Post-Petition Plan Support Agreements: Present and Future Compliance

*By Kim Martin Lewis**

In the simplest of terms, a plan support agreement ("PSA") is an agreement between and among the debtors, creditors, and often a plan sponsor, "indicat[ing] that each party will support the implementation of the restructuring agreement in a chapter 11 plan."[1] These PSAs essentially bind or lock-up the parties ensuring that they vote in favor of a prenegotiated plan. While PSAs vary in form, each agreement "should include the parties, a description of their claims against and/or interest in the debtors, [and] the key terms of the prepackaged plan of reorganization."[2] Further, an agreement should outline the parties' commitment to "(1) support a plan that comports with the negotiated plan terms, (2) not vote to reject the plan, and (3) not vote for another plan."[3]

Plan Support Agreements are ordinarily negotiated prior to the filing of a chapter 11 case ("pre-petition") and increase the ability of the parties to obtain the necessary financing or support for an exit agreement.[4] For those parties that do not reach an agreement before the petition is filed the other option is to finalize the PSA after the chapter 11 filing ("post-petition"). As post-petition PSAs are becoming increasingly commonplace the validity of such agreements has been called into question by bankruptcy courts across the country.[5]

This article will examine court decisions regarding the validity of post-petition PSAs under the Bankruptcy Code (the "Code"). First it will examine how the courts have dealt with post-petition plan support agreements as a possible violation of Code § 1125(b). Next it will discuss how post-petition PSAs interact with Code §§ 363(b) and 1129(a)(4). Finally it considers the impact of the recent Supreme Court ruling in *Jevic* on the future status of post-petition PSAs in light of recent events.

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I. Post-Petition Plan Support Agreements and Code § 1125(b)

Opponents of post-petition PSAs argue that the execution of these agreements are the result of an improper solicitation of votes and thus in direct conflict with Code § 1125(b). This section states:

> "An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information. The court may approve a disclosure statement without a valuation of the debtor or an appraisal of the debtor's assets."[6]

In other words, the Code prohibits parties from soliciting acceptances or rejections of a reorganization plan if a disclosure statement has not yet been approved by the court.[7] Thus any post-petition PSA, which serves to bind the parties to a particular vote on a prenegotiated plan, entered into between filing and the approval of a disclosure statement, would be in direct violation of § 1125(b).

Courts require a disclosure statement in order to ensure that all claim holders are provided with adequate information so that they may make an informed decision as to whether they will vote in favor of the plan.[8] In tandem with the disclosure statement § 1125(b) works to restrict parties from making premature decisions regarding the plan. The bankruptcy court reiterates the importance these requirements play in *Century Glove v. First Am. Bank* by saying, "it is only after the court has determined that the information contained within a disclosure statement is adequate can claim holders receive solicitations requesting their acceptances or rejections of the plan."[9]

Opponents to post-petition PSAs further argue that those who enter into post-petition PSAs should lose their votes under § 1126(e) as punishment for violating § 1125(b).[10] This punitive section of the Code states, "[o]n request of a party in interest, and after notice and a hearing, the court may designate any entity whose acceptance or rejection of such plan was not in good faith, or was not solicited or procured in good faith or in accordance with the provisions of this title."[11] Such opponents read this section as bestowing on the bankruptcy court the ability to designate an entity, or disqualify their vote in favor or against the plan, simply due to their involvement with a post-petition PSA. This argument relies on a broad interpretation of the term "solicitation" as it appears in § 1126(e). As is common, the Code has left the word "solicitation" undefined so that the court may construe it to reflect congressional intent.[12] However, bankruptcy courts across the country have been unable to adopt a uniform interpretation of "solicitation." Rather the courts have provided three distinct rulings on the matter; (A) those where the court narrowly interprets solicitation and thus have found no violation of § 1125(b) and therefore cannot sanction parties who have entered into a post-petition PSA, (B) those where the court broadly interprets solicitation and have found that a post-petition PSA violates § 1125(b) but found sanctions under § 1126(e) are improper, and (C) those where the court broadly interprets solicitation and have found that a post-petition PSA violates § 1125(b) and thus have sanctioned the parties under § 1126(e).

A. Cases holding post-petition PSAs do not violate § 1125(b):

The seminal case dealing with an interpretation of the term "solicitation" as it appears in an § 1125(b) context is from a 1988 decision by the United States Court of Appeals for the Third Circuit, *Century Glove, Inc. v. First American Bank*.[13] Here the Circuit Court ultimately concluded that a narrow reading of term solicitation was proper so as to promote free negotiation between creditors. This led to a finding that entering into a post-petition plan support agreement was not a violation of § 1125(b).[14]

In *Century Glove Inc.*, the company, Century Glove ("CG"), filed a reorganization plan along with a draft of a disclosure statement, which was approved by the bankruptcy court.[15] While CG sought approval from the creditor body for its plan, one of their creditors, First American Bank ("FAB"), disseminated a draft of its own plan for the company's reorganization to the other creditors. Shortly after FAB distributed its plan, CG received several rejections of its own proposed plan.[16] CG then "petitioned the bankruptcy court to designate, or invalidate, the votes of FAB, [and the rejecting creditors]."[17] The company argued that "FAB had acted in bad faith in procuring these rejections,"[18] and the bankruptcy court agreed. In ruling the bankruptcy court stated that by "providing additional materials such as copies of its draft plan"[19] FAB had violated § 1125(b) and thus was subject to monetary sanction, the invalidation of their plan, and designation of its votes.[20]

However, on appeal, the District Court reversed the bankruptcy court's designation of votes and imposition of monetary sanctions.[21] The District Court "disagreed that § 1125(b) requires approval for all materials accompanying a solicitation . . . The District Court held that merely supplying additional information does not constitute "bad faith" or a violation of the bankruptcy rules."[22] In other words, discussions of and negotiations over a plan do not constitute "solicitation." Accordingly, the District Court held that "the bankruptcy court had erred in finding that FAB had improperly solicited rejections of the Century Glove plan."[23]

CG then appealed to the United States Court of Appeals for the Third Circuit.[24] The Third Circuit agreed with the District Court's narrow interpretation of "solicitation,"[25] reasoning that a "broad reading of the § 1125 can seriously inhibit free creditor negotiations."[26] According to the court, FAB was not barred from honestly negotiating with other creditors.[27] As the court stated, "We find no principled, predictable difference between negotiation and solicitation of future acceptances. We therefore reject any definition of solicitation which might cause creditors to limit their negotiations."[28]

Many courts follow the narrow interpretation of the term "solicitation" within the meaning of § 1125(b), in line with the ruling in *Century Glove*.[29] In 2013 the United States Bankruptcy Court for the District of Delaware revisited the issue of whether or not post-petition PSAs can be considered a "solicitation" for votes in violation of the Code.[30] Again the bankruptcy court found that these agreements, as presented in *In re Indianapolis Downs, LLC,* were not in violation of § 1125(b).[31]

In *In re Indianapolis Downs* the debtor filed a voluntary chapter 11 petition on April 7, 2011.[32] On April 25 of the following year, the debtor and certain creditors filed a Restructuring Support Agreement ("RSA") which called for:

> "(i) specific terms of the dual track plan of reorganization described above, including the financial terms of, and creditor treatment under, a potential sale or in the recapitalization transaction; (ii) the requirement that the Debtors propose a plan of reorganization within a time frame set in the RSA; (iii) a prohibition upon any party to the RSA proposing, supporting or voting for a competing plan of reorganization, and (iv) the requirement (enforceable by an order of specific performance) that parties to the RSA vote "yes" for a plan that complies with the RSA."[33]

The proponents of the RSA noted, however, that the RSA would only become binding upon the court's approval of a disclosure statement.[34] The proposed disclosure statement and reorganization plan were filed on the same date as the RSA.

The opponents of the RSA contended that the RSA violated § 1125(b) because it was a wrongful post-petition solicitation of votes, and thus requested that the votes of the parties to the RSA be designated.[35] The court, relying on a narrow interpretation of solicitation in line with *Century Glove,* rejected this argument. The narrow interpretation set forth in *Century Glove* afforded the parties an opportunity "to memorialize their agreements in a way that allows a chapter 11 case to move forward"[36] and thus recognizing that a post-petition agreement such as the RSA is beneficial to the case. In so ruling the court relied on the fact that the interests that § 1125(b) is meant to protect were not at risk in this case because all parties involved were sophisticated.[37] The court summarized by saying, "[w]hen a deal is negotiated in good faith between a debtor and sophisticated parties, and that arrangement is memorialized in a written commitment and promptly disclosed, § 1126 will not automatically require designation of the votes of the participants."[38] Based on the same reasoning the court ruled that the parties were also not in violation of § 1125(b).[39] Thus it seems courts are less likely to find violations of §§ 1125(b) and 1126 when parties are both sophisticated and experienced.

In addition to permitting post-petition PSAs in the event they are negotiated by sophisticated parties, the courts are willing to allow a post-petition PSA if it contains a termination provision.[40] The United States Bankruptcy Court for the Southern District of New York validated such an agreement in 2013 in *In re Residential Capital, LLC*.[41]

The debtors in *In re Residential Capital* filed a voluntary chapter 11 petition on May 14, 2012. On May 13 of the following year, the debtors and parties in interest agreed to a plan support agreement ("PSA") that included both a plan term sheet and a supplemental term sheet.[42] Again relying on

Century Glove's reading of the term "solicitation," the court held that the PSA did not violate § 1125(b).[43] The court based this holding on the fact that, "the PSA contains termination events that permit the parties to withdraw from their promise to vote in favor of the Plan in certain events."[44] Further, the court noted that several courts in the Southern District of New York have approved post-petition PSAs.[45]

From the three cases discussed above it is clear that post-petition PSAs are not inherently violative of the Code. Rather, courts are willing to accept such agreements in the interest of promoting free negotiation between parties and the systematic progression of the bankruptcy case. Additionally, courts are clearly more willing to allow post-petition PSAs when the parties are protected, either by their sophistication or an escape valve, such as a termination provision.

B. Cases holding post-petition PSAs violate § 1125(b) but do not impose a sanction:

While some courts have been ready and willing to accept post-petition PSAs, others have proved more hesitant. The cases discussed in this section are examples of the court's unwillingness to accept these agreements, based on a conclusion that they are not in compliance with § 1125(b) of the Code. However, these courts have decided that sanctioning the parties for participating in post-petition PSAs constitutes unnecessary punishment, and are disinclined to deny the resulting votes under the designation provision of § 1126(e).

Under the belief that invalidating a party's vote would "miss the mark," courts have found more creative ways to remedy harm caused by a § 1125(b) violation.[46] For instance, courts have chosen to subordinate creditor's claims to the claims of others (a process known as equitable subordination),[47] find a party in civil contempt of court[48] or even impose monetary sanctions.[49] These remedies are predicated on the specific facts of each case.

The doctrine of equitable subordination, in which a court lowers the rank of a senior creditor's claim so that it becomes junior to the claims of other creditors, is not a recent development in bankruptcy law. In fact, the doctrine has been of use ever since the Fifth Circuit promoted the idea in 1977 in *Benjamin v. Diamond (In re Mobile Steel Co.)*.[50] The doctrine began as a power " 'to prevent the consummation of a course of conduct by [a] claimant which . . . would be fraudulent or otherwise inequitable' by subordinating his claims to the ethically superior claims asserted by other creditors."[51] Since then equitable subordination has been adopted by many courts as an adequate remedy for a violation of § 1125(b) when other sanctions seem ill-fitting. Before this doctrine may be properly implemented as a remedy for a § 1125(b) violation a three part test must be met.[52] The court must find and conclude that, "(1) the claimant [has] engaged in some type of inequitable conduct; (2) the misconduct [has] resulted in injury to the creditors of the debtor or conferred an unfair advantage on the claimant; (3) equitable subordination of the claim [is not] inconsistent with the Bankruptcy Code."[53]

The Bankruptcy Court for the District of Massachusetts applied the doctrine of equitable subordination to a § 1125(b) violation in 1999 in, *In re Clamp-All*.[54] Here the debtor filed a disclosure statement and a plan of reorganization that treated creditors, Foresta and Caliber, as Class 5 unsecured creditors.[55] Displeased with this classification, Foresta and Caliber filed an "Objection to Disclosure Statement" to which they attached a full copy of their own proposed disclosure statement and reorganization plan and then circulated it to every creditor.[56] The debtor argued that Foresta and Caliber violated § 1125(b) because they solicited votes against the debtor's plan by promoting their own proposal.[57] As punishment for such actions the debtor requested that the court designate Foresta's and Caliber's votes pursuant to § 1126(e), and "impose sanctions against Foresta and Caliber and/or find them in contempt of court."[58]

While the *In re Clamp-All* court had no issue deciding that Foresta and Caliber had violated § 1125(b) by circulating their disclosure statement and reorganization plan, the court found it more difficult to determine an appropriate remedy.[59] Specifically the court found that, "[t]he remedies suggested by the Debtor are, for one reason or the other, inappropriate."[60] The court denied designation of Foresta's and Caliber's votes as premature stating, "no plan with an approved disclosure statement is now before the Court, no vote has been cast and no assessment can now be made as to whether vote disqualification would have any impact on the confirmation of any plan or, more importantly, ameliorate the harm caused by Foresta and Caliber."[61] Thus the court refused to disqualify any future votes of Foresta and Caliber in favor of or against a possible plan because their actions did not actually lead to the approval of a competing plan. However, the court did decide punishment of some sort was warranted due to Foresta's and Caliber's malfeasance.

The court was reluctant to find Foresta and Caliber in contempt of court because, "[c]ivil contempt is a remedy which should be used sparingly and should not be employed without more of a direct relationship between a specific order focused on an alleged contemnor and the suggested violation."[62] Finding the aforementioned remedies inadequate, the court in *In re Clamp-All* went in another direction, and instead applied the doctrine of equitable subordination as it is set forth in § 510(c) and *Benjamin v. Diamond (In re Mobile Steel Co.)*.[63] As a result the claims of both Foresta and Caliber were subordinated to the claims of all other creditors making their recovery under any approved plan of reorganization unlikely.[64]

Other courts, including the District Court for the District of Colorado, are not as reluctant to hold creditors in contempt of court for violating § 1125(b). In *In re Aspen Limousine Service,* the court entered an order conditionally approving the disclosure statement and plan submitted by the Aspen Limousine Service ("ALS").[65] Earlier, the court declined to give Colorado Mountain Express ("CME") conditional approval of its plan.[66] However, CME believed the judge to have erred in approving ALS's plan and not its own, and sent a letter to the debtor's creditors "apprising them of its alternative plan and urging them to reject the plan proffered by ALS."[67] The court determined that CME's letter was a "deliberate attempt to interfere with the court-approved method of effecting the election of ALS's plan," and therefore was a violation of § 1125(b).[68]

As a result of the violation the court affirmed the order of contempt against CME.[69] Against CME's contention, the court held that contempt was a remedy available for a violation of § 1125(b) because "[a]n inherent element of the court's contempt power is to punish the doing of a forbidden act or the refusal to do that which is required. Section 105(a) of the Bankruptcy Code authorizes bankruptcy judges to issue 'any order, process, or judgement that is necessary or appropriate to carry out the provisions of this title . . . [or] to prevent an abuse of process."[70] Based on the power bestowed upon the court under § 105(a), it found no issue executing an order of contempt for a violation of § 1125(b), however it should be noted that this order of contempt was coupled with an additional punishment for CME, a court order approving ALS's plan and rejecting CME's plan.

Other than implementing equitable subordination or holding a party in contempt of court, some courts have decided to impose monetary sanctions on parties who step outside the bounds of § 1125(b). The Bankruptcy Appellate Panel of the Ninth Circuit affirmed the bankruptcy court's imposition of monetary sanctions on an unruly debtor despite the fact that no actual harm resulted from the creditor's actions in *Duff v. United States Trustee (In re California Fidelity, Inc.)*.[71] California Fidelity, Inc. ("CFI") filed a voluntary chapter 11 petition on January 19, 1995 and after a motion by the United States Trustee ("UST") the bankruptcy court appointed a chapter 11 Trustee to oversee the case.[72] On August 2, 1995 Duff, the president of CFI, and the newly appointed chapter 11 Trustee both attended the creditors' committee meeting in order to garner support for their two competing plans.[73] The creditors' committee decided that the chapter 11 Trustee's plan was the best option and the court subsequently set a date for a hearing, to take place the following month, for ultimate approval of the chapter 11 Trustee's plan based on the adequacy of the plan and accompanying disclosure statement.[74] Two weeks before the hearing, Duff circulated a letter to three hundred of the debtor's unsecured creditors "attacking the Department of Justice, the committee, the [chapter 11] trustee and the bankruptcy court."[75] Further, "[a]ttached to Duff's letter was a letter from . . . the chair of the creditors' committee, to other members of the committee advising them, inter alia, to reject the chapter 11 Trustee's plan."[76] Despite Duff's attempted solicitation, the creditors' committee approved the chapter 11 Trustee's plan. Even without evidence that Duff's actions had an impact on the votes of the creditors' committee the court concluded that Duff's letter constituted a "solicitation" within the meaning of the code and was therefore a violation of § 1125(b).[77] Although Duff's letter did not 'taint' the voting process, as it did not cause actual harm and had no real effect on the acceptance of the chapter 11 Trustee's plan; the court still affirmed the imposition of sanctions against Duff "in an amount equal to the fees and the costs of parties involved," which totaled $4,422.24.[78] Despite the lack of harm caused by Duff's actions the court was justified in imposing sanctions on the debtor for their noncompliance with the Code. Based on § 105(a) bankruptcy courts have routinely held that, "[i]t is within the inherent authority of the bankruptcy court to sanction conduct that violates the bankruptcy laws."[79] This code section provides the courts with a means "to prevent an abuse of process" and "to sanction vexatious conduct."[80] Thus the bankruptcy court is given wide latitude as to which punitive measure they wish to implement for violations of § 1125(b).[81]

An analysis of *In re Clamp-All*, *In re Aspen Limousine Service,* and *In re California Fidelity* shows that if a party solicits votes in violation of § 1125(b), those parties involved in post-petition PSAs may either have their claims subordinated, may be found in contempt of court, or may be given a bill in the form of monetary sanctions rather than suffering a loss of its vote for being a party designated under § 1126(e). However, courts still retain the discretion that would allow them to designate a party's vote in addition to implementing any of the other remedies described above. Further, in regards to post-petition PSAs, these remedies are certainly available to the courts, using either a narrow or broad interpretation of 'solicitation,' in the event that such agreement violates § 1125(b).

C. Cases designating an entity under § 1125(b) for a violation of § 1126(e):

The opponents of post-petition PSAs have sometimes been successful in convincing courts that these agreements violate the Code and should result in the invalidation of the party's vote through designation of the offending entity's vote pursuant to § 1126(e). The United States Bankruptcy Court for the Eastern District of Tennessee sided with post-petition PSA opponents in the *In re Media Central* decision.[82] Here a creditor sought sanctions against the debtor in possession ("DIP"), Media Central, claiming that the DIP improperly solicited votes for its proposed plan of reorganization.[83] During the course of the bankruptcy case, the DIP mailed a court-approved plan of reorganization and disclosure statement along with ancillary documents.[84] The DIP also included a non-court-approved "Submission of Disclosure Statement, Solicitation for Support of Plans and Notice of Status Conference" which presented two alternative plans and enclosed a ballot for voting purposes.[85] Further the ancillary documents "summarize[d] the status of negotiations with several of the major players in [the] case . . . [and] advis[ed] creditors and equity security holders . . . [to] consider two alternative proposals to its plan."[86] After receiving these documents the creditor argued, and the court agreed, that by including the two alternative plans that were neither approved by the court nor accompanied by a proper disclosure statement, the DIP solicited votes in violation of § 1125(b).[87] Without hesitation, the court decided to invalidate, pursuant to § 1126(e), all votes received as a result of this initial mailing.[88] However, the court later permitted the designated parties to vote again on an amended plan of reorganization and disclosure statement to which the DIP was required to attach a new and proper solicitation.[89]

The court reasoned that "pitfalls may still await those parties who solicit votes on the basis of information not contained in a court-approved disclosure statement"[90] and "[t]he disclosure statement hearing gives interested parties the opportunity to challenge whether certain statements or information contained in the disclosure statement should be sent out to those who will vote on a plan."[91] According to the court, a filing of a complete disclosure statement is necessary so that each relevant party may be fully informed. Other courts have also disallowed the votes of entities designated pursuant to § 1126(e) when post-petition PSAs have directly violated § 1125(b). In 2002 the Bankruptcy Court for the District of Delaware designated the votes of parties to a post-petition PSA in two cases involving pre-packaged plans: *In re Stations Holding*[92] and *In re NII Holdings*.[93]

The U.S. Trustee in *In re Stations Holding* filed a motion under § 1125(e) to disallow the votes of the parties who had entered into a lock-up agreement before the disclosure statement was approved by the court.[94] The court granted the U.S. Trustee's motion and held that the lock-up agreement was an improper solicitation of votes by implementing a different reading of the term 'solicitation' than the court in *Century Glove*. Here the court equated the term 'solicitation' to 'asking for a vote,' although the agreement specifically stated that it was not a request for an official vote.[95] Together, with the specific performance provisions of the lock-up agreement, the court had no trouble disallowing the votes of the parties involved.[96] Just months later, the court, and the same judge that ruled in *In re Stations Holdings*, relied on the same basis for disallowing the votes of parties who were privy to post-petition PSAs in *In re NII Holdings*.[97]

D. Maintaining Compliance with § 1125(b):

From the above analysis it remains clear that courts have not yet determined a uniform way in which to treat post-petition PSAs in relation to § 1125(b). Although the majority of courts have found these agreements to be compliant with the Code,[98] there exists clear precedent saying otherwise.[99] Therefore it would be in a party's best interest to remain in compliance with § 1125(b), by providing all parties with consistent and adequate information, while they develop and negotiate post-petition PSAs. Having sophisticated parties, who do not need the safety net of § 1125(b), negotiating and presenting these agreements should deter courts from finding the agreement on its own to be inequitable. Additionally, anything that can be construed as an act of bad faith, fraud, or ill-play in forming and executing these agreements should be avoided as such actions will automatically lead courts to find a violation of § 1125(b).

Parties may be able to insulate themselves from sanctions by imbedding an escape valve that presents an air of equitable dealing. The parties in *In re Residential Capital* were rewarded by the skilled drafting on display in their PSA.[100] By including termination provisions and explicitly stating that the parties were not agreeing to vote until the court accepted the plan and disclosure statement, the court concluded that the agreement was not compulsory and allowed it to stand.[101] Based on this precedent, drafting similar equitable provisions into a post-petition PSA should provide parties with some assurance that courts will not find their plan to be a violation of § 1125(b). Some other types of equitable provisions may include "fiduciary out" clauses. Although "fiduciary out" clauses are typically used in the context of an acquisition, a "fiduciary out" clause permitting parties to terminate the post-petition PSA if there is a superior plan may also provide a defense to challenges against a post-petition PSA.

II. Post-Petition PSAs and § 363(b)

Opponents of post-petition PSAs do not limit themselves to disqualifying these agreements solely based on § 1125(b). Rather, arguments have been made to the effect that such agreements also violate other sections of the Code.

Recently courts have addressed whether or not post-petition PSAs violate § 363(b). This section states that a trustee (which includes a DIP), "after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate."[102] In other words, the court must approve any transaction by a DIP that is outside the ordinary course of business. Accordingly, because the entrance into a PSA is outside the ordinary course of business, and inevitably involves distribution of property of the estate, a court would only approve the agreement if the debtor can demonstrate a sound business basis for the transaction.[103] The business judgement rule, which is used to decide if the transaction has a sound business basis, requires the court to determine the existence of five elements: "(i) a business decision, (ii) disinterestedness, (iii) due care, (iv) good faith, and (v) according to some courts and commentators, no abuse of discretion or waste of corporate assets."[104] Once a sound business justification for a transaction is demonstrated, "a presumption arises that the debtor's decision was made on an informed basis, in good faith, and in the honest belief that the action was in the best interest of the Debtors."[105]

In *In re Residential Capital* the court addressed whether a post-petition PSA complied with § 363(b).[106] The debtor filed a chapter 11 petition on May 14, 2012 and on May 13 of the following year the debtors, creditors, and other interested parties agreed to the terms of a plan support agreement.[107] This agreement was the product of months of negotiations, weeks of guided mediation, in-person meetings and conference calls, and two global mediation sessions.[108] Here the court held that the agreement satisfied the business judgment rule and was not in violation of § 363(b) because the negotiations were conducted in good faith, supervised by a mediator, and the debtor was represented by an unconflicted fiduciary.[109]

III. Post-Petition PSAs and § 1129(a)(4)

Post-petition PSAs have also been questioned as being a violation of § 1129(a)(4). This section states the following is one of the requirements for confirming a chapter 11 plan:

> "Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable."[110]

Courts have typically interpreted this section as "[a]ny payment made or to be made by the Debtors for services or for costs and expenses of the Debtors' professionals in connection with the Debtors' chapter 11 Cases, or in connection with the Prepackaged Plan and incident to the Debtors' chapter 11 Cases . . ."[111] Relying on such an interpretation, most courts have rejected the contention that post-petition PSAs are in violation of § 1129(a)(4).

In a 2017 decision by the Bankruptcy Court of the Northern District of Texas, *In re CHC Group,* the court upheld a post-petition PSA as a proper agreement, that did not violate § 1129(a)(4).[112] In that case, the debtor commenced its chapter 11 case on May 5, 2016 and subsequently entered into a plan support agreement with key creditors on October 11 of the same year.[113] The court quickly dismissed the claim that the post-petition PSA was a violation of § 1129(a)(4), concluding that it did not involve "[a]ny payment made or to be made by the debtors for services or for costs and expenses . . . in connection with the Plan and incident to the chapter 11 cases, has been approved by, or is subject to approval of the Bankruptcy Court."[114]

IV. Post-Petition PSAs and *Jevic*

In addition to relying on Code provisions to invalidate a post-petition PSA, opponents may now look to recent United States Supreme Court precedent for support. While the Supreme Court's ruling in *Czyzewski v. Jevic Holding Corp*.[115] is not determinative of the issue it may provide opponents with an added basis to invalidate a post-petition PSA. The question *Jevic* raises is whether or not §§ 1129(a)(7) and 1129(a)(9) of the Code apply to post-petition PSAs. To confirm a chapter 11 plan, § 1129(a)(7), requires that each creditor receive as much as such creditor would receive if the debtor were liquidated under chapter 7.[116] The Absolute Priority Rule, codified in § 1129(a)(9), requires that creditors holding certain claims receive specified distributions before distributions are made to other creditors.[117]

In *Jevic*, the debtor and certain creditors reached a settlement agreement after the petition was filed that provided that the bankruptcy court would dismiss the case and that the estate would distribute payments to the general unsecured creditors but effectively skipped certain priority unsecured creditors, composed of a group of former Jevic truck drivers with priority Worker Adjustment and Retraining Notification Acts ("WARN") claims, who did not approve the settlement agreement.[118] The settlement agreement in that case was intended to act as a structured dismissal — conventionally a structured dismissal returns the case to the "prepetition financial status quo."[119] In the *Jevic* case however, the agreement did not return the case to such prepetition financial status quo because it disregarded the priority claims of unsecured creditors holding WARN claims.[120] Additionally, the

Code does not explicitly state what priority rules apply in a structured dismissal so the court must rely on the ordinary priority rules for chapter 11 cases.[121] In *Jevic*, certain priority unsecured creditors and the U.S. Trustee (the "Petitioners") objected to the bankruptcy court's dismissal of the case and approval of the settlement because the settlement's distribution plan violated the Code's priority scheme.[122] The Supreme Court agreed with the Petitioners, "that the settlement's distribution scheme failed to follow ordinary priority rules. The Circuit Court below held that this did not bar approval," and upheld the settlement despite a deviation from the priority rule "in light of the 'dire circumstances' facing the estate and its creditors."[123] The Supreme Court rejected the Circuit Court's holding, and ruled that the absolute priority rule must be upheld with respect to distributions made at the end of a chapter 11 case.[124]

In *Jevic*, the Supreme Court addressed the following question: "[c]an a bankruptcy court approve a structured dismissal that provides for distributions that do not follow ordinary priority rules without the affected creditors' consent?"[125] The Supreme Court decided that the bankruptcy court did not have such a power because the Code's priority system is the bedrock of bankruptcy law.[126] Further, the court stated, "[t]he importance of the priority system leads us to expect more than simple statutory silence if . . . Congress were to intend a major departure [from the priority system]. Put somewhat more directly, we would expect to see some affirmative indication of intent if Congress actually meant to allow a structured dismissal as a backdoor means to achieve the exact kind of nonconsensual priority-violating final distributions that the Code prohibits in . . . chapter 11 plans."[127] Lastly the Supreme Court stated that even "dire circumstances" were no reason to divert from the Code's priority scheme.[128]

The holding in *Jevic* may have lasting effects that stretch beyond the requirement of priority rules being applied to settlements within a structured dismissal context. It could certainly be surmised that courts may interpret *Jevic* to mean that the Code's priority scheme applies to all agreements and plans in chapter 11 cases, including freely negotiated post-petition PSAs that result in priority-skipping. The ruling in *Jevic* could open a new door for arguments by opponents to post-petition PSAs. While courts have not yet been tasked with interpreting the role *Jevic* plays in relation to the validity of post-petition PSAs it is possible that parties may seek to extend the reasoning set forth in *Jevic* to such agreements. Thus it is essential for parties entering into such agreements to keep the Code's priority-scheme in mind when negotiating PSAs.

While past case law from the bankruptcy courts has failed to provide a clear determination on the validity of post-petition PSAs there are three main claims that opponents will make against them. The most common argument against post-petition PSAs is that they violate § 1125(b). While bankruptcy courts are split on this issue we are able to narrow the possible court rulings to one of three situations. The court will either determine that the post-petition PSA was not in violation of the Code, the agreement was in violation of the Code but the votes of the parties to the agreement should not be disallowed under § 1125(e), or the agreement was in violation of the Code and the votes of the parties to the agreement should be disallowed under that provision. Courts will ordinarily uphold a post-petition PSA if the parties to the agreement were sophisticated or the agreement itself provided the parties with specific safety measures such as a termination provision. Opponents may also rely on either §§ 363(b) or 1129(a)(4) to try to invalidate a post-petition PSA, but most courts will dismiss such an argument and uphold the PSA. While the present status of validity of post-petition PSAs is far from predictable, the future of such PSAs is even foggier. The Supreme Court's ruling in *Jevic* has left opponents of post-petition PSAs with yet another argument to invalidate a post-petition PSA. While the future of post-petition PSAs might be uncertain it is important for parties entering into such agreements to respect the Code's priority scheme if they wish the agreement to be enforceable.

NOTES:

[1]16-CM21 Collier on Bankruptcy § 21.14.

[2]16-CM21 Collier on Bankruptcy § 21.14.

[3]16-CM21 Collier on Bankruptcy § 21.14.

[4]16-CM21 Collier on Bankruptcy § 21.14.

[5]16-CM21 Collier on Bankruptcy § 21.14.

[6]11 U.S.C.A. § 1125

[7]In re Clamp-All Corp., 233 B.R. 198, 204, 34 Bankr. Ct. Dec. (CRR) 380, 41 Collier Bankr. Cas. 2d (MB) 1480 (Bankr. D. Mass. 1999).

[8]In re Clamp-All Corp., at 204.

[9]In re Clamp-All Corp., at 204.

[10]Kim Martin Lewis, Post-Petition Support Agreements.

[11]11 U.S.C. § 1126(e).

[12]In re Clamp-All Corp., at 204.

[13]Century Glove, Inc. v. First American Bank of New York, 860 F.2d 94, 18 Bankr. Ct. Dec. (CRR) 747, 20 Collier Bankr. Cas. 2d (MB) 742, Bankr. L. Rep. (CCH) P 72492, 100 A.L.R. Fed. 207 (3d Cir. 1988).

[14]Century Glove, Inc., 860 F.2d at 94.

[15]Century Glove, Inc., 860 F.2d at 95.

[16]Century Glove, Inc., 860 F.2d at 96.

[17]Century Glove, Inc., 860 F.2d at 96.

[18]Century Glove, Inc., 860 F.2d at 96.

[19]Century Glove, Inc., 860 F.2d at 96.

[20]Century Glove, Inc., 860 F.2d at 96.

[21]Century Glove, Inc., 860 F.2d at 96.

[22]Century Glove, Inc., 860 F.2d at 97.

[23]Century Glove, Inc., 860 F.2d at 97.

[24]Century Glove, Inc., 860 F.2d at 97.

[25]Century Glove, Inc., 860 F.2d at 97.

[26]Century Glove, Inc., 860 F.2d at 97.

[27]Century Glove, Inc., 860 F.2d at 100.

[28]Century Glove, Inc., 860 F.2d at 100–101.

[29]See In re California Fidelity, Inc., 198 B.R. 567, 571–72, 29 Bankr. Ct. Dec. (CRR) 506, 36 Collier Bankr. Cas. 2d (MB) 580, Bankr. L. Rep. (CCH) P 77050 (B.A.P. 9th Cir. 1996); In re Dow Corning Corp., 227 B.R. 111, 118, 33 Bankr. Ct. Dec. (CRR) 544 (Bankr. E.D. Mich. 1998), as amended, (Dec. 28, 1998) and as amended, (Jan. 25, 1999); In re Pleasant Hill Partners, L.P., 163 B.R. 388, 391, 25 Bankr. Ct. Dec. (CRR) 359, Bankr. L. Rep. (CCH) P 75725 (Bankr. N.D. Ga. 1994); In re Kellogg Square Partnership, 160 B.R. 336, 340, 24 Bankr. Ct. Dec. (CRR) 1324, 30 Collier Bankr. Cas. 2d (MB) 7, Bankr. L. Rep. (CCH) P 75511 (Bankr. D. Minn. 1993); In re Gilbert, 104 B.R. 206, 214, 19 Bankr. Ct. Dec. (CRR) 1183 (Bankr. W.D. Mo. 1989).

[30]In re Indianapolis Downs, LLC., 486 B.R. 286 (Bankr. D. Del. 2013).

[31]In re Indianapolis Downs, LLC, 486 B.R. at 286.

[32]In re Indianapolis Downs, LLC, 486 B.R. at 286.

[33]In re Indianapolis Downs, LLC, 486 B.R. at 292.

[34]In re Indianapolis Downs, LLC, 486 B.R. at 293.

[35]In re Indianapolis Downs, LLC, 486 B.R. at 293.

[36]In re Indianapolis Downs, LLC, 486 B.R. at 295 (citing In re Heritage Organization, L.L.C., 376 B.R. 783, 48 Bankr. Ct. Dec. (CRR) 229, 48 Bankr. Ct. Dec. (CRR) 230 (Bankr. N.D. Tex. 2007) ("If a creditor believes that it has sufficient information about the case and the available alternatives to jointly propose chapter 11 plan with another entity (whether that co-proponent is another creditor, the debtor, or a trustee (who also believes that it has sufficient information)), it is absurd to think that the signing of a term sheet by those parties (that contains the material terms of their to-be-filed joint plan and states that the co-proponent creditor(s) will vote for their agreed upon joint plan) is an improper solicitation of votes in accordance with § 1125(b).")

[37]In re Indianapolis Downs, LLC, 486 B.R. at 296.

[38]In re Indianapolis Downs, LLC, 486 B.R. at 297.

[39]In re Indianapolis Downs, LLC, 486 B.R. at 297.

[40]In re Residential Capital, LLC, 2013 WL 3286198 (Bankr. S.D. N.Y. 2013).

[41]In re Residential Capital, LLC, 2013 WL 3286198 (Bankr. S.D. N.Y. 2013).

[42]In re Residential Capital, LLC, 2013 WL 3286198 at *4.

[43]In re Residential Capital, LLC, 2013 WL 3286198 at *20.

[44]In re Residential Capital, LLC, 2013 WL 3286198 at *5.

[45]In re Residential Capital, LLC, 2013 WL 3286198 at *20. See, e.g. In re AMR Corp., Case No. 11-15463 (SHL) (Bankr. S.D.N.Y. June 4, 2013) (ECF Doc. # 8577); In re General Maritime Corp., No. 11-15285 (MG) (Bankr. S.D.N.Y. Apr. 2, 2012) (ECF Doc. # 421); In re Great Atl. & Pac. Tea Co., No. 10-24549 (RDD) (Bankr. S.D.N.Y. Dec. 19, 2011) (ECF Doc. # 3060); In re Chemtura Corp., No. 09-11233 (REG) (Bankr. S.D.N.Y. Aug. 9, 2010) (ECF Doc. # 3527); In re Tronox, Inc., No. 09-10156 (ALG) (Bankr. S.D.N.Y. Dec. 23, 2009) (ECF Doc. # 1030).

[46]In re Clamp-All Corp., 233 B.R. 198, 210, 34 Bankr. Ct. Dec. (CRR) 380, 41 Collier Bankr. Cas. 2d (MB) 1480 (Bankr. D. Mass. 1999).

[47]In re Clamp-All Corp., 233 B.R. at 211.

[48]See In re Aspen Limousine Service, Inc., 198 B.R. 341, 345, 36 Collier Bankr. Cas. 2d (MB) 1024 (D. Colo. 1996).

[49]See In re California Fidelity, Inc., 198 B.R. 567, 29 Bankr. Ct. Dec. (CRR) 506, 36 Collier Bankr. Cas. 2d (MB) 580, Bankr. L. Rep. (CCH) P 77050 (B.A.P. 9th Cir. 1996); In re Rook Broadcasting of Idaho, Inc., 154 B.R. 970 (Bankr. D. Idaho 1993).

[50]Matter of Mobile Steel Co., 563 F.2d 692, 15 C.B.C. 1 (5th Cir. 1977).

[51]In re Clamp-All Corp., 233 B.R. at 202.

[52]See In re Clamp-All Corp., 233 B.R. at 211.

[53]In re Clamp-All Corp., 233 B.R. at 211.

[54]See In re Clamp-All Corp., 233 B.R. at 211.

[55]In re Clamp-All Corp., 233 B.R. at 202.

[56]In re Clamp-All Corp., 233 B.R. at 202.

[57]In re Clamp-All Corp., 233 B.R. at 204.

[58]In re Clamp-All Corp., 233 B.R. at 204.

[59]In re Clamp-All Corp., 233 B.R. at 209 ("As a result, Foresta and Caliber's actions undermined the Debtor's ability to propose a confirmable plan and circumvented the adequate disclosure requirements of the Bankruptcy Code. In so doing, Foresta and Caliber violated sections 1121(b) and 1125(b) of the Bankruptcy Code and Bankruptcy Rule 3017(a)").

[60]In re Clamp-All Corp., 233 B.R. at 210.

[61]In re Clamp-All Corp., 233 B.R. at 210.

[62]In re Clamp-All Corp., 233 B.R. at 210 (referencing Willy v. Coastal Corp., 503 U.S. 131, 112 S. Ct. 1076, 117 L. Ed. 2d 280, 121 Lab. Cas. (CCH) P 10012, 21 Fed. R. Serv. 3d 1121 (1992) (civil contempt is designed to force contemnor to comply with direct order of court).

[63]In re Clamp-All Corp., 233 B.R. at 210.

[64]See In re Clamp-All Corp., 233 B.R. at 210.

[65]In re Aspen Limousine Service, Inc., 198 B.R. 341, 345, 36 Collier Bankr. Cas. 2d (MB) 1024 (D. Colo. 1996).

[66]Colo. Mt. Express, 198 B.R. at 345.

[67]Colo. Mt. Express, 198 B.R. at 345.

[68]Colo. Mt. Express, 198 B.R. at 349.

[69]Colo. Mt. Express, 198 B.R. at 350.

[70]Colo. Mt. Express, 198 B.R. at 349 (quoting 11 U.S.C.A. § 105(a)).

[71]In re California Fidelity, Inc., 198 B.R. 567, 29 Bankr. Ct. Dec. (CRR) 506, 36 Collier Bankr. Cas. 2d (MB) 580, Bankr. L. Rep. (CCH) P 77050 (B.A.P. 9th Cir. 1996).

[72]Duff, 198 B.R. at 570.

[73]Duff, 198 B.R. at 570.

[74]Duff, 198 B.R. at 570.

[75]Duff, 198 B.R. at 570.

[76]Duff, 198 B.R. at 570.

[77]Duff, 198 B.R. at 570.

[78]Duff, 198 B.R. at 574.

[79]Duff, 198 B.R. at 573.

[80]In re Rainbow Magazine, Inc., 77 F.3d 278, 283–284, 28 Bankr. Ct. Dec. (CRR) 871, 35 Collier Bankr. Cas. 2d (MB) 620, Bankr. L. Rep. (CCH) P 76830 (9th Cir. 1996).

[81]Caldwell, 77 F.3d at 278. See In re Rook Broadcasting of Idaho, Inc., 154 B.R. 970 (Bankr. D. Idaho 1993) (monetary sanction imposed for violation of 1125(b)).

[82]In re Media Cent., Inc., 89 B.R. 685, 686 (Bankr. E.D. Tenn. 1988).

[83]In re Media Central, 89 B.R. at 686.

[84]In re Media Central, 89 B.R. at 686.

[85]In re Media Central, 89 B.R. at 686.

[86]In re Media Central, 89 B.R. at 686.

[87]In re Media Central, 89 B.R. at 686.

[88]In re Media Central, 89 B.R. at 686.

[89]In re Media Central, 89 B.R. at 686.

[90]In re Media Central, 89 B.R. at 691.

[91]In re Media Central, 89 B.R. at 691.

[92]In re Stations Holding Company, Inc., 2002 WL 31947022 (Bankr. D. Del. 2002).

[93]In re NII Holdings, Inc., 288 B.R. 356, 358 (Bankr. D. Del. 2002).

[94]In re NII Holdings, 288 B.R. at 358.

[95]In re NII Holdings, 288 B.R. at 358.

[96]In re NII Holdings, 288 B.R. at 358.

[97]2014 Ann. Surv. of Bankr.Law 4 (citing Transcript of Motions at 60, NII Holdings (No. 02-11505).

[98]See generally supra note 29.

[99]See generally supra note 88, 89.

[100]See generally supra note 44.

[101]See generally supra note 44.

[102]In re Residential Capital, LLC, 2013 WL 3286198 at *18 (quoting 11 U.S.C.A. § 363(b)(1)).

[103]Judicial Review of Plan Support Agreements: A Review and Analysis, 9 NYU J.L. & Liberty 850. See also In re Lionel Corp., 722 F.2d 1063, 11 Bankr. Ct. Dec. (CRR) 553, 9 Collier Bankr. Cas. 2d (MB) 941, Bankr. L. Rep. (CCH) P 69510 (2d Cir. 1983).

[104]In re Residential Capital, LLC, 2013 WL 3286198 (Bankr. S.D. N.Y. 2013) (citing In re Innkeepers USA Trust, 442 B.R. 227, 231 (Bankr. S.D. N.Y. 2010)).

[105]In re Residential Capital, LLC, 2013 WL 3286198 at *18 (Bankr. S.D. N.Y. 2013) (citing In re Integrated Resources, Inc., 147 B.R. 650, 656, 23 Bankr. Ct. Dec. (CRR) 1042 (S.D. N.Y. 1992)

[106]See In re Residential Capital, LLC, 2013 WL 3286198 at *1.

[107]In re Residential Capital, LLC, 2013 WL 3286198 at *3.

[108]In re Residential Capital, LLC, 2013 WL 3286198 at *3.

[109]In re Residential Capital, LLC, 2013 WL 3286198 at *19

[110]11 U.S.C.A. § 1129

[111]See In re CHC Grp. Ltd., No. 16-31854, 2017 Bankr. LEXIS 1016, at *65 (U.S. Bankr. N.D. Tex. Mar. 3, 2017); In re Lazy Days' R.V. Ctr., Inc., No. 09-13911 (KG), 2009 Bankr. LEXIS 4830, at *25 (U.S. Bankr. D. Del. Dec. 8, 2009); In re Elec. Components Int'l, Nos. 10-11054 (KJC), 17, 20, 39, 54, 92, 93, 95, 96, 101, 2010 Bankr. LEXIS 2849, at *21 (U.S. Bankr. D. Del. May 11, 2010).

[112]In re CHC Grp. Ltd., 2017 Bankr. LEXIS 1016 at *29–30.

[113]In re CHC Grp. Ltd., 2017 Bankr. LEXIS 1016, at *29–30.

[114]In re CHC Grp. Ltd., 2017 Bankr. LEXIS 1016 at *29–30.

[115]Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 197 L. Ed. 2d 398, 63 Bankr. Ct. Dec. (CRR) 242, 77 Collier Bankr. Cas. 2d (MB) 596, 41 I.E.R. Cas. (BNA) 1613, Bankr. L. Rep. (CCH) P 83082 (2017).

[116]11 U.S.C.A. § 1129(a)(7).

[117]11 U.S.C.A. § 1129(a)(9).

[118]Czyzewski, 137 S. Ct. at 980.

[119]Czyzewski, 137 S. Ct. at 980.

[120]Czyzewski, 137 S. Ct. at 980.

[121]See 11 U.S.C.A. § 1129(a)(7); 11 U.S.C.A. § 1129(a)(9); and 11 U.S.C.A. § 1129(b)

[122]Czyzewski, 137 S. Ct. at 981. See 11 U.S.C.A. § 1129(a)(7); 11 U.S.C.A. § 1129(a)(9); and 11 U.S.C.A. § 1129(b).

[123]Czyzewski, 137 S. Ct. at 981–82.

[124]Czyzewski, 137 S. Ct. at 981–82.

[125]Czyzewski, 137 S. Ct. at 983.

[126]Czyzewski, 137 S. Ct. at 984.

[127]Czyzewski, 137 S. Ct. at 984.

[128]Czyzewski, 137 S. Ct. at 984.