed and the trustee begins to make trade-offs between the interests of estate and individual creditors. And other actors who might be disadvantaged by the arrangement—the third-party defendants who will be the litigation targets—often are not at the table at the time of confirmation.

b. The use of a bright-line rule obviates the need for case-by-case evaluation to decide the permissible scope of a trustee's authority

This review of some of the problems created when a trustee asserts claims assigned by creditors also lends support to the *form* of the rule set out in the Bankruptcy Code and applied in *Caplin*: a bright-line rule that restricts the trustee to pursuing actions for the estate, rather than a more contextual test that evaluates the pros and cons of each proposed arrangements. This bright line provides some of the

⁹⁶ See *Luke* 16:13 (King James) ("No servant can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other"). If these claims against estate creditors are brought solely by a trustee whose duty runs only to claims assigned by the estate, the claims are consistent with the *Caplin* rule. This trustee does not owe a duty directly to every creditor, but instead owes a duty to the estate, not directly to the individual creditor. This is like a director, who owes his or her duties to the corporation rather than directly to each shareholder. See, e.g., *Mixon v. Anderson (In re Ozark Rest. Equip. Co.)*, 816 F.2d 1222, 1227–28 (8th Cir. 1987) ("we believe Congress' message is clear—no trustee . . . has power under Section 544 of the Code to assert general causes of action . . . on behalf of the bankrupt estate's creditors").

⁹⁷ See cases cited *supra* Part I, notes 2, 5, 6.

⁹⁸ See, e.g., RESTATEMENT (THIRD) OF TRUSTS § 78 ("DUTY OF LOYALTY"), § 79 ("DUTY OF IMPARTIALITY") (2007).

advantages of a clear rule, though it probably provides some of the disadvantages as well.

Among its disadvantages, this rule prevents courts from considering all possible facts that would be relevant under a more open-textured standard. Under a standard such as "the best interests of the estate," a court could perform an unrestricted (and unstructured) inquiry to decide whether each proposed creditor claim could ultimately benefit the estate.⁹⁹

But sorting the beneficial cases from the non-beneficial and harmful cases would be difficult and time-consuming. It might not even be possible at the outset of the case. The *Caplin* approach simply takes the matter out of the court's hands by imposing a rule that forbids the trustee from pursuing claims for creditors in any case.¹⁰⁰

This limitation thus provides the benefits of a bright-line structure: decreased administrative costs and increased predictability. In the context of highly complex bankruptcies, the rule saves the trouble of analyzing all of the possible considerations, case-by-case and claim-by-claim, merely to determine whether a trustee has the authority to assert those claims in the first place. It also gives up-front predictability to efforts to structure bankruptcy plans and identify the scope of a post-confirmation trustee's authority.

CONCLUSION

Courts should resolve the existing split by addressing the considerations identified above. Courts should begin by contending with the Bankruptcy Code itself. They then should address the other interpretive considerations that I have identified.

In particular, a court that chooses to follow *Grede* bears the burden of justifying a change in the litigation rules at the time of plan confirmation—even though the post-confirmation trustee files the same lawsuit that the pre-confirmation trustee would have filed. That court also should acknowledge the other legal changes that appear to be dictated by the "after bankruptcy" logic and create further inconsistencies between the rules governing litigation pursued before and after plan confirmation. Finally, that court should consider the question of fairness to third-party defendants. Why must they defend themselves against a bankruptcy-related trustee simply because the lawsuits against them were not filed until plan confirmation? By answering these questions, courts can determine the proper

⁹⁹ This broader inquiry, leading to comparison of a case's facts to the underlying purpose of the inquiry, reduces the familiar problem of over-inclusiveness. See discussion and citations in Andrew J. Morris, *Some Challenges For Legal Pragmatism: A Closer Look At Pragmatic Legal Reasoning*, 28 N. ILL. U.L. REV. 1, 10–11 (2007).

¹⁰⁰ Thus, in an approach that is an alternate to the bright-line structure, courts could directly apply the rule's justification to each case. This would provide more context-sensitive decision-making, though at considerable cost in decision-making resources and reduced predictability. See discussion in SCHAUER, *supra* note 18, at 34–37, 47–52.

reading of the Bankruptcy Code and provide a settled rule for parties in future bankruptcies.