Best Interests of Creditors Test - Section 1129(a)(7)

The Statute:

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 . . . .

1

CASE LAW INTERPRETATION

- This section is often referred to as the "best interests" test.
- The best interests test focuses on individual dissenting creditors rather than classes of claims. See id.; see also Bank of America Nat. Trust and Sav. Assn. v. 203 N. LaSalle, 526 U.S. 424, 441 n.13 (1999).
- The court "must find that each [dissenting] creditor will receive or retain value that is not less than the amount he [or she] would receive if the debtor were liquidated." See Leslie Fay, 207 B.R. at 787. The section only to non-accepting impaired claims or equity interests.
- A court, in considering whether a plan satisfies the "best interests" test, is not required to consider any alternative to the plan other than the dividend projected in a liquidation of all of the debtor's assets under chapter 7 of the Bankruptcy Code. See In re Crowthers McCall Pattern, Inc., 120 B.R. 279, 298 (Bankr. S.D.N.Y. 1990).

2

APPLICATION OF THE BEST INTERESTS TEST

- Estimate the cash proceeds from the liquidation of debtor's assets.
- Determine the distribution of the proceeds to claimants voting to reject the plan and compare to what the rejecting claimant would receive in a chapter 7 (Section 726 of the Bankruptcy Code).

3

PREPARATION OF A LIQUIDATION ANALYSIS

Factors to Consider:

- Listing of assets
  - Cash
  - Accounts Receivable
  - Secured Obligations
  - Intercompany A/R
  - Inventory (raw material, wip, and finished product)
  - Prepaid Expenses
  - FF&E or PP&E
  - Intellectual Property
  - Chapter 5 Causes of Action
  - Other Litigation
  - Tax Refunds

4

LIQUIDATION ANALYSIS
(CONT.)

Cost Factors:

- Timing of liquidation
  - Discount to present value
  - Duration of Liquidation
- Wind Down Costs
  - Employees (wages, severance, bonuses)
  - Professional fees (attorneys, financial advisors, appraisers, etc.)
  - Closing costs
  - Chapter 7 Trustee Fees (Section 326 of the Bankruptcy Code)

5

LIQUIDATION ANALYSIS
(CONT.)

- Claims Analysis
  - Secured claims
  - Administrative and priority claims
  - Accrued Employee obligations
  - Tax claims
  - Environmental claims
  - General unsecured claims

6

WITNESSES

- Debtor representative (F.R.E. Rule 703 allows for Debtor representative to opine as to value of assets)
- Financial Advisor
- Appraiser

7

PRO FORMA LIQUIDATION ANALYSIS

Assets		Liabilities	
Real Property	$	Chapter 7 admin. Expenses	$
Minus: 1st Mortgage	$	Chapter 11 admin. Expenses	$
2nd Mortgage	$	Other priority claims	$
Any exemption	$	Total priority claims	$
Costs of sale	$	Amount available for unsecured claims (total assets minus priority claims)	$
Net equity	$	Total unsecured claims	$
Personal Property [segregate by type]	$ ______	Estimated dividend in Chapter 7(amount available - unsecured claims)	$
Total assets	$		

This presentation provides information about creditors' rights in the area of bankruptcy law. The information contained in this presentation should not be construed as legal advice, and readers should not act upon it without professional counsel.
Copyright © 2021 Norris McLaughlin, P.A.

8

OTHER CONFIRMATION ISSUES

- Classification of Claims and Treatment
  - Gerrymandering
  - Priority Tax Claims
  - Subordinated Claims
  - Small Claims
  - Substantive Consolidation
- Acceptance by at Least One Impaired Class (Section 1129(a)(10))
  - Artificial Impairment
  - Separate Classification (In the Matter of Jersey City Medical Center, 817 F.2d 1055 (3d Cir. 1987); John Hancock Mutual Life Insurance Company v. Route 37 Business Park Associates, 987 F.2d 154 (3d Cir. 1993))
  - Per Plan or Per Debtor (In re Tribune Co., 464 B.R. 293 (Bankr. D. Del. 2011; JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props. Inc. (In re Transwest Resort Props. Inc.), 881 F.3d 724 (9th Cir. 2018)
  - Non-voting Class deemed to have accepted. In re Ruti-Sweetwater, 836 F.2d 1263 (10th Cir. 1988). But see, In re S B Building Associates Limited Partnership, 621 B.R. 330 (Bankr. D.N.J. 2020).
  - Insider status not necessarily imputed to purchaser of claim. See In re Village at Lakeridge, LLC, 814 F.3d 993 (9th Cir. 2016)

This presentation provides information about creditors' rights in the area of bankruptcy law. The information contained in this presentation should not be construed as legal advice, and readers should not act upon it without professional counsel.
Copyright © 2021 Norris McLaughlin, P.A.

9

OTHER CONFIRMATION ISSUES

- Cramdown Plan (Section 1129(b)(1)
  - Unfair Discrimination Test
  - Fair and Equitable Test

- Absolute Priority Rule
  - Gifting Doctrine – Rejected by Third Circuit (In re Armstrong World Indus., 432 F.3d 507 (3d Cir. 2005)
  - New Value or New Capital Contribution (Bank of Am. Natl'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434 (1999)

10