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Bankruptcy Code Section 1129 and Confirmation of a Plan of Reorganization

Carlos J. Cuevas Copyright 2015

- Carlos J. Cuevas, Esq.
- Research Associate University of Houston School of Law
- 1250 Central Park Avenue
- Yonkers, New York 10704
- Tel. No. 914.964.7060
- Email Ccuevas576@aol.com

- Bankruptcy Code Section 1129 governs the confirmation of a Chapter 11 plan. 11 U.S.C. § 1129. Bankruptcy Code Section 1129 is a complex statute. In addition, there has been significant case law interpreting Bankruptcy Code Section 1129 and the requirements for the confirmation of a plan of reorganization. It is vital to understand not only Bankruptcy Code Section 1129, but also the case law interpreting Bankruptcy Code Section 1129.

- The proponent of a plan of reorganization bears the burden of proof that it has complied with the applicable provisions of Bankruptcy Code Section 1129, and therefore, its plan of reorganization should be confirmed. *In re Multiut Corp., 449 B.R. 323, 332 (Bankr. N.D.Ill. 2011). In re SM 104 Ltd., 160 B.R. 202, 214 (Bankr. S.D.Fla. 1993). The standard of proof is a preponderance of the evidence. In re Draiman, 450 B.R. 777, 789 (Bankr. N.D.Ill. 2011).*

- Regardless of whether an objection has been interposed it is incumbent upon a bankruptcy court to scrutinize a plan of reorganization to ensure that it complies with Bankruptcy Code Section 1129. *In re Cypersswood Land Partners, I, 409 B.R. 396, 421-22 (Bankr. S.D.Tex. 2009); see also, In re Bashas' Inc., 437 B.R. 874, 903 (Bankr. D. Ariz. 2010).*

II. *Bankruptcy Code Section 1129(a)*

- A. *Bankruptcy Code Section 1129(a)(1)*
- Bankruptcy Code Section 1129(a)(1) states:
- (a) The court shall confirm a plan only if all of the following requirements are met:
- (1) The plan complies with the applicable provisions of this title.
- 11 U.S.C. § 1129(a)(1).

- Bankruptcy Code Section 1129(a)(1) has been interpreted to require that the plan of reorganization comply with Bankruptcy Code Sections 1122 and 1123. *In re 20 Bayard Views, LLC, (Bankr. E.D.N.Y. 2011); see also, In re Eastern 1996D Ltd. Partnership, 2014 WL 7238265 pp. 4-5 (Bankr. N.D.Tex. 2014).*

- *A plan of reorganization must satisfy the claimant classification requirements of Bankruptcy Code Section 1122. In re Charles Street African Methodist Episcopal Church of Boston, 499 B.R. 66, 95 (Bankr. D. Mass. 2013); In re Multiut Corp., 449 B.R. 323, 333 (Bankr. N.D.Ill. 2011). A plan of reorganization must comply with the plan requirements contained in Bankruptcy Code Section 1123(a). In re Idearc Inc., 423 B.R. 138, 160 (Bankr. N.D.Tex. 2009).*

- Under Bankruptcy Code Section 1123(b)(6) the plan of reorganization may assume executory contracts and unexpired leases. *See, In re Idearc Inc., 423 B.R. 138, 162 (Bankr. N.D. Tex. 2009). The ability to assume and reject executory contracts is a central component of the restructuring process.*

- Under Bankruptcy Code Section 1123(b)(6) a debtor is also authorized to include a settlement as part of its plan of reorganization. *In re Heritage Organization, LLC, 375 B.R. 230, 259 (Bankr. N.D.Tex. 2007); In re Texaco Inc., 84 B.R. 893 (Bankr. S.D.N.Y. 1988). As part of its plan of reorganization, Texaco included its settlement with Pennzoil. If a debtor is going to settle a claim it has to comply with Federal Rule of Bankruptcy Procedure 9019. Fed. R. Bankr. P. 9019(a).*

- In addition, a settlement has to satisfy the following criteria:

- (1) The balance between the likelihood of plaintiff's or defendants' success should the case go to trial vis a vis the concrete present and future benefits held forth by the settlement without the expense and delay of a trial and subsequent appellate procedures.

- (2) The prospect of complex and protracted litigation if the settlement is not approved.

- (3) The proportion of the class members who do not object or who affirmatively support the proposed settlement.

- (4) The competency and experience of counsel who support the settlement.

- (5) The relative benefits to be received by individuals or groups within the class.
- (6) The nature and breadth of releases to be obtained by the directors and officers as a result of the settlement.
- (7) The extent to which the settlement is truly the product of “arms-length” bargaining, and not of fraud or collusion.
- *In re Texaco Inc., 84 B.R. 893, 902 (Bankr. S.D.N.Y. 1988).*

- Another related issue is third party releases. Some courts have held that under limited circumstances third party releases are appropriate. *Airadigm Communications, Inc., v. FCC, (In re Airadigm Communications, Inc.), 519 F.3d 640, 657 (7th Cir. 2008); Gillman v. Continental Airlines (In re Continental Airlines), 203 F.3d 203, 212 (3rd Cir. 2000); In re Dow Corning Corporation, 280 F.3d 648, 658 (6th Cir. 2002); SEC v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.), 960 F.2d 285, 293 (2nd Cir. 1992); In re A.H. Robbins, 880 F.2d 694, 701 (4th Cir. 1989).*

- Other courts have held that third party releases are beyond the scope of the Bankruptcy Code. *See, Landsing Diversified Properties-II v. The First National Bank and Trust Company of Tulsa (In re Western Real Estate Fund, Inc.), 922 F.2d 592, 601 (10th Cir. 1990); American Hardwoods, Inc. v. Deutsche Credit Corporation, (In re American Hardwoods, Inc.), 885 F.2d 621 (1989); Underhill v. Royal, 769 F.2d 1426, 1432 (9th Cir. 1985).*

- In *In re Dow Corning Corporation, 280 F.3d 648, 658 (6th Cir. 2002) the Sixth Circuit Court of Appeals held that Bankruptcy Code Section 105(a) authorized the issuance of a third party injunction; however, the issuance of a third party injunction was limited to "unusual circumstances." The court set forth the following criteria to determine whether a third party injunction was appropriate:*

- We hold that when the following seven factors are present, the bankruptcy court may enjoin a non-consenting creditor's claims against a non-debtor: (1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3)

- The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and; (7) The bankruptcy court made a record of specific factual findings that support its conclusions.

- *Id. at 658.*

- In *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.), 416 F.3d 136 (2nd Cir. 2005) the Second Circuit Court of Appeals held that* Bankruptcy Code Section 105(a) provided statutory authority for third party injunctions. A bankruptcy court was authorized to issue a third party injunction if the third party injunction was important to the success of the plan of reorganization.

- In *Underhill v. Royal, 769 F.2d 1426 (9th Cir. 1985) the Ninth Circuit ruled* that Bankruptcy Code Section 524(e) prohibited third party injunctions:

- Generally, discharge of the principal debtor in bankruptcy will not discharge the liabilities of co-debtors or guarantors.11 U.S.C. § 524(e) provides: "Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." This section of the 1978 Bankruptcy Reform Act was a reenactment of Section 16 of the 1898 Act which provided that "[t]he liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt." Act of July 1, 1898, ch. 541, § 16, 30 Stat. 550 (formerly codified at 11 U.S.C. § 34 (1976)).

- *Id. at 1432.*

B. *Bankruptcy Code Section 1129(a)(2)*

- Bankruptcy Code Section 1129(a)(2) states:

- (a) The court shall confirm a plan only if all of the following requirements are met:

- * * * *

- (2) The proponent of the plan complies with the applicable provisions of this title.

- 11 U.S.C. § 1129(a)(2).

- Bankruptcy Code Section 1129(a)(2) requires that a debtor complied with the disclosure requirements of Bankruptcy Code Section 1125. *See, In re Trenton Ridge Investors, LLC, 461 B.R. 440, 467 (Bankr. S.D.Ohio 2011); In re TCI 2 Holdings, LLC, 428 B.R. 117, 170 (Bankr. D.N.J. 2010).*

C. *Bankruptcy Code Section 1129(a)(3)*

- Bankruptcy Code Section 1129(a)(3) states:
- (a) The court shall confirm a plan only if all of the following requirements are met:
- * * * *
- (3) The plan has been proposed in good faith and not by any means forbidden by law.
- 11 U.S.C. § 1129(a)(3).

- Bankruptcy Code Section 1129(a)(3) contains the "good faith" requirement. *In re Kemp,* 134 B.R. 413, 414 (Bankr. E.D.Cal. 1991). A bankruptcy judge has broad discretion in determining whether a plan of reorganization has been proposed in good faith. *In re GAC Storage El Monte, LLC, 489 B.R. 747, 771 (Bankr. N.D. Ill. 2013).*

- The Bankruptcy Appellate Panel for the Ninth Circuit has made the following comments concerning the “good faith” requirement:

- Good faith in proposing a plan of reorganization is assessed by the bankruptcy judge and viewed under the totality of the circumstances. *In re Jorgensen, 66 B.R. 104, 108–109 (9th Cir. BAP 1986). Good faith requires that a plan will achieve a result consistent with the objectives and purposes of the Code. In re Jorgensen, 66 B.R. at 109. It also requires a fundamental fairness in dealing with one's creditors. Id. The bankruptcy judge is in the best position to assess the good faith of the parties. Id.*

- *Stolrow v. Stolrow's Inc. (In re Stolrow's Inc.), 84 B.R. 167, 172 (1988).*

- Good faith speaks to the process of plan development; it must be viewed in light of the totality of the circumstances concerning the development of the plan of reorganization. *In re Quigley Co., Inc., 437 B.R. 102, 125 (Bankr. S.D.N.Y. 2010).*

- *The good faith test is important because it provides a check against the intentional impairment of claims. Quigley Co., Inc., 437 B.R. 102, 125 (Bankr. S.D.N.Y. 2010). A contrived artificial impairment can be viewed as a violation of the good faith test. Quigley Co., Inc., 437 B.R. 102, 125 (Bankr. S.D.N.Y. 2010).*

- In *In re Rusty Jones, Inc., 110 B.R. 362 (Bankr. N.D.Ill. 1990) the court held that the* debtor failed to satisfy Bankruptcy Code Section 1129(a)(3) because the intent of its plan was to satisfy its insiders. The court stated:

- The fundamental purpose of Chapter 11 is to enable a distressed business operation to reorganize its affairs in order to prevent the loss of jobs and the adverse economic effects associated with disposing of assets at their liquidation value. *See, e.g., NLRB v. Bildisco & Bildisco, 465 U.S. 513, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984). The instant proposed Plan does not serve that purpose. Rather, as outlined earlier, the Plan serves to an unacceptable extent as a vehicle for the personal profit of*

- *"investors" who purchased the Debtor for $1.00 and since sought to operate it in bankruptcy for their personal benefit and contrary to the interests of creditors. That Plan would provide for them 20% of any net Beatrice recovery, large future earnings, and some cash (estimated at $94,000) as operating capital. It also provides significant but less than legally sufficient amounts for the unsecured creditors.*

- *Id. at 375.*

D. *Bankruptcy Code Section 1129(a)(4)*

- Bankruptcy Code Section 1129(a)(4) states:

- (a) The court shall confirm a plan only if all of the following requirements are met:

- * * * *

- (4) 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.

- 11 U.S.C. § 1129(a)(4).

- Bankruptcy Code Section 1129(a)(4) requires disclosure of all professional fees that are payable from the estate and that the bankruptcy court approve all of these payments as reasonable. *See, In re Trenton Ridge Investors, LLC, 461 B.R. 440, 472-73 (Bankr. S.D.Ohio 2011).*

E. *Bankruptcy Code Section 1129(a)(5)*

- Bankruptcy Code Section 1129(a)(5) states:

- (a) The court shall confirm a plan only if all of the following requirements are met:
- * * * *

- (5)(A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

- (ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

- (B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

- 11 U.S.C. § 1129(a)(5).

- In *In re SM 104 Ltd., 160 B.R. 202 (Bankr. S.D.Fla. 1993) the court held that the debtor's* pre-petition principal could not serve as its principal after confirmation because he had engaged in malfeasance. The court stated:

- In light of Murphy's prepetition misconduct, this court views such a result as unacceptable. Murphy intentionally diverted funds from a lockbox, in complete disregard of two state court orders. Therefore, this court cannot be satisfied that Murphy will comply with any order entered by this court. Murphy is also responsible for serious misrepresentations in the Debtor's loan application to Riverside. He also made serious misrepresentations to EquiVest with respect to his chronic diversions of rents from the state court-ordered lockbox. Therefore, the court cannot be satisfied that Murphy will be truthful

- in his dealings with creditors. Furthermore, the accounting system used by Murphy to manage the Debtor, combined with his regular commingling of funds among the SM affiliates, was inexcusable and exposed the Debtor's creditors to significant risks. In view of his egregious misconduct, this court cannot approve Murphy's control of the affairs of the reorganized Debtor. The record makes it clear that Murphy is not qualified to manage the reorganized Debtor, both in terms of competence and honesty. Continued employment of Murphy would clearly be inconsistent with the interests of the Debtor's creditors and with public policy. Thus, the Debtor's plan must be denied confirmation under § 1129(a)(5).

- *Id. at 245-46.*

F. *Bankruptcy Code Section 1129(a)(6)*

- Bankruptcy Code Section 1129(a)(6) states:

- (a) The court shall confirm a plan only if all of the following requirements are met:

- * * * *
- (6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

- 11 U.S.C. § 1129(a)(6).

- Pursuant to Bankruptcy Code Section 1129(a)(6) the governmental regulatory authority that has rate making authority has approved the change in the regulatory rate. 11 U.S.C. § 1126(a)(6). Bankruptcy Code Section 1126(a)(6) is usually inapplicable in single asset real estate cases. *See, In re 20 Bayard Views, LLC, 445 B.R. 83, 98 (Bankr. E.D.N.Y. 2011).*

G. *Bankruptcy Code Section 1129(a)(7)*

- Bankruptcy Code Section 1129(a)(7) states:
- (a) The court shall confirm a plan only if all of the following requirements are met:
- * * * *
- (7) With respect to each impaired class of claims or interests-
- (A) each holder of a claim or interest of such class-
- (i) has accepted the plan; or
- (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or
- (B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

- 11 U.S.C. § 1129(a)(7).

- Bankruptcy Code Section 1129(a)(7) is known as the best interest of the creditors test. Under the best interest of the creditors test requires that each class of unsecured creditors that is impaired unanimously accept the plan or that each holder of an unsecured claim receive at least what it would have received in a Chapter 7 liquidation. *In re Trenton Ridge Investors, LLC, 461 B.R. 440, 473-74 (Bankr. S.D.Ohio 2011).*

- *A debtor has to provide a liquidation analysis reflecting what each class of impaired unsecured creditors would have received in a Chapter 7 liquidation. See, In re 20 Bayard Views, LLC, 445 B.R. 83, 98-99 (Bankr. E.D.N.Y. 2011).*

- If there is an 1111(b)(2) election, then the creditor must receive payments equaling the present value of its collateral. *In re Trenton Ridge Investors, LLC, 461 B.R. 440, 475 (Bankr. S.D.Ohio 2011).*

H. *Bankruptcy Code Section 1129(a)(8)*

- Bankruptcy Code Section 1129(a)(8) states:
- (a) The court shall confirm a plan only if all of the following requirements are met:
- * * * *
- (8) With respect to each class of claims or interests-
- (A) such class has accepted the plan; or
- (B) such class is not impaired under the plan.

- 11 U.S.C. § 1129(a)(8).

- If a class has accepted the plan or is not impaired under the plan of reorganization, then it is a consensual confirmation of a plan of reorganization. However, if an impaired class does not accept the plan of reorganization, then the bankruptcy court has to determine whether the debtor has satisfied the cram down provisions of Bankruptcy Code Section 1129(a) & (b).

- One court has stated:

- This provision of the Code is the counterpart of §§ 1129(a)(10) and 1129(b)(1). If each class accepts or is left unimpaired, this provision is satisfied. If one or more classes dissent and reject the plan, then the debtor must have at least one other impaired class which consents to the plan. § 1129(a)(10). Then, if all of the other § 1129(a) factors are satisfied, the case may proceed to the fair and equitable considerations of § 1129(b) (the "cramdown").

- *In re Bashas' Inc., 437 B.R. 874, 914 (Bankr. D. Ariz. 2010).*

I. *Bankruptcy Code Section 1129(a)(9)*

- Bankruptcy Code Section 1129(a)(9) states:

- (a) The court shall confirm a plan only if all of the following requirements are met:

- * * * *
- (9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that-

- (A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

- (B) 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) of this title, each holder of a claim of such class will receive-

- (i) if such 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 such claim; or

- (ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;

- (C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim regular installment payments in cash-

- (i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;

- (ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; 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)); and

- (D) 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 on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

- 11 U.S.C. § 1129(a)(9).

- Bankruptcy Code Section 1129(a)(9)(A) requires that administrative claims must be paid in full on the effective date of the plan of reorganization unless debtor's counsel has agreed to different treatment under the plan of reorganization. *In re Cypersswood Land Partners, I, 409 B.R. 396, 431 (Bankr. S.D.Tex. 2009).*

- Bankruptcy Code Section 1129(a)(9)(B) governs the treatment of other nonpriority non-tax claims. If the class has accepted the plan of reorganization, then deferred cash payments of a value as of the effective date f the plan equal to the allowed amount of such claim. 11 U.S.C. § 1129(a)(9)(B).

- If the class has not accepted the plan of reorganization, cash on the effective date of the plan of reorganization equal to the amount allowed of such claim. 11 U.S.C. § 1129(a)(9)(B).

- Bankruptcy Code Section 1129(a)(9)(C) provides that for the payment for tax claims. Under Bankruptcy Code Section 1129(a)(9)(C) a tax claim shall receive regular cash installment payments of the total value, as of the effective date of plan of reorganization, equal to the amount of its allowed claim; within five years from the order for relief; and in a manner not less favorable to the most favored nonpriority unsecured creditors.

- As to a secured tax claim, a taxing authority must receive cash payments in the same manner and over the same period as required for an unsecued priority tax claim. 11 U.S.C. § 1129(a)(9)(D).

J. *Bankruptcy Code Section 1129(a)(10)*

- Bankruptcy Code Section 1129(a)(10) states:
- (a) The court shall confirm a plan only if all of the following requirements are met:
- * * * *
- (10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.
- 11 U.S.C. § 1129(a)(10).

- In a single asset real estate case Bankruptcy Code Section 1129(a)(10) is consequential because one impaired class is needed to approve the plan to invoke the cram down provisions of Bankruptcy Code Section 1129(b). An undersecured creditor is often in a position to block a plan of reorganization because not only does it have a secured claim, but also it has the largest unsecured claim. The failure of one impaired class to accept a plan of reorganization means that under Bankruptcy Code Section 1129(a)(10) the plan of reorganization cannot be confirmed. *In re Valley Park Group, Inc., 96 B.R. 16, 22 (Bankr. N.D.N.Y. 1989).*

- Gerrymandering of creditor classes is with a few exceptions is a disapproved of practice. *Barakat v. The Life Insurance Co. of Virginia (In re Barakat), 99 F.3d 1520, 1524-26 (9th Cir. 1996); Boston Post Road Ltd. Partnership v. Federal Deposit Insurance Corp. (Boston Post Road Ltd. Partnership), 21 F.3d 477 (2nd Cir. 1994); Phoenix Mutual Life Insurance Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture), 995 F.2d 1274, 1278-82 (5th Cir. 1991)*

- Confirmation of a plan of reorganization has been denied in single asset real estate cases in which a debtor attempted to confirm a plan through artificial impairment. *E.g., Boston Post Road Ltd. Partnership v. Federal Deposit Insurance Corp. (Boston Post Road Ltd. Partnership), 21 F.3d 477 (2nd Cir. 1994); Phoenix Mutual Life Insurance Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture), 995 F.2d 1274, 1278-82 (5th Cir. 1991).*

- In *In re All Land Investments, LLC, 468 B.R. 676 (Bankr. D. Del. 2012) the court ruled that two creditor classes had been artificially impaired, and therefore, these classes were excluded from the Bankruptcy Code Section 1129(a)(10) determination as to whether one impaired class had accepted the plan. Moreover, the votes of two of the debtor's officers had to be excluded from the determination as to whether general unsecured creditors had accepted the plan.*

- *Bankruptcy Code Section 1129(a)(10) provides that the votes of insiders cannot be counted to determine whether a class had accepted the plan. The secured creditor's unsecured deficiency was so large that it controlled the vote of the class of unsecured creditors. The plan of reorganization could not be confirmed because Bankruptcy Code Section 1129(a)(10) could not be satisfied.*

- In *In re RAMZ Real Estate Co., LLC, 510 B.R. 712 (Bankr. S.D.N.Y. 2014) the court ruled that a 3% decrease on a secured real property tax claim constituted impairment. The county's real property tax claim was an impaired class that satisfied Bankruptcy Code Section 1129(a)(10) for purposes of cram down and Bankruptcy Code Section 1129(b).*

K. *Bankruptcy Code Section 1129(a)(11)*

- Bankruptcy Code Section 1129(a)(11) states:
- (a) The court shall confirm a plan only if all of the following requirements are met:
- * * * *
- (11) Confirmation 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.
- 11 U.S.C. § 1129(a)(11).

- Bankruptcy Code Section 1129(a)(11) contains the feasibility test. *In re Multiut Corp.,*449 B.R. 323, 347 (Bankr. N.D.Ill. 2011). Feasibility is a dispositive hurdle that if not surmounted, precludes consideration of the other confirmation requirements. *In re Marble Cliff Crossing Apartments, LLC, 486 B.R. 887, 893 (Bankr. S.D.Ohio 2013).*

- *Bankruptcy Code Section 1129(a)(11) requires that a plan can only be confirmed if confirmation is not likely to be followed by liquidation or the need for further financial reorganization. In re Chicago Investments, LLC, 470 B.R. 32, 107 (Bankr. D. Mass. 2012). The central inquiry is whether there is a reasonable probability that the plan provisions can be effectuated. In re Olde Prairie Block Owner, LLC, 467 B.R. 165, 169 (Bankr. N.D.Ill. 2012).*

- The plan proponent must establish by the preponderance of the evidence that the proposed Chapter 11 plan has a reasonable probability of success and more than a visionary scheme. *In re TCI 2 Holdings, LLC, 428 B.R. 117, 148 (Bankr. D.N.J. 2010).*

- *A plan proponent must provide concrete proof that of sufficient cash flow to meet its operations and plan obligations. In re Multiut Corp., 449 B.R. 323, 347 (Bankr. N.D.Ill. 2011). The feasibility test is rooted in objective facts. In re Olde Prairie Block Owner, LLC, 467 B.R. 165, 169 (Bankr. N.D.Ill. 2012).*

- The following are criteria employed to determine feasibility of a plan of reorganization:

- . . . (1) the adequacy of the debtor's capital structure; (2) the earning power of its business; (3) economic conditions; (4) the ability of the debtor's management; (5) the probability of the continuation of the same management; and (6) any other related matters which determine the prospects of a sufficiently successful operation to enable performance of the provisions of the plan.

- *In re RAMZ Real Estate Co., LLC, 510 B.R. 712, 719 (Bankr. S.D.N.Y. 2014).*

- A pertinent case in which a bankruptcy court ruled that a plan of reorganization was not feasible is *In re Marble Cliff Crossing Apartments, LLC, 486 B.R. 887 (Bankr. S.D.Ohio 2013).* There, the debtor proposed a thirty-two year plan with a 2.25% to 2.85% for the secured creditor. The debtor based its projections upon the faulty premise that it could obtain HUD like terms. The Debtor also had a methane gas problem. There were also weather related insurance losses that prompted the cancellation of insurance coverage by Eerie Insurance Company. The current insurance policy was set to shortly expire. The secured creditor offered evidence that the appropriate interest rate was 8.25% because of the risk involved with this debtor.

- The court ruled that the plan was not feasible, and it stated:

- Regarding the proposed thirty-two year repayment term, this protracted payout generates greater exposure to fluctuations in demand for apartments, based upon the economy and entrance of competitors to the market. Over time, this may lead to increased vacancies and plan payment defaults. In addition, over a thirty-two year period and as the project ages, there will be major repair and replacement costs. Over thirty-two years, there is greater risk that additional environmental concerns may arise, despite the current remediation plan. Finally, the inordinate repayment term increases exposure to a project with a history of payment defaults, from its inception.

- *Id. at 894.*

L. *Bankruptcy Code Section 1129(a)(12)*

- Bankruptcy Code Section 1129(a)(12) states:

- (a) The court shall confirm a plan only if all of the following requirements are met:

- * * * *

- (12) All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

- 11 U.S.C. § 1129(a)(12).

- Bankruptcy Code Section 1129(a)(12) requires that all United States Trustee have been paid or that they will be paid on the effective date of the plan of reorganization. *In re Rosewood at Providence, LLC, 470 B.R. 619, 632 (2011). A debtor's failure to be current with his or her*
- U.S. Trustee fee payments is a basis for denying confirmation. *In re Fisette, 459 B.R. 898, 901 (2011); In re Valley Park Group, Inc., 96 B.R. 16 (Bankr. N.D.N.Y. 1989).*

L. *Bankruptcy Code Section 1129(a)(13)*

- Bankruptcy Code Section 1129(a)(13) states:

- (a) The court shall confirm a plan only if all of the following requirements are met:

- * * * *

- (13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

- 11 U.S.C. § 1129(a)(13).

M. *Bankruptcy Code Section 1129(a)(14)*

- Bankruptcy Code Section 1129(a)(14) states:

- (a) The court shall confirm a plan only if all of the following requirements are met:

- * * * *

- ((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.

- 11 U.S.C. § 1129(a)(14).

- In order for a plan of reorganization to be confirmed Bankruptcy Code Section 1129(a)(14) requires that an individual debtor must be current on all post-petition domestic support obligations. *In re Fisette, 459 B.R. 898, 901 (2011); 6 Norton Bankr. L. & Prac. 3d § 112:31 (William L. Norton, III 2015).*

- *A debtor's failure to be current with his or her post-petition domestic support obligations will result in the denial of confirmation of his or her Chapter 11 plan. In re Fisette, 459 B.R. 898, 901 (2011).*

M. *Bankruptcy Code Section 1129(a)(15)*

- Bankruptcy Code Section 1129(a)(15) states:

- (a) The court shall confirm a plan only if all of the following requirements are met:

- * * * *

- (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-

- (A) 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

- (B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) 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.

- 11 U.S.C. § 1129(a)(15).

- Bankruptcy Code Section 1129(a)(15) requires that an objecting unsecured creditor be paid full present value or an amount not less than the debtor's projected disposable income to be received during the longer of five years after the first payment under the plan or the term of the plan payments. *In re Draiman, 450 B.R. 777, 816 (Bankr. N.D.Ill. 2011).*

- In *In re Gbadebo, 431 B.R. 222 (Bankr. N.D.Cal. 2010) the court denied confirmation because the debtor failed to satisfy Bankruptcy Code Section 1129(a)(15). The court stated:*

- The Debtor correctly notes that this requirement goes to the amount paid to all creditors under the Plan, not just to the Class 8 creditors or just to the creditor who objects to the plan. He notes that his statement of income and expenses showed a negative number. However, in order to find that 11 U.S.C. § 1129(a)(15) has been satisfied, the Court must be persuaded that the Debtor's financial information is credible. The Court is unable to do so.

- The Debtor's testimony at trial persuaded the Court that the Debtor uses ITC as his personal “piggy bank,” drawing money from it or causing it to pay his personal expenses as needed and failing to maintain its corporate separateness. Thus, the Court believes that the Debtor's calculation of his income and expenses is unreliable at best. The Debtor bears the burden of proof on this issue and has failed to satisfy it. As a result, for this reason as well, the Plan may not be confirmed.

- *Id. at 226-27.*

III. *1129(b) and Cram Down*

- A. *Bankruptcy Code Section 1129(b)(1)*
- Bankruptcy Code Section 1129(b) permits a plan proponent to confirm a plan of reorganization over the objection of a dissenting class of creditors. Bankruptcy Code Section1129(b)(1) states:

- (b)(1)Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

- 11 U.S.C. § 1129(b)(1).

- In order for “cram down” to occur two conditions must be satisfied. Each requirement of Bankruptcy Code Section 1129(a) must be satisfied, except acceptance of each impaired class under Bankruptcy Code Section 1129(a)(8). *In re Multiut Corp., 449 B.R. 323, 351*(Bankr. N.D.Ill. 2011).

- The plan may be confirmed over the objection of an impaired class if the plan does not discriminate unfairly, and it is fair and equitable as to each class of claims or interests that is impaired and has not accepted the plan of reorganization. *Bank of Am. Nat'l Trust and Sav. Ass'n v. 203 LaSalle St. P'ship, 526 U.S. 434, 441 (1999).*

- Under Bankruptcy Code Section 1129(b)(1), a plan of reorganization unfairly discriminates when it treats similarly situated classes differently without a reasonable basis for the different treatment. *In re Young Broad. Inc., 430 B.R. 99, 13940 (Bankr. S.D.N.Y. 2010); In re Pine Lake Village Apartment Co., 19 B.R. 819, 829–30 (Bankr.S.D.N.Y.1982). If there is a reasonable basis for the disparate treatment of two classes of similarly situated creditors exists, there is no unfair discrimination. See In re WorldCom, Inc., No. 02–13533(AJG), 2003 WL 23861928, at *59 (Bankr.S.D.N.Y. Oct.31, 2003).*

B. *Bankruptcy Code Section 1129(b)(2)(A): Cram Down and Secured Creditors*

1. *Introduction*

- Bankruptcy Code Section 1129(b)(2)(A) governs the cram down of secured creditors, and it states:

- (2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

- (A) With respect to a class of secured claims, the plan provides-

- (i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

- (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

- (ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

- (iii) for the realization by such holders of the indubitable equivalent of such claims.

- 11 U.S.C. § 1129(b)(2)(A).

2. *Bankruptcy Code Section 1129(b)(2)(A)(i)*

- In order for a plan of reorganization to be fair and equitable to a secured creditor under Bankruptcy Code Section 1129(b)(2)(A)(i) a secured creditor must retain its lien on its property and receive deferred cash payments on the effective date of the plan of at least the value of its lien. 11 U.S.C. § 1129(b)(2)(A)(i). The first requirement under Bankruptcy Code Section 1129(b)(2)(A)(i) is that the secured creditor retain its lien on the property. *In re 20 Bayrard Views, LLC , 445 B.R. 83, 105-06 (Bankr. S.D.N.Y. 2011).*

- *The second requirement of Bankruptcy Code Section 1129(b)(2)(A)(I) is that the secured creditor has to receive deferred cash payments on the effective date of the plan of reorganization equal to the value of its secured claim. In re Pamplico Highway Development, LLC, 468 B.R. 783, 789 (Bankr. D.S.C. 2012).*

- An important case concerning the cram down rate of interest is *Till v. SCS Credit Corp., 541 U.S. 465 (2004)(plurality opinion). In Till, a plurality of the Supreme Court held that a formula approach is the current methodology for determining the cram down rate in a Chapter 13 case. The Court stated:*

- Taking its cue from ordinary lending practices, the approach begins by looking to the national prime rate, reported daily in the press, which reflects the financial market's estimate of the amount a commercial bank should charge a creditworthy commercial borrower to compensate for the opportunity costs of the loan, the risk of inflation, and the relatively slight risk of default. Because bankrupt debtors typically pose a greater risk of nonpayment than solvent commercial borrowers, the approach then requires a bankruptcy court to adjust the prime rate accordingly. The appropriate size of that risk adjustment depends, of course, on such factors as the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan. The court must therefore hold a hearing at which the debtor and any creditors may present evidence about the appropriate risk adjustment. (Footnote omitted).

- *Id. at 478-49.*

- In *Bank of Montreal v. Official Committee of Unsecured Creditors et al. (In re American HomePatient, Inc., 420 F.3d 559 (6th Cir. 2005) the Court of Appeals for the Sixth Circuit interpreted Till, in the context of a Chapter 11 cramdown. The Sixth Circuit adopted a nuanced approach to determining the correct interest rate under Chapter 11 cramdown. The court stated:*

- Taking all of this into account, we decline to blindly adopt *Till ' s endorsement of the formula approach for Chapter 13 cases in the Chapter 11 context. Rather, we opt to take our cue from Footnote 14 of the opinion, which offered the guiding principle that "when picking a cram down rate in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce." Till, 541 U.S. at 476 n. 14, 124 S.Ct. 1951. This means that the market rate should be applied in Chapter 11 cases where there exists an efficient market. But where no efficient market exists for a Chapter 11 debtor, then the bankruptcy court should employ the formula approach endorsed by the Till plurality. This nuanced approach should obviate the concern of commentators who argue that, even in the Chapter 11 context, there are instances where no efficient market exists.*

- *Id. at 568.*

3. *Bankruptcy Code Section 1129(b)(2)(A)(ii)*

- Bankruptcy Code Section 1129(b)(2)(A)(ii) permits cram down of a secured creditor if the property is sold and the secured creditor's lien attaches to the proceeds of the sale. 11 U.S.C.
- 1129(b)(2)(A)(ii).

- An important case involving the interpretation of Bankruptcy Code Section 1129(b)(2)(A)(ii) is *RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S.Ct. 2065 (2012).* In *RadLAX Gateway the debtor sought to sell its real property under Bankruptcy Code 1129(b)(2)(A)(iii) without affording the secured creditor the opportunity to credit bid. Instead, the secured creditor would have been compelled to bid cash if it desired to participate in the bankruptcy auction.*

- *The Court held that the debtor's plan that failed to provide the secured creditor the right to credit bid violated Bankruptcy Code Section 1129(b)(2)(A)(ii). The Court reasoned that Bankruptcy Code Section 1129(b)(2)(A)(ii) was a specific statute that governed sales conducted pursuant to a plan of reorganization. Bankruptcy Code Section 1129(b)(2)(A)(iii), that governed the indubitable equivalent, could not be utilized to circumvent the more specific statute.*

4. *Bankruptcy Code Section 1129(b)(2)(A)(iii)*

- Bankruptcy Code Section 1129(b)(2)(A)(iii) permits cram down on a secured creditor realizes the indubitable equivalent of its claim. 11 U.S.C. § 1129(b)(2)(A)(iii). The concept of "indubitable equivalent" is derived from Judge Learned Hand's decision in *In re Murel Holding Corp., 75 F.2d 941 (2nd Cir. 1935).*

- An important appellate decision involving Bankruptcy Code Section 1129(b)(2)(A)(iii) is *Sandy Ridge Development Corp. v. Louisiana National Bank (In re Sandy Ridge Development Corp.), 881 F.2d 1346 (1989). There, the Fifth Circuit Court of Appeals held that the return of a secured creditor's collateral satisfied Bankruptcy Code Section 1129(b)(2)(A)(iii). The court stated:*

- This “indubitable equivalent” language is at the heart of the current case, and fortunately its application is relatively straightforward. The key determination is the precise meaning of the phrase “such claims,” and our inquiry concludes that “such claims” can only mean *secured claims. Section 1129(b)(2) is divided into several subsections. Section 1129(b)(2)(A) deals with secured claims, while section 1129(b)(2)(B) deals with unsecured claims. Since the “indubitable equivalent” language is part of section 1129(b)(2)(A), it deals only with secured claims, and thus section 1129(b)(2)(A)(iii) can be accurately read to state “the realization of the holders of secured claims of the indubitable equivalent of their secured claims.”*

- *Since the value of LNB's secured claim is equal to the value of Brightside, a plan which provides that LNB will realize the indubitable equivalent of Brightside will satisfy the requirements of section 1129(b)(2)(A)(iii). The current plan provides that LNB will receive Brightside itself, and since common sense tells us that property is the indubitable equivalent of itself, this portion of the current plan satisfies the "indubitable equivalent" requirement. (Footnote omitted).*

- *Id. at 1350.*

C. *Bankruptcy Code Section 1129(b)(2)(B): Cram Down and Unsecured Creditors*

- Bankruptcy Code Section 1129(b)(2)(B) governs the cram down of unsecured creditors.

- 11 U.S.C. § 1129(b)(2)(B). Bankruptcy Code Section 1129(b)(2)(B) states:

- (B) With respect to a class of unsecured claims--

- (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

- (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

- 11 U.S.C. § 1129(b)(2)(B).

- Under Bankruptcy Code Section 1129(b)(2)(B)(i) cram down of the unsecured creditors is permitted if the unsecured creditor receives on the effective date of plan property equal to the value of its claim. 11 U.S.C. § 1129(b)(2)(B)(i). Under Bankruptcy Code Section 1129(b)(2)(B)(ii) cram down is permitted if no junior class is receiving a distribution or retaining property under the plan of reorganization, the absolute priority rule. 11 U.S.C. § 1129(b)(2)(B)(ii).

- D. *The Absolute Priority Rule and the New Value Exception*

- 1. *The Supreme Court and the Absolute Priority Rule*

- The absolute priority rules provides that a dissenting class of unsecured creditors must be paid in full before any junior class can receive or retain property under the plan of reorganization. *Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 202 (1988). The absolute priority rule is codified in Bankruptcy Code Section 1129(b)(2)(B)(ii).*

- In *Norwest Bank Worthington v. Ahlers, 485 U.S. 197 (1988) the Supreme Court addressed the issue of a debtor's promise to provide future labor, experience, and expertise permitted the debtors to retain their ownership over the objections of their creditors in violation of the absolute priority rule.*

- *The Court ruled that the debtors' promise failed to satisfy the Los Angeles Lumber parameters because money or mon's worth was not being contributed. There was no indication that Congress intended to expand the "new value exception." Moreover, any equitable powers that a bankruptcy court has must be exercised within the confines of the Bankruptcy Code such as not to create new entitlements.*

- In *Bank of America National Trust and Savings Association v. 203 North Lasalle Street Partnership, 526 U.S. 434 (1999) the Supreme Court ruled that if the new value exception did exist then a plan of reorganization under which a debtor has the exclusive right to file and provide for a debtor to retain his or her interest without being tested by the market place violate the absolute priority rule contained in Bankruptcy Code Section 1129(b)(2)(B)(ii). The Court stated:*

- Given that the opportunity is property of some value, the question arises why old equity alone should obtain it, not to mention at no cost whatever. The closest thing to an answer favorable to the Debtor is that the old equity partners would be given the opportunity in the expectation that in taking advantage of it they would add the stated purchase price to the estate. See Brief for Respondent 40–41. But this just begs the question why the opportunity should be exclusive to the old equity holders. If the price to be paid for the equity interest is the best obtainable, old equity does not need the protection of exclusiveness (unless to trump an equal offer from someone else); if it is not the best, there is no apparent reason for giving old equity a bargain. There is no reason, that is, unless the very purpose of the whole transaction is, at least in part, to do old equity a favor. And that, of course, is to say that old equity would obtain its opportunity, and the resulting benefit, because of old equity's prior interest within the meaning of subsection (b)(2)(B)(ii). Hence it is that the exclusiveness of the opportunity, with its protection against the market's scrutiny of the purchase price by means of competing bids or even competing plan proposals, renders the partners' right a property interest extended "on account of " the old equity position and therefore subject to an unpaid senior creditor class's objection.

- *Id. at 456.*

- 2. *Lower Federal Court Decisions Interpreting the Absolute Priority Rule and the New Value Corollary*

- The following are the requirements for the new value exception: former equity has to invest new substantial money or money's worth that is necessary for a successful reorganization and that is reasonably equivalent to the value being received. *Bonner Mall Partnership v. U.S. Bancorp. Mortgage Co., (In re Bonner Mall Partnership), 2 F.3d 899, 908 (9th Cir. 1993).*

- The threshold issue concerning new value is that the new value has to be substantial, and an insubstantial contribution will not satisfy the new value exception. *See, Liberty National Enterprises v. Ambanc Mesa Limited Partnership (In re Ambanc Mesa Limited Partnership), 115 F.3d 650, 655-56 (9th Cir. 1997); In re Snyder, 967 F.2d 1126, 1131 (7th Cir. 1992).*

- In *Liberty National Enterprises v. Ambanc Mesa Limited Partnership (In re Ambanc Mesa Limited Partnership), 115 F.3d 650 (9th Cir. 1997) the Ninth Circuit held that the new value contribution by the existing shareholders was de minimis. Under the plan of reorganization the partners existing partners would initially contribute $32,000.00 and a total of $320,000.00 over ten years.*

- *The court reasoned that the issue of substantial contribution concerned the initial outlay of funds. Only those outlay of funds that would be contributed as of the effective date of the plan of reorganization should be considered. The $32,000.00 contribution was less than 0.5% of the total unsecured debt, which was $4,000,000.00. As a matter of law, the partners contribution was insubstantial.*

- Another pertinent case is *In re Woodbrook Associates, 19 F.3d 312 (7th Cir. 1994). There, the Seventh Circuit Court of Appeals ruled that a capital infusion of $100,000 which was equal 3.8% of the unsecured debt was not substantial. The contribution has to be real and contribute to the plan's feasibility.*

3. *The Absolute Priority Rule and Individual Chapter 11 Cases*

- In 2005 Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"). As part of BAPCPA Congress enacted Bankruptcy Code Section 1115, and the pertinent part of Bankruptcy Code Section 1115(a) states:

- (a) In a case in which the debtor is an individual, property of the estate includes, in addition to the property specified in section 541--

- (1) all property of the kind specified in section 541 that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first; and

- (2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first.

- 11 U.S.C. § 1115(a).

- As part of BAPCPA Congress also amended Bankruptcy Code Section 1129(b)(2)(B)(ii).

- Bankruptcy Code Section 1129(b)(2)(B)(ii) states:

- (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section. (Emphasis added).

- 11 U.S.C. § 1129(b)(2)(B)(ii).

- There is a significant division among the lower federal courts concerning whether the absolute priority rule is applicable to an individual debtor. Some courts have ruled that the BAPCPA amendments did not impliedly repeal the absolute priority rule in individual Chapter 11 cases. *E.g., Ice House America, LLC v. Cardin (In re Cardin), 751 F.3d 734 (6th Cir. 2014); In re Lively, 717 F.3d 406 (5th Cir. 2013); Dill Oil Co. v. Stephens (In re Stephens), 704 F.3d 1279 (10th Cir. 2013); In re Mahraj, 681 F.3d 558 (4th Cir. 2012).*

- Other courts have held that the BAPCPA amendments did abolish the absolute priority rule in individual Chapter 11 cases. *E.g., Friedman v. P+P, LLC (In re Friedman), 466 B.R. 471 (Bankr. 9th Cir. 2012); In re Shat, 424 B.R. 854 (Bankr. D. Nev. 2010) In re Tegeder, 369 B.R. 477 (Bankr. D. Neb. 2007).*

- In *In re Lively, 717 F.3d 406 (5th Cir. 2013) the Fifth Circuit Court of Appeals adopted the narrow approach to the BAPCPA amendments, and it held that the BAPCPA amendments did not repeal the absolute priority rule. The narrow approach holds that the absolute priority rule was amended so that individual debtors could exclude from creditors reach property that was acquired post-petition. There was ambiguity in the statute. However, the Fifth Circuit Court of Appeals was adverse to holding that there was an implied repeal of the absolute priority rule because this would have been a drastic modification of bankruptcy law.*

- On the other hand, the Bankruptcy Appellate Panel for the Ninth Circuit has adopted the "broad view", and it has held that the absolute priority rule has been abrogated in individual Chapter 11 cases. *Friedman v. P+P, LLC (In re Friedman), 466 B.R. 471 (Bankr. 9th Cir. 2012). The court viewed the BAPCPA amendments as transposing the Chapter 13 confirmation requirements into individual Chapter 11 cases. The concepts of post petition property embodied in Bankruptcy Code Section 1115 and the disposable income test embodied in Bankruptcy Code Section 1129(a)(15) reinforced the notion that the confirmation requirements of Chapter 13 were now applicable in individual Chapter 11 cases. There is no absolute priority test in Chapter 13.*