Expert Witnesses
FROM THE SECTION OF LITIGATION EXPERT WITNESSES COMMITTEE
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# What Do You Do with a Completed Bankruptcy Examiner's Report?

By Sylvia Mayer, John Mastando III, Aliza Reicher, and Cheryl James – May 31, 2011

What does one do with a bankruptcy examiner's report? Multimillion- or multibillion-dollar Chapter 11 bankruptcy cases involving allegations of fraud or other improprieties by management, whether pre- or post-filing, may result in the appointment of an examiner. An examiner is an independent expert appointed by the bankruptcy court to investigate and report on alleged wrongdoing or other issues. The debtor company opens its books, records, and sometimes even documents protected by the attorney-client and work-product privilege to the examiner for inspection, and it pays for the cost of the investigation, which can be quite expensive. Once the examiner completes the investigation, a report is filed with the bankruptcy court, detailing the investigation process and the examiner's findings and conclusions.

In a review of over 550 large Chapter 11 cases between 1991 and 2007 where the debtor held over $100 million in assets and publicly traded securities, cases where an examiner was sought and appointed were analyzed. While data indicated that the appointment of an examiner was somewhat rare—one was requested in 15.1 percent of cases and appointed in a scant 6.7 percent of cases in the sample set—these cases had many similar characteristics. Jonathan C. Lipson, "Understanding Failure: Examiners and the Bankruptcy Reorganization of Large Public Companies," 84 *Am. Bankr. L.J.* 1, *19, *24 (2010). Most requests for examiners originated from the busiest and largest bankruptcy court districts—Delaware and the Southern District of New York. However, examiner appointments in these districts accounted for only 40.5 percent of total appointments, making it somewhat more likely to have an examiner appointed outside of these districts. On average, cases where an examiner was sought had assets (as described on the debtor's schedules) of four times greater than the sample. Cases were also larger by average assets where the examiner motion was granted. Finally, the study indicated that examiners were rarely sought or granted in cases where allegations of fraud were made, despite the fact that fraud is a specific statutory basis for the appointment of an examiner.

After the examiner's investigation and report have been completed (and paid for), the question arises: Now what? Frequently, parties in litigation seek to admit all or part of the report, which represents the analysis and views of the examiner, into evidence. Consequently, to the extent offered to prove the truth of the matter asserted, the examiner report, by its very nature, may be hearsay. Both bankruptcy courts and non-bankruptcy courts have grappled with the issue of the admissibility of examiner's reports. The result of these rulings is a mixed bag—there is no clear answer to this question. One thing is clear, however—the admissibility of an examiner's report depends on the facts, circumstances, and equities of each situation.

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**The CSI of Bankruptcy**

Examiners, essentially court-appointed investigators and forensic analysts, are creatures of Chapter 11 bankruptcy law. Their charge is to perform the equivalent of a crime-scene investigation of the issues identified by the appointing court. Section 1104(c) of the Bankruptcy Code provides as follows:

> If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor, if—
>
> > (1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or
> > (2) the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000.

The scope, focal point, and timing of the examiner's investigation and report is determined by the Bankruptcy Court and set forth in either the order appointing the examiner or a separate order. Pursuant to Bankruptcy Code section 1106(a)(4), the examiner's report should include, at a minimum, "a statement of any investigation conducted . . . including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate." While examiners are typically tasked to investigate fraud or other improprieties, bankruptcy courts may also appoint an examiner to investigate and facilitate Chapter 11 plan negotiations or to analyze an issue central to a Chapter 11 case that requires specialized expertise.

An examiner holds a purely independent, nonadversarial role. The examiner is charged with serving as an objective party to provide unbiased views and prepare an informational report to aid the parties in interest in "identifying assets of the estate, evaluating the plan of reorganization, or describing likely and legitimate areas for recovery." *In re Fibermark, Inc.*,339 B.R. 321, 325 (Bankr. D. Vt. 2006)("The benefit of appointing an independent examiner is that he or she will act as an objective nonadversarial party who will review the pertinent transactions and documents, thereby allowing the parties to make an informed decision as to their substantive rights."). As a result, in addition to the duty to investigate and report, an examiner must not possess a "material adverse" interest in or against a party in the Chapter 11 case, must disclose any and all compensation or payment arrangements made during the bankruptcy case, and owes the debtor's stakeholders (its creditors and shareholders) a duty of loyalty. *In re Big Rivers Elect. Corp.*, 355 F.3d 415, 433 (6th Cir. 2005).

The public policies underlying the examiner concept are to provide a less drastic alternative than the appointment of a Chapter 11 trustee and to provide information and transparency to public bond and stockholders. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 402-03 (1997). As a result, the Bankruptcy Code provides guidelines governing the appointment of an examiner, the report to be prepared by an examiner, and payment of the costs of an examiner. Although not addressed in the Bankruptcy Code, the examiner may also negotiate additional terms of engagement, such as an order from the Bankruptcy Court prohibiting or limiting third parties from seeking document production from or depositions of the examiner. *See In re Lehman Bros. Holdings Inc.*, No 08-13555 (JMP), July 13, 2001, Order Discharging Examiner and Granting Related Relief, at 4–5; *In re SemCrude, L.P.*, No. 08-11525 (BLS), Oct. 21, 2009, Supplemental Order Granting in Part the Examiner's Motion for Entry of an Order Regarding Certain Procedural Issues in Connection with the Termination of the Examination of SemCrude, L.P., et al., at 3. One open issue remains, however—how to use an examiner's report once it's completed.

**Now What?**

Typically, an examiner's investigation costs millions of dollars, takes several months to conclude, and results in a voluminous report. But, once the report has been filed, neither the Bankruptcy Code nor the Bankruptcy Rules address how the report can or should be used. While the report process may itself be cathartic for the company and its stakeholders, examiner's reports are, conceptually, intended to be used to aid the company and parties in interest in identifying causes of action to pursue (or not to pursue) or provide an informational backdrop to settlement negotiations. In addition, litigants often seek to introduce the report into evidence at confirmation hearings, in adversary proceedings, and in non-Bankruptcy Court litigation.

To the extent that an examiner's report is offered into evidence to prove the truth of the matter(s) asserted in the report, then the applicable rules of evidence come into play. As defined by Federal Rule of Evidence 801(c), "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay, as a general rule, is inadmissible because the declarant is unavailable for cross-examination, thus raising concerns that the evidence is inherently unreliable. Michael D. Sousa, "The Examiner's Report and the Hearsay Rule: Are Both Mutually Inclusive?" 25 *Kan. Am. Bankr. Inst. J.* 20, 81–82 (2007). However, there are several exceptions to the hearsay rule. As a result, to the extent that a court concludes that an examiner's report is hearsay, then the analysis turns to whether the report falls within one of the exceptions.

Courts have considered and, depending on the case, accepted or rejected the application of Federal Rule of Evidence 706(2), which provides for the admission of an expert report, or Federal Rule of Evidence 803(8), which provides for the admission of a public record, as rationales for admission of an examiner's report despite its classification as hearsay. A further complication with respect to examiner's reports is that examiners are not constrained by the rules of evidence when conducting their investigations or preparing their reports. Consequently,

examiner's reports often contain or rely upon hearsay, confidential information, and, in some instances, privileged information. The trial court must then consider not only the application of the hearsay rule to the report generally, but also potential double or triple hearsay contained within the report and issues regarding confidentiality and privilege.

**To Admit or Not to Admit**

The seminal case examining the admissibility of an examiner's report over a hearsay objection is *In re Fibermark, Inc.* Prior to the *Fibermark* opinion, "no case [had] squarely addressed the circumstances under which an examiner's report may be admitted into evidence over the objection of an interested party, or how an examiner's report fits into the rubric created by the Federal Rules of Evidence." *Fibermark*, at 324. Indeed, "the Bankruptcy Code is silent on the question of how an examiner's report may be used."

In *Fibermark*, the debtors moved to admit the examiner's report into evidence as an expert opinion in connection with prosecuting their objection to a fee application. The examiner had been appointed by the Bankruptcy Court to investigate and address certain parties' allegations against the debtors' principals for breach of fiduciary duty. The debtors argued that the Bankruptcy Court should rely on the "dozens of cases in which bankruptcy courts have considered an examiner's written report and testimony in contested matters" and find that it is the "regular practice in the bankruptcy courts for examiner's reports to be received into evidence and considered a part of the evidentiary record." The fee applicant objected to the admission of the entire report as rank hearsay. The fee applicant further argued, to which the debtors conceded, that no cited precedent held that hearsay in an examiner's report is admissible and that no case law addressed the issue of the admissibility of the examiner's full report.

Notably, the *Fibermark* court began its analysis by first explaining that it is not necessary to determine that a report is admissible—or to admit it into evidence—for the examiner's investigation and report to be of benefit to the estate. Further, "an examiner's findings have no binding effect on the court." The court also noted that "while courts are aided by the conclusions of examiners and often rely on their reports in contested matters, the decision of whether to admit the examiner's written explanation of how he or she reached his conclusions does not diminish the value of the examiner's conclusions" because there are numerous benefits of appointing an independent examiner. Those benefits include that the examiner "will act as an objective nonadversarial party who will review the pertinent transactions and documents, thereby allowing the parties to make an informed determination as to their substantive rights," that "the report may serve as a road map for parties in interest as they evaluate and pursue their substantive rights," and that the report is "a resource containing information and observation of an independent expert," which may be helpful to a court in understanding the relevant facts, among others.

The court then focused its analysis on the specific examiner's report at issue. It noted that, contrary to a situation where an examiner is employed to conduct an analysis of purely objective

data from the examiner's particular field of expertise, the examiner in *Fibermark* was specifically appointed by the court to investigate the motives of parties involved in the bankruptcy case and whether any breaches of fiduciary duty had occurred. Accordingly, even by the examiner's own account, "the materials upon which he relied to produce the Report constitute out-of-court statements that lack the indices of reliability required for admission into evidence under the Federal Rules." The court then held that the examiner's rendition of the facts in his report was in fact hearsay and could not be relied upon to prove the truth of the matters asserted.

The court then considered the debtor's argument that the entire examiner's report should be admissible as an expert report under Federal Rule of Evidence 706. The court recognized the status of the examiner, Harvey Miller, as an expert in the field of bankruptcy and reorganization law and determined that his expertise justified the admission of the examiner's conclusions into evidence as an expert report. However, the court held that the examiner's status as an expert did "not change the fact that the factual portions of his report contain an abundance of statements that are the purest sort of hearsay" and, as such, those portions were inadmissible.

Although *Fibermark* is generally regarded as the authoritative case on the admissibility of examiner's reports, other courts have considered the admissibility of examiner's reports, whether explicitly or implicitly, and come to inconsistent results. Recognizing that the context of the introduction of the report is often relevant to the outcome, the summaries below are organized according to whether the opinions were in the context of confirmation, other contested bankruptcy proceedings or litigation, or non-bankruptcy litigation.

**Confirmation Use**

*Reports Considered/Held Admissible*

In addition to the two representative examples discussed, courts have routinely accepted examiner's reports under circumstances in which they have been appointed to investigate "objective issues that experts in a field of business routinely rely on, or where the examiner's report was not in dispute." *See Fibermark*, at 326 (collecting cases); *see also In re General Dev. Corp.*, 147 B.R. 610, 615–17 (Bankr. S.D.Fla. 1992) (the examiner performed an investigation of the appropriate interest rates of claims under a plan of reorganization); *In re Industrial Commercial Elec., Inc.*, 304 B.R. 24 (Bankr. D. Mass. 2004), *rev'd*, 319 B.R. 35 (D. Mass. 2005) (the examiner was an accounting expert and was called on to analyze tax issues); *Paul Ruth Trading Co. v. Royal Yarn Dyeing Corp. (In re Royal Yarn Dyeing Corp.)*, 114 B.R. 852, 856 (Bankr. E.D.N.Y. 1990) (the examiner was a specialist on real-estate matters and was appointed to investigate the condition of property).

In *In re PWS Holding Corp.*, the court noted that the examiner's report was admitted during the confirmation hearing, stating that "upon all of the evidence adduced at the Confirmation Hearing, including but not limited to the Final Report of Harrison J. Goldin, dated October 5, 1999 (the 'Examiner's Report'), as the Examiner appointed in these Chapter 11 Cases to serve as

the Court's expert in evaluating the claims, if any, in respect of the Leveraged Recapitalization of Bruno's that occurred on August 18, 1995 . . . ." Nos. 98–212 (SLR), 98–223 (SLR), 1999 WL 33510165, at *1 (Bankr. D. Del. Dec. 30, 1999). The court provided no explanation to support admission of the examiner's report, but notably referred to the examiner as having served "as the Court's expert." The court's order confirming the debtors' joint reorganization plan was affirmed on appeal, for reasons unrelated to the admissibility of the report. *See In re PWS Holding Corp.*, 228 F.3d 224 (3d Cir. 2000). The Third Circuit did note, however, that the findings of fact of the examiner were not disputed.

In *In re Best Prods. Co., Inc.*, the court considered confirmation of a plan of reorganization under which certain complex transfer avoidance claims arising out of a leveraged buyout of the debtor would be settled. *In re Best Prods. Co., Inc.*, 168 B.R. 35, 39 (Bankr. S.D.N.Y. 1994). Certain creditors objected, alleging that the terms of the settlement were unreasonable and not in the best interests of the creditors, and, thus, the plan could not be confirmed. The court examined the causes of action alleged and potential weaknesses in the claims and relied upon the examiner's extensive legal and financial analysis of the potential claims to confirm the plan and underlying settlement agreement.

*Reports Considered/Held Inadmissible*

In *In re Granite Broadcasting Corp.*, both the debtors and a creditor group opposed admission of the examiner's report because they claimed that the examiner's conclusions were not based on a full factual record and constituted hearsay. 369 B.R. 120, 129 n. 10 (Bankr. S.D.N.Y. 2007). In dicta, the court agreed that the report was inadmissible hearsay and, perhaps more importantly, noted that the extensive testimony and documentary evidence in the confirmation record proved that the examiner's conclusions were wrong. Nonetheless, despite its characterization of the report, the court discussed the examiner's findings and cited the examiner's report repeatedly in its opinion confirming the plan.

In *In re Washington Mut., Inc.*, the equity committee and certain preferred securities holders objected to admission of all or any portions of the examiner's report at the confirmation hearing. Case No. 08-12229 (MFW) (Bankr. D. Del. 2010), Dec. 2, 2010 Hr'g Tr. at 25–32. The debtor argued that, consistent with *Fibermark* and *Enron*, the examiner's conclusions and opinions should be admissible as an expert report. In a ruling from the bench, the court reasoned that the examiner's report was hearsay and not admissible and noted that an expert cannot testify, nor can an expert report be introduced into evidence, unless parties are given full discovery regarding the basis for the expert's report and conclusions, which had not occurred. Accordingly, the court held that the report was inadmissible.

**Contested Bankruptcy Proceedings/Litigation Use**

*Reports Considered/Held Admissible*

In contrast to the ruling of other bankruptcy courts, *In re Latshaw Drilling Co., LLC* involves claims litigation between two debtors—Latshaw Drilling Co., whose bankruptcy case was

pending in Oklahoma, and a Lehman subsidiary, whose bankruptcy case was pending in New York. During pretrial proceedings, Latshaw filed a motion in limine to admit into evidence the examiner's report submitted in the Lehman bankruptcy case. Case No. 09-13572-R (DLR) (Bankr. N.D. OK. 2010), Sept. 9, 2010 Hr'g Tr. at 15. The court ruled that the report was admissible under the public records exception to the hearsay rule. In reaching this conclusion, the court found that the report is a record, report statement, and data compilation; an examiner in a bankruptcy case is an appointee of a public office or agency; and the examiner's report sets forth the activities of the examiner and his team and factual findings resulting from an investigation made pursuant to authority granted by law. The court further noted that, although Federal Rule of Evidence 803(8) appears to permit admission of only factual findings, courts have construed it broadly and have regularly admitted conclusions and opinions found in evaluative reports of public agencies. Finally, the court noted that the party objecting to admission of the public report bears the burden of presenting evidence that the report is untrustworthy, a burden that the court concluded Lehman had not satisfied.

*Reports Considered/Held Inadmissible*

In direct contradiction to the *Latshaw* holding, in the main Lehman bankruptcy case, *In re Lehman Brothers Holdings, Inc*., a party sought to admit into evidence certain excerpts of the examiner's report "for the limited purpose of showing what the examiner reported to the Court on some of the subsidiary fact issues that have come up in the case," under the public records exception to the hearsay rule. *In re Lehman Bro.s Holdings, Inc*., Case No. 08-13555 (JMP) (Bankr. S.D.N.Y. 2010), Oct. 18, 2010 Hr'g Tr. at *14, 16. In denying the admission of these excerpts, the bankruptcy judge held that these excerpts were clear hearsay and that Federal Rule of Evidence 803(8) did not apply in this instance because the examiner was appointed "pursuant to a carefully negotiated order that was drafted by parties-in-interest . . . [and] as a result . . . his work does not neatly fit within the public records and reports exception to the hearsay rule." The judge noted, however, that because he was so extensively involved in the case and had such extensive knowledge of the evidence introduced therein, he would be able to draw appropriate conclusions going forward without the aid of the examiner report excerpts.

In *In re Rickel & Associates, Inc.*, defendants in an adversary proceeding brought by the debtors moved for summary judgment and cited the examiner's report in support of their motion. 272 B.R. 74, 87–88 (Bankr. S.D.N.Y. 2002). The defendants asserted that, based on the findings in the examiner's report, the debtors had actual or constructive notice of omissions made by the defendants, thus defeating the debtors' case against the defendants as a matter of law. The trial court concluded that the examiner's report was inadmissible hearsay, that the examiner's findings and conclusions were not binding on the court, and that the examiner was not responsible for determining claims in the bankruptcy case. Nonetheless, in its order denying summary judgment, the court discussed the examiner's report at length, noting that the report raised the possibility of fraud, as alleged by the debtors.

In *In re Monus*, a debtor plaintiff in an adversary proceeding attempted to introduce an examiner's report from a different proceeding into evidence at trial to support the debtor's fraudulent conveyance claim. No. 92-41883, 1995 WL 469694, at *8 (Bankr. N.D. Ohio May 18, 1995). The plaintiff asserted that the examiner's report should be admitted as a public record pursuant to Federal Rule of Evidence 803(8). The defendants objected on the basis that the report was classic hearsay based on out-of-court declarations that could not be tested by cross-examination and that even if the document were relevant, it should be excluded under Federal Rule of Evidence 403. Although the court considered the report a public record prepared by a court-appointed examiner, the court noted that the report contained sworn and unsworn testimony by individuals, some whose identities were not revealed, and a variety of documents whose authenticity could be challenged. Further, the court found that it was unclear whether the examiner could testify to the 1,000-page report's contents if called as a witness. The court doubted that the "examiner's report is one of those public records or reports which the drafters of the Federal Rules of Evidence had in mind in creating the Rule 803(8) exception to hearsay" and excluded the report "for the reasons that it lack[ed] a guarantee of trustworthiness" and because "whatever probative value the examiner's report may have [was] substantially outweighed by the danger of unfair prejudice, waste of time, and needless presentation of accumulative evidence." The court reserved judgment on whether the examiner could testify to the report's contents if called as a witness.

**Non-Bankruptcy Litigation Use**

*Reports Considered/Held Admissible*

In *In re Enron Corp. Sec. and ERISA Lit.*, plaintiffs in a securities action brought claims of aiding and abetting conspiracy to defraud, among other claims, against a defendant financial services firm. 623 F. Supp. 2d 798, 805 (S.D.Tex. 2009). The plaintiffs offered the *Enron* bankruptcy examiner's conclusions as evidence of causation and actual knowledge of wrongful conduct—necessary elements of plaintiffs' aiding-and-abetting claims. The defendants claimed that the plaintiffs had not presented sufficient evidence to allege those elements, such that their claims should be dismissed on summary judgment. The court, in rejecting the defendant's arguments, held that the plaintiffs' evidence of the conclusions and opinions of the *Enron* examiner were admissible as an expert report under Federal Rule of Evidence 706. In so ruling, the court considered the examiner's qualifications, including that he was an eminently qualified expert in bankruptcy and reorganization law, that he was recognized as one of the country's top bankruptcy practitioners, that he earlier served as an examiner in another large bankruptcy with over $8.5 billion in assets, and that he had numerous reputable professional affiliations.

In *Vietnam Veterans Found. v. Erdman*, plaintiffs identified a court-appointed examiner as their expert witness and sought to have him testify at a jury trial regarding the findings and conclusions contained in his report. No. 84-0940, 1987 WL 9033, at *1–3 (D.D.C. Mar. 19, 1987). The court held that the examiner could not testify as to the findings and conclusions in his

report in a third-party proceeding but noted that "the report itself, if relevant, may well [have] be[en] admissible." It is unknown whether the report was ultimately admitted.

In *U.S. v. Moore*, the court held that a statement made to a bankruptcy examiner was improperly admitted as evidence in a criminal trial unrelated to the bankruptcy proceedings. 27 F.3d 969, 975 (4th Cir. 1994). The court noted, however, that it was possible that the report itself fell within the public records exception to the hearsay rule, Federal Rule of Evidence 803(8).

**Conclusion**

As demonstrated by the cases discussed above, courts analyze the admissibility of an examiner's reports on a fact-specific basis, and even when an examiner's report is admissible, the reasoning behind the ruling varies considerably. However, certain key themes and lessons can be drawn from these opinions that may provide guidance to debtors and other litigants faced with how to best use an examiner's report.

First, an examiner's report does not have to be admitted into evidence to provide value to the estate. Though an examiner's report is not binding on the court, litigants can use the report for their own information and investigation and refer the court to the report for relevant information and conclusions, even if the court ultimately rejects admission of the report as evidence. With the exception of the *Washington Mutual* court, all of the cases examined herein, which have rejected examiner's reports as hearsay, nonetheless otherwise consider or reference the reports in their opinions.

Second, in analyzing the admissibility of an examiner's report, context matters. Whether an examiner's report will be admitted may differ if the report is offered as evidence in a confirmation hearing, in an adversary proceeding in Bankruptcy Court, or in non-bankruptcy litigation. Context is the key for several reasons. A Bankruptcy Court is both the decider of the law and the trier of facts; therefore, when a Bankruptcy Court excludes evidence, it does so only after that evidence has been reviewed. This was particularly important in understanding why the *Washington Mutual* Bankruptcy Court could comfortably exclude the report—its previous review of the report allowed for it to make a well-reasoned decision nonetheless. Additionally, because bankruptcy judges experience an examiner's investigation within the greater framework of the bankruptcy case, which allows the Bankruptcy Court to have a deeper understanding of the context of the report than does a non-bankruptcy court, which has no real context for the tone and tenor of the investigation.

Third, courts have admitted examiner's reports, both in part and in full, under Federal Rules of Evidence 706 and 803(8) but seem to consider a number of relevant factors in making that determination. For example, courts seem to consider whether the report as a whole is sought to be admitted into evidence. Specifically, courts appear more willing to admit certain findings and conclusions rather than the entire report, at times finding that the underlying facts are still inadmissible hearsay. Also relevant is the focus of the examiner's report. Courts appear more

willing to admit reports that provide an objective analysis of a particular issue based on specialized expertise rather than a fact-driven investigation that inherently results in a more subjective analysis, i.e.,whether the subject matter of the report is akin to a traditional expert's report.

Courts have also considered the accuracy of the report and underlying factual information. Factoring into this is the expertise of the appointed examiner. For instance, both the *Fibermark* and *Enron* courts specifically noted the examiner's extensive experience and authority on the relevant topics. Further, where the report has been viewed by the trial court as a public record with the indicia of trustworthiness expected of traditional public records, the court has been willing to admit the report. On the other hand, where courts have noted that the report is unreliable and even contains incorrect information, they have ruled that the report is inadmissible. Finally, the court may consider whether the examiner has been or can be subjected to discovery or the parties have been afforded an alternative means of discovery, such as access to the underlying information that the examiner relied on.

With the increased frequency of the appointment of an examiner and the substantial costs associated with the preparation of an examiner's report, courts will continue to face the issue of admissibility of examiner reports at confirmation, in adversary proceedings, and in non-bankruptcy litigation. Absent clear guidance from Congress or the Supreme Court, and given the fact-specific nature of the inquiries to date, courts will have to consider the policies underlying the examiner statute and the facts and circumstances of the particular case when ruling on the admissibility of all or part of the examiner's report.

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