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What's a Creditor to Do? The Standing Doctrine in Bankruptcy Court

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CONCURRENT SESSION

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What's a Creditor to Do? The Standing Doctrine in Bankruptcy Court.

I. Standing doctrines

a. **Constitutional Standing** (Article III Standing) –

i. "[T]he requirement that a claimant have standing is an essential and unchanging part of the case-or-controversy requirement of Article III. To qualify for standing, a claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling. *Davis v. Fed. Election Comm'n*, 554 U.S. 724, (2008) (internal citations omitted); *Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S. Ct. 1540, 1547, (2016)

1. "Injury in fact" – "First and foremost, there must be alleged (and ultimately proved) an 'injury in fact'—a harm suffered by the plaintiff that is concrete and 'actual or imminent, not conjectural or hypothetical." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103, (1998) (internal citations omitted). "For an injury to be "particularized," it "must affect the plaintiff in a personal and individual way." *Id.* "When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—'real,' and not 'abstract.'" *Id.* (internal citations omitted). An "injury in fact" can be "tangible" or "intangible". *Spokeo* at 1549.

2. "Causal connection" – "There must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant." *Citizens for a Better Env't*, at 103.

3. "Redressability" – "[I]t must be 'likely, as opposed to merely 'speculative,' that the injury will be "redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, (1992).

b. **Prudential Standing** –

i. "[P]rudential standing encompasses 'the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.'" *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12, 124 S. Ct. 2301, 2309, 159 L. Ed. 2d 98 (2004), *abrogated by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014);

II. Statutory Standing for Bankruptcy Court - "Party in Interest" status

a. 11 U.S.C. Sec. 1109 - The definition of "party in interest" under 11 U.S.C. § 1109(b) is generally consistent among the circuits, and has a similar meaning under

most sections of the Bankruptcy Code. In the Fourth Circuit, the term "is generally understood to include all persons whose pecuniary interests are directly affected by the bankruptcy proceedings." *Yadkin Valley Bank & Tr. Co. v. McGee (In* re *Hutchinson)*, 5 F.3d 750, 756 (4th Cir. 1993); *see also Nintendo Co. Ltd. v. Patten (In re Alpex Computer Corp.)*, 71 F.3d 353, 356 (10th Cir.1995) (same). The Third Circuit has defined "party in interest" as one who "has a sufficient stake in the proceeding so as to require representation." *In re Amatex Corp.*, 755 F.2d 1034, 1042 (3d Cir. 1985). Stated another way, a "party in interest" is "anyone who has a legally protected interest that could be affected by a bankruptcy proceeding." *In re Glob. Indus. Techs.*, 645 F.3d 201 (3d Cir. 2011) (*citing In re James Wilson Associates,* 965 F.2d 160, 169 (7th Cir.1992)). In *Savage & Assocs. P.C. v. K&L Gates L.L.P.* (*In re Teligent, Inc.)*, 640 F.3d 53, 60–61 (2d Cir. 2011), the Second Circuit Court of Appeals held that a "party in interest" generally must have a direct financial stake in the outcome of the bankruptcy case. While these definitions do differ slightly, they convey the same meaning; courts at all levels often cite cases from other circuits when defining "party in interest". *In re Old ANR, LLC*, 2019 WL 2179717, at *4 (Bankr. E.D. Va. May 17, 2019)

i. **File a Plan** - 11 U.S.C. Sec. 1109(c)

ii. **Object to confirmation of a Plan** - 11 U.S.C. Sec. 1129(b)

1. *See In re Fencepost Prods., Inc.*, 2021 WL 1259691 (Bankr. D. Kan. Mar. 31, 2021) (where there was no circumstances under which the subordinated creditors, who transferred their voting rights to senior creditors under an intercreditor agreement, could receive any financial benefits from a Chapter 11 plan or a Chapter 7 liquidation, prudential standing principles precluded the subordinated creditors from participating in the disclosure statement and plan confirmation process. Thus, even though it found the subordinated creditors had statutory standing to object to confirmation of the chapter 11 plan under Section 1109(b), the court held that "prudential considerations bar the [subordinated creditors] from exercising their rights to vote against confirmation and to challenge specific aspects of Debtors' Plan which do not directly impact their financial interests.").

b. <u>Agencies and Advocacy Groups</u>

i. Although not expressly enumerated in section 1109(b), a person may qualify as a "party in interest" if the person possesses a significant legal (as contrasted with financial) stake in the outcome of the case.

ii. This issue frequently arises with respect to agencies and advocacy groups, which have may have an interest in the outcome of a matter but do not always have a financial interest in the bankruptcy case.

iii. Agencies

1. Section 1109(a) expressly permits the SEC to appear and be heard but limits its right to appeal. *See* 11 U.S.C. § 1109(a) ("The Securities and Exchange Commission may raise and may appear and be heard on any issue in a case under this chapter, but the Securities and Exchange Commission may not appeal from any judgment, order, or decree entered in the case.").

2. A regulatory agency with supervisory responsibilities over the debtor's business or financial affairs has generally be found to be a "party in interest." *See In re Co Petro Mktg. Group, Inc.*, 680 F.2d 566, 572 (9th Cir. 1982) (holding Commodity Futures Trading Commission has standing to intervene for purposes of filing motion to dismiss chapter 11 petition).

3. Where environmental liabilities are particularly large or cannot be discharged, the governmental agencies holding these claims generally have standing based on their financial stake as creditors and often have the ability to drive the outcome of the case.

iv. Advocacy groups frequently struggle to participate in case based on lack of pecuniary interest.

1. Environmental groups objecting to an application for compromise and settlement between the debtor-coal mine operator and the State of West Virginia lacked standing to object. The court concluded that the environmental groups lacked standing because (i) under Article III of the Constitution they failed to identify a concrete and particularized injury that is likely to result from approval of the settlement or how the advocacy group's members are likely to be harmed by the settlement and (ii) they did not qualify as a parties in interest under any of the categories listed in section 1109(B) and had too remote a pecuniary interest in the matter. *See In re Alpha Natural Resources Inc.*, 544 B.R. 848, 859 (Bank. E.D. Va. 2016).

2. Consumers' rights organization allegedly representing ticketholders was not a "party in interest" in airline bankruptcy. *See In re Ionosphere Clubs, Inc.*, 101 B.R. 844, 850-51 (Bankr. S.D.N.Y. 1989) ("Overly lenient standards may potentially over-burden the reorganization process by allowing numerous parties to interject themselves into the case on every issue, thereby thwarting the goal of a speedy and efficient reorganization.").
3. An advocacy group may seek to participate in a bankruptcy case by way of permissive intervention pursuant to Fed. R. Bankr. P. 2018(a). *See In re Allegheny Intern. Inc*., 107 B.R. 518, 524 (W.D. Pa. 1989); Advisory Committee Notes to Bankruptcy Rule 201 (stating that Rule 2018(a) permits intervention of an entity not otherwise entitled to do so under the Code or this rule). *But see*

Southern Blvd Inc. v. Martin Paint Stores, 207 B.R. 57, 62 (S.D.N.Y. 1997).

a. The factors to be considered include whether intervention would result in undue delay or prejudice, and whether the proposed intervenor's interests are adequately represented by a party already present in the case. *See, e.g., In re Longfellow Indus., Inc.,* 76 B.R. 338, 341 (Bankr. S.D.N.Y. 1987).

b. For example, recently, the NAACP utilized Rule 2018(a) to move to intervene and participate in the *Purdue Pharma L.P.* chapter 11 cases. *See In re Purdue Pharma L.P.*, Case No. 19-23649 (Bankr. S.D.N.Y.) at Docket No. 1555 (NAACP Motion to Intervene) and Docket No. 1614 (Stipulation and Agreed Order Resolving Motion of NAACP to Intervene).

c. Claim objection – 11 U.S.C. Sec. 502

i. Recharacterization/Equitable Subordination of a claim. *In re Tara Retail Grp., LLC*, 595 B.R. 215 (Bankr. N.D. W. Va. 2018). A mall tenant of a commercial mall debtor had statutory standing to object to proof of claim filed by an assignee of deed of trust debt, and to seek recharacterization of that claim as equity interest, reasoning that "creditor is a party in interest that may raise and appear on any issue, and a creditor is specifically authorized to object to another creditor's proof of claim under § 502(a) of the Bankruptcy Code.".

d. Who has standing to move for an extension of the deadline to object to the dischargeability of specific debts under Rule 4007?

i. Chapter 7 Trustee? The Circuits are split.

1. **No** - *Matter of Farmer*, 786 F.2d 618, 619 (4th Cir. 1986). In the *Matter of Farmer*, debtors Elma Speight Farmer and Mary Alice Farmer filed a Chapter 7 bankruptcy petition after being sued in federal court on allegations of securities and investment fraud. The Chapter 7 trustee sought and obtained an extension of the § 523(c) time permitted for creditors to object to both the debtor's discharge and the dischargeability of creditor claims. *Id.* at 619. The trustee then sought a second extension of the deadline pursuant to Rule 4007(c), to which the debtors objected, arguing that the trustee was not a "party in interest" entitled to request an extension under Rule. The bankruptcy court granted the trustee's motion, holding that the trustee was a "party in interest" under Bankruptcy Rules 4004(b) and 4007(c). *Id.* at 619. On appeal, the Fourth Circuit reversed, concluding that a chapter 7 trustee is not a "party in interest" for the

purposes of rule 4007(c) as he has neither (1) a statutory duty related to extending time for creditor objections, nor (2) a financial interest in the dischargeability of individual debts. *Id.* at 621. In so holding, the Court noted that a trustee in Chapter 7 proceedings acts on behalf of all creditors to maximize distribution from the estate and distributes property according to § 726. *Id.* at 620. When addressing a trustee's interest in nondischargeable debt, the Court held that because such claims are distributed from post-petition assets, they are of no interest to a trustee in a bankruptcy proceeding. *Id.* at 620. Lastly, the Fourth Circuit addressed a trustee's duty to investigate the financial affairs of a debtor. *Id.* at 621. The Court concluded that neither a trustee's general duty to investigate nor the complexity of the specific facts of the case required that the trustee be permitted to extend time for creditors to file objections. *Id.* at 621. The Court reasoned that permitting such a request would not enhance the trustee's duties or assisting in addressing the complexities of the case. *Id.*

2. **Yes** – In *Brady v. McAllister*, the Sixth Circuit reached the opposite conclusion of the Fourth Circuit, holding that a Chapter 7 trustee is a "party in interest" within the meaning of rule 4007(c). *In re Brady*, 101 F.3d 1165, 1169 (6th Cir. 1996). In *Brady*, the Chapter 7 trustee sought and received an extension "on behalf of the estate and all secured and unsecured creditors of the estate, have through and including October 21, 1992 in which to file nondischargeability complaints in the aforesaid case." *Id.* at 1167. Subsequently, a creditor filed a complaint asserting a nondischargeable debt by the extended deadline and won at trial. The debtor appealed.

   On appeal, the Sixth Circuit first examined the language of both Bankruptcy rule 4007(a) and 4007(c), noting that while 4007(a) restricts the ability to file complaints to debtors and creditors, 4007(c) broadly provides that "any party in interest" has the ability to move for an extension of time for nondischargeability complaints. 101 F.3d 1165, 1170. The Court explains that ignoring the distinction in phrasing would ultimately render the wording meaningless. *Id.* at 1170.

   The Court next examined the Fourth Circuit's analysis of a trustee's economic interest, holding that the Farmer Court's conclusion was incorrect. *Id.* at 1170. The Court suggested that because creditors with nondischargeble debts can recover from estate distributions and post-petition assets, a Chapter 7 trustee does have an economic interest in nondischargeble debts. *Id.* at 1170. The *Brady* Court next held that "[d]epriving the trustee of standing to secure additional time for creditors to file nondischargeability complaints could undermine the efficient administration of bankruptcy proceedings."

Id. at 1170. Lastly, the Sixth Circuit examined a Chapter 7 trustee's statutory duty to investigate the financial affairs of a debtor and concluded that this duty suggests that a trustee has standing under 4007(c). The *Brady* Court concluded that because (1) the language in rule 4007(c) broadly permits "any party in interest" to move on for an extension of the § 523 bar date, (2) Chapter 7 trustees do have an economic interest in the dischargeability of individual debts, (3) permitting Chapter 7 trustees to move on behalf of all creditors eases burdens on parties in a bankruptcy proceeding and bankruptcy courts, and (4) the trustee's duty to investigate a debtor's financial affairs makes him a "party in interest," a trustee was a "party in interest" under Rule 4007(c) with standing to move for an extension of the § 523 bar date. *Id.* at 1171.

e. United States Trustee

   i. The United States Trustee is an administrative office with significant supervisory responsibilities but is not a "party in interest" under section 1109(b).

   ii. Section 307 grants the United States Trustee special rights of participation in chapter 11 cases. 11 U.S.C. § 307 ("The United States trustee may raise and may appear and be heard on any issue in any case or proceeding under this title but may not file a plan pursuant to section 1121(c) of this title."). *See also Adams v. Zarnel (In re Zarnel)*, 619 F.3d 156, 162 (2d Cir. 2010); *In re Columbia Gas Sys.*, 33 F.3d 294, 296 (3d Cir.1994) ("[i]t is difficult to conceive of a statute that more clearly signifies Congress's intent to confer standing").

   iii. Statutory construction supports this conclusion – if the United States Trustee was a "party in interest" then section 307 would be superfluous. *See also* 11 U.S.C. § 1112(b) (emphasis added) (providing that the court may dismiss or convert a chapter 11 case "on request of a party in interest or the United States trustee").

f. Does a Chapter 13 debtor have standing to bring an avoidance action under 547 or 548? Courts have reached different conclusions.

   i. **Yes** – *In re Cohen*, 305 B.R. 886 (B.A.P. 9th Cir. 2004). The Ninth Circuit BAP held that a Chapter 13 debtor has standing to pursue an avoidance action. In so doing, it pointed to various provisions in the Bankruptcy Code that support this conclusion: (a) under § 1306(b) Chapter 13 debtors may remain in possession of all property of the estate during the case; (b) under § 541(a)(3) property of the estate includes interests in property recovered by the trustee pursuant to the avoidance powers; (c) under § 1322(b)(8) property of the estate may be used to fund a Chapter 13 plan; (d) under the best interest test in § 1325(a)(4) recoveries resulting from use of the

avoidance powers would have to be included in the Chapter 13 plan; (e) under § 1321 and 1325 only a debtor can propose or modify a plan before confirmation; (f) under § 1303 the debtor may use, sell or lease property of the estate under § 363(b), 363(d), 363(e), 363(f) or 363(l); (g) under § 1302(b)(1) the Chapter 13 trustee has only 7 of the 9 duties of a Chapter 7 trustee; (h) a Chapter 13 debtor engaged in business is required to perform the trustee duties set forth in § 704(8); and (i) neither the Chapter 13 trustee nor the debtor has the trustee duty under § 701(1) to "collect and reduce to money the property of the estate. Based on these various statutory powers and duties, the *Cohen* Court concluded that a Chapter 13 debtor has standing to file an avoidance action because otherwise a situation could arise in which recovery of an avoidable transfer could be required in order to meet the best interest of creditors test of § 1324, but the debtor would be without the authority to avoid the transfer. *See also Thacker v. United Cos. Lending Corp. (In re Thacker)*, 256 B.R. 724 (W.D. Ky. 2000); *In re Freeman*, 72 B.R. 850 (Bankr. E.D. Va. 1987); *In re Weaver*, 69 B.R. 554 (Bankr. W.D. Ky. 1987); *In re Ottaviano*, 68 B.R. 238 (Bankr. D. Conn. 1986); *In re Einoder*, 55 B.R. 319 (Bankr. N.D. Ill. 1985); *In re Rothenbush*, 2017 WL 933019 (Bankr. M.D. Fla. Feb. 28, 2017).

ii. **No** – *In re Ryker*, 315 B.R. 664 (Bankr. D.N.J. 2004). The United States Bankruptcy Court in the District of New Jersey held that a Chapter 13 debtor is not statutorily authorized to exercise trustee's avoidance powers and specifically disagreed with the *Cohen* Court. The Court found that the *Cohen's* statutory analysis was plausible, but not persuasive because it did not consider the plain language of the statute. When applying the analysis of the Supreme Court in *Hartford Underwriters*, the Court found that "the structure of the Code reveals that a Chapter 13 debtor does not have standing to independently assert the trustee avoidance powers. It must be viewed as significant that Congress conferred the avoidance powers on debtors in Chapter 11 and Chapter 12 cases, but did not extend them to Chapter 13 debtors." Further, Congress' grant of power to trustees rather than Chapter 13 debtors should be viewed as intentional — if congress intended for Chapter 13 debtors to have unrestricted power, there would be no need for the limited use of powers outlined in § 522(h). Additionally, the Court found that "a reading of the statute in which only the Chapter 13 trustee has standing to prosecute avoidance actions is not inconsistent with the other rights and responsibilities of a Chapter 13 debtor, and is no real impediment to proposing or performing a Chapter 13 plan." *See also Realty Portfolio, Inc. v. Hamilton (Matter of Hamilton),* 125 F.3d 292 (5th Cir. 1997); *In re Binghi,* 299 B.R. 300 (Bankr. S.D.N.Y. 2003); *In re Wood*, 301 B.R. 558 (Bankr. W. D. Mo. 2003); *In re Kildow,* 232 B.R. 686 (Bankr. S.D. Ohio 1999); *In re Merrifield,* 214 B.R. 362 (8th Cir. BAP 1997); *In re Wilkinson,* 186 B.R. 186 (Bankr. D. Md. 1995); *In re Redditt,* 146 B.R. 693 (Bankr. S.D. Miss. 1992); *In re Perry,* 131 B.R. 763 (Bankr. D. Mass. 1991); *In re Bruce,* 96 B.R. 717 (Bankr. W.D. Tex. 1989).

g. "Derivative Standing" – *Cybergenics* and progeny

i. **Need for derivative standing**. While 11 U.S.C. Sec. 1109(b) grants a "party in interest", including a creditor and a creditors' committee, standing to ". . . be heard on any issue in a case under [Chapter 11]," the Code does not expressly authorize a creditor or a creditors' committee to bring an action on behalf of the bankruptcy estate. Thus, in a case where a debtor, for whatever reason, fails or refuses to bring an action against the target (i.e., directors, officers, lenders), a creditor or creditors' committee must first obtain derivative standing before it can pursue a claim or an action against such target.

ii. **Requirements for derivative standing**. In order to have derivative standing, the following requirements must be met (*see In re Gibson Grp., Inc.,* 66 F.3d 1436 (6th Cir. 1995)):

1. A demand has been made upon the statutorily authorized party (i.e., trustee, debtor, debtor-in-possession) to take action against the target;

a. Formal demand is not necessary; a debtor's refusal to pursue an action may be implied even in the absence of formal demand. "It cannot be said that a formal request, in order to obtain a formal refusal, a request which would surely be refused, should be required." *In re G-I Holdings, Inc.,* 313 B.R. 612, 628 (Bankr. D.N.J. 2004)).

2. The demand is declined;

3. There is a colorable claim that would benefit the estate based on a cost-benefit analysis performed by the court; and

a. The issue for this prong is whether the creditor/creditors' committee has asserted "claims for relief that on appropriate proof would support a recovery." *Unsecured Creditors Comm. v. Noyes (In re STN Enters., Inc.),* 779 F.2d 901, 905 (2d Cir. 1985)). In determining whether a claim is colorable, courts "weigh the probability of success and financial recovery, as well as the anticipated costs of litigation, as part of a cost/benefit analysis." *In re iPCS, Inc.,* 297 B.R. 283, 291 (Bankr. N.D. Ga. 2003); *In re Adelphia Commc'ns Corp.,* 330 B.R. 364, 386 (Bankr. S.D.N.Y. 2005).

b. The Delaware bankruptcy court has held that in a case that might "yield substantial recovery" for the debtor's estate, derivative standing is likely to be granted. *See In re Yes! Entm't Corp.,* 316 B.R. 141, 145 (D. Del. 2004).

c. The burden to satisfy the colorable claim prong of derivative standing is relatively low as the court need only be satisfied that there is "some factual support" for the claims. *In re Adelphia*, 330 B.R. at 369.

4. The inaction is an abuse of discretion in light of the trustee's or debtor-in-possession's duties in a Chapter 11 case.

a. The creditor/creditors' committee must show that the trustee or debtor-in-possession unjustifiably refuses to bring its claims. "To satisfy its burden, the creditor, at a minimum, must provide the bankruptcy court with *specific* reasons why it believes the trustee's refusal is unjustified. A creditor thus does not meet its burden with a naked assertion that the trustee's refusal is unjustified. If presented with nothing more than this, the bankruptcy court may properly deny a creditor's motion without explanation." *In re Racing Servs., Inc.,* 540 F.3d 892, 900 (8th Cir. 2008) (emphasis original).

iii. **Consenting to derivative standing**. Where a creditor or creditors' committee obtains consent of the trustee or debtor-in-possession to pursue an action derivatively, courts have held that the creditor or the committee has derivative standing if the action (*In re Commodore Int'l Ltd.*, 262 F.3d 96, 100 (2d Cir. 2001)):

1. Is in the best interest of the bankruptcy estate; and

2. Is necessary and beneficial to the fair and efficient resolution of the bankruptcy proceedings.

When the trustee or debtor-in-possession has consented to the suit, "the court need not give strict consideration to the question of whether the debtor-in-possession has unjustifiably refused to initiate suit." *In re iPCS, Inc.*, 297 B.R. at 291. The most important factor to be considered is "whether the claims are colorable." *Id.* One court has held that when the party seeking derivative standing has the consent of the trustee or debtor in possession, the court need not engage in a strict analysis of the other three factors of the derivative standing test. *In re Valley Park, Inc.*, 217 B.R. 864, 867 (Bankr. D. Mont. 1998).

iv. **Circuit split over derivative standing**. There is a circuit split over the viability of derivative standing. While most courts recognize derivative standing, some courts have either not addressed the issue of derivative standing or have held derivative standing is not available.

1. Majority position:

a. **Second Circuit**: "Most bankruptcy courts that have considered the question have found an implied, but qualified, right for creditors' committees to initiate adversary proceedings in the name of the debtor in possession under 11 U.S.C. §§ 1103(c)(5) and 1109(b)." *In re STN Enters., Inc.,* 779 F.2d at 904.

b. **Third Circuit**: "[W]e are satisfied that the most natural reading of the Code is that Congress recognized and approved of derivative standing for creditors' committees." *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery,* 330 F.3d 548, 566 (3d Cir. 2003); *see also In re Wilton Armetale, Inc.*, 968 F.3d 273 (3d Cir. 2020) (holding that when a bankruptcy trustee formally abandoned the estate's claims against certain entities, he returned the power to pursue those claims to the creditor, and thus, a creditor plaintiff had both constitutional standing and the statutory authority to sue certain entities, who allegedly plundered a now-bankrupt company that owed the creditor money).

c. **Fifth Circuit**: "The law is well settled that in some circumstances, a creditors' committee has standing under Title 11, United States Code, section 1103(c)(5) and/or section 1109(b) to file suit on behalf of a debtor-in-possession or a trustee." *Louisiana World Exposition v. Fed. Ins. Co.,* 858 F.2d 2247 (5th Cir. 1988).

d. **Ninth Circuit**: "It is well settled that in appropriate situations the bankruptcy court may allow a party other than the trustee or debtor-in-possession to pursue the estate's litigation." *Liberty Mut. Ins. Co. v. Official Unsecured Creditors Comm. (In re Spaulding Composites Co., Inc.),* 207 B.R. 899, 903 (B.A.P. 9th Cir. 1997).

e. **Eleventh Circuit**: "[I]f a debtor has a cognizable claim, but refuses to pursue that claim, an important objective of the Code [the recovery and collection of estate property] would be impeded if the bankruptcy court has no power to authorize another party to proceed on behalf of the estate in the debtor's stead." *In re iPCS, Inc.,* 297 B.R. at 290.

2. Minority position:

a. **Fourth Circuit**: "It is far from self-evident that the Bankruptcy Code permits creditor derivative standing. Strong arguments exist on both sides of the debate, as

evidenced by the differing opinions offered in the Third Circuit's recent *en banc* consideration of the matter [in *Cybergenics*]." *In re Baltimore Emergency Servs. II, Corp.,* 432 F.3d 557, 561 (4th Cir. 2005). While the Fourth Circuit Court of Appeals has not ruled specifically on whether a creditor may bring a derivative suit, bankruptcy courts within the Fourth Circuit analyzing *Baltimore Emergency Services II* have recognized the concept of derivative standing. *See In re CHN Constr., LLC*, 531 B.R. 126, 132 (Bankr. E.D. Va. 2015) ("Thus, in a case under chapter 11 the debtor in possession may consent and authorize the unsecured creditors' committee, or even individual creditors, to prosecute avoidance actions on behalf of a chapter 11 bankruptcy estate if the court finds the circumstances appropriate."); *In re Tara Retail Grp., LLC*, 595 B.R. 215, 226 (Bankr. N.D. W. Va. 2018) ("Under certain circumstances, a creditor may be granted derivative standing to pursue a cause of action that is property of the Debtor's estate if it can show the estate's refusal to bring a colorable claim and it obtains leave to sue from the bankruptcy court.").

b. **Tenth Circuit**: "[I]f a trustee refuses for whatever reason to pursue a valuable asset, the creditors' remedy is his or her removal under 11 U.S.C. § 324. These remedies are the ones Congress saw fit to provide for creditors and committees in such cases." *United Phosphorus, Ltd. v. Fox (In re Fox)*, 305 B.R. 912, 916 (10th Cir. BAP 2004).

v. *Gavin/Solmonese LLC, Liquidating Trustee v. Citadel Energy Partners, LLC*, 603 B.R. 897 (Bankr. D. Del. 2019) (debtor was a limited partnership formed under Delaware law). At no time was the Official Committee of Unsecured Committee a partner or an assignee of a partnership interest in debtor, as required under Delaware law. Thus, the court held the Committee lacked standing to file adversary proceedings against numerous individuals and entities. The court also held that under the doctrine of assignment, the liquidation trustee could not receive more than its assignor, the Committee, and thus, the liquidation trustee also lacked standing to sue derivatively.)

h. Section 363 – buying claims to get standing. Ordinarily, an unsuccessful bidder in a section 363 sale lacks standing to challenge a bankruptcy court's approval of the sale, except when challenging the "intrinsic fairness" of the sale process. *See In re Colony Hill Assoc.*, 111 F.3d 269, 273 (2d Cir. 1997). However, the losing bidder may be able to purchase a claim to obtain standing. *See In re Fam. Christian, LLC*, 533 B.R. 600, 621 (Bankr. W.D. Mich. 2015) (an unsuccessful bidder who had purchased administrative expense claim, which remained unpaid as of date of sales hearing, had pecuniary interest to challenge the sale. The Court stated the bidder

"held pecuniary interest as of the date of the sale hearing that conveyed standing to object" to the sale).

Faculty

Hon. Kevin J. Carey is a partner in Hogan Lovells US LLP's Business Restructuring and Insolvency practice in Philadelphia and is a retired bankruptcy judge. He represents both companies and creditors in domestic and cross-border bankruptcy proceedings. Judge Carey was first appointed to the U.S. Bankruptcy Court for the Eastern District of Pennsylvania in 2001, then in 2005 began service on the U.S. Bankruptcy Court for the District of Delaware (as chief judge from 2008-11). During that time, he authored more than 200 reported decisions, issued important rulings on key issues such as valuation, fiduciary duties and other complex chapter 11, confirmation issues, and presided over high-profile cases, including *Exide Technologies*, *Tribune Co.* and *New Century Financial*. Judge Carey is ABI's President-Elect, a past global chairman of the Turnaround Management Association and an honorary member of the Turnaround, Restructuring and Distressed Investing Hall of Fame. He also is a Fellow of the American College of Bankruptcy and a member of the International Insolvency Institute, and he is a member of the National Conference of Bankruptcy Judges. In addition, he was the first judge to serve as global chair of the Turnaround Management Association. Judge Carey lectures worldwide on bankruptcy issues and is a contributing author to *Collier on Bankruptcy*. In addition, he is a part-time adjunct professor in the LL.M. in Bankruptcy program at St. John's University School of Law in New York City. Judge Carey began his legal career in 1979 as law clerk to Bankruptcy Judge Thomas M. Twardowski, then served as clerk of court in the U.S. Bankruptcy Court for the Eastern District of Pennsylvania. He received his B.A. in 1976 from Pennsylvania State University and his J.D. in 1979 from Villanova University School of Law.

Christopher A. Jones is a managing partner with Whiteford Taylor & Preston, LLP in its Falls Church, Va., office and focuses his practice in the insolvency area, regularly dealing with financial restructuring, distressed-asset transactions, business turnarounds and bankruptcy law, including related litigation. His experience includes representing all major constituencies in the distressed-business arena, including companies and their owners, directors and officers, ad hoc and official committees, trade creditors and vendors, and court-appointed fiduciaries. During his nearly 25 years in practice, Mr. Jones has worked with clients in a variety of industries, including commercial real estate, retail, automotive, government contracting, mortgage lending, consumer electronics, hospitality, convenience store, construction and electrical contracting. He has been involved in many of the "mega" chapter 11 cases filed in Virginia, including Paper Source Inc., Intelsat, SA, Le Tote Inc. (Lord & Taylor), Pier 1 Imports Inc., Guitar Center, Chinos Inc. (J Crew), Toys "R" Us, Gymboree, LandAmerica Financial Group, Circuit City Stores, RoomStore Inc. and Heilig-Meyers Corp. He has also represented bankruptcy trustees and liquidating agents in a variety of litigation matters. In addition to his work in the insolvency arena, Mr. Jones also has trial experience in commercial litigation matters in federal court. He has been recognized by *Chambers and Partners* as a leading bankruptcy attorney in Virginia, and is listed in *Virginia Business Magazine*'s "Legal Elite – Virginia's Best Lawyers" and in *The Best Lawyers in America*. He has also been selected as a *Super Lawyer* in Virginia. Mr. Jones is AV Peer Review-Rated by Martindale-Hubbell. He received his undergraduate degree in 1992 from Duke University and his J.D. in 1996 from the University of Richmond School of Law.

Alexis A. Leventhal is a member of the Financial Industry Group in the Pittsburgh office of Reed Smith LLP, where she practices in the area of restructuring and bankruptcy. She represents and advises corporate clients on bankruptcy and other insolvency matters, as well as on UCC issues. She also has extensive experience representing equipment lessors in workout and bankruptcy cases, as well as in documenting equipment leasing transactions. Prior to joining Reed Smith, Ms. Leventhal clerked in the Western District of Pennsylvania and the Middle District of Florida. She received her B.A. in 2007 in the growth and structure of cities from Haverford College, her Master's degree *summa cum laude* in urban and regional planning in 2010 from the University of New Orleans, and her J.D. *cum laude* in 2013 from the University of Florida Levin College of Law, where she served on the *Journal of Law and Public Policy* and was a member of the International Commercial Arbitration Moot Court Team.

Hon. Keith L. Phillips is a U.S. Bankruptcy Judge for the Eastern District of Virginia in Richmond, sworn in on Aug. 26, 2013. Prior to his appointment, he was a principal of the law firm of Phillips & Fleckenstein, PC in Richmond, where he represented debtors, creditors, creditors' committees and trustees in all chapters of the Bankruptcy Code. He also served as a mediator in bankruptcy-related disputes, as a chapter 7 trustee on the Richmond panel for more than 27 years, and as a chapter 11 trustee, liquidation trustee and state court receiver. Judge Phillips has been a frequent lecturer on bankruptcy matters for various bar organizations and has served as a representative on the Eastern District of Virginia's Richmond Division Bankruptcy Bar Liaison Committee. He has been a permanent member of the Fourth Circuit Judicial Conference since 1985 and has held multiple positions with the Virginia and Richmond Bar Associations, including chairman. In addition, he is a member of and currently serves on a number of committees for the National Association of Bankruptcy Judges. Judge Phillips received his undergraduate degree in biology from the College of William & Mary in 1976 and his J.D. from the University of Richmond Law School in 1979, where he was a member and editor of the *Law Review* and a member of the McNeil Law Society. Following law school, he clerked for Hon. Walter E. Hoffman of the U.S. District Court in Norfolk, Va.

Tara J. Schellhorn is a partner with Riker Danzig Scherer Hyland & Perretti LLP in Morristown, N.J., in the firm's Bankruptcy & Corporate Restructuring Group. Her practice focuses on all aspects of bankruptcy and restructuring, including the representation of debtors, creditors' committees, trustees, financial institutions, secured lenders, unsecured creditors and other parties in interest in complex chapter 11 cases. Ms. Schellhorn also has experience in bankruptcy litigation, including prosecuting and defending nondischargeability, preference and other avoidance actions. In addition, she has significant experience representing clients on complex corporate lending issues, including the representation of indenture trustees in default and bankruptcy situations. Her practice also includes civil litigation in both federal and state courts. Ms. Schellhorn is a member of the International Women's Insolvency & Restructuring Confederation (IWIRC) and co-chairs its New Jersey Network. She also is U.S. Program Committee Co-Director for the IWIRC International Board and is an active ABI member, currently co-chairing ABI's Young and New Members Committee and overseeing the *ABI Journal*'s "Building Blocks" column. Ms. Schellhorn also is a member of the Lawyers Advisory Committee to the U.S. Bankruptcy Court for the District of New Jersey, co-chairs the Morris County Bar Association's Women Lawyers Committee and is a member of the board of advisors of the Widener University Commonwealth Law School. In January 2020, Ms. Schellhorn was appointed to a two-year term as a member of the Chester Township Environmental Commission. Prior to joining Riker Danzig, she clerked for Hon. Raymond T. Lyons in the U.S. Bankruptcy

Court for the District of New Jersey. Ms. Schellhorn received her undergraduate degree *magna cum laude* and Phi Beta Kappa from Gettysburg College in 2004, and her J.D. *magna cum laude* from Widener University School of Law in 2007, where she served as editor-in-chief of the *Widener Law Journal* and received the *Widener Law Journal* Award for Distinguished Legal Scholarship. In addition, she received a 2007 ABI Medal of Excellence for outstanding performance in her bankruptcy coursework.