5th Circuit Bench-Bar Bankruptcy Conference

Module C

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Confirmation, Exit Financing, and Structuring Issues

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Zydeco-Tejano Family Farms

Zydeco-Tejano ("Zy-Tex") Family Farms, Inc. is a diversified family-owned business with extensive agricultural, energy and land holdings spanning the gulf coast from Brownsville to Ocean Springs and often ranging more than 100 miles inland. During the late 1990s, Zy-Tex built a handful of golf courses on its land holdings, initially as retreats for employees, family and friends. The consistent excellence of the courses attracted national attention, and Zy-Tex was besieged with offers from financial players seeking to capitalize on the boom in resort vacation homes. After rebuffing a number of offers Zy-Tex accepted a proposal from Smith-Carter-Henry Money Opportunities Fund ("SCHMO") in which the two companies would partner in the development of golf resorts around the existing courses and on additional properties.

Coastal Links, LLC

To accomplish this in November 2006, Zy-Tex and SCHMO formed Coastal Links, LLC, a Texas limited liability company. Contemporaneously with the formation of Coastal Links, Zy-Tex contributed land with an appraised value of $500 million, SCHMO contributed cash of $350 million. Coastal Links entered into a $400 million senior secured loan agreement with a multi-member bank group agented by Last Resort Bank. To provide operating funds and to fund future development costs, Coastal Links then distributed $250 million to Zy-Tex.

The LLC Agreement for Coastal Links provided that SCHMO and Zy-Tex were the sole members, and provided for a two person management committee responsible for running the business. The LLC Agreement waived fiduciary duties of the members to each other and of the management committee to either member. Routine matters were delegated to officers of the business, but decisions involving more than $5 million were reserved to the management committee. The LLC Agreement required both the Zy-Tex appointee and the SCHMO appointee to vote in favor of a decision involving more than $5 million.

Coastal Links never made an affirmative election regarding its treatment of federal income tax purposes and thus was treated as a partnership for federal income tax purposes.

Relationships with the Last Resort Lenders

Between 2006 and 2008 Coastal Links developed numerous golf courses, winning awards and accolades. By February 2008 the $400 million facility had been fully utilized. Based on an internal appraisal valuing the assets at $1 billion, the credit agreement was amended to increase the facility to $700 million, and all but $50 million of additional funds were drawn and utilized. In September 2008, Lehman failed, the markets crashed, and the market for vacation homes evaporated overnight.

A few months later, Coastal Links had roughly $100 million in obligations coming due but did not have enough cash to cover them. Coastal Links approached Last Resort to once again amend the credit agreement, increasing the facility to $800 million. Last Resort agreed to do this only if it could obtain guarantees from two of Coastal Links' subsidiaries, XX Inc. and YY Inc., to which Coastal Links, XX Inc., and YY Inc. agreed. Prior to finalizing the amendment, Last

Resort also sought a solvency opinion to show that Coastal Links was solvent both before and after the transaction. To do this, Last Resort hired a financial advisory firm on a contingent fee basis. The financial advisors considered data supplied by Coastal Links as well as Coastal Links' company projections that business would pick up significantly in the next 12-18 months and issued the opinion. Finally, really clever lawyers drafted a savings clause provision executed by all of these sophisticated parties, precluding a fraudulent transfer attack. The deal closed, the subsidiary companies guaranteed Coastal Links' additional debt, and Coastal Links distributed the money to certain of its creditors.

By February 2009, the value of Coastal Links' portfolio was estimated to be $400 million, although buyers were virtually nonexistent due to the state of the credit markets. Last Resort issued a notice of default, citing, breaches of numerous financial covenants.

The existing lender will not continue to advance funds under the existing credit facility, but a subset of the existing lenders are willing to provide a priming post-petition loan, to which the other lender will consent assuming acceptable provision for the adequate protection can be negotiated. Management believes the deflated asset prices are temporary but recovery may take two to three years.

Coastal Links was generally current on its payables prior to the notice of default usually paying within 30 days of the due date. In addition to the bank debt, Coastal Links has lienable claims of approximately $3 million, unpaid property taxes of approximately $10 million, and unsecured trade obligations of approximately $6 million. Coastal Links is party to numerous executory contracts and about 20 unexpired leases, primarily for space for its sales offices.

Possible Sale

Coastal Links has an offer for its most highly-rated property for $50 million cash from a credible buyer; however, the buyer does not want to go through an auction process. The property includes a five-acre tract on which sits a maintenance facility subject to a long-term lease in favor of a non-affiliated neighboring golf community. The buyer desires to buy the property free and clear of the lease.

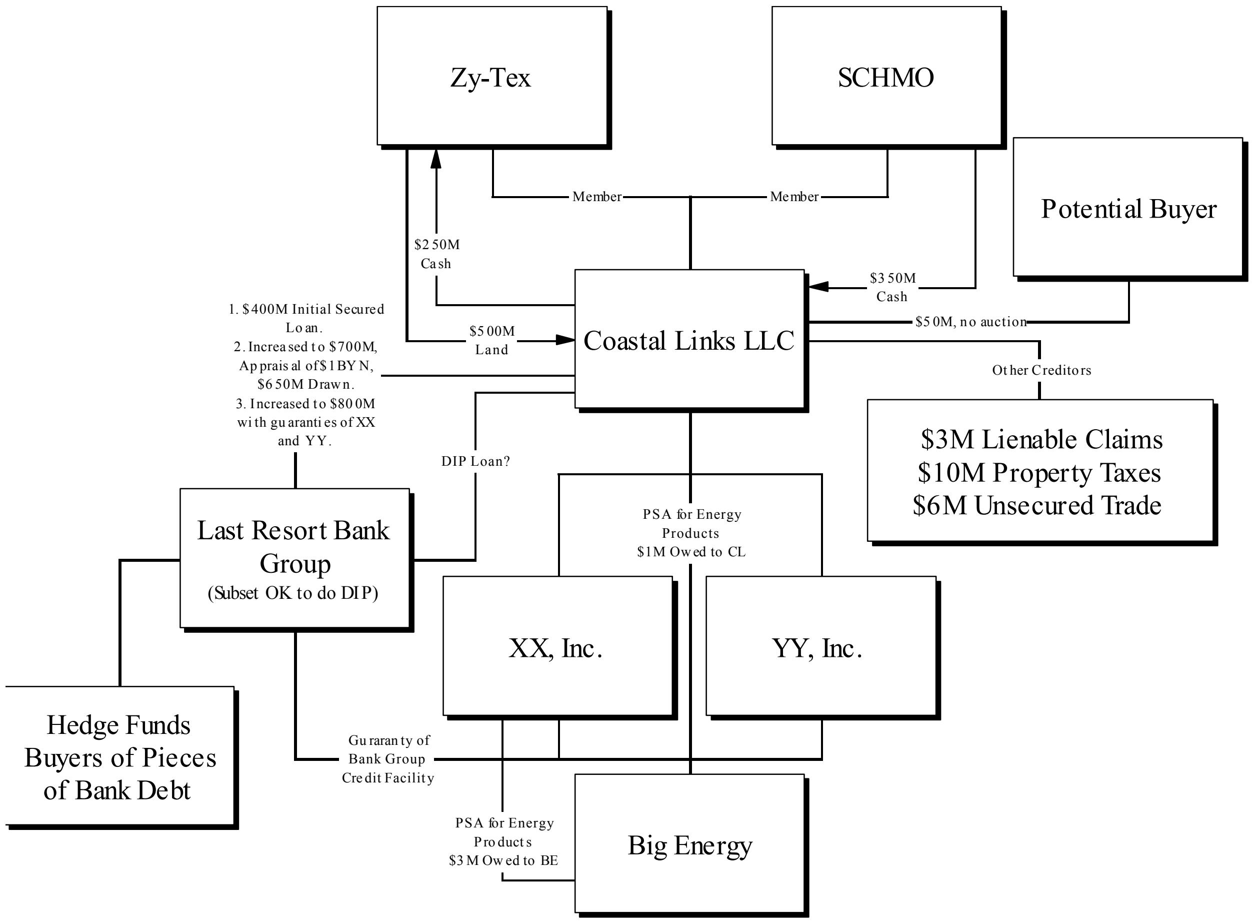
Plan Considerations

Competing hedge funds have been acquiring pieces of the bank debt. The lenders disagree among themselves regarding valuation and capital structure.

Setoff

Big Energy had contracts with Coastal Links and XX Inc. for the sale and purchase of energy products. The contracts contained clauses explicitly obligating all affiliates for each other's debt. Eventually, both Coastal Links and XX Inc. filed bankruptcy, and as of the petition date, Big Energy owed Coastal Links $1 million, but XX Inc. owed Big Energy $3 million. Big Energy wants to setoff the amount it owes to Coastal Links against the amount owed to it by XX Inc.

Viewed schematically:



<u>**DISCUSSION POINTS**</u>[1]

1. What factors will Coastal Links need to prove to confirm a plan of reorganization under Bankruptcy Code §1129?

2. Can a plan of reorganization that pays creditors in full still be found to be proposed in bad faith under Bankruptcy Code §1129(a)(3)?

3. If Coastal Links is sold under a plan of reorganization instead of Bankruptcy Code §363 and the secured lenders vote against the plan and object, do secured lenders have the right to credit bid in?

4. Can the secured lenders "gift" sale proceeds to equity holders or unsecured creditor classes over the objection of an impaired class of creditors with a higher priority?

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[1] Special thanks to Brad Foxman, Associate of Vinson & Elkins LLP for his help in preparing this paper. Portions of this paper were presented to the Dallas Bankruptcy and Commercial Law Section in February of 2010.

5. Can non-debtor parties such as Zy-Tex, SCHMO, Last Resort Bank, and the other lenders obtain releases or exculpation from non-debtor third parties under a proposed plan of reorganization?

6. What is the impact of Bankruptcy Code §1111(b)? Is this section triggered under a sale pursuant to a plan of reorganization? What is a sale pursuant to a plan of reorganization?

7. Can a credit agreement with the lenders be reinstated over their objection? If so, what conditions must Coastal Links satisfy?

8. If Coastal Links seeks exit financing, what issues may arise and need to be dealt with as part of plan confirmation?

9. If the confirmation order or plan are legally defective, can the confirmation order become final as to all parties served with the plan and notice of hearing and survive a motion for reconsideration?

10. If the plan of reorganization does not provide for a cause of action to survive confirmation, will the debtors have standing to pursue the cause of action after confirmation?

11. If a plan of reorganization is confirmed, what type of issues will an appellate court decline to review under the doctrine of equitable mootness?

12. Could mediation be helpful to the parties in resolving confirmation issues? If so, should mediation be conducted globally or only as to discrete issues with parties affected by those issues? If so, which issues and parties would be most appropriate for mediation?

DISCUSSION POINTS LEGAL ANALYSIS

Bad Faith and 100% Plans

Despite the apparent contradiction, 100% payout plans have still been found to have been proposed in bad faith. While admittedly rare, a few cases indicate that simply because a plan proposes to pay all of its creditors in full, this does not insulate the plan from meeting the other provisions of Bankruptcy Code § 1129, namely Bankruptcy Code § 1129(a)(3) which requires that the plan has been proposed in good faith and not by any means forbidden by law.[2]

Big Shanty Land Corp. v. Comer Properties, Inc., 61 B.R. 272 (N.D.Ga. 1985).

In *Big Shanty*, the debtor proposed a plan of reorganization but failed to disclose certain documents that revealed the plan was favorable to one creditor/prospective buyer and that detailed the debtor had entered into certain side agreements with that prospective buyer. A competing plan was also filed by a separate potential purchaser. Under either plan all creditors would be paid in full given the purchase price for the property. At the disclosure statement

[2] Interestingly, all cases that were found addressing this issue were single asset real estate cases. Query whether this is a trend in that area, or whether single asset real estate cases simply lend themselves more to bad faith issues.

hearing, the full nature of the transaction proposed by the debtor, including the side agreements, was revealed. The debtor's creditors then voted in favor of the debtor's plan. The court ultimately held that the debtor owed the bankruptcy court and its creditors a duty of candor, and there was ample evidence that the debtor breached that duty. Thus, the court denied confirmation of the debtor's plan, despite the favorable creditor vote and the fact the plan would pay all creditors in full.

In re Natural Land Corp., 825 F.2d 296 (11th Cir. 1987).

In this oft-cited seminal case, the Eleventh Circuit held that "the taint of a petition filed in bad faith must naturally extend to any subsequent reorganization proposal; thus, any proposal submitted by a debtor who filed his petition in bad faith would fail to meet section 1129's good faith requirement." In this case, the debtor acquired the subject property on the same date the state court entered a foreclosure order, did not have any paid employees, had never previously engaged in business and had no legitimate creditors. Thus, the court easily affirmed the conclusion that the debtor had filed is bankruptcy petition in bad faith.

In re 652 West 160th LLC, 330 B.R. 455 (S.D.N.Y. 2005).

In this case, the debtor filed for chapter 11 protection on the eve of foreclosure for unpaid past due taxes. After filing for bankruptcy protection, the debtor proceeded to ignore deadlines, made unauthorized post-petition payments and filed false operating reports with the court. As a single asset real estate case, the debtor's plan of reorganization was due 90 days after the petition date; the debtor did not file its plan until several creditors had filed motions for relief from the automatic stay. The debtor also listed all of his creditors on his schedules as disputed and obtained a bar date order. After the bar date expired, the debtor amended his schedules to change all of the prior debt from disputed to undisputed. Additionally, the debtor made payments of interest to an unsecured prepetition creditor and failed to disclose those payments on its monthly operating report. The debtor asked the court to excuse these defaults because it filed a plan of reorganization that proposed to pay all creditors in full and accomplished a reorganization of the debtor. The court held, after reviewing all factors, that the debtor filed and prosecuted the case in bad faith, and such "bad faith is not cured by [the debtor's] subsequent filing of a reorganization plan." Citing *In re Natural Land Corp.*, the court noted that the taint of a petition filed in bad faith extends to any subsequent reorganization proposal. The court did recognize, however, that a "court can [not] lightly ignore a plan that pays all creditors in full," although there were no real creditors in this case other than the city of New York.

Plan Sales and Credit Bidding in Plan Sales

A proposed plan of reorganization must provide adequate means for the plan's implementation which can include the sale of all or any part of the property of the estate, either subject to or free and clear of any lien.[3] If a plan proposes to sell property of the estate free and

[3] 11 U.S.C. §1123(a)(5)(D).

clear of a lien over the objection of a secured creditor, the plan must be "fair and equitable" as required under Bankruptcy Code §1129(b)(1) in order to "cramdown" the secured creditor.[4]

The Bankruptcy Code lists three alternative requirements to be fair and equitable with respect to a secured creditor: (i) that the secured creditor retain the liens securing its claims, whether the property subject to its liens is retained by the debtor or is transferred to another entity, to the extent of the allowed amount of its claims and that the secured creditor receive on account of its claim deferred cash payments totaling at least the allowed amount of its claim, as of the effective date of the plan, of at least the value of the secured creditor's interest in the estate's interest in the property; (ii) for the sale, subject to credit bidding, of any property that is subject to the secured creditor's liens free and clear of such liens, the liens attach to the proceeds of the sale and are treated in accordance with clause (i) or (iii); or (iii) for the realization by the secured creditor of the indubitable equivalent of its claims.[5] This raises an issue as to whether a plan that proposes to cramdown a secured creditor under subparagraph (i) or (iii) is required to permit a secured creditor to credit bid in order to be fair and equitable.

In re Philadelphia Newspapers, LLC, 2010 WL 1006647 (3rd Cir. 2010).

The debtors proposed a plan that provided that substantially all of the debtors' assets would be sold at a public auction free of liens. The proceeds of the auction were to go to the secured lenders, as would a valuable real property interest. Accordingly, the debtors filed a motion to approve bid procedures. As part of the motion, the debtors sought to preclude the lenders from "credit bidding" for the assets. Instead, the debtors insisted that any qualified bidder fund its purchase with cash. The lenders objected, and the Bankruptcy Court approved a revised set of bid procedures without the ban on credit bidding. The revised bid procedures specifically allowed the lenders to bid their secured debt. The Bankruptcy Court's ruling was appealed to the District Court. The District Court reversed the Bankruptcy Court as it disagreed with the Bankruptcy Court's interpretation of Bankruptcy Code § 1129(b)(2)(A) and held that the Bankruptcy Code provides no legal entitlement for secured lenders to credit bid at an auction sale held pursuant to a reorganization plan.

The District Court relied on the plain language of § 1129(b)(2)(A), which provides three distinct routes to plan confirmation: retention of liens and deferred cash payments under subsection (i), a free and clear sale of assets subject to credit bidding under subsection (ii), or provision of the "indubitable equivalent" of the secured interest under subsection (iii). The court reasoned that these three routes were independent prongs, separated by the disjunctive "or," and therefore each was sufficient for confirmation of a plan as "fair and equitable" under the Bankruptcy Code. Because the right to credit bid was not incorporated into subsection (iii) as it was in subsection (ii), the District Court reasoned that Congress did not intend that a debtor who proceeded under the third prong would be forced to permit credit bidding. Instead, subsection (iii) required only that a debtor provide secured lenders with the "indubitable equivalent" of the secured creditor's secured interest in the assets. The District Court pointed out that this broad language served as an "invitation to debtors to craft an appropriate treatment of a secured

[4] 11 U.S.C. §1129(b)(1).

[5] 11 U.S.C. §1129(b)(2)(A).

creditor's claim, separate and apart from the provisions of subsection (ii)." As such, a plan sale is potentially another means to satisfy this indubitable equivalent standard.

The Third Circuit upheld the District Court's ruling. The court reasoned that this approach recognizes that Congress' use of "or" in Bankruptcy Code § 1129(b)(2)(A) was not without purpose and that to guide courts in interpreting this standard, Congress provided examples: a transfer of lien-encumbered assets with deferred cash payments, a free and clear sale of assets subject to credit bidding, or any other disposition that provides lenders with the "indubitable equivalent" of their secured interest. The final option elevates a fair return to the lenders over the methodology the debtor selects to achieve that return, and invites debtors to craft an appropriate treatment of a secured creditor's claim, separate and apart from the provisions of subsection (ii). The court held that it had no statutory basis for concluding that such flexibility should be curtailed.

The court further held that the language of § 1129(b)(2)(A) is unambiguous, both as to the non-exclusive enumeration of permissible treatments of secured claims, and the inclusion of a broad option to provide the "indubitable equivalent" of secured interests. The court held that this interpretation is consistent with Congressional intent. However, the court limited its holding by stating that the holding only precludes a lender from asserting that it has an absolute right to credit bid when its collateral is being sold pursuant to a plan of reorganization and that in some instances credit bidding may be required in order for a plan to be fair and equitable. In addition, a lender can still object to plan confirmation on a variety of bases, including that the absence of a credit bid did not provide it with the "indubitable equivalent" of its collateral.

Bank of New York Trust Co. v. Official Unsecured Creditors' Committee (In re Pacific Lumber Co.), 584 F.3d 229 (5th Cir. 2009).

The Fifth Circuit had previously reached the same conclusion as the Third Circuit in *Philadelphia Paper*. The transaction in *Pacific Lumber* was an inside transfer of assets to the reorganized entities, free and clear of the liens, which the Fifth Circuit determined was a sale under the Code. In exchange, the secured lenders received the full cash equivalent of their undersecured claims but were not permitted to bid their credit to attain possession of the assets. The secured lenders objected to the confirmation of the plan based on their inability to credit bid.

In analyzing the confirmation, the Fifth Circuit required the creditors to do more than show that clause (ii) of Bankruptcy Code § 1129(b)(2)(A)theoretically applied to this transaction. The court reasoned that the creditors could not demonstrate the exclusive application of subsection (ii) because the three subsections of § 1129(b)(2)(A) were alternatives and "not even exhaustive" of the ways in which a debtor might satisfy the "fair and equitable" requirement. Thus, even though the debtors' proposed asset transfer was a "sale" under the Bankruptcy Code, the court did not limit the debtors to confirmation under subsection (ii). Rather, the court examined whether the transaction satisfied the requirements of subsection (iii). Because the proposed cash payout of the value of the collateral provided the secured lenders with the "indubitable equivalent" of their claims, the plan was confirmable under subsection (iii) notwithstanding its structure as an asset sale and the exclusion of any right of the secured lenders to credit bid.

In summary, the Fifth Circuit took the more flexible approach, consistent with the disjunctive nature of the statute, that a plan could be confirmed so long as it met any one of the three subsections' requirements, regardless of whether the plan's structure more closely resembled another subsection.

Gift Plans

The absolute priority rule states that "the holder of any claim or interest that is junior to the claims of [an impaired dissenting] class will not receive or retain under the plan on account of such junior claim or interest any property."[6] The language of the statute makes it clear that a plan cannot give property to junior claimants over the objection of a more senior class that is impaired. Despite the plain language of the absolute priority rule, several cases have followed the "MCorp-Genesis" rule that allows creditors to distribute proceeds from the bankruptcy estate to other claimants without violating the absolute priority rule.[7] In addition, frequently senior secured creditors will "pay to play" by giving a distribution to junior claimants in the context of a sale under Bankruptcy Code § 363 in order to ensure the success of the sale.

In re World Health Alternatives, 344 B.R. 291 (Bankr. Del. 2006).

The debtors in a chapter 11 case moved for entry of an order approving a settlement agreement among the official committee of unsecured creditors, debtors, and a pre-petition lender with a first lien on all of the debtors' assets. The U.S. Trustee (UST) opposed the motion. None of the priority creditors, nor any other party in interest other than the UST, objected to the settlement. The court held that it had the authority to approve a compromise or settlement pursuant to Fed. R. Bankr. P. 9019(a) and that whether to approve a settlement was within its discretion. To approve the settlement, the court needed to conclude that the settlement was within the reasonable range of litigation possibilities. The principle motivating the UST's two objections was the same—the committee was not authorized to borrow and/or compromise estate claims and causes of action at the expense of priority creditors in chapter 11. The court held that the payout to the general unsecured creditors was a carve-out of the secured creditor's lien and not estate property. It therefore found that the Bankruptcy Code did not prohibit this arrangement. Overall, it found that the record as a whole suggested that only the lender would have benefited if the letter agreement was not approved. The court acknowledged that the UST

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[6] 11 U.S.C. § 1129(b)(2)(B)(ii).

[7] *See In re SPM Manufacturing Corp.*, 984 F.2d 1305 (1st Cir. 1993) (permitting senior secured creditors to share bankruptcy proceeds with junior unsecured creditors while skipping over priority tax creditors in a chapter 7 liquidation); *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 602, 617-18 (D.Del. 2001) (allowing senior secured lenders to (1) give up a portion of their proceeds under the reorganization plan to holders of unsecured and subordinated claims, without including holders of punitive damages claims in the arrangement, and (2) allocate part of their value under the plan to the debtor's officers and directors as an employment incentive package); *In re MCorp Fin., Inc.*, 160 B.R. 941, 948 (S.D.Tex. 1993) (permitting senior unsecured bondholders to allocate part of their claim to fund a settlement with the FDIC over the objection of the junior subordinated bondholders).

raised valid questions. Nevertheless, it concluded that the settlement was in the interest of the estate, and the motion for entry of an order approving the settlement agreement was granted.

In the matter of Genesis Health Ventures, Inc., 266 B.R. 591 (N.J. 2001).

Genesis Health held that a plan did not violate the absolute priority rule when it provided for a distribution to certain equity holders and unsecured creditors. This plan provided for the officers and directors of the debtor to receive a distribution of stock, forgiveness of loans, waivers, releases, and exculpations "in essence on account of their prepetition equity." The court held that the plan did not violate the absolute priority rule because the court had already approved various management benefits and the additional management benefits were derived from value otherwise allocable to senior lenders. The court also allowed the secured lenders to give up a portion of their proceeds under the reorganization plan to holders of unsecured and subordinated claims without including holders of punitive damages claims in the arrangement.

In re Armstrong World Industries, Inc., 432 F.3d 507 (3rd Cir. 2005).

In *Armstrong*, the plan provided for the transfer of warrants (to purchase the new equity of the debtor) from a class of unsecured creditors to the equity holders over the objection of another class of unsecured creditors. The plan proposed that the class of unsecured creditors would automatically receive and transfer the warrants to the former equity holders should the other unsecured class fail to vote for the plan. The court distinguished cases following the MCorp-Genesis doctrine and held that the plan violated the absolute priority rule. The *Armstrong* court distinguished *SPM*[8] in three ways: (1) *SPM* involved a distribution under chapter 7, which did not trigger 11 U.S.C. § 1129(b)(2)(B)(ii); (2) the senior creditor in *SPM* had a perfected security interest, meaning that the property was not subject to distribution under the Bankruptcy Code's priority scheme; and (3) the distribution was a "carve out," a situation where a party whose claim is secured by assets in the bankruptcy estate allows a portion of its lien proceeds to be paid to others. Similarly, the *Armstrong* court distinguished *Genesis Health* because *Genesis Health* involved property subject to the senior creditors' liens that was "carved out" for the junior claimants. In addition, *Armstrong* distinguished *MCorp* on its facts because the senior unsecured creditor transferred funds to the FDIC to settle pre-petition litigation, and there was not an equivalent settlement of prepetition litigation in *Armstrong*. The *Armstrong* court held that the MCorp-Genesis line of cases does not stand for the proposition that creditors are generally free to do whatever they wish with the bankruptcy proceeds they receive and that creditors must also be guided by the statutory prohibitions of the absolute priority rule. The court held that the plan at issue violated the absolute priority rule.

In re OCA, Inc., 357 B.R. 72 (E.D. La. 2006).

OCA followed a similar line of reasoning as *Armstrong*. In *OCA,* the plan provided for payment in full to the secured creditor. The plan also provided for payments to general

[8] *See In re SPM Manufacturing Corp.*, 984 F.2d 1305 (1st Cir. 1993) (permitting senior secured creditors to share bankruptcy proceeds with junior unsecured creditors while skipping over priority tax creditors in a chapter 7 liquidation).

unsecured creditors, potentially 100% over time, but the plan did not provide for any interest on the allowed general unsecured claims and thus general unsecured claims were not paid in full. The issue was a proposed settlement that the senior lender extended to the equity holders in the form of certain participation rights. The plan provided that the senior lender waived its right to receive up to 15% of the new common stock that it was entitled to receive under the plan in favor of the equity holders in exchange for their agreeing not to raise objections to the plan and to issue a press release setting forth their support of the plan. The court held that the participation rights were similar to the warrants in *Armstrong*, and that granting participation rights to the equity holders violated the absolute priority rule.

In re Journal Register Co, 2009 Bankr. Lexis 1737 (Bankr. S.D.N.Y. 2009).

The debtor proposed a reorganization plan which provided a means for payment of a gift from secured lenders to unsecured trade creditors, and provided for an incentive plan which permitted bonuses to employees who achieved stated goals. The debtors moved for confirmation of the plan, and certain creditors objected to confirmation. An unsecured creditor contended that the gift to trade creditors unfairly discriminated against other unsecured creditors, and other creditors argued that the incentive plan was an impermissible payment of unreasonable administrative expenses. Holders of stock in the debtors also asserted that the plan was not feasible nor in the best interests of creditors. The court first held that the gift payment was not improper since the payment was from a trade account which was property of the lenders rather than the estate, the payment was to be made outside the plan, unsecured creditors otherwise shared equally in the estate distribution, and the gift was warranted to ensure the post-confirmation goodwill of the trade creditors. Further, the incentive plan provided for performance bonuses rather than prohibited retention incentives, the bonus payments were not being paid as administrative expenses to preserve the estate, and the secured lenders would pay the bonuses with no effect on unsecured creditors. Also, credible financial projections indicated that the plan was feasible, and all creditors would receive more under the plan than in a liquidation of the debtors. Therefore, the objections were overruled, and the debtors' reorganization plan was confirmed.

Release and Exculpation Provisions

Bank of New York Trust Co. v. Official Unsecured Creditors' Committee (In re Pacific Lumber Co.), 584 F.3d 229 (5th Cir. 2009).

The plan released various creditors from liability—other than for willfulness and gross negligence—related to proposing, implementing, and administering the plan. The Bankruptcy Code states, however, that "discharge of a debt of the debtor does not affect the liability of any other entity on . . . such debt." 11 U.S.C. § 524(e). The court stated that "in a variety of contexts, this court has held that Section 524(e) only releases the debtor, not co-liable third parties." The court further stated that "[t]hese cases seem broadly to foreclose non-consensual nondebtor releases and permanent injunctions."

The court distinguished the two cases that cast doubt on this categorical prohibition against non-debtor releases by stating that "these cases are distinguishable because they concern the res judicata effect of non-debtor releases, not their legality." In *In Republic Supply Company* *v. Shoaf*, 815 F.2d 1046 (5th Cir. 1987), the court had previously ruled that res judicata barred a debtor from bringing a claim that was specifically and expressly released by a confirmed reorganization plan because the debtor failed to object to the release at confirmation. The court distinguished the current case as an appeal of the confirmation order, not a separate action barred by the exculpation provision collaterally attacking the legality of the release.

Similarly, the court held that their opinion in *Applewood Chair Co. v. Three Rivers Planning & Development District*, 203 F.3d 914, distinguished *Shoaf* by holding that the release at issue there was not specific. *Applewood* did not find specific releases satisfy § 524(e), instead it held that the court would only give res judicata effect to specific clauses. The court further reasoned that other cases permitting third party releases all concerned global settlements of mass claims against the debtors and co-liable parties, and that now the Bankruptcy Code permits bankruptcy courts to enjoin third-party asbestos claims under certain circumstances which suggests non-debtor releases are most appropriate as a method to channel mass claims toward a specific pool of assets.

The court agreed, however, with courts that have held that 11 U.S.C. § 1103(c), which lists the creditors' committee's powers, implies committee members have qualified immunity for actions within the scope of their duties. The court found that the scope of protection in the plan, which does not insulate them from willfulness and gross negligence, was adequate. Consequently, the court required that the non-debtor releases must be struck except with respect to the creditors committee and its members.

In re Pilgrim's Pride Corporation, Case No. 08-45664-DML-11 (2010).

Upon review of the *Pacific Lumber* case, the court held that the holding in *Pacific Lumber* could not reasonably be read to limit its ruling to the facts of that case. In this case, the court held that the plan could not bar claims against co-liable third parties, even where the debtors indemnified the third party. The court qualified its holding by stating that while the court may not prevent suits against third parties even if the debtors have indemnified them, the court could provide relief from such suits where the debtors accept liability and wish to avoid or minimize the cost of defense. The court ruled that it should channel to itself claims that may be asserted against the debtors' management (including its board of directors and chief restructuring officer) and professionals based on their conduct in pursuit of their responsibilities during the chapter 11 cases.

The court also held that the plan's releases of the committee and its professionals complied with the law because they do not extend to immunity from liability for willful misconduct or ultra vires activity.

In re Crusader Energy Group Inc. Case No. 09-31797-bjh-11 (2009).

In this case, the co-proponents of the plan (including the debtors, the debtors' first and second lien lenders, and the official committee of unsecured creditors) proposed a plan with releases of third parties whereby creditors could chose to "opt-out" of the release on their ballot.

The court raised *Pacific Lumber* issues regarding "opt-out" releases, and the co-proponents modified the plan so that creditors had to "opt-in" on their ballot to release the third parties from liability. The court confirmed the plan with the "opt-in" provisions.

The plan included a finding that any causes of action under the first lien credit facilities are property of the debtors' bankruptcy estates, and by the terms of the release such causes of action are barred from being asserted in any manner by the debtors, reorganized debtors, buyers, holders of claims against the debtors, or the current or former holders of equity interests of the debtors. This finding could have the practical effect of preventing any creditors or former equity holders from bringing derivative claims against the first lien creditors without constituting a release that could be barred by the Pacific Lumber decision.

1111(b) Dynamics-What is a Sale?

Bankruptcy Code § 1111(b)(1)(B) contains a restriction upon the exercise of the section 1111(b)(2) election to have an entire undersecured claim treated as fully secured.[9] Bankruptcy Code § 1111(b)(1)(B)(ii) states that a class may not exercise the election if the holder of a claim of the class has recourse against the debtor on account of the claim and the property is sold under section 363 of this title or is to be sold under a plan.[10]

Whether a § 1111(b) election can be made often turns upon whether the property securing the creditor's claim is being "sold" under § 363 or a plan. The Fifth Circuit recently provided guidance as to what constitutes a sale under the Bankruptcy Code.

Bank of New York Trust Co. v. Official Unsecured Creditors' Committee (In re Pacific Lumber Co.), 584 F.3d 229 (5th Cir. 2009).

In *Pacific Lumber*, the Fifth Circuit analyzed what constitutes a "sale" as such term is used in Bankruptcy Code § 1129(b)(2)(A)(ii). The debtors' proposed plan of reorganization contemplated (i) a transfer of the debtors' assets to newly-formed entities; and (ii) the conversion of a secured creditor's debt owed by the debtors to equity in the newly-formed entities. An opponent of the plan asserted that the transaction was a "transfer" rather than a "sale" of the assets. The Fifth Circuit explained the circumstances and then held as follows:

> MRC, a competitor of Palco, joined with Palco's creditor Marathon to offer cash and convert debt into equity in return for taking over both Palco and Scopac. New entities wholly owned by MRC and Marathon received title to the assets in exchange for this purchase. That the transaction is complex does not fundamentally alter that it involved a "sale" of the Noteholders' collateral. See Black's Law Dictionary 1337 (7th ed. 1999). Section 1123(a)(5), cited by the

[9] 11 U.S.C. 1111(b)(1)(B).

[10] 11 U.S.C. 1111(b)(1)(B(ii).

court, lists "transfers" and "sales" among various devices a debtor may employ to accomplish reorganization, and "transfer" is defined broadly in 11 U.S.C. § 101(54). The terms used in these provisions are descriptive and have no independent legal significance. Further, as the Noteholders point out, every sale of property involves a transfer, but not every transfer is a sale. Here, a sale occurred.

Reinstatements/Impairment and Exit Financing

Reinstatement comes from the principle that creditors cannot be elevated to a better position than their prepetition legal entitlements.[11] To that end, Bankruptcy Code §§ 1123 and 1129 provide that a chapter 11 plan of reorganization may in appropriate circumstances treat certain obligations as unimpaired and reinstate the terms of a prepetition debt obligation.[12]

To reinstate a prepetition obligation, a plan must de-accelerate any acceleration of such debt, reinstate the original maturity applicable to the debt, and provide for the cure of certain defaults that may have occurred.[13] Bankruptcy Code § 1124 allows a debtor to cure any defaults, nullifying any consequences of such defaults, and returning the parties to pre-default conditions.[14] When a debt obligation is reinstated, a creditor is "thereby given the full benefit of his original bargain."[15]

In re Charter Communications, 419 B.R. 221 (Bankr. S.D.N.Y. 2009).

A confirmation hearing was held on a pre-packaged chapter 11 plan where the debtors sought to restructure their debt while reinstating senior loans that they had obtained on favorable terms. Charter sought to remove more than eight billion dollars from its capital structure, to secure the investment of approximately $1.6 billion in new capital through a rights offering back-stopped by a group of bondholders that would be appointing members of the reconstituted board, and to reinstate a senior secured credit facility and certain junior secured debt with the objective of preserving favorable existing credit terms and saving interest expense that otherwise would be payable if the senior secured debt had to be replaced at then current market pricing.

The senior lenders asserted that reinstatement was not an available option due both to existing events of default relating to the prepetition financial condition of certain holding

[11] *Butner v. United States*, 440 U.S. 48, 55 (1979).

[12] 11 U.S.C. §§ 1123(b)(1), 1123(b)(5), 1129(a)(1). *See also* 7 Collier on Bankruptcy ¶ 1124.03 (15th ed. Rev.) (explaining that the Bankruptcy Code "permits the plan to reinstate the original maturity of the claim or interest as it existed before the default without impairing the claim or interest").

[13] 11 U.S.C. § 1124(2).

[14] *See Southland Corp. v. Toronto Dominion (In re Southland Corp.)*, 160 F.3d 1054, 1058 (5th Cir.1998).

[15] *In re Gillette Assocs., Ltd.*, 101 B.R. 866, 875 (Bankr.N.D.Ohio 1989).

companies within the debtors' corporate structure and to a change of control default that the lenders claimed would occur on the effective date of the debtors' proposed plan of reorganization in violation of covenants in the credit agreement mandating that a certain individual retain a stipulated minimum percentage of voting control. The senior lenders complained that accordingly their secured claims were impaired and that their debt could not be reinstated. The senior lenders openly admitted that their goal was to obtain an increased interest rate that reflects what could be charged for a new loan in the then current market for syndicated commercial loans. The senior lenders had been paid everything that they were owed under the existing facility and had even received default interest during the bankruptcy cases.

The basis for the senior lenders' objection comprised three alleged defaults under the credit agreement. The lenders asserted that (i) the holding companies were unable to pay their debts as they become due in violation of the credit agreement; (ii) the consummation of the plan would cause a change of control to occur in violation of the credit agreement; and (iii) an acceleration of debt of the holding companies due to the filing of the bankruptcy cases had caused a cross-acceleration default under the credit agreement. After a review of the facts and circumstances of the case, the court found that none of these defaults existed, and that the credit agreements could be reinstated.

Official Committee of Equity Security Holders v. Spectrum Jungle Labs Corp., 2009 WL 2432163 (W.D.Tex.2009); *In re Spectrum Jungle Labs Corp.,* 09-50455-rbk (2009).

Spectrum Brands filed under chapter 11, and the debtors filed a proposed plan which was subsequently confirmed. The debtors obtained a $242 million asset-based exit loan facility pursuant to a credit agreement. The equity committee, whose interests were canceled pursuant to the terms of the plan, filed a notice of appeal of the confirmation order on a variety of grounds not related to the exit facility. The equity committee filed a motion to stay the confirmation order pending appeal, but the District Court concluded that the equity committee had not carried its burden of proof and denied the stay motion. The Fifth Circuit subsequently denied the equity committee's emergency motion for stay pending appeal. Because the District Court and the Fifth Circuit denied the stay motions pending before them, the plan, by its terms became effective. After the effective date, the equity committee moved to withdraw its appeal which was granted. The credit facility became effective, but not until after appeals were dismissed and the confirmation order became effective.

Plan Finality

United Student Aid Funds v. Espinosa, 559 U.S. ___ (2010)(slip opinion).

The debtor filed under chapter 13, and in his plan he proposed to pay only the principal amount of his student loan and discharge the accrued interest. The lender received a copy of the plan, and in response filed a proof of claim for the principal and interest due on the loan. The Bankruptcy Court confirmed the plan without an adversary proceeding to determine undue hardship despite the Code's confirmation requirements. After confirmation, the chapter 13 trustee mailed the lender a notice informing the lender that the amount claimed in its proof of claim differed from the amount listed for payment in the plan. That notice also informed the lender that if it wanted to dispute the treatment of its claim, the lender had the responsibility to notify the trustee within 30 days. After the debtor completed his plan, the lender attempted to collect the remaining debt. The lender filed a motion under FRCP 60(b)(4) to set aside as void the confirmation order. This motion was filed approximately ten years after the plan was confirmed.

Federal Rule of Civil Procedure Rule 60(b)(4)(incorporated into bankruptcy cases by Bankruptcy Rule 9024) permits a court to relieve a party from a final order or judgment if that order or judgment is void. The lender argued that the confirmation order was void because (i) the lender was denied due process because it had not been served with a summons and complaint in an adversary proceeding as required by the Bankruptcy Rules and (ii) the Bankruptcy Court lacked statutory authority to confirm the plan absent a finding of undue hardship.

The Supreme Court held that because the lender had actual notice and did not object to the plan or timely appeal the confirmation order, the order was enforceable. The court found that the two notices received by the lender satisfied the lender's due process rights because the notice was reasonably calculated to apprise the lender of the pending action and afford the lender an opportunity to present their objections.

While the court agreed that the Bankruptcy Court's confirmation of the plan was legal error, the court held that the error did not void the order. The court stated that a judgment is not void simply because it was erroneous and that Rule 60(b)(4) applies only when a judgment is premised on "a certain kind of jurisdictional error" or on a "violation of due process that deprives a party of notice or the opportunity to be heard."

Post Confirmation Standing of the Debtors

In re Dynasty Oil & Gas, 540 F3d 351 (5th Cir. 2008)

In this case, the Court held that Dynasty, a reorganized debtor, did not have standing to pursue claims based on pre-confirmation management of the estate's assets. The court reasoned that upon confirmation of the plan, the estate ceased to exist, and Dynasty lost its status as a debtor in possession. At that time, Dynasty's authority to pursue claims as though it were a trustee also expired.

The court acknowledged that in some cases the Code allows a reorganized debtor to bring a post-confirmation action on a claim or interest belonging to the debtor or to the estate. A debtor may preserve its standing to bring such a claim but only if the plan of reorganization expressly provides for the claim's retention and enforcement by the debtor. For a debtor to preserve a claim, the plan must expressly retain the right to pursue such actions. The reservation must be specific and unequivocal. If a debtor has not made an effective reservation, the debtor has no standing to pursue a claim that the estate owned before it was dissolved.

The debtor must also put its creditors on notice of any claim it wishes to pursue after confirmation. Such notice allows creditors to determine whether a proposed plan resolves matters satisfactorily before they vote to approve it — "absent 'specific and unequivocal' retention language in the plan, creditors lack sufficient information regarding their benefits and potential liabilities to cast an intelligent vote." Nor can the bankruptcy court's retention of jurisdiction over a given type of claim preserve a debtor's standing to pursue it. The court held that if Dynasty had wanted to bring a post-confirmation action for maladministration of the estate's property during the bankruptcy, it was required to state as much clearly in the Plan.

The Court found that neither the plan's blanket reservation of any and all claims arising under the Code, nor its specific reservation of other types of claims under various Code provisions are sufficient to preserve the common law claims of fraud, breach of fiduciary duty, and negligence that Dynasty brought in state court.

In re Manchester, Inc., 08-30703-BJH-11 (2009)

In this case, the court concluded that the plan failed to specifically and unequivocally retain the right to pursue certain non-avoidance claims. As a result, the debtors did not have standing to pursue the claims. The court felt this result was compelled by the rule announced by the Fifth Circuit in *United Operating*. However, the court included a multi-paragraph footnote, below:

> The undersigned judge comes to this conclusion with great reluctance, but concludes that this result is compelled by the seemingly bright-line rule announced by the Fifth Circuit in United Operating. However, this judge respectfully urges the Fifth Circuit to reconsider its United Operating holding because such holding works a severe injustice under the facts present here.
>
> Here, the primary secured creditor of the Debtors, Palm Beach Multi-Strategy Fund, L.P. and certain of its affiliates (collectively, "Palm Beach"), filed a 26-page "Motion Pursuant to Section 1104(a)(1) of the Bankruptcy Code for Appointment of a Chapter 11 Trustee" within a few days after the Petition Date. In that motion Palm Beach alleged numerous "bad acts" by various of the Debtors' officers and directors (and former officers and directors), including certain of the Defendants. Accordingly, it became clear to the Court early on in the Case that Palm Beach believed that these parties had committed acts which would give rise to their liability to the Debtors and/or Palm Beach.
>
> An official committee of unsecured creditors (the "Creditors' Committee") was appointed by the Office of the United States Trustee. The Creditors' Committee retained professionals in the Case to represent the interests of the Debtors' unsecured creditors.
>
> Recognizing that the Debtors were hopelessly insolvent and that Palm Beach had a lien on all of the Debtors' assets, the Debtors, Palm Beach, and the Creditors' Committee quickly came to the conclusion that a plan of reorganization could be

proposed that cancelled existing equity interests in the Debtors and transferred the stock in the Reorganized Debtors to Palm Beach in satisfaction of its allowed secured claim. However, such a plan would leave Palm Beach with a large unsecured claim and it would leave the claims of, among others, general unsecured creditors unaddressed. Because Palm Beach and the Creditors' Committee believed that the Debtors owned valuable unliquidated claims and causes of action against various third-parties, including the Avoidance Claims and the Non-Avoidance Claims asserted in the Adversary against the Defendants, the Debtors agreed to propose in the Plan that (i) the Litigation Trust be created, (ii) all of the Causes of Action be preserved and transferred to the Litigation Trust, and (iii) those Causes of Action be pursued by an independent third-party – i.e., the Litigation Trustee – for the benefit of various of the Debtors' creditors. See Plan, Article V, A. The Creditors' Committee was granted the right to appoint the initial Litigation Trustee. Id. Not only did the Debtors contribute some portion of the Leftover Cash – i.e., up to $500,000 – to the Litigation Trust, Palm Beach contributed an additional $3.2 million of its own funds to the Litigation Trust to insure that the trust had sufficient cash to meaningfully pursue the Causes of Action.

In other words, the Creditors' Committee quickly recognized that the only recovery unsecured creditors could expect to receive in the Case was that which could be generated through the successful prosecution of the Causes of Action. Moreover, the Creditors' Committee bargained for, and received, the right to select the Litigation Trustee under the Plan to insure that an independent person who they had confidence in would control the litigation. Finally, the Creditors' Committee bargained for, and received, a commitment from Palm Beach to make sufficient funds available to the Litigation Trust (over $3.5 million in total) to insure that the trust had a substantial "war chest" so that it could pursue all appropriate litigation to conclusion. The Creditors' Committee supported confirmation of the Plan, see Docket No. 306 in Case No. 08-30703-BJH-11, as did Palm Beach. Palm Beach voted its secured claim (Class 4) and unsecured claim (Class 7) in favor of the Plan. While Class 5 general unsecured creditors voted to reject the Plan, that outcome was largely dictated by the rejecting ballots of Ray and Victoria Lyle (the "Lyles") in the aggregate amount of approximately $32.9 million, who had been sued by the Debtors at the time of confirmation and which suit would be assigned to the Litigation Trust under the terms of the Plan for pursuit by the Litigation Trustee. In other words, a target of the Plan's contemplated litigation voted against the Plan. Ironically, for strategic reasons not relevant here, the Lyles sought, and received, permission to withdraw their proofs of claim in the Case post-confirmation. The Plan was confirmed in accordance with § 1129(b)(1)&(b)(2)(B)(ii) with respect to the Class 5 general unsecured claims – i.e., the Plan did not discriminate unfairly and was fair and equitable with respect to the Class 5 general unsecured claims.

From the undersigned judge's perspective, creditors knew everything they needed to know about the litigation contemplated in the Plan in order to make an informed judgment regarding the Plan. Specifically, creditors knew that if they hoped to receive a distribution in the Case, litigation claims that the Debtors owned needed to be successfully pursued. Whether those claims and causes of action were specifically identified in the Plan – i.e., "the Avoidance Claims," or were simply described in general terms – i.e., "any and all claims . . . [and] causes of action," was of no real significance to the Debtors' creditors whose claims were to be paid from possible Litigation Trust recoveries. Rather, all those creditors needed to know was that (i) without the litigation they would receive nothing on their claims against the Debtors, (ii) if the Debtors' claims against third parties were preserved in the Plan, transferred to the Litigation Trust, and successfully prosecuted by the Litigation Trustee, an independent third party selected by the Creditors' Committee, they might receive a distribution on their claims against the Debtors, and (iii) how the litigation would be funded. A rule that requires more disclosure than that contained in the Plan (or its attendant disclosure statement), from this judge's perspective, is unduly rigid and, in many bankruptcy cases, completely speculative. In most bankruptcy cases, the litigation claims will not have been asserted and discovery regarding the merits of those claims will not have been undertaken. Thus, any attempt to evaluate the merits of those claims for creditors would be premature. Moreover, to delay confirmation of a plan so that prospective litigation claims can be brought pre-confirmation and then be assigned to a litigation trust would only serve to needlessly run up the cost of administering bankruptcy cases.

For these reasons, this Court believes that a rule that requires more specific disclosure, particularly here where the proposed litigation is to be funded from monies the unsecured creditors had no claim to, unnecessarily prejudices the Debtors' creditors and provides a needless windfall to the Defendants. Under the facts present here, the Defendants who filed proofs of claim in the Case (and who arguably were entitled to notice of the Debtors' intent to preserve and pursue claims against them) knew, or should have known, that they were the targets of post-confirmation litigation under the Plan.

Needless to say, the Court has no view of the merits of the Non-Avoidance Claims. This Court's proposed rule regarding the preservation and transfer of claims against third parties in a plan of reorganization has nothing to do with the viability of the Litigation Trustee's claims as pled in the Complaint. Rather, it is about maximizing the value of the Debtors' estates for their legitimate creditors (if the Defendants have, for example, received preferences or fraudulent transfers, § 502(d) precludes them from sharing in any distributions in the Case until those amounts have been repaid, or if the Defendants are guilty of other "bad acts," the Code may permit the equitable subordination of their claims in the Case to the claims of other creditors under § 510(c) of the Bankruptcy Code). Under the circumstances present here, the forfeiture of the Non-Avoidance Claims is unnecessarily harsh. The Litigation Trustee should be found to have standing to pursue the Causes of Action and legitimate creditors should be given the opportunity to realize some value on account of their claims against the Debtors. Because this result is precluded under the United Operating holding, the undersigned respectfully requests that such holding be reconsidered.

Mootness

"Equitable mootness" has evolved in bankruptcy appeals to limit appellate review and potential reversal of orders confirming plans of reorganization.[16] Equitable mootness is a kind of appellate abstention that favors the finality of reorganizations and protects interrelated multi-party expectations.[17] In the Fifth Circuit, a court will attempt to "strik[e] the proper balance between the equitable considerations of finality and good faith reliance on a judgment and competing interests that underlie the right of a party to seek review of a bankruptcy order adversely affecting him."[18] The Fifth Circuit will consider "(1) whether a stay was obtained, (2) whether the plan has been 'substantially consummated,' and (3) whether the relief requested would affect either the rights of parties not before the court or the success of the plan."[19]

Bank of New York Trust Co. v. Official Unsecured Creditors' Committee (In re Pacific Lumber Co.), 584 F.3d 229 (5th Cir. 2009).

This chapter 11 case concerned six affiliated entities involved in the growing, harvesting, and processing of redwood timber in Humboldt County, California. After the bankruptcy court terminated the debtors' exclusivity period, two competing plans were proposed, one by the indenture trustee and the other by a secured creditor who was also one of debtor's competitors. In the interval between confirmation of the plan and oral argument, the plan was substantially consummated, and a secured creditor and competitor, as plan proponents and owners of the reorganized debtors, joined by the United States and the State of California, moved to dismiss the appeal as equitably moot. The Fifth Circuit found that (i) equitable mootness did not bar review of issues concerning the treatment of noteholders' secured claims; (ii) equitable mootness did not bar re-evaluation of whether the noteholders' administrative priority claim was correctly calculated; (iii) equitable mootness barred review of noteholders' impairment and classification

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[16] *Bank of New York Trust Co. v. Official Unsecured Creditors' Committee (In re Pacific Lumber Co.)*, 584 F.3d 229, 240 (5th Cir. 2009).

[17] *Id*. at 240.

[18] *In re Manges*, 29 F.3d at 1039; *In re Hilal*, 534 F.3d 498, 500 (5th Cir.2008); *In re GWI PCS 1 Inc.*, 230 F.3d 788, 800 & n. 24 (5th Cir.2000); *In re Berryman Products, Inc.*, 159 F.3d 941, 944 (5th Cir.1998).

[19] *In re Manges*, 29 F.3d at 1039.

contentions; (iv) equitable mootness barred review of noteholders' unfair discrimination claim; and (5) equitable mootness did not bar review of plan's release clauses.

The court held the issue of the treatment of the secured creditors' claim justiciable notwithstanding equitable mootness. The court reasoned that secured credit represents property rights that ultimately find a minimum level of protection in the takings and due process clauses of the Constitution. The court stated that federal courts should proceed with caution before declining appellate review of the adjudication of these rights under a judge-created abstention doctrine. Moreover, the court found no case that applied equitable mootness to decline review of the treatment of a secured creditor's claim, but at least two cases ruled on such appeals despite plan proponents' pleas for equitable mootness.

The court further reasoned that as part of the plan over $500 million in cash was escrowed to pay the noteholders and that if the court was to reverse the Bankruptcy Court's decision, the cash would revert to some other use for the benefit of the reorganized company. The court suggested that the expectations of third parties could largely be preserved despite a decision reinstating the noteholders' liens. Alternatively, some other, more limited form of relief might be afforded the noteholders. The court reasoned that the fact that there might be adverse consequences to one party is not only a natural result of any ordinary appeal, but adverse appellate consequences were foreseeable to them as sophisticated investors who opted to press the limits of bankruptcy confirmation and valuation rules. Finally, the court reasoned that the fact the complexity of cramdown often cries out for appellate review, and this "should encourage the debtor to bargain with creditors to gain acceptance of a plan in the majority of cases."

The court commented as follows in an important footnote:

> Equitable mootness should protect legitimate expectations of parties to bankruptcy cases but should not be a shield for sharp or unauthorized practices. Applying equitable mootness too broadly to disfavor appeals challenging the treatment of secured debt carries a price. It may promote the confirmation of reorganization plans, but it also destabilizes the credit market for financially troubled companies. Lenders will be reluctant to work with debtors who may unilaterally decide to file bankruptcy, propose a plan that aggressively undervalues the collateral, and may then thwart appellate review by rotely incanting equitable mootness. On the whole, it is preferable to create an environment in which firms can avoid bankruptcy rather than one in which bankruptcy litigiousness will thrive.

The court also held that reviewing an $11 million intercompany administrative claim would not seem to imperil a reorganization involving hundreds of millions of dollars because the Bankruptcy Court would be able to award effective relief either with an appropriate lien in the noteholders' favor or a cash payment. The court thus found that this claim was not equitably moot.

The court did find the impairment and classification contentions equitably moot. Because the plan had been substantially consummated, the smaller unsecured creditors had received payment for their claims. Third-party expectations could not reasonably be undone, and no remedy for the noteholders' contentions was practicable other than unwinding the plan. The court found that these contentions were not remediable on appeal. For similar reasons, the court declined to review the unfair discrimination claims.

The court found the claim that the plan releases were unlawful was not equitably moot. The court reasoned that the bargain the proponents claimed to have purchased is exculpation from any negligence that occurred during the course of the bankruptcy. Any costs the released parties might incur defending against suits alleging such negligence were unlikely to swamp either these parties or the consummated reorganization. The court found that the goal of finality sought in equitable mootness analysis did not outweigh the court's duty to protect the integrity of the process by hearing an appeal of these release provisions.

Appendix B – Plan Confirmation and Cramdown Requirements

Introduction

To confirm a plan of reorganization, the court must find that each of the requirements of Section 1129(a) of the Bankruptcy Code has been satisfied.[20] Generally speaking, plans of reorganization generally fit in the following categories: (i) operational and balance sheet reorganization plan with emerging reorganized debtors, (ii) plan of liquidation following sale of substantially all assets with liquidating trust for excluded assets, or (iii) plan with integrated sale process of substantially all assets or equity in reorganized debtors coupled with liquidation trust for excluded assets. In the event all requirements of Section 1129(a) are met with the exception of subsection (a)(8), the court may confirm the plan if the requirements of Section 1129(b) of the Bankruptcy Code are satisfied.[21] These plan confirmation requirements are set forth in more detail below.

Compliance with Bankruptcy Code (11 U.S.C. § 1129(a)(1) and (2))

Section 1129(a)(1) requires that the plan comply with the "applicable provisions" of the Bankruptcy Code.[22] The debtors must comply with all applicable provisions of the Bankruptcy Code, including §§ 1121 (who may file a plan), § 1122 (classification of claims or interests), § 1123 (contents of plan), § 1125 (disclosure and solicitation), § 1126 (acceptance of plan), § 1127 (modification of plan), and § 1128 (confirmation of plan). The legislative history of Section 1129(a)(1) also explains that this provision encompasses the requirements of Sections 1122 and 1123 of the Bankruptcy Code, which govern classification of claims and equity interests and the contents of the plan, respectively.[23] Section 1129(a)(2) requires that each proponent of the plan comply with the applicable provisions of the Bankruptcy Code, example, acting in good faith and meeting other applicable requirements.[24]

> Practice Tip: Evidence should be presented from a debtor representative with requisite personal knowledge, the case record and pleadings, and the solicitation agent (if applicable). If the court permits, the use of written proffers can be beneficial. Also if the court permits, the claims agent can present evidence by affidavit to save travel costs, but should be available by phone if needed.

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[20] *See In re 203 N. Lasalle St. P'ship*, 126 F.3d 955, 960 (7th Cir. 1997) (the plan's proponent must show that the plan satisfies the thirteen requirements of § 1129(a)) *rev'd on other grounds*, 526 U.S. 434 (1999); *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 648 (2d Cir. 1988).

[21] *See* 11 U.S.C. § 1129(b)(1).

[22] 11 U.S.C. §1129(a)(1).

[23] *See* S. Rep. No. 95-989, at 126 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5912; H.R. Rep. No. 95-595, at 412 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6368; *See Mabey v. Southwestern Elec. Power Co. (In re Cajun Elec. Power Coop., Inc.)*, 150 F.3d 503, 512-13 n.3 (5th Cir. 1998).

[24] 11 U.S.C. § 1129(a)(2).

Plan Proposed in Good Faith (11 U.S.C. § 1129(a)(3))

Section 1129(a)(3) of the Bankruptcy Code provides that the court shall confirm a plan of reorganization only if the plan has been "proposed in good faith and not by any means forbidden by law."[25] "Though the term 'good faith,' as used in Section 1129(a)(3), is not defined in the Bankruptcy Code . . . the term is generally interpreted to mean that there exists a reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code."[26]

To evaluate good faith for plan confirmation purposes, the requirement of good faith must be viewed in light of the totality of the circumstances surrounding the formulation of a Chapter 11 plan, considering the underlying goal of the Bankruptcy Code to encourage a debtor's rehabilitation.[27] In determining whether a plan will succeed and accomplish goals consistent with the Bankruptcy Code, courts look to the terms of the reorganization plan and determine, in light of the particular facts and circumstances, whether the plan will fairly achieve a result consistent with the Bankruptcy Code.[28] The plan proponent must show, therefore, that the plan has not been proposed by any means forbidden by law and that the plan has a reasonable likelihood of success.[29]

The primary goals of Chapter 11 are to promote the restructuring of the obligations of a debtor to enable the continued existence of an entity that provides jobs and a tax base to the communities in which it operates, as well as the provision of goods and services to those communities. Congress has thus recognized the primacy of the goal of rehabilitating viable businesses.[30] Furthermore, the Fifth Circuit has held that "where the plan is proposed with the

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[25] 11 U.S.C. § 1129(a)(3).

[26] *203 N. LaSalle*, 126 F.3d at 969, (quoting *In re Madison Hotel Assocs.*, 749 F.2d 410, 424-25 (7th Cir. 1984)); *see also In re Zenith Elecs. Corp.*, 241 B.R. 91, 107 (Bankr. D. Del. 1999) ("The good faith standard requires that the plan be 'proposed with honesty, good intentions and a basis for expecting that a reorganization can be effected with results consistent with the objectives and purposes of the Bankruptcy Code.'" (citations omitted)).

[27] *See Ronit, Inc. v. Stemson Corp. (In re Block Shim Dev. Co.-Irving)*, 939 F.2d 289, 292 (5th Cir. 1991) (finding that the focus of a court's inquiry is the plan itself, and courts must look to the totality of the circumstances surrounding the plan, keeping in mind the purpose of the Bankruptcy Code is to give debtors a reasonable opportunity to make a fresh start); *In re Sun Country Development, Inc.*, 764 F.2d 406, 408 (5th Cir. 1985); *In re The Landing Assoc., Ltd.*, 157 B.R. 791, 812 (Bankr. W.D. Tex. 1993).

[28] *203 N. LaSalle*, 126 F.3d at 969; *Madison Hotel Assocs.*, 749 F.2d at 410; *see also In re Sound Radio, Inc.*, 93 B.R. 849, 853 (Bankr. D.N.J. 1988) (concluding that the good faith test provides the court with significant flexibility and is focused on an examination of the plan itself, rather than other, external factors), *aff'd in part, remanded in part on other grounds*, 103 B.R. 521 (D.N.J. 1989), *aff'd*, 908 F.2d 964 (3d Cir. 1990).

[29] *See Fin. Sec. Assurance, Inc. v. T-H New Orleans Ltd. P'ship (In re T-H New Orleans Ltd. P'ship)*, 116 F.3d 790, 802 (5th Cir. 1997) (finding that a court may only confirm a plan for reorganization if the plan has been proposed in good faith and not by any means forbidden by law and where the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement of Section 1129(a)(3) is satisfied); *Koelbl v. Glessing (In re Koelbl)*, 751 F.2d 137, 139 (2d Cir. 1984).

[30] *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984).

legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement of section 1129(a)(3) is satisfied."[31] A plan of liquidation is within the scope of good faith as one of the ways to exit chapter 11 is via a 363 sale and a plan of liquidation.

> Practice Tip: Evidence should be presented from a debtor representative with requisite personal knowledge and others who can support this (e.g. financial advisors, CRO, etc.). If the court permits, the use of written proffers can be beneficial.

Payment for Services or Costs and Expenses (11 U.S.C. § 1129(a)(4))

Section 1129(a)(4) of the Bankruptcy Code provides:

> Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.[32]

In essence, this subsection requires that any and all fees promised or received in connection with or in contemplation of a Chapter 11 case must be disclosed and approved, or be subject to approval, by the court.[33]

> Practice Tip: Evidence should be presented from a debtor representative with requisite personal knowledge and others who can support this (e.g. financial advisors, CRO, etc.). If the court permits, the use of written proffers can be beneficial.

Officers and Insiders (11 U.S.C. § 1129(a)(5))

Section 1129(a)(5) requires that the debtors disclose the identity of certain Persons who will hold positions with the Reorganized debtors after Confirmation of the plan.[34] This provision focuses on the methods by which the management of a reorganized corporation is to be chosen, requiring adequate representation of those whose investments are involved in the reorganization -- *i.e.*, creditors and equity holders.[35] In determining whether the post-confirmation management

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[31] *In re Sun Country Development, Inc.*, 764 F.2d 406, 408 (5th Cir. 1985); *Heartland Federal Savings & Loan Assoc. v. Briscoe Enterprises, Ltd., II, d/b/a Regalridge Apartments*, 994 F.2d 1160, 1167 (5th Cir. 1993); *In re The Landing Assoc., Ltd.*, 157 B.R. 791, 812 (Bankr. W.D. Tex. 1993) (stating that "the Fifth Circuit had adopted a two-part standard for determining if a plan has been proposed in good faith").

[32] 11 U.S.C. § 1129(a)(4).

[33] *See In re Johns-Manville Corp*, 68 B.R. 618, 632 (Bankr. S.D.N.Y. 1986); *In re Chapel Gate Apartments, Ltd.*, 64 BR. 569, 573 (Bankr. N.D. Tex. 1986).

[34] *See* 11 U.S.C. § 1129(a)(5).

[35] *See* 7 *Collier on Bankruptcy* ¶ 1123.01 [7], at 1123-16 (Lawrence P. King ed., 15th ed. rev. 1996).

of a debtor is consistent with the interests of creditors, equity security holders, and public policy, a court must consider proposed management's competence, discretion, experience, and affiliation with entities having interests adverse to the debtor.[36]

> Practice Tip: Evidence should be presented from a debtor representative with requisite personal knowledge, the case record and pleadings, and the disclosure statement. If the court permits, the use of written proffers can be beneficial.

Governmental Regulatory Approval (11 U.S.C. § 1129(a)(6))

Section 1129(a)(6) requires, with respect to a debtor whose rates are subject to governmental regulation following confirmation, that appropriate governmental approval has been obtained for any rate change provided for in the plan, or that such rate change be expressly conditioned on such approval.[37]

> Practice Tip: Evidence should be presented from a debtor representative with requisite personal knowledge and present applicable regulations. If the court permits, the use of written proffers can be beneficial.

Best Interests of Creditors (11 U.S.C. § 1129(a)(7))

Through the "best interest of creditors" test of Section 1129(a)(7), the Bankruptcy Code protects dissenting members of impaired, accepting classes by ensuring that such creditors or equity holders receive at least what they would receive if the debtor were liquidated under chapter 7 of the Bankruptcy Code.[38] The best interest test focuses on individual dissenting creditors, rather than Classes of Claims.[39] Bankruptcy Code § 1129(a)(7) requires that each holder in an impaired class of claims or interests receive or retain under the plan, on account of such claim or interest, property of a value that is not less than the amount that such holder would receive or retain if the applicable debtor were liquidated under chapter 7 of the Bankruptcy Code on such date.

> Practice Tip: Evidence should be presented from a debtor representative with requisite personal knowledge, the case record and pleadings, financial advisors, sources and uses analysis, and a liquidation analysis. If the court permits, the use of written proffers can be beneficial.

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[36] *See In re Sherwood Square Assocs.*, 107 B.R. 872, 878 (Bankr. D. Md. 1989); *see also In re W.E. Parks Lumber Co.*, 19 B.R. 285, 292 (Bankr. W.D. La. 1982) (a court should consider whether "the initial management and board of directors of the reorganized corporation will be sufficiently independent and free from conflicts and the potential of post-reorganization litigation so as to serve all creditors and interested parties on an even and loyal basis").

[37] 11 U.S.C. § 1129(a)(6).

[38] *203 N. LaSalle*, 126 F.3d at 969; *In re Keck, Mahin & Cate*, 241 B.R. 583, 590 (Bankr. N.D. Ill. 1999).

[39] *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 723, 761 (Bankr. S.D.N.Y. 1992).

Acceptance by Impaired Classes (11 U.S.C. § 1129(a)(8))

Bankruptcy Code §1129(a)(8) requires that, with respect to each class of claims or interests, such class has accepted the plan or such class is not impaired under the plan.[40]

> Practice Tip: Evidence should be presented from the solicitation agent. If the court permits, the claims agent can present evidence by affidavit to save travel costs, but should be available by phone if needed.

Treatment of Administrative, Priority, and Tax Claims (11 § U.S.C. § 1129(a)(9))

Bankruptcy Code §1129(a)(9) requires payment of administrative, priority, and tax claims is comprised of four subparts.[41]

Section 1129(a)(9)(A) requires that, with respect to a claim of a kind specified in Section 507 (a)(2) or 507 (a)(3), on the effective date of the plan the holder of such claim will receive cash equal to the allowed amount of the claim.

Section 1129(a)(9)(B) requires that, with respect to a class of claims of a kind specified in Section 507 (a)(1), 507 (a)(4), 507 (a)(5), 507 (a)(6), or 507 (a)(7), each holder of a claim of such class will receive (i) if a class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of the claim; or (ii) if a class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of the claim.

Section 1129(a)(9)(C) requires that, with respect to a claim of a kind specified in Section 507 (a)(8), the holder of such claim will receive regular installment payments in cash (i) of a total value, as of the effective date of the plan, equal to the allowed amount of the claim; (ii) over a period ending not later than 5 years after the date of the order for; and (iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under Section 1122 (b)).

Section 1129(a)(9)(D) requires that, with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under Section 507 (a)(8), but for the secured status of that claim, the holder of that claim will receive cash payments, in the same manner and over the same period, as prescribed in Section 1129(a)(9)(D).

> Practice Tip: Evidence should be presented from a debtor representative with requisite personal knowledge, the case record and pleadings, financial advisors, and sources and uses analysis. Testimony may be necessary from the solication agent if priority claimants are entitled to vote as required by Section 1139(a)(9)(C). If the court permits, the use of written proffers can be beneficial.

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[40] *See* 11 U.S.C. 1129(a)(8).

[41] *See* 11 U.S.C. 1129(a)(9).

<u>Acceptance by Impaired Class (11 U.S.C. § 1129(a)(10))</u>

Section 1129(a)(10) requires that at least one of the impaired classes accept the plan.[42] Impairment is defined and discussed in Section 1124 of the Bankruptcy Code.

> <u>Practice Tip</u>: Evidence should be presented from a debtor representative with requisite personal knowledge and from the solicitation agent to prove this element. If the court permits, the claims agent can present evidence by affidavit to save travel costs, but should be available by phone if needed.

<u>Feasibility (11 U.S.C. § 1129(a)(11))</u>

Section 1129(a)(11) of the Bankruptcy Code provides that a plan of reorganization may be confirmed only if "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan."[43] One commentator has stated that this section "requires courts to scrutinize carefully the plan to determine whether it offers a reasonable prospect of success and is workable."[44] In order to satisfy Section 1129(a)(11), the debtors need not warrant, or prove to a mathematical certainty, the future success of the plan.[45] Rather, a plan is feasible and should be confirmed if it "offers a reasonably workable prospect of success and is not a visionary scheme."[46]

The key question is whether there is a reasonable probability that the provisions of the plan can be performed. Factors include the economic conditions of the debtors' businesses, the debtors' earning power, the ability of management, the probability of continuation of management, and any other factor which determines the probability of a successful operation that enables the performance of plan provisions.[47] As such, feasibility is an issue that calls for the

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[42] 11 U.S.C. § 1129(a)(10).

[43] 11 U.S.C. § 1129(a)(11); *see also 203 N. LaSalle*, 126 F.3d at 969.

[44] 7 Collier on Bankruptcy ¶ 1129.03 [11], at 1129-74; *see also Mut. Life Ins. Co. of New York v. Patrician St. Joseph Partners Ltd. P'ship (In re Patrician St. Joseph Partners Ltd. P'ship)*, 169 B.R. 669, 674 (D. Ariz. 1994); *In re Cellular Info. Sys., Inc.*, 171 B.R. 926, 945 (Bankr. S.D.N.Y. 1994); *In re Rivers End Apartments, Ltd.*, 167 B.R. 470, 476 (Bankr. S.D. Ohio 1994); *Johns-Manville*, 68 BR. at 635.

[45] *203 N. LaSalle*, 126 F.3d 955 at 962 (the court overruled an objection which was based upon a different interpretation of the real estate market in Chicago stating that "[a] plan need not be assured of success to be confirmed").

[46] *In re Merrimack Valley Oil Co.*, 32 B.R. 485, 488 (Bankr. D. Mass. 1983) (citing *In re Landmark At Plaza Park Ltd.*, 7 B.R. 653 (Bankr. D.N.J. 1980)); *Kane*, 843 F.2d at 649 (a plan may be feasible although its success is not guaranteed); *In re Henke*, 90 B.R. 451, 456 (Bankr. D. Mont. 1988); *Texaco*, 84 B.R. at 910 ("All that is required is that there be reasonable assurance of commercial viability."); *In re Prudential Energy Co.*, 58 B.R. 857, 862 (Bankr. S.D.N.Y. 1986) ("Guaranteed success in the stiff winds of commerce without the protection of the Code is not the standard under § 1129(a)(11).").

[47] *In re The Landing Assoc., Ltd.*, 157 B.R. 791, 812 (Bankr. W.D. Tex. 1993); *In re Swiftco, Inc.*, 1988 Bankr. LEXIS 2251, *16 (Bankr. S.D. Tex. 1988).

exercise of judicial discretion.[48] If a debtor's financial projections "are credible, based upon the balance of all testimony, evidence, and documentation, even if the projections are aggressive, the court may find the plan feasible."[49] Many of these elements fall to the wayside when a liquidating plan is involved.

> Practice Tip: Evidence should be presented from a debtor representative with requisite personal knowledge, the case record and pleadings, financial advisors, sources and uses analysis and projections. If the court permits, the use of written proffers can be beneficial.

Payment of Fees (11 U.S.C. § 1129(a)(12))

Bankruptcy Code §1129(a)(12) requires the payment of all U.S. Trustee fees either on the effective date of the plan or throughout the case.[50]

> Practice Tip: Evidence should be presented from a debtor representative with the requisite personal knowledge and sources and uses analysis. If the court permits, the use of written proffers can be beneficial.

Retiree Benefits (11 U.S.C. § 1129(a)(13))

The plan must provide for the continuation after its effective date of payment of all retiree benefits at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.[51]

> Practice Tip: Evidence should be presented from a debtor representative with requisite personal knowledge, plan requirements, sources and uses analysis and projections. If the court permits, the use of written proffers can be beneficial.

Domestic Support Obligations (11 U.S.C. § 1129(a)(14))

If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition.[52]

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[48] *See In re Schoeneberg*, 156 B.R. 963, 973 (Bankr. W. D. Tex. 1993).

[49] *In re T-H New Orleans,* 116 F.3d at 802 (quoting *In re Lakeside Global II, Ltd.*, 116 B.R. 499, 508 n.20 (Bankr. S.D. Tex. 1989)); *see also In re F.G. Metals, Inc.*, 390 B.R. 467, 476 (Bankr. M.D. Fla. 2008) ("The bankruptcy court is only required to find that a plan offers a reasonable probability of success, and a plan may be confirmed even if the debtor's projections are aggressive and do not view all business prospects in the worst possible light.") (emphasis added).

[50] *See* 11 U.S.C. 1129(a)(12).

[51] *See* 11 U.S.C. 1129(a)(13).

[52] *See* 11 U.S.C. 1129(a)(14).

Practice Tip: Evidence should be presented from a debtor representative with requisite personal knowledge. If the court permits, the use of written proffers can be beneficial.

Cases of Individuals (11 U.S.C. § 1129(a)(15))

In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan, the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.[53]

Practice Tip: The debtor or an expert must be prepared to show that the distributions under the plan are, where payments over time will not equal the allowed amount of all such claims, equal to or greater than the projections of disposable income which the individual would generate over a 5 year period. Knowing a good chapter 13 practitioner to help prepare this projection is quite helpful.

Transfers of Property (11 U.S.C. § 1129(a)(16))

All transfers of property must be made in accordance with any applicable provisions of non-bankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.[54]

Practice Tip: Evidence should be presented from a debtor representative with requisite knowledge or an expert witness. If the court permits, the use of written proffers can be beneficial.

11 U.S.C. § 1129(b) Cramdown Requirements

Section 1129(b) of the Bankruptcy Code provides that if all of the applicable confirmation requirements of Section 1129(a) other than subsection (8) are met, the court, on request of the plan proponent, shall confirm the plan if it does not "discriminate unfairly" and is "fair and equitable" with respect to each class of claims or interests that is impaired under, and that has not accepted, the plan.[55] This cramdown provision allows a court to confirm a reorganization plan even if all of the necessary consents of each class are not obtained. The policy behind the cramdown provision is that the public is well-served by company

[53] *See* 11 U.S.C. 1129(a)(15).

[54] *See* 11 U.S.C. 1129(a)(16).

[55] *See* 11 U.S.C. § 1129(b)(1).

rehabilitations, and a plan that prevents creditors from getting immediate satisfaction, but provides creditors with the same amount as they would receive upon a company's liquidation, is just to force upon the creditors.[56]

Unfair discrimination "is best viewed as a horizontal limit on nonconsensual confirmation …. [j]ust as the fair and equitable requirement regulates priority among classes of creditors having higher and lower priorities, creating inter-priority fairness, so the unfair discrimination provision promotes intra-priority fairness, assuming equitable treatment among creditors who have the same level of priority."[57] The "unfair discrimination" standard "is not derived from the fair and equitable rule or from the best interests of creditors test. Rather it preserves just treatment of a dissenting class from the class' own perspective."[58] To prevent "unfair discrimination" the plan must "allocate value to the class in a manner consistent with the treatment afforded to other classes with similar legal claims against the debtor."[59] The Bankruptcy Code is based on the idea of "equality of treatment" and so "creditors with claims of equal rank are entitled to equal distribution."[60] The "unfair discrimination" standard of Section 1129(b) does not prohibit all types of discrimination among holders of claims and equity interests, it merely prohibits unfair discrimination.[61]

Courts typically examine the facts and circumstances of the particular case to determine whether unfair discrimination exists.[62] At a minimum, however, the unfair discrimination standard prevents creditors and interest holders with similar legal rights from receiving materially different treatment under a proposed plan without compelling justification for doing so.[63]

In accordance with Section 1129(b)(2), a plan will be found to be fair and equitable with respect to a the relevant classes if it complies with one of the following conditions: (a) the plan

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[56] *Heartland Federal Savings & Loan Assoc. v. Briscoe Enterprises, Ltd., II, d/b/a Regalridge Apartments*, 994 F.2d 1160, 1162 (5th Cir. 1993), *citing Daniel R. Cowans et al., Cowans Bankruptcy Law and Practice* § 20.26 at 419 (1989 edition).

[57] *In re Sentry Operating Co. of Tex.*, 264 B.R. 850, 863 (S.D. Tex. 2001).

[58] *In re MCorp Financial, Inc.*, 137 B.R. 219, 225 (Bankr. S.D. Tex. 1992); *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 416-17 (1977), reprinted U.S.C.C.A.N. 6372, 6373 (1978).

[59] *See* Collier on Bankruptcy ¶ 1129.03 at 1129-69 (15th ed. 1991).

[60] *In re Sentry Operating Co. of Texas*, 264 B.R. 850, 863 (Bankr. S.D. Tex. 2001).

[61] *See In re Leslie Fay Cos. Inc.*, 207 B.R. 764, 791 n.37 (Bankr. S.D.N.Y. 1997).

[62] *See, e.g.*, *In re Freymiller Trucking, Inc.*, 190 B.R. 913, 916 (Bankr. W.D. Okla. 1996) (holding that a determination of unfair discrimination requires a court to "consider all aspects of the case and the totality of all the circumstances"); *In re Aztec Co.*, 107 B.R. 585, 589 (Bankr. M.D. Tenn. 1989) (noting that courts "have recognized the need to consider the facts and circumstances of each case to give meaning to the proscription against unfair discrimination").

[63] *See, e.g.*, *In re Ambanc La Mesa Ltd. P'ship*, 115 F.3d 650, 656 (9th Cir. 1997).

provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or (b) the holder of any interest that is junior to claims of such class will not receive or retain under the plan on account of such junior claim or interest any property… the interests of such class will not receive or retain under the plan on account of such junior interest any property.[64]

> Practice Tip: Evidence should be presented from a debtor representative with requisite personal knowledge, the case record and pleadings, interest rate expert, financial advisors, sources and uses analysis, projections and valuations. If the court permits, the use of written proffers can be beneficial.

Other Provisions of Bankruptcy § 1129(c) – (e)

The court may confirm only one plan, unless the order of confirmation in the case has been revoked.[65] In addition, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933, and the governmental unit has the burden of proof on the issue of avoidance and principal purpose.[66] Section 1129(e) requires the court to confirm a plan that complies with the applicable provisions of the Bankruptcy Code in a small business case that is filed in accordance with Section 1121(e) not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with Section 1121(e)(3).[67]

> Practice Tip: Evidence should be presented from a debtor representative with requisite personal knowledge and the ballot agent as to voting preferences. If the court permits, the use of written proffers can be beneficial.

[64] 11 U.S.C. § 1129(b)(2)(B).

[65] 11 U.S.C. § 1129(c).

[66] 11 U.S.C. § 1129(d).

[67] 11 U.S.C. § 1129(e).

Appendix B - Bankruptcy Code Confirmation Requirements Summary

Code Section	Confirmation Requirement Name
§ 1129(a)(1)	Plan complies with the Bankruptcy Code.
§ 1129(a)(2)	Proponents comply with Bankruptcy Code.
§ 1129(a)(3)	Good faith.
§ 1129(a)(4)	Payments for services/costs and expenses approved by the Court.
§ 1129(a)(5)	Identity/affiliations of individuals to serve as Ds/Os must be disclosed.
§ 1129(a)(6)	Rate approvals by governmental regulatory commission obtained.
§ 1129(a)(7)	Best interest of creditors test, must receive not less than Chapter 7.
§ 1129(a)(8)	Class has accepted or is unimpaired under the plan.
§ 1129(a)(9)	Payment of administrative, priority and tax claims.
§ 1129(a)(10)	At least one impaired class (excluding insiders) has accepted the plan.
§ 1129(a)(11)	Feasibility, liquidation or further financial reorganization not likely.
§ 1129(a)(12)	All fees payable under 28 U.S.C. § 1930 paid as of plan effective date.
§ 1129(a)(13)	All retiree benefits (if applicable) to be paid as under § 1114.
§ 1129(a)(14)	All post-petition domestic support obligations must be paid.
§ 1129(a)(15)	Individual debtor, if plan objection, pays disposable income for plan period.
§ 1129(a)(16)	All property transfers for "non-moneyed" entities per applicable law.
§ 1129(b)	Cramdown, secured claims, unsecured claims, equity, absolute priority.
§ 1129(c)	Only one plan may be confirmed, consider creditors and equity preferences.
§ 1129(d)	Principal purpose of plan cannot be tax avoidance.
§ 1129(e)	Small business case, generally, confirm the plan within 45 days of filing.