Disclosure Statement

Published by the Bankruptcy section of the North Carolina Bar Association • Section Vol. 34, No. 1 • November 2012 • *www.ncbar.org*

The Chair's Comments

Musings from the Chair ...

About 18 years ago, knowing that I was a Louisiana native, a very kind and now deceased North Carolina bankruptcy lawyer gave me a framed poster from the 1989 Cajun Music Festival in Lafayette, Louisiana. The slogan on the poster reads: "A culture is passed on one generation at a time." That poster hangs in my office.

I was fortunate to be taught by some very fine bankruptcy lawyers. They taught me how to fill out schedules, how to bring and defend preference actions, how to avoid liens, the meaning of cash collateral, and even the theory behind the 1111b election (which I have tried to forget). They also taught me a few unwritten rules – rules which I think reflect the culture of our bankruptcy bar.

I confess that I have forgotten or broken most of these rules at one time or another – but in general I try to follow them. I'm sure that my unwritten (until now) rules differ from the unwritten rules of other bankruptcy practitioners – but I doubt they differ greatly. Here they are:

1. Help other lawyers anytime you can.
Give continuances freely. Always give a continuance if the other lawyer has a personal conflict.

2. Opposing counsel is your colleague, not your enemy.
Over time, many of your colleagues will become your friends. And remember that today's adversary is tomorrow's co-counsel.

3. If an attorney misses an answer deadline, call them and give them a chance to file an answer before seeking a default.

4. Fight the fights that need fighting.
Settle what should be settled.

The New Value Exception after *In re Maharaj*

By George F. Sanderson III & Lauren Miller

Congress amended the United States Bankruptcy Code significantly when it enacted the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") in 2005. One of the biggest BAPCPA-induced quandaries with which courts have grappled since is whether BAPCPA abrogated the absolute priority rule for individual debtors proceeding under chapter 11.

This summer, the Fourth Circuit weighed in on the debate. In **In re Maharaj**, the court held that the absolute priority rule applies to individual debtor chapter 11 cases.[1] While succinctly resolving that the absolute priority rule does apply, the Fourth Circuit's opinion leaves open important questions about how

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bankruptcy courts should apply the rule. Perhaps most significantly, the opinion did not address how, if at all, the new value exception to the absolute priority rule applies to individual chapter 11 debtors.

This article summarizes the Fourth Circuit's decision in **In re Maharaj**, discusses the history and application of the new value exception to the absolute priority rule, and, in light of the Fourth Circuit's decision, addresses the difficulty in applying the new value exception in individual chapter 11 cases.

The Facts | The debtors in **Maharaj** owned and operated an auto body repair shop in Virginia. After falling victim to an apparent fraud that left them in significant debt, the debtors filed for relief, as individuals, under chapter 11 of the Bankruptcy Code.[2] The debtors' proposed chapter 11 plan segregated their creditors into four separate classes. One class consisted of most of the debtors' general unsecured claims. The Plan also provided that the debtors would continue to own and operate their auto body business. In fact, the debtors planned to use the income generated from the business to pay their unsecured creditors.

Discover Bank, the holder of an unsecured claim, voted to reject the plan. The debtors sought to "cram down" plan confirmation over Discover Bank's dissent. The bankruptcy court denied confirmation, finding that the plan violated the absolute priority rule.

The debtors appealed the bankruptcy court's confirmation denial. The bankruptcy court, *sua sponte*, certified its order for direct appeal to the Fourth Circuit, and the Fourth Circuit authorized the debtors' direct appeal. Attorneys from Stubbs & Perdue, P.A., filed an amicus brief supporting the debtors' position, along with attorneys from the National Association of Consumer Bankruptcy Attorneys and law students under the supervision of an attorney from the Georgetown University Law Center, Appellate Litigation Program.

The Fourth Circuit's Decision | The Fourth Circuit began its opinion by tracing the origin and history of the absolute priority rule. The court noted that the earliest version of the rule was articulated by the United States Supreme Court "in response to widespread collusion in the context of railroad organizations, just after the Civil War."[3] Specifically, the Supreme Court stated that "stockholders are not entitled to any share of the capital stock nor to any dividend of the profits until all the debtors of the corporation are paid." The Supreme Court first coined the phrase "absolute priority rule" in **Case v. Los Angeles Lumber Products Co.**, 308 U.S. 106, 117, 60 S.Ct. 1, 84 L.Ed. 110 (1939) to describe the rule. The rule was never codified under the former Bankruptcy Act. In fact, Congress expressly prohibited further application of this rule by passing the 1952 Amendments to the Act.[4] It was not until the Bankruptcy Reform Act of 1978 that Congress specifically incorporated the absolute priority rule into § 1129(b)(2)(B)(ii). This version remained unchanged until BAPCPA's enactment in 2005.

The Fourth Circuit went on to discuss the statutory provisions relevant to determining whether BAPCPA abrogated the absolute priority rule in individual chapter 11 cases. The court noted that the commencement of a bankruptcy case creates a "bankruptcy estate" as defined by 11 USC § 541(a)(1). As a precondition to confirmation of a chapter 11 plan, the debtor must meet the requirements set forth in 11 U.S.C. § 1129(b)(1). One requirement is that each impaired class of creditors accepts the plan. However, the court may still confirm the plan over the dissent of an impaired class by using a procedure commonly known as "cram down." This procedure has its own requirements under the Code. Specifically, the plan must not discriminate unfairly and must be "fair and equitable" to the dissenting creditors.

The Code also provides specific requirements that the plan must meet in order to be "fair and equitable." Among those requirements is the absolute priority rule. Essentially, the absolute priority rule governs the order of payment among creditors. The United States Supreme Court has explained the rule as follows: "a dissenting class of unsecured creditors must be provided for in full before any junior class can receive or retain any property under a reorganization plan."[5]

When Congress enacted BAPCPA, it included additional language to the absolute priority rule requirement.[6] It is the inclusion of this additional language that has caused courts confusion.

Broad View vs. Narrow View | In reaching its decision, the Fourth Circuit considered the national split among courts regarding the absolute priority rule's application to individual chapter 11 debtors, post-BAPCPA. First, it considered courts that have taken the "broad view" by ruling that BAPCPA abrogated the absolute priority rule in the case of an individual Chapter 11. Courts that have adopted the "broad view" find "that, by including in § 1129(b)(2)(B)(ii) a cross-reference to § 1115 (which in turn references § 541, the provision that defines the property of a bankruptcy estate), Congress intended to include the entirety of the bankruptcy estate as property that the individual debtor may retain, thus effectively abrogating the absolute priority rule in Chapter 11 for individual debtors."[7]

Some of the broad view courts reached this conclusion based on the plain language of § 1129(b)(2)(B)(ii). They find that by reading § 1115 and § 541 together, "property of the estate" includes property and earnings acquired both before and after the filing of a bankruptcy petition. Thus, reading § 1129(b)(2)(B)(ii) and § 1115 together, the individual chapter 11 debtor may retain pre- and post- petition property without violating the absolute priority rule.

The broad view courts also argue that abrogating the absolute priority rule would be consistent with Congress' intent to "harmonize the treatment of the individual debtor under Chapter 11 with those under Chapter 13, which has no absolute priority rule."[8] Those courts noted "that Congress drafted the new § 1115 to mirror § 1306(a) of the Code, which adds certain property to a § 541 bankruptcy estate in the Chapter 13 context."[9]

Finally, in **Shat**, the court found that a broader view "saves Section 1129(b)(2)(B)(ii) from an almost trivial reading."[10]

In contrast, courts, including the Fourth Circuit, "adopting the 'narrow view,' have held that Congress did not intend such a sweeping change to Chapter 11, and that the BAPCPA amendments merely

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have the effect of allowing individual Chapter 11 debtors to retain property and earnings acquired after the commencement of the case that would otherwise be excluded under § 541(a)(6) & (7)."[11] Also, some of the courts adopting the narrow view found that if Congress's intent was to abrogate the rule in the case of an individual chapter 11 debtor, "it would have done so in a far less convoluted way, particularly in light of the well established place of the absolute priority rule in bankruptcy jurisprudence."[12] In response to courts finding that Congress intended to harmonize Chapter 11 with Chapter 13, some narrow view courts have held "if that were Congress' intent, Congress would simply have amended the statutory debt ceilings for Chapter 13 cases[.]"[13]

Another common theme among the narrow view courts is in their finding that the primary purpose of BAPCPA is to improve bankruptcy law "by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors."[14] They find that applying the absolute priority rule to individual chapter 11 cases effectuates that purpose.

The Fourth Circuit's Analysis | The Fourth Circuit began its own analysis by interpreting the plain language of BAPCPA. The court held that the relevant language is ambiguous. Specifically, the "included in the estate" language under § 1129(b)(2)(B)(ii) is susceptible to more than one reasonable interpretation. The court stated that the language could mean § 1115 merely adds to the property of the estate as defined in § 541. On the other hand, it could also mean that § 541 was absorbed into and superseded by § 1115 for individual chapter 11 debtors.

The court also stated that the language "in addition to the property specified in section 541" found in § 1115 was ambiguous.[15] The debtors asked the court to treat the language as a "signpost, used only to note that § 541 property is already included in the bankruptcy estate" and therefore it would be redundant to include that property again through the § 1115 language.[16] However, other bankruptcy courts have found that § 541 operates as a subset of § 1115 and "[b]y that construction, § 541 property, which is referred to by § 1115, is literally 'property included in the estate under § 1115.'"[17]

Concluding that the relevant statutory language was ambiguous, the court then considered "the specific and broader context within which Congress enacted the BAPCPA."[18] The court dismissed the broad view courts' reasoning that a narrow reading of the amendments renders § 1115 trivial. The court explained that prior to the BAPCPA, property and earnings acquired post-petition were not considered property of the estate. Thus, chapter 11 debtors were permitted to retain property and earnings acquired post-petition without violating the absolute priority rule. Section 1115 potentially changed that for individuals by adding post-petition acquired property and earnings to property of the estate. By creating an exception to § 1129(b)(2)(B)(ii), Congress ensured that an individual's property and earnings acquired post-petition would not be subject to the absolute priority rule. "In other words, what Congress took from the individual debtor with its § 1115-hand, it returned for application of the [absolute priority rule] within its § 1129(b)(2)(B)(ii)-hand."[19] Ultimately, the court was persuaded that the context demonstrated "that Congress intended § 1115 to add property to the estate already established § 541."[20]

In reaching its conclusion, the court also relied on the cannon of statutory construction of the presumption against implied repeal. The court noted, as a general matter, "repeals by implication are not favored and therefore, the intention of the legislature to repeal must be clear and manifest."[21] In the field of bankruptcy law, the court stated that the canon against implied repeal is particularly strong. Quoting **Hamilton v. Lanning**, the court explained that courts should be mindful not to read the bankruptcy code as an erosion of "past bankruptcy practice absent a clear indication that Congress intended such a departure."[22]

Based on the language of the relevant statutes and legislative history, the Fourth Circuit was unable to conclude that Congress intended to abrogate the absolute priority rule in the case of an individual chapter 11 debtor. Importantly, the Fourth Circuit noted "that, if Congress intended to abrogate such a well-established rule of bankruptcy jurisprudence, it could have done so in a far less convoluted manner."[23] The court pointed out that, in the past, when Congress wanted to eliminate a well-established requirement under the bankruptcy code, it did so expressly. As an example, the court referred to Congress' abrogation of the absolute priority rule when it amended the Bankruptcy Act in 1952. Here the court noted that the language of § 1129(b)(2)(B)(ii) and § 1115 simply do not provide a clear intention of Congress to abrogate the rule for individual chapter 11 debtors. In addition, the legislative history is completely devoid of congressional intent to abrogate the rule.

The court was also not persuaded by the position advanced by the debtors that Congress intended to abrogate the rule to harmonize chapter 11 and chapter 13 proceedings. The debtors argued that the additional requirements imposed by the BAPCPA to a case under chapter 7 forces many individuals to proceed under chapter 13 or chapter 11. And the debt limits under chapter 13 in turn force many of those same individuals to proceed under chapter 11. The debtors argued that because many individuals' only option is to proceed under chapter 11 when filing for bankruptcy, Congress must have intended to make chapter 11 a viable alternative.

Again, the court concluded that if that was Congress's intent it could have been effectuated in a much simpler manner by, i.e., raising the debt limits under chapter 13. The court reemphasized that the purpose of BAPCPA was to ensure debtors who can pay their debts will do so. The Court agreed with **In re Gbadebo** that, "[n]o one who reads BAPCPA as a whole can reasonably conclude that it was designed to enhance the individual debtor's 'fresh start.'"[24]

In sum, the court held that neither the language nor legislative history compelled a conclusion that Congress intended to repeal the absolute priority rule for individual chapter 11 debtors. Because the court concluded that Congress did not intend such a repeal based on the specific and broader context of the BAPCPA, the court stated it was not obligated to consider the debtors' public policy arguments.

The court considered those arguments to be "the weakest of reeds upon which to reach a contrary conclusion."[25]

The court nevertheless addressed some of the debtors' public policy concerns. The debtors' principal concern was that applying this rule to individual chapter 11 debtors makes it more difficult to confirm a plan. In dismissing this point, the court first stated that in enacting BAPCPA, Congress did not necessarily intend to provide greater benefits to debtors as compared to creditors—essentially Congress did not necessarily intend to make it "easier" for debtors to be successful in bankruptcy. The court also noted that Congress was aware that from 1978-2005 the absolute priority rule unquestionably applied to individuals. If Congress thought it necessary to repeal this law it would have clearly done so or at a minimum expressed its intent through its legislative history.

The debtors argued that consensual plan confirmation for an individual chapter 11 debtor is virtually impossible in light of the absolute priority rule. The court stated, "[t]o the contrary, plan acceptance is still very much a possibility, even within the confines of the absolute priority rule. Debtors "may negotiate a consensual plan, by higher dividends, pay dissenting classes in full, or comply with the [absolute priority rule] by contributing pre-petition property.'"[26] Notably, the court makes no mention of the new value exception as a way for individuals to retain pre-petition property without violating the absolute priority rule.

The History of the New Value Exception | Prior to the codification of the absolute priority rule, the United States Supreme Court recognized a corollary to the rule, known as the "new value exception."[27] This exception allows a debtor's former equity owners (when the debtor is a business) to retain their interest in the new reorganized debtor, even if senior creditors are impaired and vote to reject the plan. In order to take advantage of this exception, the old equity owners must provide some contribution of new value. The Supreme Court in **Case v. Los Angeles Lumber** found:

> It is, of course, clear that there are circumstances under which stockholders may participate in a plan of reorganization of an insolvent debtor.... Where th[e] necessity [for new money] exists and the old stockholders make a fresh contribution and receive in return a participation reasonably equivalent to their contribution, no objection can be made.[28]

The essential elements adopted by the Supreme Court were that "the stockholder's participation must be based on a contribution in money or in money's worth, reasonably equivalent in view of all the circumstances to the participation of the stockholder."[29]

In **Northwest Bank Worthington v. Alhers**, 485 U.S. 197, 204 (1988), the Supreme Court ruled that an unsecured promise of payments out of anticipated *future* income, also known as "sweat equity," did not constitute new value. Specifically, this payment does not meet the requirement that the value given be in "money or money's worth," because it cannot be exchanged in the market for something of value on the effective date of the plan. This was precisely what the debtors in **Maharaj** had proposed and the Fourth Circuit rejected.

Prior to BAPCPA, the Fourth Circuit addressed the question of whether equity owners of a chapter 11 business debtor could retain their prior interests by contributing new value.[30] The court recognized that the Supreme Court had found a new value exception to the absolute priority rule prior to the enactment of the 1978 Bankruptcy Act. However, when the Bankruptcy Act of 1978 codified the absolute priority rule and was silent on the new value exception, the Fourth Court questioned whether the new value exception was still viable absent an express mandate by Congress. Without directly answering the question, the court held "even if some limited new capital exception were viable under the Bankruptcy Code, it would not be so expansive as to apply under the facts of this case."[31]

In **Travelers**, the equity owners were the only parties afforded a right to contribute new capital in exchange for an equity interest in the debtor. Essentially under the plan, the old equity owners would be able to buy back their equity interests without exposing that interest to the market. The court noted, "[t]his exclusive right to contribute constitutes 'property' under § 1129(b)(2)(B)(ii), which was received or retained on account of a prior interest." The court held that this provision in the plan amounted to self-dealing and was not "fair and equitable" to the unsecured creditor.

Unlike the absolute priority rule, the new value exception has never been codified. In 1999, the Supreme Court considered whether the new value exception was still viable under the 1978 Bankruptcy Act.[33] The decision arose in the context of a business's reorganization. The court assumed, for purposes of the decision, that the exception did exist but found that, under the plan, the former equity holders had the exclusive right to contribute new value. The court focused on the statutory language that precludes any party from receiving or retaining property "on account of their claim or interest."[32] Because no other parties had the opportunity to contribute new value, the court found that the debtor's plan allowed the former equity owners the exclusive right to obtain a new equity interest in the debtor "on account of" their former equity interest. The court held that the debtor's plan violated the statutory prohibition and therefore could not be confirmed.

The court declined to specifically take a position on the existence of a new value exception, but it did hold that, if the exception survived, the valuation of this contribution must be subject to a market test.[34] By way of example, the court stated that the market test may require competing bids or filing competing plans.[35] In addition, the new value must be (1) equal to new capital or money's worth, (2) reasonably equivalent to the property's value and (3) necessary for a successful reorganization.[36]

New Value Exception in the Case of an Individual Chapter 11 Debtor | It is generally accepted that an infusion of new capital is essential to a business's ability to successfully reorganize. Former stockholders of the debtor-business are the most likely parties ready, willing, and able to invest in the future success of the reorganized debtor. Since this infusion comes from an outside source, the capital contribution does not add to the debtor's financial burden.

In the Eastern District of North Carolina, bankruptcy courts have been known to hold an equity auction post-confirmation.[37] Under

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this scenario, the old equity owners are permitted to place competing bids for a stake in the new reorganized debtor. In **In re Smithville**, the old equity owners engaged in a bidding war with a subsidiary entity of the largest secured creditor.[38] In that case, the subsidiary outbid the old equity owners and thus became the new owner of the reorganized debtor. The court held that the "[t]he debtor will be required to consummate the confirmed plan including the payment of attorney fees under the priority claims."[39] This case illustrates that even if a new value exception is viable, it does not always guarantee that the old equity owners will have a stake in the new reorganized debtor.

In several instances, courts, without deciding the issue of whether the new value exception applies to individual chapter 11 cases at all, have rejected individual debtors' specific new value proposals.[40] These cases reflect the inherent difficulties in applying the new value exception in an individual chapter 11 case. For example, an equity auction works best in cases, like **Smithville**, that involve single asset real estate or in closely held businesses where management is not distinct from ownership.[41] In the case of an individual debtor, it would obviously be against public policy for the court to auction off ownership interests in people. If the court engaged in an auction, it would be limited to the individual's property interests. This is no different from a case were the debtor proposes an orderly liquidation. Under this scenario, the court typically does not act as auctioneer. Instead the property is sold through a legitimate uninterested channel at market value prior to confirmation. This practice potentially raises issues concerning feasibility, e.g., post-petition financing may be dependent on the debtor's stream of income from his non-bankrupt business that is now being auctioned off post-confirmation.

If the debtor is permitted to borrow funds to buy back the property, the debtor is only further increasing his or her financial burden. This is counterintuitive to the reason why any debtor would file for bankruptcy in the first place—to obtain a fresh start. Assuming an individual chapter 11 debtor can take personal exemptions offered under the Code and state law, permitting the debtor to exchange exempt property for non-exempt property would also run counter to the fundamental purpose of the exemption statutes. The purpose of exemptions is to allow the debtor to emerge from bankruptcy not completely destitute. In addition, the amount of the exemptions that the debtor may claim is limited. In some cases the non-exempt property may be worth substantially more than the exempt property. The court in **In re Harman**, 141 B.R. 878, 888 (Bankr.E.D.Pa.1992), expressed considerable doubt "as to whether a consumer debtor can ever use the new value exception" The court distinguished between business and consumer debtors utilizing chapter 11 and the new value exception by stating

> A final distinction between business and consumer debtors arises from the concept of a 'going concern.' It is often important to keep a business operating, at least until it can be sold, to preserve its 'going-concern' value.... On the other hand, there are no comparable considerations which justify keeping the instant Debtors in Chapter 11. The property owned by the Debtors consists of liquid assets and consumer goods, such as their residences, for which there is an available market. The value of such property is unlikely to be greatly enhanced or deflated whether it is sold as a unit or in individual parcels.[42]

The **Harman** court also stated that "the purpose of the new value exception is to encourage equity holders of businesses, who wish to retain their interests in a debtor who plans to retain an ongoing business, to make capital contributions necessary to allow the debtor-business to survive."[43] The court noted this reasoning was inapplicable to individuals because individuals "unlike a business, will probably survive the instant bankruptcy case physically, whether it remains in Chapter 7 or Chapter 11."[44]

At least one court has held that post-BAPCPA, the new value exception does apply to individual chapter 11 debtors. In **In re Draiman**, the debtor attempted to retain the pre-petition assets of his business.[45] His plan proposed a capital contribution from a non-filing business associate in exchange for the non-exempt assets. The court stated that the Seventh Circuit, the controlling circuit in that case, had already found a new value exception to the absolute priority rule.[46] The court went on to make three specific findings.

First the court found that because the funding was coming from an outside source, and not the debtor, the contribution was "new." Second, the court found that the value of the contribution was the substantial and reasonable equivalent of the non-exempt property based on the estimated value of the non-exempt property. Of particular importance, the court found the assets the debtor was proposing to retain were worth $30,350. The capital contribution was for $100,000. Finally, the court found the contribution would be made in cash and thus was money's worth. The court also found the new value contribution necessary to an effective reorganization of the debtor.

It does not appear that the court engaged in any kind of auction nor does the opinion state whether other parties had the ability to purchase the assets at a higher price. In other words, it does not appear that the court engaged in any type of "market test" as required by the Supreme Court. Instead, the court relied on the debtor's valuation of the property to conclude the value given was new and substantially equivalent to the property to be retained. The court did note the difficulty of applying this rule to individuals because the value has to come from a new source.

Conclusion | Maharaj conclusively announced the Fourth Circuit's position on the absolute priority rule's application to individual debtors in chapter 11; however, the opinion also left additional questions unanswered. The **Maharaj** court was silent as to the existence of a new value exception for individual chapter 11 debtors. Whether its omission was intentional is debatable. Even if a new value exception applies, there is no guarantee the debtor will be able to retain pre-petition property. Unlike business reorganizations, individual debtors cannot be subject to an equity auction. In the case of an orderly liquidation auction, there is no guarantee that the debtor will be the high bidder.[47] It will also undoubtedly be difficult for an individual to

provide new value that is substantially equivalent to the pre-petition property interest it seeks to retain. And even if he or she is able to do so, using outside funding or exempt property to obtain non-exempt property may not be in the individual debtor's long-term best interests. These uncertainties are likely to make individuals more wary of proceeding under Chapter 11. One solution is for debtors to work closely with unsecured creditors to propose a plan that the unsecured creditors are likely to accept. This may be the debtor's best chance of crafting a successful reorganization.

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End Notes

1. **In re Maharaj**, 681 F.3d 558 (4th Cir. 2012).
2. The court noted that their debts exceeded the limits for filing under Chapter 13 of the Bankruptcy Code. Therefore, they had to proceed under Chapter 11 of the Code.
3. Chi., **Rock Island & Pac. R.R. v. Howard**, 74 U.S. 392, 409–10 (Wall 1868).
4. *See* Pub.L. 456, 66 Stat. 420, 433 (1952). ("Confirmation of an arrangement shall not be refused solely because the interests of a debtor, or if the debtor is a corporation, the interest of its stockholders or members will be preserved under the arrangement.").
5. **Norwest Bank Worthington v. Ahlers**, 485 U.S. 197, 202 (1988).
6. The additional language states, "except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section." 11 U.S.C. § 1129(b)(2)(B)(ii).
7. **In re Maharaj**, 681 F.3d 558, 563 (4th Cir. 2012).
8. *Id.* at 564.
9. *Id.*
10. **In re Shat**, 424 B.R. 854, 868 (Bankr.D.Nev.2010).
11. **Maharaj**, 681 F.3d at 563.
12. *Id.* at 566.
13. *Id.* at 566.
14. *Id.* at 566.
15. *Id.* at 569.
16. *Id.*
17. *Id.*
18. *Id.* at 574.
19. *Id.* at 570 (internal quotations omitted).
20. *Id.*
21. *Id.* (internal quotations omitted).
22. *Id.* at 571 (quoting **Hamilton v. Lanning**, 560 U.S. ___, 130 S. Ct. 2464, 2467 (2010)).
23. *Id.* at 571.
24. *Id.* at 573 (quoting **In re Gbadebo**, 431 B.R. 222, 229–30 (Bankr.N.D.Cal.2010)).
25. *Id.* at 574.
26. **Maharaj**, at 575 (internal quotations omitted).
27. **Case v. Los Angeles Lumber Products Co.**, 308 U.S. 106 (1939).
28. *Id.* at 121.
29. *Id.* at 122.
30. **Travelers Ins. Co. v. Bryson Properties, XVIII** (**In re Bryson Properties, XVII**), 961 F.2d 496 (4th Cir.1992).
31. *Id.* at 505.
32. *Id.* at 504.
33. **Bank of America Nat'l Trust and Savings Assoc. v. 203 North LaSalle Street P'ship**, 526 U.S. 434 (7th Cir. 1999).
34. Although the Supreme Court did not specifically decide whether the exception was still viable, the court did conclude: "assuming a new value corollary, that plans providing junior interest holders with exclusive opportunities free from competition and without benefit of market valuation fall within the prohibition of § 1129(b)(2)(B)(ii)." *Id.* at 458.
35. *Id.* ("a market test would require an opportunity to offer competing plans or would be satisfied by a right to bid for the same interest sought by old equity[.]").
36. *Id.* at 442 (quoting the court below).
37. **In re Smithville Crossing Development, LLC**, Case No. 11-02573-8-JRL at *3 (Bankr. E.D.N.C. Jan. 27, 2012) ("While the Supreme Court did not rule on which method was preferred, this jurisdiction permits interested parties to hold an equity auction after confirmation of the plan." citing **In re Graham & Currie Well Drilling Co., Inc.**, 2011 WL 5909632 (Bankr. E.D.N.C. 2011)).
38. *Id.* Slip Op. at *2.
39. *Id.* Slip Op. at *3.
40. **In re Rocha**, 179 B.R. 305, 307 (Bankr.M.D.Fla.1995) ("The difficulty with extending the new value exception to an individual is that the new value must come from an 'outside' source, meaning it cannot come from the [d]ebtor himself."); **In re Cipparone**, 175 B.R. 643, 643 (Bankr. E.D.Mich. 1994) ("The Court holds that the 'new value' exception to the absolute priority rule is inapplicable because the proposed contribution comes from the debtors themselves rather than from an outside source."); **In re Harman**, 141 B.R. 878, 888 (Bankr.E.D.Pa.1992) ("We also question whether the particular property contributed by the [d]ebtors, particularly the Husband's future wages, are sufficiently 'outside' of the [d]ebtors' normal 'operations' as to constitute new value."); In re East, 57 B.R. 14 (Bankr.M.D.La. 1985), ("[I]t might be that the injection of 'outside capital' would allow cram down in an individual case. It is easier in a corporate context to consider the concept of the injection of outside capital; when an individual is involved, it is difficult to imagine the source of such funds: perhaps a relative or friend might make a gift; perhaps there are other sources.").
41. _____
42. **In re Harman**, 141 B.R. 878, 886–87 (Bankr.E.D.Pa.1992).
43. *Id.* at 886.
44. *Id.*
45. **In re Draiman**, 450 B.R. 777, 821 (Bankr. N.D. Ill. 2011) (These assets included office equipment, furnishings, supplies and certain management agreements.).
46. **In re 203 N. LaSalle St. P'ship**, 126 F.3d 955, 963 (7th Cir. 1997) ("The Seventh Circuit has recognized an exception to the absolute priority rule called the 'new value exception.' In order to qualify for the exception, one must contribute capital which is new, substantial, necessary for success of the plan, reasonably equivalent to the value retained, and in the form of money or money's worth.") (internal quotations omitted).
47. **Smithville** at *2.