BANKRUPTCY FOR THE REAL ESTATE PRACTITIONER

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Mr. Weissberg founded Weissberg and Associates in July, 1984. Since then, he has built a varied and loyal clientele, comprised of small to medium-sized to publicly traded businesses, and individuals. He is sought out for complex business and financial planning, especially relating to credit facilities and crisis-management, and high-risk litigation. Beyond that, Mr. Ariel Weissberg is engaged as an expert witness in legal malpractice cases involving claims emanating from real estate and bankruptcy-related matters. Also, he serves as general counsel in senior management to a number of businesses, including well-established businesses engaged in real estate finance and development.

Mr. Weissberg's practice is concentrated in real estate matters, particularly real estate litigation and transactional work, with an emphasis in financially distressed real estate and insolvency. Mr. Weissberg is a trial lawyer, having litigated in state, federal and bankruptcy courts in Illinois relating to legal malpractice; industrial espionage and patent infringement; alter-ego, piercing the corporate veil and fraudulent conveyance litigation; bankruptcy discharge and dischargeability litigation; residential, commercial and industrial foreclosures; real estate reorganizations and hospitality reorganizations; real estate mortgage fraud actions; landlords matters relating to residential and commercial forcible entry and detainer actions and other lease disputes; in breach of real estate contract actions; mechanics lien foreclosure actions; residential and commercial lease disputes, including evictions; and representing creditors and debtors in post-judgment remedies.

In 1979, Mr. Weissberg received his J.D. from St. Louis University, where he was the co-managing editor of the St. Louis University Law Journal and also received from the American Bar Association a Silver Gavel Award for his legal reporting on KSD Radio on the trial of Benjamin Goins, a prominent St. Louis political figure. In 1976, he received his B.S. from Washington University in St. Louis.

In addition to practicing in Illinois, Mr. Weissberg has litigated in federal courts and bankruptcy courts in Indiana, Wisconsin, Michigan, Delaware, Florida and Missouri and is currently a member of the Chicago Bar Association, Federal Bar Association and Decalogue Society.

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He completed his undergraduate degree at the University of California, Berkeley earning a Bachelors of Arts in Economics in 2010. He received his *Juris Doctor cum laude* from the University of Illinois, College of Law in May 2013. After graduating law school and prior to his association with Weissberg and Associates, Ltd., Mr. Sinha served as the term law clerk for the Hon. Thomas M. Lynch, United States Bankruptcy Court for the Northern District of Illinois (Rockford, IL) and as the term law clerk for the Hon. Eugene R. Wedoff, United States Bankruptcy Court for the Northern District of Illinois (Chicago, IL)

Devvrat Sinha is admitted to practice: Illinois, 2013; United States District Court for the Northern District of Illinois, 2016. Member of the Trial Bar, 2017.

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Erica is a graduate of Loyola University School of Law and has practiced law for 35 years, of which 33 have been in some form of her own firm. Jokingly referring to herself as a "distressed real estate lawyer," Erica concentrates her time, talents and passion on assisting clients to be well-informed about their real estate decisions, whether they are buying a home or an investment, as well as helping them get out of debt and to build a solid financial future. Her field of expertise includes the spectrum of conventional and distressed real property issues, foreclosure defense, short sale transactions, and counseling her clients in re-establishing their credit and becoming debt free and mortgage free. She also advises investors in need of exit strategies for real estate deals gone sour, investors who see the current market as a great place to invest, and home buyers who are purchasing conventional and distressed real estate.

For five years in a row, Erica has been named a Leading Lawyer by the Leading Lawyers Network and has been named a Super Lawyer for 2017. The extent of her mentoring younger attorneys in her areas of concentration, as well as marketing and law office management, has been acknowledged in the Kathryn Barisa Rinella Mentoring Award, given to her by the Justinian Society of Lawyers. Erica serves on the boards of the Association of Foreclosure Defense Attorneys (Founder and President), the Illinois Real Estate Lawyers Association, and is a Commissioner on the Village of Skokie Economic Development Commission. Currently, Erica is the 2016-17 Chair of the Illinois State Bar Association Real Estate Law Section Council. She is regularly invited to be on the faculty of continuing legal education programs on real estate issues. Her business and professional association memberships include the Justinian Society of Lawyers, Small Business Advocacy Council, Women's Council of Realtors, Women's Bar Association and the Skokie Chamber of Commerce. She has maintained her Real Estate License for over 25 years. Erica is also the mother of two grown children and she has been married for over 32 years to her husband, Jim.

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BANKRUPTCY FOR THE REAL ESTATE PRACTITIONER

I. INTRODUCTION

Real estate is a recurring and pervasive theme in bankruptcy, as is true in most contexts of business law. But in bankruptcy, there are additional important components that require the practitioner to meet the challenges of protecting and advancing a client's rights, whether a debtor or a creditor. These additional components include crisis management and impending forfeiture, and the loss or severe diminution of *in personam* or *in rem* rights. While these components are not necessarily unique to bankruptcy cases, they are much more pronounced and intense in bankruptcy because of the highly "result-oriented" aspects of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure (that require, among other things, the debtor to be transparent under penalty of perjury) and the practicalities of triage (i.e., the allocation of scarce resources) in bankruptcy.

Moreover, in bankruptcy, all of a debtor's creditors are organized in one forum. By organizing all of the creditors in one forum, the creditors have the ability to act individually or with a "strength-in-numbers" scenario, acting in concert with the other creditors and additional parties-in-interest, such as the United States Trustee, to advance agendas that might be detrimental to the debtor, and to advocate in support or opposition to the debtor's actions. Thus, with these foundational imperatives that are often unique to bankruptcy cases, in reality, the "breathing spell" that is a central cornerstone of the protections afforded to a debtor in bankruptcy, with its paired policy of "fresh start" are often more of a myth than a reality for even the "honest debtor" (i.e., a defined term, but not necessarily a <u>well-defined</u> term).

These realities of today's bankruptcy cases dictate that a business debtor must have resources to avail itself or oneself of the axiomatical protections of bankruptcy. One of those resources is a well-prepared, knowledgeable lawyer to handle the challenges facing a business debtor. While less so for creditor's counsel, who has less "movable parts" to protect a creditor's rights than debtor's counsel, a lawyer representing either a creditor or a debtor in bankruptcy must be well-knowledgeable, and when called upon, act as a skilled litigator and adroit transactional lawyer. On both sides, lawyers need to be "deal makers" – where often the opportunities to make deals in bankruptcy are fleeting -- and well-aware that the "fight" must be tempered by the limited resources available to both creditors (seeking affirmation of rights or distributions) and debtors

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(who are seeking rehabilitation, a fresh start and the ability to fairly balance the retention of assets with the rights of creditors).

But even the less experienced lawyer can find solace that real estate issues in bankruptcy are often, literally, concrete. One of these issues involve landlord-tenant relationships, with the ability to reject (i.e., terminate) an unexpired lease that is burdensome financially, with a debtor-generous cap on liability; or the ability to assume the lease, with the conditions precedent of curing pre-petition defaults within a reasonable amount of time and providing adequate assurance of future performance to the landlord.

Another common real estate issue in bankruptcy, is the attempt of a Chapter 13 debtor to "bifurcate" secured claims on the debtor's primary residence, into partially secured claims, with the balance of the claim being unsecured. The analysis for "bifurcation" is tied to value of the collateral, and specifically, whether there is any value to attach to the targeted secured claim. The concept of "bifurcation," however, works poorly in Chapter 11 real estate reorganizations, where the Seventh Judicial Circuit has rejected it as means of reorganizing commercial real property in a cram-down confirmation.

One darling of the debtor's bar is the debtor's ability to remove a judicial lien encumbering the debtor's principal residence because the judicial lien impairs the homestead exemption of the debtor. As in matters involving "bifurcation" of claims in a Chapter 13, the ability to remove a judicial lien encumbering the debtor's primary residence is a "numbers game," where the issue is whether there is any value to attach to the judicial lien. This requires a computation of fair market value of the residence versus the amount of mortgage debt versus the Illinois Homestead Exemption—ending with the question answered, "Is there any value to attach to the judicial lien?"

Another pervasive issue relating to real estate is "single asset" bankruptcy cases, where the sole asset of the debtor is one unit of real estate, like one shopping center or one hotel or one multi-family residential building. Here, the debtor is the owner of fee simple title or the owner of the beneficial interests in the land trust that owns fee simple title in the subject real estate. Typically, in this context, the precipitating events for the filing of the petition to initiate the Chapter 11 bankruptcy case (i.e., to take advantage of the automatic stay) is a foreclosure action, where the debtor is faced with loss of control of the real property by the imminent appointment of a receiver, or a judicial sale is approaching (note: if the judicial sale occurs, in this judicial circuit, the debtor has forfeited the property for bankruptcy purposes, even though the court has not entered an order

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confirming the judicial sale. Thus, whether in a Chapter 7, Chapter 13 or Chapter 11, the petition must be filed before the judicial sale for the debtor-fee holder to reorganize or assert bankruptcy rights using the subject real property). In a "single asset bankruptcy," there are strict, time-sensitive requirements for the debtor to achieve a reorganization in a Chapter 11.

Perhaps the most common issues in bankruptcy center on a mortgagee or a non-consensual lien claimant (e.g., mechanic's lien claimant, judicial lien claimant or tax lien claimant) seeking to modify, annul or vacate the automatic stay mandated by Section 362 of the Bankruptcy Code to enforce the lien claimant's rights outside of the Bankruptcy Court. For a mortgagee, that typically means seeking an order from the Bankruptcy Court allowing the mortgagee to complete a foreclosure all the way through to confirmation of a judicial sale. For a mechanic's lien claimant, the reception for adjudicating rights in the Bankruptcy Court is less welcoming: very often the mechanic's lien claimant is sent back to the state court to adjudicate the extent and priority of lien rights in the subject real property, but the mechanic's lien claimant is not allowed to proceed to judicial sale or confirmation of a judicial sale (unless the mechanic's lien is part of a mortgage foreclosure case). Most bankruptcy judges dislike acting as the trier of facts on mechanic's lien litigation, and correctly perceive that state court judges sitting in mechanic's lien sections as having much greater expertise, and often greater patience, to adjudicate the fact-intensive construction issues arising in complex mechanic's lien cases with multiple lien claimants. Thus, many mechanic's lien claimants have their claims adjudicated in state court, and once adjudicated, they return to the Bankruptcy Court for the administration of their claims based on priorities for distribution set forth in the Bankruptcy Code.

Finally, the cornerstones of real estate reorganizations in a Chapter 11 will be discussed: namely, confirmation of a Chapter 11 Plan and sales pursuant to Section 363 of the Bankruptcy Code. Both topics present procedural and substantive complexities that should be mastered if success is to be achieved.

II. DISCUSSION

A. REAL ESTATE LEASES IN BANKRUPTCY: ASSUMPTION, REJECTION, AND ASSIGNMENT

Real estate leases are governed by special rules in bankruptcy. If a lease has not yet expired, it is known as an "unexpired lease" and a debtor has the choice to either assume or reject

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the lease within 120 days of the filing of the bankruptcy. 11 U.S.C. §365(d)(4). In a Chapter 7 case, the trustee, not the debtor, has to decide whether to assume or reject a lease of nonresidential real property. This 120-day period may be extended "for cause" if the Debtor files a motion prior to the expiration of the period. If the lease is not assumed within this period, the lease will automatically be deemed rejected. In the 2005 amendments to the Bankruptcy Code, commercial landlords obtained a significant victory, the enactment of a "drop dead" period of 210 days, after which even a Court Order cannot extend the time for the debtor to assume or reject a lease.

Assumption of a lease requires the debtor to reaffirm the lease, cure all pre- and post – filing defaults, and show that it will be able to perform its obligations in the future. 11 U.S.C. § 365(b)(1). In general, the standard to be applied for approval of the assumption of a lease is the deferential "business judgment" standard, which requires a sufficient showing of (1) whether performance of the contract will be advantageous to the estate, and (2) whether the estate will be able to perform. If both questions are resolved in the affirmative, the debtor or the trustee is normally allowed to assume, regardless of the opposition of the other party to the contract. *See In re Del Grosso*, 115 B.R. 136, 138 (Bankr. N.D. Ill. 1990).

Rejection of a lease means that the lease is breached, the debtor tenant has to vacate the property, and the landlord can file a claim against the debtor's estate for the amount of any past or future rent. Note, that if the lease is rejected, the landlord's damage claim will be treated as a pre-petition unsecured claim**.** Moreover, debtor-tenant has the ability to cap the landlord's claim to an amount equal to the greater of one year's rent or fifteen percent of the remaining lease term, up to a maximum of three years' worth of rent.

Section 365(f) authorizes the debtor or trustee to assign an assumed contract or lease, notwithstanding any clause in the lease that "prohibits, restricts, or conditions" an assignment. This can allow a debtor to "assume and assign" a lease to a third party over the landlord's objection. The Bankruptcy Code allows for the debtor to assume and assign any of its contracts to another party, but only if *adequate assurance* of future performance by the assignee is provided. 11 U.S.C. § 365(f)(2)(B). "Adequate" is a term of art and simply means assurances that are *commercially reasonable* under the particular circumstances of the case. The Seventh Circuit has described it as a "commonsense," 'case-specific inquiry" that is given "a practical, pragmatic construction." *In re Res. Tech. Corp.*, 624 F.3d 376, 383 (7th Cir. 2010). It outlined the following factors to consider: "the financial ability to perform the contract; the general economic climate; the existence

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of a guarantee; the reputation of the party seeking to assume responsibility for the contract; and past dealings between the parties." *Id.*

Since third parties will often pay substantial sums to take over a lease with rent obligations below current market rates, these below-market leases can be valuable assets for debtors.

B. LIEN ISSUES UNDER THE BANKRUPTCY CODE: STRIPPING OR AVOIDING A LIEN

Section 506(d) of Bankruptcy Code provides the statutory framework for lien stripping bankruptcy cases. It provides that "to the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void." 11 U.S.C. § 506(d). Section 506(a) in turn provides that an allowed claim is a "secured claim to the extent of the value of such creditor's interest in the estate's interest in such property." *Id.* Thus, if a parcel of real property is valued at $1,000 and there is a mortgage on the property with an outstanding balance of $1,500, under Section 506(a) and Section 506(d), the creditor's allowed secured claim would be $1,000 with $500 of its claim being unsecured.

However, this straightforward analysis has been confused by *Dewsnup v. Timm*, 502 U.S. 410 (1992). In *Dewsnup,* the Supreme Court, "rather than apply[ing] the statutory definition of secured claim under Section 506(a)" reasoned that the term "secured" "contained an ambiguity." *See Bank of Am., N.A. v. Caulkett*, 135 S. Ct. 1995, 1999 (2015) (disagreeing with reasoning of *Dewsnup* but applying it as precedent). In *Dewsnup,* the court held that if a creditor has an allowed claim, which is a *secured* claim under state law, then a creditor has an "allowed secured claim." Thus, lien stripping now hinges on which chapter of the Bankruptcy Code the debtor is seeking relief under. By far the most common bankruptcy filings are under Chapter 7, Chapter 11 and Chapter 13.

In Chapter 7 cases, when a mortgagee has an allowed secured claim, <u>then no lien stripping is allowed</u>. In a chapter 7 case, a debtor cannot reduce the money owed on a lien, even if the debtor's property is severely underwater. In *Bank of Am., N.A. v. Caulkett,* 135. S.Ct. 1995 (2015), the Supreme Court held that even if a lien is <u>completely unsecured</u> – a lien may not be stripped off. Thus, if a house is worth $100,000.00, there is a first mortgage on it with an outstanding balance of $150,000.00 and a second mortgage with a balance of $50,000, then the

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entirety of the second mortgage is treated as an allowed secured claim, which may not be avoided or stripped.

In Chapter 13 cases, a lien secured by the debtor's primary residence may be avoided *if and only if* the entirety of the lien has no security to attach to. Section 1322(b)(2) provides a Chapter 13 plan may "modify the rights of holders of secured claims, *other than a claim secured only by a security interest in real property that is the debtor's principal residence . . .*" In *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 327 (1993), the Supreme Court held that "Section 1322(b)(2) prohibits such a modification [bifurcation under § 506(a)] where the lender's claim is secured only by a lien on the debtor's principal residence." With all other liens, such as those with a security interest in the debtor's car, *rental home*, furniture etc., the debtor may modify the rights of the lienholders. *See Bank One, Chicago, NA v. Flowers*, 183 B.R. 509, 514 (N.D. Ill. 1995) ("lien stripping is permissible in the Chapter 13 context when the collateral is not the debtor's principal residence.") Note that Congress enacted a "910-day rule" with respect to car loans in 2005, such as purchase money loans for automobiles incurred within 910 days of the bankruptcy petition may not be bifurcated under Section 506(a). 11 U.S.C. § 1325(a) (unnumbered hanging paragraph after § 1325(a)(9)). With respect to older cars, rental homes, and other collateral (besides a debtor's primary residence) that secure a claim more than the value of the collateral, the Debtor can bifurcate the claim into secured and unsecured portions, and provide different treatment to each portion.

In chapter 11 cases, similar to chapter 13 cases, a debtor may not modify the rights of holders of a claim secured only by a lien on the debtor's principal residence. *See* 11 U.S.C. § 1123(b)(5) (similar to § 1322(b)(2)). However all other secured claims may be modified through bifurcation and cramdown provisions.

C. LIEN AVOIDANCE UNDER SECTION 522 (f)

Another mechanism of lien avoidance is outlined in **Section 522(f)** of the Bankruptcy Code. 11 U.S.C. § 522(f) provides that

> (1) Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the

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> extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—
>
> (A) a judicial lien, other than a judicial lien that secures a debt of a kind that is specified in section 523(a)(5)
>
> . . .
>
> (2)(A) For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of—
>
> (i) the lien;
>
> (ii) all other liens on the property; and
>
> (iii) the amount of the exemption that the debtor could claim if there were no liens on the property;
>
> exceeds the value that the debtor's interest in the property would have in the absence of any liens.

11 U.S.C. § 522(f). Under Section 522(f), a debtor can avoid a judicial lien or a non-possessory, non-purchase-money lien on household goods, if the debtor is entitled to claim an exemption in at least some of the equity in the property, and the lien would result in a loss or some or all of the equity if the property were sold. As a threshold matter, "[a] debtor can avoid a lien to the extent that it impairs an exemption to which the debtor is entitled to exempt under § 522(d), and, as a result, claiming the actual exemption is unnecessary." *In re Moreno*, 352 B.R. 455, 460 (Bankr.N.D.Ill.2006) (emphasis added) (quoting 11 U.S.C. § 522(f)(1)(A)). *See also Owen v. Owen*, 500 U.S. 305, 311, 111 S. Ct. 1833, 1837, 114 L. Ed. 2d 350 (1991) (the text of Section 522(f) sets up a "conceived" or "hypothetical" test: not an exemption to which the debtor "is entitled," but one to which he "would have been entitled.") Accordingly, under the "hypothetical" test established by Section 522(f), it is immaterial whether the Debtors actually did claim an exemption in the subject property in Schedule C. They can still avoid a judgment lien under Section 522(f) if they are entitled to claim an exemption under Illinois law.

Illinois personal property exemptions are listed at 735 ILCS 5/12-1001 and the homestead exemption is listed at 735 ILCS 5/12-901. For example, let's say a single debtor has residential property valued at $100,000.00, a mortgage in the amount of $80,000.00 and a judgment lien of $50,000.00. The applicable Illinois homestead exemption for a single persons is $15,000.00. Now,

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the only equity that the judgment line can attach to is $5,000. [$100,000 (value) - $80,000 (mortgage) - $15,000 (exemption) = $5,000.00 (remaining equity)]. Thus, the judgment lien will be limited to $5,000.00 with the remaining treated as an unsecured claim. For underwater properties, Section 522(f) can be a boon to reduce the amounts owed to judgment creditors, especially in no-asset chapter 7 cases.

Note that Section 522(f)(2)(C) provides that "this paragraph shall not apply with respect to a judgment arising out of a mortgage foreclosure." However, "mortgage deficiency judgments, by their nature and operation, are sufficiently distinct from mortgage foreclosure proceedings to be outside the purview of Section 522(f)(2)(C)." In re Linane, 291 B.R. 457, 460 (Bankr. N.D. Ill. 2003) (applying Illinois law and avoiding judgment lien based on deficiency judgment.) Linane succinctly stated:

> it is plain that under Illinois law, deficiency judgments, as a remedy, are distinct from, and complementary to foreclosures, and arise out of the underlying obligation, not "out of a mortgage foreclosure" as required by Section 522(f)(2)(C). As such, debtors are unhampered by Section 522(f)(2)(C) in avoiding mortgage deficiency liens.

Id. See *also In re Hart*, 328 F.3d 45, 49 (1st Cir. 2003) (favorably citing Linane); *In re Brinley*, 403 F. 3rd 415 (6th Cir.2005); *In re Taras*, 131 Fed. Appx. 167(11th Cir.2005); *In re Charnock*, 318 B.R. 720 (B.A.P. 9th Cir.2004); *In re Anderson*, No. 09 B 12312, 2010 WL 322167, at *3 (Bankr. N.D. Ill. 2010). Thus, a judgment lien arising out of a deficiency judgment from a foreclosure action receives the same treatment under Section 522(f) as any other judicial lien and may be avoided.

D. SINGLE ASSET REAL CASES

A debtor is a "single asset real estate" debtor if (i) the debtor has real property constituting a single property or project (which could have multiple units within the same project), other than residential real property with fewer than 4 residential units, (ii) which generates substantially all of the gross income of a debtor; and (iii) no substantial business is being conducted by the debtor other than the business of operating the real property and activities incidental to the property. 11 U.S.C. § 101(51B). The debtor can either self-designate on the schedules that it is a SARE debtor,

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or a secured creditor or other party can file a motion with the court to determine that the Debtor constitutes a SARE debtor. SARE debtors operate on a constrained timeline, they must file a plan with a reasonable chance of being confirmed **or** begin monthly payments to the secured creditor that are in an amount equal to the non-default contract rate of interest. 11 U.S.C. § 363(d)(3). The debtor must file a plan or begin the monthly payments within 90 days of the bankruptcy filing or 30 days after the court determines the debtor is a SARE debtor, whichever is later.

While the statutory framework requires the SARE debtor to operate in a shortened timeframe, in practice, generally, the pressure is applied right from the commencement of the case by the mortgagee, who likely had a foreclosure action pending in state-court. Unable to secure financing to either pay off arrears or to refinance the property, debtors can gain (a) breathing space under the automatic stay to stay foreclosure litigation, (ii) reobtain control of the property from a receiver (see Section E (ii) infra) appointed in state court, (iii) garner additional time to secure financing or market the property for sale, (iv) find themselves with more leverage in any settlement negotiations with the prospect of bifurcating the creditor's claim (if undersecured) and proposing a cramdown plan.

Often, however, a creditor will file a motion for relief from the automatic stay, under Section 362(d)(1) or Section 362(d)(2), coupled with a motion to dismiss for the petition for lacking "good faith." *See, for e.g., In re Tekena USA, LLC*, 419 B.R. 341, 343 (Bankr. N.D. Ill. 2009) (discussion of twelve factors reflecting bad faith). The Debtor must be prepared to respond to these motions from the outset, which are geared not towards specific SARE sections, but towards generally applicable sections of the Bankruptcy Code. Harkening back to an earlier era, a lot of bankruptcy case law discusses that two-party disputes belong in the state-court, and cases filed on the eve of foreclosure reflect a lack of good faith. Note that there are no specific bankruptcy sections that lead to such conclusions, and such cases often preceded the SARE specific sections that were enacted later. To prevent an early dismissal from the protections of the Bankruptcy Code, the Debtor must ensure that it complies with the standard operating procedures of a debtor in possession, including obtaining permission from the lender for use of cash collateral (generally rents from a property are part of the mortgagee's collateral package) or obtaining a Court Order for such use, setting up a DIP account, complying with US Trustee's requirements, paying all taxes and insurance premiums as they come due, and having an "exit strategy" in mind, either a confirmed plan, a Section 363 sale, or a settlement with the lender.

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E. USING CHAPTER 13 TO ADDRESS FORECLOSURE/POSSESSION ISSUES

This section will address how chapter 13 can be used to prevent foreclosure and association issues for homeowners who are delinquent on mortgage payments or association dues.

1. Chapter 13 for paying arrears

   1.1 Process

   1.1.0 Case is filed

   1.1.1 Automatic Stay goes into effect

   "11 U.S.C. §362(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title…operates as a stay, applicable to all entities, of (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title. (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title; (3) any act to obtain possession of the property of the estate or of property from the estate or to exercise control over property of the estate…"

   1.1.2 The chapter 13 would need to have been filed prior to the sheriff's sale being conducted. See Colon v. Option One Mortgage, 319 F.3d 912(7th Cir. 2003).

   1.1.3 If there has been a prior chapter 13 filing, confirm the facts of the dismissal of the prior proceeding(s) Since §109(g)(1) of the Code, provides: Notwithstanding any other provision of this section, no individual… may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if (1) the case was dismissed by the court for willful failure of the debtor

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to abide by orders of the court, or to appear before the court in proper prosecution of the case . .”

1.1.4 If there has been a prior chapter 13 filing, and §109(g)(1) is not an issue, make sure the case is filed enough in advance of the sheriff’s sale for the Debtor to bring a Motion to Extend the Automatic Stay as 11 U.S.C. §362(c)(3) provides that if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)—then (A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case; (B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed. (See sample pleading)

2.1 Schedules are prepared

2.1.0 Review Clients’ Assets, Liabilities, Income and Expenses. Be sure you have an honest and thorough analysis of Clients’ situation.

2.1.1 Schedules need to be filed within 14 days of filing of the petition. If you need to go beyond that amount of time, you will need a Motion to Extend.

2.2 §341 hearing will be scheduled about 30 days after the filing date; the Confirmation Hearing will be scheduled about 45 days after the filing date.

2.3 Preparing the Plan

2.3.0 First look at how much the arrearage is.

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2.3.1 It would be a good idea to ask for reinstatement figures from opposing counsel in the foreclosure proceeding if you have filed an appearance. If not, take the most recent mortgage statement and estimate the court costs and attorneys' fees for the foreclosure to get to the number you should use.

2.3.2 Comparing against the Debtors' budget and other debts, determine the amount of repayment. (See Sample Plan)

2.3.3 Determine the proper percentage to be paid to unsecured creditors.

2.3.4 Determine the value of the property. If the first mortgage debt exceeds the value of the property you may "cram down" or "lien strip" any lien beyond the first mortgage

2.3.5 11 U.S.C. 522(f) provides

(1) Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—

(A) a judicial lien, other than a judicial lien that secures a debt of a kind that is specified in section 523(a)(5); or

(B)a nonpossessory, nonpurchase-money security interest in any—

(i) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

(ii) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or

(iii) professionally prescribed health aids for the debtor or a dependent of the debtor.

(2)(A) For the purposes of this subsection, **a lien shall be considered to impair an exemption to the extent that the sum of—**

(i) the lien;

(ii) all other liens on the property; and

(iii) the amount of the exemption that the debtor could claim if there were no liens on the property;

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exceeds the value that the debtor's interest in the property would have in the absence of any liens.

(B) In the case of a property subject to more than 1 lien, a lien that has been avoided shall not be considered in making the calculation under subparagraph (A) with respect to other liens.

(C) This paragraph shall not apply with respect to a judgment arising out of a mortgage foreclosure.

(3) In a case in which State law that is applicable to the debtor—

(A) permits a person to voluntarily waive a right to claim exemptions under subsection (d) or prohibits a debtor from claiming exemptions under subsection (d); and

(B) either permits the debtor to claim exemptions under State law without limitation in amount, except to the extent that the debtor has permitted the fixing of a consensual lien on any property or prohibits avoidance of a consensual lien on property otherwise eligible to be claimed as exempt property; (See Sample Complaint)

2.3.6 You will need an appraisal to prove the value of the property and proof of the payoff of the first mortgage.

2. Using a chapter 13 to pay Assessments to a Condo Association or Homeowners Association Dues

2.1 A chapter 13 can be used to pay delinquent dues and the plan can provide for payments up to over 60 months.

2.2 This might be used to negotiate with an Association or HOA that is going to Judgment for Possession.

2.3 Consider what the attorneys' fees will be to address a judgment amount.

2.4 Attorneys' fees outside of a judgment amount will not be allowed once the chapter 13 is filed, so the filing can limit the liability.

2.5 Special Assessments can be included in a chapter 13 Plan as well.

2.6 Remember that dues incurred after filing are required to be paid as they come due or the plan will be in default.

3. Using Chapter 13 to avoid Judicial Liens

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3.1 The "Preference" provisions of 11 U.S.C 522 (b) provides that **(b)**Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4)made—

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5)that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

3.2 A Chapter 7 Trustee has the avoidance powers for a Chapter 7 Debtor, but a Chapter 13 Debtor acts as his own Trustee. Therefore, the Chapter 13 Debtor has the right to seek to remove a preference if the chapter 13 was filed within 90 days of the lien being recorded.

3.3 Once removed, the use of a chapter 13 or conversion to a chapter 7 should be reviewed, especially if removal of the lien only benefits the homeowner and not the Trustee.

4. Using Chapter 13 to "cram down" an unsecured mortgage or other lien

4.1 The right to cram down an unsecured mortgage is provided under 11 USC 506(a) and (d)

4.2 If a Junior Mortgage lien is wholly unsecured it may be stripped off. See In re Mann, 249 B.R. 831, In re Pond, 2001 U.S. App. Lexis 11287 (2nd Cir. 2001), In re McDonald, 205 F.2d 606 (3rd Cir 2000), Bartee v. Tara Colony Homeowners

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Assoc., 212 F.3d 277 (5th Cir. 2000), In re Lam, 211 B.R. 36 (9th Cir BAP 1357), In re Tanner, 217 F. 3d 1357 (11th Cir.).

4.3 The Court must determine the nature and extent of the lien and an appraisal may be necessary to determine that there is no equity against which the lien attaches.

4.4 If the lien can be crammed down, it is paid as an unsecured creditor and whatever percentage unsecured creditors are paid.

4.5 Plan should provide that the unsecured lien will be paid as a General Unsecured Creditor and that upon completion of the Plan, the creditor shall release its lien within 7 days.

F. REAL ESTATE REORGANIZATIONS UNDER CHAPTER 11

Real estate reorganizations are not easily achievable in Chapter 11 for the Debtor. These cases are fraught with business and legal hurdles that are especially difficult to overcome in "single asset real estate" bankruptcy cases, where the time-frame for reorganization are shortened, and there is a "built-in" adequate protection requirement, 11 USC § 362(d)(3).

The filing of a Chapter 11 to stay foreclosure proceedings are met with near-immediate responses by the mortgagee in the Bankruptcy Court, that substantially increase legal costs (the Debtor typically pays the lender's attorney's fees) and which require the Debtor to formulate and disclose in court submissions a feasible game-plan for reorganization—and failing that, the Debtor's efforts to thwart the foreclosure will be short-lived.

While "scorched earth" litigating might seem the correct approach to achieve the best goals for the mortgagee, that is not always the case in a Chapter 11 bankruptcy case. Once the Chapter 11 case is filed, the mortgagee must consider whether it is best to seek the sale of the subject real estate within the bankruptcy case pursuant to 11 USC §363; work cooperatively with the Debtor in fashioning a consensual Plan of Reorganization or in effectuating "take-out" financing; or by taking a less cooperative/more hostile approach by pursuing remedies to complete the foreclosure.

If the mortgagee chooses a less cooperative/more hostile approach to complete the foreclosure, there are a number of possible actions available to the mortgagee: (i) moving to lift the automatic stay, 11 USC §362(d)(1) and (2); (ii) moving to dismiss the bankruptcy case,

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including as a "bad faith" filing pursuant to 11 USC §1112; (iii) moving to convert the bankruptcy case from a Chapter 11 to a case under Chapter 7 pursuant to 11 USC §1112; (iv) moving for the appointment of a Chapter 11 trustee or an examiner pursuant to 11 USC §1104; (v) seeking to prohibit the Debtor from using rent proceeds generated from the real property in the Chapter 11 as a prohibited use of the mortgagees "cash collateral" pursuant to 11 USC § 363; (vi) seeking the excusal of the requirement that the receiver immediately surrender possession of the real estate pursuant to 11 USC §543(d). These rights are cumulative and certainly not mutually exclusive, but nonetheless require careful investigation and planning before the mortgagee proceeds.

The mortgagee must respect the automatic stay mandated by 11 USC §362(a) (note: "respect" denotes strictly observing the automatic stay and appreciating the possibility for sanctions for violating the automatic stay).

Also, the mortgagee must respect the requirement that upon the initiation of the bankruptcy case the Receiver must immediately surrender possession of the real estate to the debtor and fully account to the Debtor, unless the court excuses this requirement pursuant to a motion filed promptly by the receiver or the mortgagee or both seeking "excusal" of this requirement pursuant to 11 USC §543(d). Again, the mortgagee must appreciate the possibility of sanctions for violating this requirement.

(i) Automatic Stay

The automatic stay of the Bankruptcy Code is one of the most basic protections provided by bankruptcy law, serving to give the debtor a breathing spell from financial pressures and to prevent an unfair distribution of estate assets among creditors. *In re Grogg*, 295 B.R. 297, 301 (Bankr. C.D. Ill. 2003). The automatic stay provision, § 362(a), has been described as one of the most fundamental debtor protections provided by the bankruptcy laws. *In re Fernstrom Storage and Van Co*., 938 F.2d 731, 735 (7th Cir. 1991). The purpose of the automatic stay is to preserve what remains of the debtor's insolvent estate and to provide a systematic equitable liquidation procedure for all creditors, secured as well as unsecured, thereby preventing a chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts. *In re Holtkamp*, 669 F.2d 505, 508 (7th Cir. 1982) citing H.R. Rep.No.595, 95th Cong., 1st Sess. 340 (1977), reprinted in (1978) U.S. Code Cong. & Ad. News 6296-97. Section 362(a) bars "the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have

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been commenced before the commencement of the case under this title...." *Id*. Though § 362(a) provides for a nearly comprehensive stay of proceedings against the debtor, § 362(d) requires the bankruptcy judge "to grant relief from the stay ... **for cause**." *Id.* "Cause" as used in § 362(d) has no clear definition and is determined on a case-by-case basis. The statutory grounds for obtaining relief from the automatic stay and the kinds of relief available are identified in 11 U.S.C. Section 362(d). 11 U.S.C. § 362(d) provides in relevant part:

> d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if-
>
> (A) the debtor does not have an equity in such property; and
>
> (B) such property is not necessary to an effective reorganization.

In balancing the competing interests of the debtor and the movant, courts consider three factors: 1) the prejudice that would be suffered should the stay be lifted; 2) the balance of the hardships facing the parties; and, 3) the probably success on the merits if the stay is lifted. There are two alternative, independent grounds for relief from the automatic stay. Under Section 362(d)(1), the court shall grant relief from the stay for "cause," including lack of adequate protection of the movant's interest in property. Under Section 362(d)(2), relief from the automatic stay must be granted with respect to a stay of an act against property if the debtor lacks equity in the property and the property is not necessary to an effective reorganization.

The Bankruptcy Code does not define **"adequate protection"** (see 11 USC § 361); but it is an important concept when seeking to lift the automatic stay or prohibiting the debtor's use of rent proceeds, see *Thompson v. General Motors Acceptance Corp*., 566 F. 3d 699 (7th Cir. 2009)(in conjunction with §542). The courts focus on the condition of the creditor's collateral, and will require adequate protection through post-petition payments and remedial action if: (i) the collateral is diminishing in value through the debtor's use; (ii) or the collateral is wasting or at risk, including through a lack of proper insurance, with governmental authorities pursuing the Debtor or the collateral (e.g., building code violations), or a lack of maintenance of the collateral. The debtor's

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failure or inability to pay real estate taxes or utilities are of major consequence. *See e.g., First National Bank and Trust Company of Rockford v. Ausherman*, 34 B.R. 393 (Bankr. N.D. Ill. 1983)

With respect to Section 362(d)(2), for the purpose of determining whether the debtor has an equity in the property, the court must look to the difference between the value of the property and the total of all claims which it secures. Once the movant establishes that there is no equity in the property, the debtor must establish that the property is essential for an effective reorganization. This means that there must be a "**reasonable possibility of a successful reorganization within a reasonable time**." *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 366 (1988). The party requesting relief from the automatic stay has the burden of proof on the issue of the debtor's equity in the property and the party opposing the relief from the automatic stay has the burden on all other issues.

(ii) Turnover of property from the receiver to the Debtor in Possession.

Section 543(b) provides that a "custodian shall deliver to the trustee" any property that that is in the "custodian's possession, custody or control." 11 U.S.C. § 543 (b**). A receiver appointed by a state court is a "custodian" subject to § 543(b)**. See 11 U.S.C. § 101(11); *In re Franklin*, 476 B.R. 545, 551 (Bankr. N.D. Ill. 2012).

11 U.S.C. §543(d) provides that a bankruptcy court may excuse compliance with 11 U.S.C. §543(b) if the interests of the creditors would be better served by permitting the custodian to continue in possession, custody or control of such property. When analyzing whether the interest of creditors would be better served by permitting a receiver to continue in possession, courts weigh a number of factors including:

(1) The likelihood of reorganization, and whether funds held by the receiver are required for reorganization;

(2) Whether there were instances of mismanagement by the debtor;

(3) Whether turnover would be injurious to creditors;

(4) Whether the debtor will actually use the property for benefit of its creditors

See In re Falconridge, LLC, 2007 WL 3332769, *7 (No. 07-19200, J. Cox) (Bankr. N.D. Ill. 2007)("evidence of mismanagement or questionable business practices by the Debtor may negate the statutory obligation of a custodian to turn over assets to a debtor in bankruptcy."); *see also In re Plantation Inn Partners*, 142 B.R. 561, 563 (S.D.Ga. 1992) (receiver excused from turnover

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where court found that debtor had defaulted on mortgage payments, failed to pay taxes, failed to report revenues, failed to place casualty and liability insurance on the Property, allowed flood insurance to lapse, hired an unqualified manager for the hotel, failed to maintain current accounting records, failed to account).

When the debtor cannot demonstrate a likelihood of reorganization, or when the creditor demonstrates past instances of gross mismanagement, the court will likely let the receiver continue as the custodian for the property.

(iii) Sale of Property Under Section 363

Bankruptcy Code § 363(f) permits a trustee or debtor in possession to sell property of the estate free and clear of interests in the property if any one of five conditions is met. The section provides:

> The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if -
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f). Although § 363 can be used to implement a confirmed plan, it can also be used on a freestanding basis to authorize a preplan sale of property free and clear through a motion to sell. Sales not in the ordinary course of business require court approval. All purchase agreements entered into by the trustee or debtor in possession must include court approval as a condition of the obligation of the trustee or DIP to perform. The bankruptcy court order will set forth the auction's bidding procedures, including the terms of the bidding process.

The standard for approval of a sale of property of the estate under section 363 is whether there exists some articulated business justification for the proposed transaction, and whether the sale is in the best interests of the debtor, creditors and equity holders. See Walter v. Sunwest Bank (In re Walter), 83 B.R. 14, 19 (9th Cir. BAP 1988) (quoting Institutional Creditors of Continental

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Airlines, Inc. (In re Continental Airlines, Inc.), 780 F.2d 1223, 1226 (5th Cir. 1986). In making such a determination, courts may look to the following factors:

a) Whether the assets are increasing or decreasing in value;

b) Whether the proposed sale will effectuate a de facto reorganization;

c) Whether the assets have been adequately marketed; and

d) Whether adequate and reasonable notice of the sale was given.

Procedural Requirements – Rules 6004(f) and 2002(c)(1)

Rule 6004(f) of the Federal Rules of Bankruptcy Procedure provides that "[a]ll sales not in the ordinary course of business may be by private sale or by public auction." F.R.B.P 6004(f). A Debtor is entitled to broad discretion in determining the manner of sale, including whether to sell property by public or private sale. In re Frezzo, 217 B.R. 985, 989 (Bankr. M.D. Pa. 1988) (citing In re Canyon Partnership, 55 B.R. 520, 524 (Bankr. S.D. Cal. 1985)). Rule 2002(c)(1) of the Federal Rules of Bankruptcy Procedure further provides that:

> [N]otice of a proposed use, sale, or lease of property . . . shall include the time and place of any public sale, the terms and conditions of any private sale, and the time fixed for filing objections.

These procedural requirements ensure that sufficient notice is sent to all parties in interest to allow for debtor's estate to receive maximum value while providing any interested parties with a chance to object to a sale in a timely manner. Adherence to these procedural requirements serves as a safeguard against any objections against the sale that may arise in the future.

(iv) Confirmation of a Plan of Reorganization.

As previously stated, Chapter 11 bankruptcy cases involving the reorganization of real estate are difficult cases where there is a lack of cooperation between the mortgagee and the Debtor. A debtor must file a feasible plan. Section 1129(a)(11) of the Bankruptcy Code codifies a feasibility standard for confirmation of a Chapter 11 Plan. Section 1129(a)(11) provides:

> (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 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 under the plan.

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In determining whether a plan is feasible, the bankruptcy court need not find that it is guaranteed to succeed; "[o]nly a reasonable assurance of commercial viability is required." *In re 203 N. LaSalle St. P'ship*, 126 F.3d 955, 961-62 (7th Cir.1997) (rev'd on other grounds). On the other hand, a plan meets the feasibility standard only if it "offers a reasonable prospect of success and is workable." *In re Patrician St. Joseph Partners Ltd*., 169 B.R. 669, 674 (D.Ariz.1994). The central inquiry is "whether there is a reasonable probability the provisions of the plan can be performed." *In re G-I Holdings Inc*., 420 B.R. 216, 267 (D.N.J.2009). Furthermore, "[s]incerity, honesty and willingness are not sufficient to make the plan feasible, and neither are visionary promises." *In re Hoffman*, 52 B.R. 212, 215 (Bankr.D.N.D. 1985). Rather, the feasibility test "is firmly rooted in predictions based on objective facts." *In re Hoff*, 54 B.R. 746, 752 (Bankr.D.N.D.1985) (citing In re Clarkson, 767 F.2d 417, 420 (8th Cir.1985)). A Fifth Circuit Opinion states:

> Where the projections are credible, based upon the balancing of all testimony, evidence, and documentation, even if the projections are aggressive, the court may find the plan feasible. Debtors are not required to view business and economic prospects in the worst possible light.

In re T-H New Orleans Ltd. P'ship, 116 F.3d 790, 802 (5th Cir.1997). Furthermore, under the feasibility test, the judge "views the probability of actual performance of the provisions of the plan. “The test is whether the things which are to be done after confirmation can be done as a practical matter under the facts." *In Re Olde Prarie Block Owner, LLC*, 465 BR 165 (Bankr. N. D. Ill. 2012).

For a bankruptcy court to approve a proposed reorganization plan, the plan's proponent must show that the plan satisfies the 13 requirements of § 1129(a), if they are applicable. With one exception, a plan must meet all 13 requirements. They are: (1) the plan's compliance with Title 11, (2) the proponent's compliance with Title 11, (3) the good faith proposal of the plan, (4) the disclosure of payments, (5) the identification of management, (6) the regulatory approval of rate changes, if applicable, (7) the "best interest" test, (8) the unanimous acceptance by impaired classes, (9) the treatment of administrative and priority claims, (10) the acceptance by at least one impaired class of claims, (11) the feasibility of the plan, (12) the bankruptcy fees, and (13) retiree benefits. *See* 11 U.S.C. § 1129(a)(1)-(13). If, however, a plan is not approved by all of the impaired classes, as generally required by 11 U.S.C. § 1129(a)(8), it is still possible for a plan to be confirmed. If at least one of the non-insider, impaired classes of claims approves the plan, then a plan may be confirmed if two additional requirements are met: (i) that the plan does not

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discriminate unfairly between impaired classes and (ii) is fair and equitable to the rejecting classes. See 11 U.S.C. § 1129(b)(1)-(2); *In re 203 N. LaSalle Street Partnership*, 126 F. 3d 955 (7th Cir. 1997)

A fundamental tenet of bankruptcy law is that creditors in bankruptcy are entitled to full payment before equity investors can receive anything. 11 U.S.C. § 1129(b)(2)(B)(ii). This is called the **absolute-priority rule**. Equity investors sometimes contend that the value they receive from the debtor in bankruptcy is on account of new (post-bankruptcy) investments rather than their old ones. The Supreme Court held in *Bank of America National Trust & Savings Ass'n v. 203 North LaSalle Street Partnership*, 526 U.S. 434, 119 S.Ct. 1411, 143 L.Ed.2d 607 (1999), that competition is the way to tell whether a new investment makes the senior creditors (and the estate as a whole) better off. A plan of reorganization that includes a new investment must allow other potential investors to bid.

Thus the concepts of: (i) the mortgagee's right to "credit bid"; (ii) the "Absolute Priority Rule" and its exceptions; (iii) the election under §1111(b) by the mortgagee; and (iv) "cram down," are critically important concepts for confirmation in a non-consensual confirmation process. For a discussion of these concepts within the context of real estate reorganizations, see, *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S.Ct. 2065 (2012); *Till v. SCS Credit Corp*, 541 US 465, 124 S. Ct. 1951 (2004); *In Re River East Plaza, LLC*, 669 F. 3d 826 (7th Cir. 2012); *River Road Hotel Partners, LLC v. Amalgamated Bank*, 651 F. 3d 642 (7th Cir. 2011).

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