DEBTOR/CREDITOR RIGHTS COMMITTEE
REPORT PREPARED FOR THE DECEMBER 2, 2017 COUNCIL MEETING

1. Next Scheduled Meeting of the Committee.

As discussed below, the Committee is preparing a theme issue for the Spring 2018 Michigan Business Law Journal on hot topics in fraudulent transfer law. In conjunction with this publication, the Committee will present a seminar on some of the covered fraudulent transfer issues in February 2018. The exact date for this program has not yet been set.

2. Council Approval.

A subcommittee is working with representatives of the Real Property Law Section to prepare proposed amendments to Michigan's assignment of rents statute in light of recent Sixth Circuit case law. The proposed text is not ready, but we hope to have it ready for approval in January 2018, and will probably seek approval prior to the next council meeting.

3. Membership.

The Committee communicates regularly with its membership through its email list with announcements of Committee events, case law alerts, and announcements of events of interest to bankruptcy and insolvency law practitioners. This increases the Committee's profile. In addition, holding regular meetings and educational events increases the interest of the bar in becoming members. We regularly receive inquiries from bar members about joining the Committee and respond immediately to reach out to the individuals.

The Committee works with other bankruptcy/insolvency bar groups, which exposes the members of those groups to the Committee and its activities and increases interest in the Committee.

The Committee has healthy attendance at its meetings and events. Eighteen members attended the Committee's November 8, 2017 meeting.

4. Accomplishments Toward Committee Objectives.

The Committee held two well-attended events this fall. The feedback that Committee leadership received from both events was very positive.

5. Meetings and Programs.

The Committee held a dinner seminar on August 9, 2017 at the offices of Jaffe Raitt Heuer & Weiss, P.C. discussing recent Sixth Circuit case law dealing with assignment of rents and bankruptcy. The event was very well attended, and resulted in the creation of the subcommittee referenced in response to question 2.

The Committee held a dinner meeting on November 8, 2017 at the offices of Honigman Miller Schwartz & Cohn. The meeting included presentations on the new model chapter 13 plan for the Eastern District of Michigan and the amendments to the Federal Rules of Bankruptcy that become effective December 1, 2017. Paul R. Hage, Co-Vice Chair of the Committee, led a discussion on recent case law and circulated the attached Case Law Update.

The Committee is planning a seminar on fraudulent transfer issues in February 2018. We anticipate that many of the authors who contributed to the Michigan Business Law Journal issue discussed below will participate in this seminar. The exact date for this program has not yet been set.

6. Publications.

The Committee is preparing the Spring 2018 edition of the Michigan Business Law Journal. The theme of the issue will be fraudulent transfers. We have secured eight articles on a wide variety of topics concerning fraudulent transfers, including standing to bring fraudulent transfer actions, Michigan's new domestic asset protection trust act, the new Michigan Voidable Transactions Act, ponzi schemes, payment of a child's tuition as a fraudulent transfer and a recent Sixth Circuit decision addressing the standard for the good faith defense. We are in the process of reviewing and editing submitted drafts.

7. Methods of Monitoring Legislative/Judicial/Administrative Developments and Recommended Action

The Committee leadership is active in monitoring new statutes, rules and case-law of interest to our members. Co Vice-Chair Paul R. Hage writes case notes for the American Bankruptcy Institute's monthly magazine, and also keeps the Committee apprised of new case law developments. His most recent Case Law Update was distributed to the entire membership of the Committee on its list serve.

The Committee discusses hot topics, legislative developments and case law at its meetings, many of which are brought to our attention by our members.

8. Miscellaneous.

None.

Respectfully submitted,

Judy B. Calton, Co-Chair
Judith Greenstone Miller, Co-Chair
Paul Hage, Co Vice-Chair
Marc N. Swanson, Co Vice-Chair

Dated: November 17, 2017.

State Bar of Michigan Debtor-Creditor Rights Section

CASE LAW UPDATE

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Ninth Circuit Holds that a Sale Under Section 363(f) Strips Tenants of their 365(h) Rights.

In *In the Matter of Spanish Peaks Holdings II, LLC,*[1] the Ninth Circuit Court of Appeals held that a sale of property under section 363(f) strips a tenant of its statutory right to remain in the premises notwithstanding rejection pursuant to section 365(h).

Spanish Peaks was a 5,700 acre resort in Big Sky, Montana. Prepetition, the debtors entered into two long-term, under-market commercial leases with tenants. Postpetition, the bankruptcy trustee moved for an order approving a sale process which contemplated a sale "free and clear of any and all liens, claims, encumbrances and interests." Relying on section 365(h), the tenants objected to the sale of the assets free and clear of their leasehold interests. After a two day evidentiary hearing, the bankruptcy court, applying what it called a "case-by-case, fact-intensive" approach, held that the sale to the winning bidder was free and clear of the tenants' leases. The district court affirmed.

The Ninth Circuit stated that "the issue brings two sections of the Code into apparent conflict." Section 363(f) authorizes sales "free and clear" of any interest in such property. Meanwhile, section 365(a) authorizes a debtor to reject any unexpired lease subject to subsection (h), which allows a tenant to "retain any rights – including a right of continued possession – to the extent those rights are enforceable outside of bankruptcy."[2]

The "majority approach," adopted by numerous bankruptcy courts concludes that the statutory provisions overlap. Such courts hold that section 365(h) trumps section 363(f) under the canon of statutory construction that the specific prevails over the general. Such courts further reason that "the legislative history regarding § 365 evinces a clear intent on the part of Congress to protect a tenant's estate when the landlord files bankruptcy, and that the protection would be nugatory if the property could be sold free and clear of the leasehold under section 363."[3]

[1] *In the Matter of Spanish Peaks Holdings II, LLC,* 862 F.3d 1148 (9th Cir. 2017).
[2] *Id.* at 1154.
[3] *Id.* at 1155.

The "minority approach" is based on the Seventh Circuit's 2003 ruling in *In re Qualitech Steel Corp*[4] that section 363(f) confers a right to sell property free and clear of "any interest," without excepting from that authority leases entitled to the protections of section 365(h). The *Qualitech* court found that the statutory provisions do not necessarily conflict with each other, reasoning that section 365(h) focuses solely on the rejection of an executory contract and says nothing at all about sales of estate property, "which are the province of section 363."

The Ninth Circuit adopted the "minority approach." While a sale of property free and clear of a lease "may be an effective rejection of the lease in some everyday sense," the court found, it is not the same thing as the "rejection" contemplated by section 365.[5] "In sum, section 363 governs the sale of estate property, while section 365 governs the formal rejection of a lease. Where this is a sale, but no rejection (or a rejection, but no sale), there is no conflict."[6]

The court then responded to the argument that the "minority approach" results in "the effective repeal of § 365(h)."[7] It found that the mandatory language of section 363(e), which provides that a court must provide adequate protection for an interest that will be terminated by a sale if the holder of the interest requests it, addresses this concern. The court suggested that if the tenants had simply sought adequate protection of their leasehold interest, the bankruptcy court may have had no choice but to allow them to continue in possession.

Physical Possession of Goods is Required for Purposes of Section 503(b)(9).

In *In re World Imports Ltd.,*[8] two Chinese furniture manufacturers shipped goods to the debtor "FOB," or "free on board," more than twenty days before the petition date, but the debtor took physical possession of the goods in the United States within the twenty day priority period contemplated in section 503(b)(9). Post-petition, the vendors filed motions for allowance of an administrative expense. The parties disagreed about which action (transfer of title or physical acceptance) constituted receipt for purposes of section 503(b)(9).

The bankruptcy court noted that the term "received" is not defined in the Bankruptcy Code. It concluded that the authority controlling the definition of the term was international commercial law, not the UCC, which defines the term "receipt" as "taking physical possession."[9] Accordingly, the court looked to the Convention on Contracts for the International Sale of Goods. While that treaty does not define the term "received," it does incorporate Incoterms, and the Incoterm governing FOB contracts makes clear that title and the risk of loss transfers to the buyer when the seller delivers the goods to the common carrier's vessel. Because the risk of loss transferred when the goods were shipped, the goods were "constructively received" by the debtor when they left the port in China. Accordingly, the court denied the vendors' motions.

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[4] *Id* (citing *In re Qualitech Steel Corp.,* 327 F.3d 537 (7th Cir. 2003)).
[5] *Id.* at 1156.
[6] *Id.*
[7] *Id.* at *6 (citing *Dishi & Sons v. Bay Condos, LLC,* 510 B.R. 696 (S.D.N.Y. 2014)).
[8] *In re World Imports, Ltd.,* 862 F.3d 338 (3d. Cir. 2017).
[9] *Id.* at 342 (citing UCC § 2-103(1)(l)).

The Third Circuit reversed, holding that goods are "received" for purposes of 503(b)(9) only when the debtor takes "physical possession" of them. The court recited the principle from Supreme Court case law that Congress does not write on a clean slate and if a word incorporated in a statute had a well-known meaning, it is presumed to have been used in that sense. The court then noted that well-known dictionaries define the word "received" as requiring physical possession. These definitions, the court continued, comport with the definition found in the UCC.

The court also found ample evidence from the statutory context that Congress relied on the UCC definition when it enacted BAPCPA. The court noted that section 503(b)(9) was enacted as part of a section of BAPCPA entitled "Reclamation," which: (i) limited the reclamation remedy in section 546(c), and (ii) created section 503(b)(9) "as an *exemption* from § 546(c)'s reclamation conditions."[10] The interrelationship between section 546(c) and section 503(b)(9) is also explicit in the Bankruptcy Code, given that section 546(c)(2) expressly references and preserves a vendor's rights under section 503(b)(9).

Finally, the court focused on the Third Circuit's precedent dealing with reclamation and noted that it had previously defined "receipt" for purposes of section 546(c) to mean "taking physical possession."[11] This definition, that court stated, like the reclamation provision itself, arose out of the UCC. Because Congress essentially borrowed the reclamation provision from the UCC, "it also borrowed the standard definition of the term receipt."[12]

The debtor argued that the goods were constructively received upon delivery because they were delivered "FOB" to a common carrier. Rejecting this argument, the court stated: "While it is true that a buyer may be deemed to have received goods when his agent takes physical possession of them, common carriers are not agents."[13] Accordingly, because the debtor took physical possession of the goods within twenty days before the petition date, the orders of the lower courts were reversed.

Delaware Bankruptcy Court Extends *World Imports* to Goods that are Drop-Shipped

Days later, in *In re SRC Liquidation, LLC,*[14] Judge Brendan Linehan Shannon of the United States Bankruptcy Court for the District of Delaware relied on *In re World Imports* in holding that a vendor who "drop-shipped" goods to a customer of the debtor during the twenty day period were not entitled to an administrative expense under section 503(b)(9). The debtor purchased goods from a vendor. While some goods were delivered to the debtor, others, totaling $44,439.78, were shipped directly to the debtor's customers. The shipments to the debtor's customers were made at the debtor's direction and utilizing the debtor's account with United Parcel Service. The vendor sought an administrative expense for the goods shipped to the debtor's customers. The purchaser of substantially all of the debtor's assets, who was

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[10] *Id.* at 343 (emphasis in original).
[11] *Id.* (citing *In re Marin Motor Oil*, 740 F.2d 220, 224-25 (3d Cir. 1984)).
[12] *Id.*
[13] *Id.* at 344.
[14] *In re SRC Liquidation, LLC,* 573 B.R. 537 (Bankr. D. Del. July 13, 2017).

responsible for paying all administrative expenses under the debtor's confirmed plan, objected to the request alleging, among other things, that the drop-shipped goods were not "received" by the debtor during the twenty days prior to the petition date.

The court began its analysis by noting that although the phrase "received by the debtor" is not defined in the Bankruptcy Code, "case law teaches that courts may look to Article 2 of the U.C.C. when analyzing section 503(b)(9) claims."[15] Turning to the UCC, the court stated:

> The U.C.C. defines receipt of goods as "taking physical possession of them," "unless the context clearly requires otherwise." U.C.C. § 2–103(1)(c). An example of a "context [that] clearly requires otherwise" includes stoppage and reclamation rights. *See* U.C.C. §§ 2–702, -705. Section 2–705 of the U.C.C. specifies four situations in which a buyer "receives" goods such that the stoppage provisions of section 2–705 no longer apply and the reclamation provisions of section 2–702 come into play: one situation involves physical possession of the goods by the buyer and the other three situations include "constructive receipt," each of which require physical possession of the goods through an agent. *See* U.C.C. § 2–705(2). Accordingly, the U.C.C. recognizes "receipt" in both its actual and constructive forms. See U.C.C. §§ 2–103(1)(c), -705(2).[16]

Digging deeper, the court noted that section 2-705 of the UCC contemplates actual, physical receipt of goods along with three forms of constructive receipt, specifically: (i) acknowledgement to the buyer by any bailee of the goods; (ii) acknowledgment to the buyer by a carrier by reshipment or as warehouseman; and (iii) negotiation to the buyer of any negotiable document of title covering the goods. The purchaser, relying on *Marin,* argued that receipt under section 503(b)(9) should be restricted to the four situations listed in section 2-705 of the UCC, none of which existed in the present case.

The court held that its hands were tied as the *In re World Imports* opinion directly governed . As stipulated by the parties, the court explained, the goods at issue "were delivered … to a common carrier (UPS) for shipping via the Debtor's account to a third party customer" of the debtor.[17] The debtor never physically possessed the goods. "Only UPS possessed the goods," the court found, "and as a carrier UPS does not qualify as an agent" under *World Imports*.[18]

Accordingly, the court held that the goods were never received by the debtor within the meaning of section 503(b)(9) and, thus, the vendor's request for an administrative expense was denied.

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[15] *Id.* at 540 (citing *In re Momenta, Inc.,* 455 B.R. 353, 358 (Bankr. D. N.H. 2011); *In re Erving Industries, Inc.* 432 B.R. 354, 364 (Bankr. D. Mass. 2010)).
[16] *Id.* at 540-41.
[17] *Id.* at 542
[18] *Id.*

Contractual Exclusion in D&O Policy Barred Claims by a Liquidating Trustee.

Chapter 11 cases often result in some form of a plan that establishes a liquidating trust to pursue causes of action, including insider causes of action, for the benefit of creditors. Often times the true target of these causes of action is the debtor's D&O insurer. *Indian Harbor Insurance Co. v. Zucker*[19] followed this fact pattern.

The creditors and the debtor in possession, still under the direction of the insiders, agreed to a liquidation plan that required the debtor to assign all of the company's causes of action to a liquidating trust, which could pursue those claims on behalf of creditors. The plan stipulated that the insiders had no liability for any conduct after they filed the bankruptcy petition, and limited any pre-petition liability to amounts recovered from the debtor's liability insurance policy. The liquidation plan also required the insiders to sue the insurer if it denied coverage under the management liability policy.

The liquidating trustee ultimately filed suit against the insiders, seeking $18.8 million in damages for alleged breaches of their fiduciary duties. The insiders notified the insurer. The policy contained a typical "insured-versus-insured" exclusion, excluding from coverage any claims "by, on behalf of, or in the name or right of, the Company or any Insured Person." Citing this "insured-versus-insured" exclusion, the insurer commenced a declaratory judgment action, arguing that the liquidating trustee's claims were not covered under the policy.

The issue presented to the Court of Appeals for the Sixth Circuit was whether the exclusion applied to the liquidating trustee's claims. In a split decision, the court recognized that, while there is a legal distinction between a pre-bankruptcy debtor and the post-petition debtor-in-possession, that distinction made no difference in the context of the "insured-versus-insured" exclusion in an insurance policy. "A lawsuit by Capitol as debtor in possession on behalf of the bankruptcy estate remains a lawsuit 'by' Capitol and thus would still fit within the insured-versus-insured exclusion." The court noted that the Supreme Court has rejected the argument that a debtor in possession is a "wholly new entity" unbound by the pre-bankruptcy company's contracts.[20]

The split panel applied the same logic to the liquidating trustee, explaining that the trustee (like the debtor-in-possession) was merely pursuing litigation on behalf of, or as an assignee from, the debtor. The court suggested (and the dissent assumes) that the result may be different if the plaintiff was a court appointed trustee instead of a liquidating trustee, stating:

> [The trustee] and the [insiders] do not come to grips with [the debtor/debtor-in-possession] distinction. **Every case they invoke in support of their position involves a court-appointed trustee rather than an assignee from a Chapter 11 debtor in possession.**[21]

[19] *Indian Harbor Insurance Co. v. Zucker (In re Capitol Bancorp),* 860 F.3d 373 (6th Cir. 2017).
[20] *Id.* at 377 (citing *NLRB v. Bildisco & Bildisco,* 465 U.S. 513, 528 (1984)).
[21] *Id.*

And:

> It makes no difference that the bankruptcy court approved the plan transferring the bankruptcy estate's causes of action from Capitol to the Liquidation Trust. [The trustee] and the [insiders] may be right that court approval offers a safeguard against the collusive suits that insured-versus-insured exclusions seek to prevent. **But that does not eliminate the practical and legal difference between an assignee and a court-appointed trustee that receives the right to sue on the estate's behalf by statute.**[22]

The liquidating trustee argued that the purpose for the exclusion was to prevent collusion, and that, under the circumstances, the plan confirmation process provided sufficient safeguards to protect against collusion such that the "insured-versus-insured" exclusion need not apply. But the Sixth Circuit rejected this argument:

> That a contractual term, like a statutory term, was designed to avoid certain problems does not mean that a fact-intensive search for that problem—here for collusion—must occur each time someone invokes the provision. And it does not mean that collusion must be found before the provision applies. We ask only whether 'the Company' includes Capitol as debtor in possession. The contract itself, together with core principles of bankruptcy law, confirms that it does.[23]

The court therefore affirmed judgment in favor of the insurance carrier, and held that the trustee's claims were not covered under the policy.

Ninth Circuit Corrects Itself Regarding Valuation of Property in Chapter 11.

When a debtor, over a secured creditor's objection, seeks to retain and use the creditor's collateral in a chapter 11 plan through a "cram down," the Bankruptcy Code treats the creditor's claim as secured "to the extent of the value of such creditor's interest."[24] That value is to "be determined in light of the purpose of the valuation and of the proposed disposition or use of such property."[25]

In *Associates Commercial Corp. v. Rash*,[26] the Supreme Court adopted a "replacement-value standard" for section 506(a)(1) cram-down valuations. The Court held that replacement value, "rather than a foreclosure sale that will not take place, is the proper guide under a prescription hinged to the property's disposition or use."[27] In rejecting a "foreclosure-value standard," the Court noted that foreclosure value was typically lower than replacement value.

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[22] *Id.* at 377-78.
[23] *Id.* at 378.
[24] 11 U.S.C § 506(a)(1).
[25] *Id.*
[26] *Associates Commercial Corp v. Rash,* 520 U.S. 953, 956 (1997).
[27] *Id.* at 963.

However, in *In re Sunnyslope Housing Limited Partnership (Sunnyslope II)*,[28] foreclosure value exceeded replacement value because a foreclosure would vitiate covenants requiring that the property—an apartment complex—be used for low-income housing. Ultimately, the Ninth Circuit held that "§ 506(a)(1) requires the use of replacement value rather than a hypothetical value derived from the very foreclosure that the reorganization is designed to avoid."

The debtor filed a bankruptcy case to stave off a foreclosure sale by a lender of its collateral, a low-income apartment complex. The debtor's chapter 11 cram-down plan valued the apartment complex as low-income housing (approximately $2.6 million). The lender objected, arguing that the low- income housing restriction should be disregarded for purposes of valuation under section 506(a)(1), reasoning that its collateral would have a much higher value (approximately 7 million) if the property were not subject to these restrictions. The bankruptcy court approved the debtor's plan and the district court affirmed.

In *In re Sunnyslope Hous. Ltd. Partnership (Sunnyslope I)*,[29] the Ninth Circuit Court of Appeals held that affordable housing restrictive covenants should not affect the valuation of a creditor's secured interest in the property in a cram down. The court held that, under section 506(a)(1), replacement cost "is a measure of what it would cost to produce or acquire an equivalent piece of property" and such replacement cost "does not take into account ... a restriction on the use of the complex." The court reasoned that the debtor's valuation fell well below what the secured creditor would obtain from an immediate foreclosure sale.

The Ninth Circuit subsequently vacated the panel opinion in *Sunnyslope I* when it granted the debtor's petition for rehearing *en banc*. On rehearing, the Ninth Circuit relied on *Rash*, where the "Supreme Court adopted a 'replacement-value standard' for section 506(a)(1) cram-down valuations."[30] Agreeing with the dissent in *Sunnyslope I*, the majority in *Sunnyslope II* reasoned that *Rash* "compels valuing [the Bank's] collateral ... in light of [the debtor's] proposed use of the property in its plan of reorganization as affordable housing."

The purpose of a valuation under section 506(a), the court noted, is not to determine the amount the creditor would receive if it hypothetically had to foreclose and sell the collateral. The court noted, "The debtor is in, not outside of, bankruptcy, so the foreclosure value is not relevant because the creditor is not foreclosing."[31]

The lender tried to distinguish *Rash* by noting that in the instant case the foreclosure value is greater than replacement value. The Ninth Circuit concluded that *Rash* acknowledged that this unique scenario may occur. Nonetheless, the Ninth Circuit was not inclined to depart from *Rash* or else it would be forced to assume a foreclosure that is directly contrary to the result avoided by filing the voluntary chapter 11 petition.

MISCELLANEOUS

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[28] *In re Sunnyslope Housing Ltd. Partnership*, 859 F.3d 637 (9th Cir. 2017).
[29] *In re Sunnyslope Housing Ltd. Partnership*, 818 F.3d, 937, 940 (9th Cir. 2016).
[30] *In re Sunnyslope Housing Ltd. Partnership*, 859 F.3d at 640.
[31] *Id.* at 643.

Clark's Crystal Springs Range, LLC v. Gugino (In re Clark), 2017 WL 2963538 (9th Cir. July 12, 2017) (Notwithstanding the Supreme Court's decision in *Law v. Siegel,* the bankruptcy court had the power to enter a substantive consolidation order. "Ordering substantive consolidation ... does not contravene specific provisions of the Bankruptcy Code. While the Code does not explicitly authorize substantive consolidation, neither does the Code forbid it.");

In re Cherry Growers, Inc., 2017 WL 4990443 (Bankr. W.D. Mich. Nov. 1, 2017) (Debtor and its lender sought approval of a stipulated cash collateral order. The motion was opposed by a PACA claimant, who asserted that the cash collateral order violated its statutory trust. Under PACA, a seller of eligible produce has a trust claim against the qualifying inventory and proceeds that trumps the claims and liens of the buyer's secured creditors. Comingling is contemplated and there is no tracing requirement. The debtor has the burden of demonstrating that assets do not constitute proceeds of perishable agricultural commodities. Noting the broad scope of section 541, the court rejected the PACA claimant's argument that the debtor's cash collateral was not property of the estate due to the PACA trust and 541(d). Moreover, the court found that the debtor was permitted to use the cash in the absence of the PACA claimant proving a case for injunctive relief or the necessity of providing adequate protection under section 363(e). Because the debtor's assets greatly exceeded the amount of the PACA claims, it had met its burden of showing that the PACA claimant was adequately protected.);

In re CS Mining, LLC, 2017 WL 3208457 (Bankr. D. Utah July 27, 2017) (Relying on the plain language of section 502(d), the court refused to approve a 9019 settlement filed by the debtor with respect to its secured creditor's claim because the settlement precluded another creditor from prosecuting its own pending claim objection. The court also found that cause existed to deny the secured creditor's credit bid rights under section 363(k) because: (i) the secured creditor's claim was subject to a pending claim objection, (ii) in light of the size of the secured creditor's claim, "the bidding process would be chilled, then frozen" and (iii) the secured creditor had close ties with the debtor.). On the ability to settle a claim over the objection of other creditors, *see In re C.P. Hall Co.*, 513 B.R. 540 (Bankr. N.D. Ill. 2014); *In re Kaiser Aluminum Corp.*, 339 B.R. 91 (D. Del. 2006); *In re The Heritage Organization, LLC*, 375 B.R. 230 (Bankr. N.D. Tex. 2007).

In re Dinoto, 2017 WL 5054310 (Bankr. E.D. Mich. Nov. 3, 2017) (Lender loaned $800k to a home builder, which loan was guaranteed by debtor, his nephew and others. After default, the lender foreclosed on the property securing the loan, and obtained a judgment against the guarantors for the deficiency. The debtor filed a chapter 7 bankruptcy case. Two years later, the nephew/guarantor purchased the judgment for $11k. He then filed a general unsecured claim in the chapter 7 case for $934k. The debtor objected to the claim, which represented 97% of the claim pool, on various grounds. Judge Tucker noted that the general rule is that an insolvent debtor in a chapter 7 case does not have standing to object to a proof of claim (*i.e.* it is not a party in interest under section 507(a)). The court looked at whether the debtor had demonstrated a "reasonable possibility" that there would be a surplus (requiring $34k in funds to be distributed) if the claim was disallowed. The court surveyed the potential value of each of the assets in the bankruptcy estate, and the likely administrative expenses, and concluded that the debtor had not met its burden of demonstrating that a surplus was a "reasonable possibility.");

In re Millennium Lab Holdings II, LLC, 242 F.Supp.3d 322 (D. Del. 2017) (The District Court for the District of Delaware opined that a bankruptcy court does not have constitutional authority under *Stern* to approve non-consensual third party releases in chapter 11 plans. The court said "It is clear from these recent Supreme Court cases that parties have a constitutional right to have their common law claims adjudicated by an Article III court." It was equally clear, the court explained, that regardless of whether the bankruptcy court has subject matter jurisdiction, it cannot enter a final order releasing third-party claims unless it has constitutional authority to do so as well. The court concluded that the bankruptcy court had not had the opportunity to rule on the constitutional authority issue and, therefore, remanded the case for further consideration).

In re Wagle, LLC, 2017 WL 3503664 (Bankr. W.D. Pa. Aug. 16, 2017) (Court denied confirmation of a cram down chapter 11 plan because it violated the absolute priority rule. An $8,000 cash contribution by old equity holders (which would result in a 2% distribution to unsecured creditors) was not reasonably equivalent to the value of the interest being retained by equity. In evaluating whether a capital contribution is reasonably equivalent, the reorganized enterprise must be valued on a going concern basis rather than as if the assets were to be liquidated.);

Jahn v. Burke (In re Burke), 863 F.3d 521 (6th Cir. 2017) (In an issue of first impression, the Sixth Circuit held that a chapter 7 trustee could not evict the debtors from their home in order to make the property easier to sell by simply tendering a check representing the full value of the homestead exemption. The court rejected the trustee's argument that the debtors lacked standing and, further, ordered the trustee to abandon the property because it had inconsequential value to the estate's unsecured creditors.);

Oakland Police & Fire Retirement System v. Mayer Brown, LLP, 861 F.3d 644 (7th Cir. 2017) (Seventh Circuit affirmed the district court's dismissal of legal malpractice claims brought by lenders to General Motors against the automaker's law firm regarding the mistaken release of a $1.5 billion lien. The court agreed that the law firm owed no duty to the lenders notwithstanding the fact that: (i) lenders were clients of the law firm in unrelated matters, (ii) the law firm agreed to draft the closing documents, and (iii) the primary purpose of the law firm's relationship with General Motors was to influence the lenders.); and

Pirinite Consulting Group v. Kadant Solutions Division (In re Newpage Corporation), 569 B.R. 593 (D. Del. 2017) (District court affirmed bankruptcy court holding that payments made by debtor for custom equipment that creditor was not obligated to begin manufacturing under the parties' agreement until after payments were received were in the nature of "advance payments" and, thus, were not payments on account of an antecedent debt for purposes of section 547. The trustee's argument that "a contract creates a claim at the moment of its execution and is therefore an antecedent debt" was rejected. Rather, the court properly looked to the terms of the agreement and the unrefuted facts to determine when a right to payment arose.).