ings of fact to the court which asserted that the parties to the sale of the Jeannette Glass Division's assets attributed $300,000 of the sales price to its real property and $1.6 million to the Division's total personal property. (*See* Tr. 20, 20:4–11, 26:2–14). Furthermore, plaintiff asserted in those revised proposed findings that $.9 million of the proceeds of the Royal China sale were attributed to the land and buildings by the parties to the sale while $1.42 million was attributed to its machinery, equipment, and other non-inventory personalty. (*See* Tr. 20, 26.17–27:33). While we do not rely on these figures as admissions establishing the value of this PP & E, these proposed findings indicate that not even plaintiff thought that Jeannette's PP & E was worthless.

153. Even under extremely unfavorable sale conditions, including several transactions associated with bankruptcy proceedings, the PP & E of Jeannette Corporation and its subsidiaries was disposed of (along with other assets) in transactions in which the consideration totalled over $9 million plus the assumption of various liabilities. There is evidence tending to show that of this amount a significant portion was attributable to the fixed assets sold. Even at those late dates and under those extremely adverse sale conditions, Jeannette Corporation's PP & E continued to be worth millions of dollars.

154. The present fair salable value of the property and equipment of Jeannette Corporation and its subsidiaries in July 1981, was undoubtedly not as high as the $29 million figure arrived at by Manufacturers' Appraisal in 1978. It probably was not even the $17.7 million GAAP value reflected on the balance sheet at July 31, 1981, prior to the sale. Nonetheless, in light of the sales of the assets of several subsidiaries and divisions (in most cases as going concerns) under adverse conditions for substantial sums, the fact that those fixed assets continued to be used in operating businesses after July 31, 1981, and the substantial amounts spent by the company between 1978 and 1981 on capital additions and maintenance, there is no reason to believe that the value of these assets was zero or even close to zero as urged by the plaintiff.

155. Most of Jeannette's PP & E as of July 31, 1981, was sold as part of the liquidation sales of Jeannette's divisions, but nevertheless commanded substantial sums. Jeannette's bankruptcy schedules reflected a value of $1.8 million for its PP & E, while Brookpark's real property was valued by the parties to its sale at over $.5 million. The Old Harbor PP & E was carried on its books at $1.3 million, less accumulated depreciation. These values alone total $3.6 million, and they include no portion of Royal China's PP & E. (Royal China was sold out of bankruptcy for $4.2 million.) On the eve of trial plaintiff, as noted above, had proposed that we find that the parties to the Royal China sale attributed over $2.3 million of the sale price to its PP & E. While we do not rely on these values originally proposed by plaintiff, we certainly think it reasonable to find that the PP & E of Royal China was worth millions of dollars. In addition to the foregoing, Mr. Pfingstler opined that the PP & E was worth over $12 million, some $5 million less than its net book value. We find that the present fair salable value of the property, plant and equipment of Jeannette Corporation and its subsidiaries as of July 31, 1981, was at least $5–6 million, and may have been substantially more.

156. An appraisal as of July 31, 1981, certainly would have helped the court on this issue. We do note, however, that our finding of the minimum value for Jeannette's PP & E was less than 20% of that contained in the Manufacturers' Appraisal Company's appraisal as of September 15, 1978. While the assets may certainly have lost value, substantial sums were spent on maintenance and improvements and Jeannette Corporation continued to function as a going concern until, and after, July 31, 1981. Therefore, we find our minimum figure of $5–6 million to be conservative and reasonable. The only evidence of value of any of the assets plaintiff offered was the July 31, 1981, selling price, and he urged us to find that the PP & E has no

value. We find plaintiff's positions untenable.

157. The goodwill carried on the financial records of Jeannette Corporation had little or no present fair salable value as of July 31, 1981.

158. The other long-term assets on Jeannette Corporation's books at July 31, 1981, included a note receivable that was subsequently collected and other assets that provided continuing benefit to the company's operations. The present fair salable value of these assets as of July 31, 1981, was $119,000.

159. The total of the present fair salable values of all the assets of Jeannette Corporation and its subsidiaries immediately following the July 31, 1981, transaction was at least $26.2 million—$27.2 million, and probably was more.

160. Jeannette Corporation's liability on its accounts payable after the July 31, 1981, transaction was $2.96 million.

161. The current portion of long-term debt (that portion of long-term debt due to be repaid within the next twelve months) of Jeannette Corporation and its subsidiaries after the July 31, 1981, transaction was $500,000.

162. The accrued liabilities of Jeannette Corporation and its subsidiaries after the July 31, 1981, transaction was approximately $4.34 million.

163. The foregoing liabilities, totalling approximately $7.8 million, were all of the liabilities expected to be repaid within the year following July 31, 1981. In contrast, the total current assets were over $21 million. (Tr. 18, 145:12–145:25 (Pfingstler)).

164. The debt to Security Pacific incurred by Jeannette Corporation in the course of the July 31, 1981, transaction was approximately $11,711,000.

165. Although this debt could technically be characterized as a current liability because it was repayable on demand, the parties expected that this would be a long-term lending arrangement in which much of the balance would not have to be paid down for years. Jeannette carried this obligation on its records as a long-term debt, and no demand was ever made on the loan. (S–12, p. 19).

166. The long-term debt (net of the current portion) of Jeannette Corporation and its subsidiaries after the July 31, 1981, transaction was $1,856,000, which was due and payable over a number of years.

167. Jeannette Corporation incurred, and paid, the acquisition costs associated with the July 31, 1981, transaction. These costs included fees to Mr. Brogan's company, to Bennan & Associates, and to M–K Candle. They also included legal fees and interest expenses. Those liabilities, as of July 31, 1981, totalled approximately $140,000.

168. The liability account for Accrued Pensions on Jeannette's July 31, 1981, Consolidated Balance Sheet is an estimate of the difference between the total vested liabilities that are due participants in the pension plan less the assets of the pension plan, net of a projected or expected tax benefit.

169. As of January 1, 1981, based upon data in the actuarial report of Medinger & Company, Jeannette's actual liability upon termination of its pension plan was estimated to be $3,700,000. (Tr. 17, 8:3–9:24 (Matheny); P–465, pp. 2–3).

170. The total of all the liabilities of Jeannette Corporation and its subsidiaries after the July 31, 1981, transaction was approximately $25.2 million.

[6] 171. The present fair salable values of the assets of Jeannette Corporation and its subsidiaries following the July 31, 1981, transaction exceeded their liabilities by at least $1–2 million and most probably by more, given the conservative value we have assigned Jeannette's PP & E. This evidence supports the conclusion that Jeannette was solvent after the July 31, 1981, transaction.

172. Furthermore, following the July 31, 1981, transaction, the total of the present fair salable values of just the current assets of Jeannette Corporation (which excluded any of its PP & E) was roughly equal to the total of all of Jeannette's liabil-

ities, other than pension termination liability. Jeannette's liabilities included millions of dollars not due to be repaid within a year, including the Security Pacific debt.

173. Following the July 31, 1981, transaction, the total of the present fair salable values of the current assets of Jeannette Corporation exceeded the total of its current liabilities, plus the Security Pacific debt. The total of the present fair salable values of the current assets was roughly 2½ times larger than the total of the current liabilities, exclusive of the Security Pacific debt.

174. In the face of the foregoing, the only evidence offered by plaintiff regarding Jeannette's alleged insolvency after the July 31, 1981, transaction was Coke of New York's decision to write down its investment in the Jeannette stock to $9,144,000 and the testimony of Mr. Gustafson, an investment banker and plaintiff's expert witness, that the $12.1 million purchase price was the present fair salable value of Jeannette's assets.

175. When questioned about asset values during closing argument, plaintiff's counsel admitted that the present fair salable value of the accounts receivable was $8.3 million, was unable to suggest an adjustment to the roughly $12 million value attributed to the inventory by defendants, and suggested that the PP & E should be given a value of zero. At three of the four operating divisions, however, those fixed assets have continued to be used in ongoing businesses, and the Jeannette Glass assets, including the PP & E, yielded a substantial sum in the bankruptcy auction. As indicated above, the record will not support anything close to a zero valuation for the PP & E. That plaintiff was forced to resort to such a position illustrates that our conclusion that Jeannette was solvent is reasonable.

Post-Closing—Jeannette's "Capital"

[7] 176. As set forth below, we believe that the July 31, 1981, transaction did not leave Jeannette Corporation with an unreasonably small capital with which to conduct the business in which it was engaged.

177. Jeannette Corporation continued to operate as an ongoing business after Coke of New York sold its stock in Jeannette Corporation to J. Corp.

178. Testimony was presented at trial on a number of factors relevant to the consideration of whether Jeannette had "unreasonably small capital" after the July 31, 1981, transaction. These factors included net worth or solvency, working capital, profitability, cash flows, access to lines of credit, and ability to retire debt.

179. First as discussed more fully in Findings of Fact 125–174, *supra*, Jeannette was solvent after the July 31, 1981, transaction with a net worth of at least $1–2 million. Jeannette's book value, under GAAP, was substantially higher.

180. Most of Jeannette's assets on July 31, 1981, were also highly liquid. Jeannette's accounts receivable and inventory as of that date were approximately $21 million. In contrast, the liabilities Jeannette would have to pay within the twelve months following July 31, 1981, were approximately $7.8 million. Therefore, Jeannette's working capital structure (current assets minus current liabilities) was also strong after the July 31, 1981, transaction.

181. The observation regarding working capital above does not include the Security Pacific loan as a current liability, because, by the nature of that credit facility, it was not expected by the parties that it would be repaid on a current basis. In looking at the economic reality of Jeannette's capitalization, therefore, it is more appropriate to view the Security Pacific debt as long-term debt. However, even if the entire Security Pacific debt were viewed as a current liability, Jeannette still had positive net working capital, plus access to additional credit under the Security Pacific credit facility, after the July 31, 1981, transaction.

182. As found above, prior to the July 31, 1981, transaction, Jeannette's management, Mr. Brogan, and Security Pacific personnel all projected that Jeannette's operations after that date would be profitable. Brogan and Security Pacific analyzed the effect of the proposed leveraged buyout on

Jeannette and concluded that after that transaction it would be able to pay its creditors, pay the additional interest burden, and operate profitably. These projections were made in good faith and were reasonable and prudent when made.

183. There is no dispute that Jeannette's capital structure changed as a result of the July 31, 1981, transaction. That does not necessarily demonstrate, however, that the remaining capital was unreasonably small to conduct the business of the company.

184. As set forth above, Jeannette's business was cyclical; cash flow and profits were much stronger in the last half of the calendar year than in the first. While Coke of New York owned Jeannette, Jeannette met its working capital needs by borrowing from Coke of New York. When the Brogan group purchased Jeannette, it received the benefits of cash infusions made by Coke of New York in the first seven months of 1981. Jeannette was headed into its strong cash flow period after the July 31, 1981, transaction. In fact, availability on the Security Pacific line started at $2 million as of July 31, 1981, but rapidly rose to $7.4 million in November, 1981. (Tr. 14, 152:23–154:9 (Seiden); S–25; Tr. 13, 231:14–232:4 (Warren)).

185. Throughout the latter half of 1981, Jeannette Corporation's financial reports and projections indicated that the company was operating and would continue to operate profitably, with adequate capital to pay its debts. The first projection in 1982 showed ample availability under the line of credit, healthy sales, and profitable operations. There were no contrary indications until late January 1982, when orders declined and projected sales were reduced. (S–2, S–4, S–5, S–6, S–7, S–9, S–23, S–33, S–34, S–35, S–41, S–44, S–45, S–57, S–160; D–666; Tr. 13, 201:24–204:3 (Warren)).

186. After the July 31, 1981, transaction, Jeannette's peak working capital needs in 1981 were in the months of August and September. In August, Jeannette increased its inventory by over $2.7 million. By the end of December 1981, Jeannette had over $1.7 million more inventory on hand than it did as of December, 1980. (D–921; D–922).

187. Throughout the fall of 1981, during its period of peak demand for working capital, Jeannette had unused availability in excess of $3 million. (S–25).

188. From August through December 1981, Jeannette incurred millions of dollars in liabilities to its vendors. Generally, it paid those vendors on a timely basis. (D–197; Tr. 13, 182:20–183:5 (Warren)).

189. The latter half of the year was Jeannette's strongest selling season; 1981 proved to be no exception. From August through December 1981, Jeannette's net sales were over $31 million, at a gross profit in excess of $6 million. At the end of December it had unused availability on the Security Pacific credit line of over $4 million. (S–57; S–25).

190. Through December 1981, Jeannette had received advances from Security Pacific, excluding the initial $11.7 million, of over $31 million. (D–373).

191. During the first five months after the July 31, 1981, transaction, Jeannette Corporation had positive cash flow from operations of over $3 million. This strong cash flow continued well into 1982. Cash flow greatly exceeded book operating profits because of the high levels of depreciation expense that Jeannette recorded on its books. (Tr. 18, 172:23–174:18 (Pfingstler); D–892).

192. From August 1, 1981 through July 31, 1982, Jeannette made disbursements of $75.2 million. Of this amount, $15.6 million was paid to employees as salary and wages, and $50.2 million was paid to trade and other creditors. (D–870).

193. When Jeannette shut down its furnaces in 1982, it did so because it had an excess of inventory that it was unable to sell. Jeannette workers testified that Jeannette had so much inventory in 1982 that it was stacked outside and in aisles. It was unusual for Jeannette to have this much inventory, which was spread evenly across all product lines. (Tr. 19, 100:2–100:21 (Fontana)).

194. Approximately one year after the July 31, 1981, transaction, Jeannette Corporation had availability on its revolving credit facility with Security Pacific of over $2.3 million, which was more than its starting availability on July 31, 1981. (S-25).

195. After the July 31, 1981, transaction, Security Pacific periodically sent its employees to Jeannette Corporation to conduct "field examinations" or collateral inspections. Prior to September 1982, none of the reports of these visits contained any indication of significant concerns about the company's operations, financial condition, ability to make payments to creditors, or availability. (Tr. 16, 6:20–9:24, 13:16–14:23, 18:19–19:3, 44:15–45:17 (Faraone); D-195, D-197, D-198; D-136).

196. Having gone a full cycle of 12 months, during which Jeannette had paid out to vendors, other creditors, and employees over $75 million, had always met its payroll, had positive cash flows, and had substantial inventory for the coming peak season, Jeannette had more unused availability as of the end of July, 1982 than it did in July, 1981. During this 12 month period it had received advances from Security Pacific of over $77 million, including the initial $11,710,800 advance. The problem it ultimately encountered in 1982 was not capital, but sales.

197. At no time after July 31, 1981, did Jeannette Corporation use up the total availability on its revolving credit facility with Security Pacific. In closing argument, plaintiff suggested that Jeannette did not draw on its availability because of Brogan's fear that M-K Candle would perhaps have to answer on its guarantee. Even if this contention were borne out by the record, and we think that it is not, it may be more indicative of Brogan's poor business judgment than Jeannette's allegedly unreasonably small capital. In any event, Security Pacific was amply protected under the loan documents. Under those documents, Security Pacific's loan was secured by all of Jeannette's assets. The advance rates under the credit facility were set well below the anticipated "knockdown value" (i.e. immediate forced liquidation sale) of Jeannette's assets so that any advances made by Security Pacific would be adequately secured. We find no support in the record for plaintiff's speculation in closing argument that Jeannette did not draw on the Security Pacific line of credit because of concern for possible exposure on the M-K Candle guarantee.

198. Jeannette Corporation's financial department personnel maintained a running calculation of the current availability on the Security Pacific revolving credit line. All of the witnesses, including plaintiff's expert and Jeannette's Assistant Treasurer, agreed that because of timing differences and other adjustments, the figures on Jeannette's availability schedule as of any particular day generally did not match the availability figure calculated by Security Pacific. (Tr. 7, 169:10–169:25 (Gustafson); Tr. 13, 236:3–236:23 (Warren)).

199. The record amply demonstrates that the Security Pacific records substantially understated the actual net availability and overstated the loan balance at any particular point in time. Much of the difference between the Security Pacific and Jeannette availability records resulted from timing delays relating to Jeannette's notifying Security Pacific of its most recent sales and collections, mail delays from Jeannette to Security Pacific, and Security Pacific's updating inventory figures on only a monthly basis. Therefore, Jeannette's records more accurately stated the actual availability.

200. Although Security Pacific had the ultimate lending determination authority, in all cases the determination was based upon information supplied by the borrower, whether in writing or orally. Security Pacific was routinely willing to make advances to borrowers on the basis of telephone calls from borrowers in which new, "in transit" information was reconciled to the data already on Security Pacific's computer. This information could then be verified when the documentation arrived a few days later. Prior to the bankruptcy, Jeannette personnel actually began communicating such information to Security Pacific by telephone and receiving advances from

Security Pacific based upon these calls. (Tr. 13, 236:25–237:25 (Warren)).

201. At no time after July 31, 1981, did Security Pacific ever refuse any request by Jeannette Corporation for funds under the revolving credit facility. On approximately eight occasions after July 1982, however, Security Pacific suggested that Jeannette draw a smaller amount on the line of credit than originally requested, in light of upcoming large expenses such as payroll. (Tr. 13, 239:3–239:16, 240:22–241:22 (Warren)).

202. Under the revolving credit facility loan documents, Security Pacific was not rigidly bound by the availability calculation as an upper limit on its ability to make loans to Jeannette Corporation. If there was a reason to do so, Security Pacific had the discretion to modify advance rates or determinations of eligible collateral to increase the availability, or to make an advance in excess of the current availability. Where circumstances warranted it on similar revolving credit secured loans, Security Pacific had frequently agreed to make such advances when requested by borrowers. Jeannette Corporation never requested any such excess advances from Security Pacific.

Jeannette's Payments to Creditors

203. Historically, Jeannette Corporation's policy and practice was to pay its vendors in accordance with the terms of their invoices.

204. From August through December 1981, during the peak of its business cycle, Jeannette made payments of its accounts payable in the ordinary course of its business, as it had done previously. (Tr. 13, 182:13–183:5 (Warren)).

205. The only change in Jeannette's practices regarding payments to creditors in 1981 was its decision to pay within 45 days, rather than within the historical 30 days, to equalize receipts and payments. This decision occurred in late 1981 or early 1982. Later in 1982 Jeannette then decided, because of weak sales, to begin paying its creditors on a 60 day policy. Eventually, sales proved to be so weak that Jeannette announced an 88 day payment policy. (Tr. 13, 217:11–222:11).

206. From August through December 1981, Jeannette made purchases of approximately $22 million. (D–197, p. 2092).

207. An analysis performed by an Security Pacific field examiner in 1982 reflects that from August 1, 1981, to July 31, 1982, Jeannette's payments of accounts payable were similar to its payments during the twelve months prior to July 31, 1981. (P–178).

208. As noted above, in late February 1982, when Jeannette was encountering a substantial decline in orders and sales, it announced an 88 day payment policy to many of its vendors, but excluded critical vendors.

209. In fact, various creditors negotiated payment terms with Jeannette of varying lengths. There is no evidence in the record that any such creditors were not paid in accordance with those new terms, at least until the second half of 1982. (S–107A; Tr. 3, 133:9–134:12 (Storey)).

[8] 210. The adoption of a new payment policy in 1982 in the face of dramatically changed and unforeseen market conditions does not justify a finding that Jeannette was left with unreasonably small capital as a result of the July 31, 1981, transaction.

[9] 211. Plaintiff points to the fact that Jeannette's month end accounts payable balance increased substantially from July to August in 1981 and urges us to find from this evidence that the defendants intended to hinder, delay and defraud Jeannette's creditors, and that Jeannette was left with an unreasonably small capital in its hands after the July 31, 1981, transaction. A mere comparison of month-end balances, without any analysis of their composition, does not establish that there was any delay in paying creditors. Indeed, a reasonable explanation for the rise in the payables balance is the combination of the adoption of the 45 day payment policy with increased production by Jeannette. *See* Finding of Fact 186. Jeannette adopted the 45 day policy in an attempt to match its

receipts from accounts receivable and payments on its accounts payable. The record amply demonstrates, however, that Jeannette was moving into its maximum cash generation period and had ample availability under the line of credit. The 45 day policy was not adopted because of inadequate capital. Furthermore, as noted above, the subsequent 60 and 88 day policies were in response to a drastic decrease in sales.

212. Plaintiff elicited testimony from Mr. Storey that, as a result of his first meeting with Mr. Brogan, Jeannette "froze" its payables. Brogan directly disputed that testimony. Leaving to one side the disagreement between Mr. Brogan and Mr. Storey about what was said in the conversation, such a freeze never occurred. The most the record supports is a finding, as noted above, that Jeannette adopted a 45 day payment policy to attempt to match receivables and payables. David Warren, the Assistant Treasurer who was in charge of Jeannette's accounts payable, testified that Jeannette did pay its creditors conscientiously in the months following the buyout and during the 45 and 60 day policies. (Tr. 13, 220:2–12 (Warren)).

213. Of the total amount of almost $2.5 million worth of proofs of claim filed by trade creditors in the Jeannette Corporation bankruptcy, which was filed on October 4, 1982, *over 90 percent were for goods or services provided to Jeannette Corporation subsequent to June 1982. No claim was for goods or services provided prior to July 31, 1981.* All of the trade creditors who dealt with Jeannette presumably had notice of the Security Pacific debt. Furthermore, all of the trade creditors in the bankruptcy had provided Jeannette with goods or services after the July 31, 1981, transaction. Jeannette did not immediately cease paying creditors after the transaction. (D–875; D–876).

Jeannette's Demise

214. From late 1981 and into 1982, the American glassware industry in general and Jeannette in particular experienced a shrinking domestic glasswares market, unprecedented increases in foreign competition, dramatic price slashing and dumping of inventory by domestic manufacturers, and an extended recession. (D–905; D–906; D–913; D–943; D–942; D–673; D–900; D–903).

215. Thus, rather than meeting historical levels, orders for, and then sales of, Jeannette's glassware products declined dramatically. Orders started falling off in January 1982. By August and September of 1982, traditionally peak sales months, sales had dropped to 69% and 52%, respectively, of historical sales levels. By October, sales had fallen to 44% of 1981 levels. (D–943).

216. This drop in sales volume led inevitably to severe cash flow problems. (D–912).

217. The drop in orders and projected sales in January 1982 coincided with Mr. Silverberg's departure from Jeannette. Nearly everyone involved in the July 31, 1981, transaction, and Jeannette employees, viewed Mr. Silverberg as the key member of Jeannette management.

218. When orders dropped in 1982, Jeannette was left with an unusually large inventory across its product line that Jeannette management had built up in anticipation of a strong sales year in 1982. (Tr. 19, 100:2–100:21 (Fontana); Tr. 12, 39:2–12 (Brogan)).

219. Although sales did not decline precipitously in the first six months of 1982, during that period of time orders were down, price competition was stiff, and Jeannette personnel believed that one of its major competitors, Anchor Hocking, was undercutting Jeannette's prices in an attempt to put Jeannette out of business. Tr. 5, 118:6–120:11 (McCracken); Tr. 14, 5:22–7:3 (Leon)).

220. In early October 1981, Jeannette began an inventory reduction program at the direction of Mr. Brogan and Robert Janowiak, whom Brogan appointed as Jeannette's new president, in order to reduce inventory levels and raise cash. Under the program, inventory was sold at a 50–60% discount from list prices. While only about 8% of Jeannette's August through Decem-

ber 1981 sales were from this program, it did have the effect of souring customer relations because not all of those customers were offered the discount prices.

221. At Brogan's direction, Jeannette responded to its drop in orders and sales and its excessive inventory in early 1982 by reducing production levels.

222. During February to April of 1982, Brogan discussed with Robert Janowiak the subject of selling off certain of Jeannette Corporation's assets. One of the reasons for considering that possibility was to raise cash to assist Jeannette with its operating needs.

223. One of Jeannette Corporation's three glass tanks was shut down in March 1982. The minutes of the March 11, 1982 board of directors meeting indicate that a total of approximately 635 employees had been laid off by that date at the Jeannette Glass, Royal China and Brookpark plants. Within two months of this shutdown, Anchor Hocking and Libby, two of Jeannette's major competitors, also shut down tanks. (Jt. Stip., ¶ 117; S–161, p. 002; Tr. 13, 101:7–9 (Brogan)).

224. In late February or early March 1982, Jeannette Corporation invoked the 88–day vendor payment policy discussed above. Even after implementing the 88–day policy, Jeannette failed to pay some creditors within the specified time period.

225. A second glass tank at Jeannette was shut down in April, restarted in June for a brief period and then shut down permanently in late July 1982. The third tank was shut down on or about August 1982, and all production activity at the Jeannette Glass Division ceased.

226. Although its furnaces were shut down in September 1982, Jeannette had a large volume of glassware inventory across its product lines.

227. During the second half of 1982, the bottom had dropped out of the market for Jeannette's products. Jeannette's competitors closed entire plants and dumped inventory at drastically reduced prices. Jeannette's competitors, including Anchor Hocking, had a peculiar opportunity to take advantage of Jeannette in this market environment, having been given Jeannette's proprietary and confidential marketing information and customer lists when Coke of New York was trying to sell Jeannette. (Tr. 5, 119:1–120:11 (McCracken); Tr. 14, 5:22–7:3 (Leon)).

228. The foregoing difficulties developed and grew at a time when Mr. Brogan had little or no ability to help respond to them. Throughout the summer of 1982 he was under doctors' orders to stay away from work while he recovered from his kidney transplant operation. By the time he returned to work in September 1982, the company was facing serious difficulties, including failures to pay creditors in accordance with the payment terms that had been established with them. Although many of the problems which beset Jeannette during this period were beyond the control of management, see Finding of Fact 214, Brogan's ill health certainly was an aggravating factor. (Tr. 12, 125:5–126:1 (Brogan)).

229. Jeannette's loss of sales, and consequent cash flow loss, resulted in its paying its creditors on an erratic basis.

230. An involuntary bankruptcy petition was filed against Jeannette Corporation on October 4, 1982 under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Western District of Pennsylvania. (Jt. Stip., ¶ 119).

231. On December 10, 1982, the bankruptcy case was converted to a voluntary case under Chapter 11, with Jeannette Corporation as a debtor-in-possession. Eventually, plaintiff was appointed trustee. On May 1, 1990, this court converted the bankruptcy case to one under Chapter 7. (Jt. Stip., ¶ 121).

232. Three of Jeannette's four businesses were sold as going concerns and continued operating under other owners, but production ceased at the Jeannette Glass facility in the latter half of 1982 and never resumed.

Factors Contributing to Jeannette's Failure

233. The principal causes of the failure of Jeannette Corporation—most specifical-

ly, the Jeannette Glass division—were the substantial drop in orders and sales that began in 1982, as a result of increased foreign and domestic competition and as a result of the continued recession. The effects of the unfavorable market conditions on Jeannette were more severe in light of management mistakes made by Jeannette, including the inventory reduction program, the 1982 inventory build-up, the improper management of creditor relationships, and Mr. Brogan's failure to either relinquish control or set a sound course for Jeannette while he was unable to work because of his kidney problems. These unanticipated events and management errors were exacerbated by the stigma resulting from the filing of the October 4, 1982, bankruptcy petition.

234. In the 14 months following the buyout, substantial amounts were paid by Jeannette to Mr. Brogan, members of his investor group, and long-time members of Jeannette's management in the form of salaries, directors' fees, incentive bonuses, commissions, management fees and the like. Depending on what items are included, the total of such payments was over $1 million. At least with the benefit of hindsight, one may well question whether all of these payments reflected wise business judgments. Similarly, Jeannette's inventory reduction program in late 1981 created marketing difficulties for the company in 1982. While there likely were mistakes made, and while those mistakes arguably exacerbated the difficulties Jeannette began to experience in late 1982, the fraudulent conveyance laws were not designed to insure creditors against all possible consequences of a company's post-leveraged buyout errors in judgment or poor business practices.

235. Based upon the foregoing factors, defendants proved that after the July 31 transaction Jeannette was not left with an unreasonably small capital in its hands to conduct its business in the ordinary course, and in substantially the same manner as it had prior to the sale of its stock to J Corp. Jeannette's property was sufficient for it to carry on its business until it experienced an unforeseen dramatic decline in its orders and sales.

Legal Discussion and Conclusions of Law

[10, 11] In Counts Two, Three and Five of the amended complaint, plaintiff attacks Jeannette's conveyance of the initial $11.7 million advance to J. Corp., Jeannette's granting security interests and assuming obligations under the terms of its loan from Security Pacific, and Jeannette's repayment of that loan. In support of these attacks, plaintiff relies on the intentional and constructive fraud provisions of Pennsylvania's version of the Uniform Fraudulent Conveyance Act,[6] as well as 11 U.S.C. §§ 548–9. We address 39 Pa.Stat. § 357 and § 356 first.[7]

6. The trustee relies on 11 U.S.C. § 544(b) of the United States Bankruptcy Code to assert his claims under Pennsylvania law. That statute permits a trustee in bankruptcy to avoid "any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by ... a creditor holding an unsecured claim...." 11 U.S.C. § 544(b). Under § 544(b), the trustee "stands in the overshoes of the debtor corporation's unsecured creditors." *In re Agricultural Research and Technology Group,* 916 F.2d 528, 534 (9th Cir.1990). In this case, it is undisputed that Mellon Bank was an unsecured creditor of Jeannette as of July 31, 1981, and as of the date of the bankruptcy. Therefore, the trustee may attack the July 31, 1981, transaction under § 544(b). *See generally, 4 Collier on Bankruptcy,* § 544.03[1] (15th ed. 1990). We have jurisdiction over this case under 28 U.S.C. §§ 1331 and 1334.

7. As an initial matter, we hold that the fraudulent conveyance laws apply to a leveraged buyout such as the one here. This conclusion is mandated by the decision in *United States v. Tabor Court Realty,* 803 F.2d 1288 (3d Cir.1986). *Tabor Court* did involve an intentionally fraudulent conveyance, unlike this case. 803 F.2d at 1304. In holding that the fraudulent conveyance laws applied in *Tabor Court,* the United States Court of Appeals for the Third Circuit did note that regardless of the policy arguments against application of those laws, "the circumstances of this case justify application." 803 F.2d at 1297. We do not believe that this statement was meant to encourage district court forays into legislating exceptions for some leveraged buyouts and not others. In the words of the *Tabor Court* opinion, "[i]f the UFCA is not to be applied to leveraged buy-outs, it should be for the state legislators, not the courts, to decide." *Id.*

Intentional Fraud

[12, 13] The Pennsylvania Act provides:

Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

39 Pa.Stat. § 357. A plaintiff bears the burden of demonstrating intent through "clear and convincing evidence." *United States v. Gleneagles Investment Co., Inc.*, 565 F.Supp. 556, 580 (M.D.Pa.1983), *aff'd in part and remanded, United States v. Tabor Court Realty Corp.*, 803 F.2d 1288 (3d Cir.1986), *cert. denied sub nom., McClellan Realty Co. v. United States*, 483 U.S. 1005, 107 S.Ct. 3229, 97 L.Ed.2d 735 (1987); *In re Pinto Trucking Service, Inc.*, 93 B.R. 379, 386 (Bankr.E.D.Pa.1988). Intent is often difficult to prove, however, and a plaintiff may meet his burden under § 357 by introducing evidence which supports an inference of intent:

Under Pennsylvania law, an intent to hinder, delay, or defraud creditors may be inferred from transfers in which consideration is lacking and where the transferer and transferee have knowledge of the claims of creditors and know that the creditors cannot be paid. *Godina v. Oswald*, 206 Pa.Super. 51, 55, 211 A.2d 91, 93 (1965).

Tabor Court, 803 F.2d at 1304.

[14] A court may infer intent to defraud from subsequent conduct. *Id.; Voest-Alpine Trading USA Corp. v. Vantage Steel Corp.*, 919 F.2d 206, 214 (3d Cir.1990); *Godina*, 206 Pa.Super. at 55, 211 A.2d at 93; *Sheffit v. Koff*, 175 Pa.Super. 37, 41, 100 A.2d 393, 395 (1953). *See also Wieboldt Stores, Inc. v. Schottenstein*, 94 B.R. 488, 504 (N.D.Ill.1988). In considering whether it is proper to infer intent, courts also have looked to the so-called "badges of fraud." *In re Pinto Trucking*, 93 B.R. at 386 (applying the list of "badges of fraud" set forth in § 4B of the Uniform Fraudulent Transfers Act, which Pennsylvania has not enacted); *In re Compton*, 70 B.R. 60, 62 (Bankr.W.D.Pa.1987); *Wieboldt Stores*, 94 B.R. at 504; *4 Collier on Bankruptcy*, ¶ 548.02[5] (15th ed. 1990).

[15] We need not tarry with this issue. While the transfers Jeannette made were without fair consideration, as discussed below, defendants did not know or believe that Jeannette's creditors could not be paid, and did not intend to hinder, defraud, or delay creditors. As set forth above in Findings of Fact 97–99, and 112, we think that it is abundantly clear that the Brogan group, Security Pacific, and Coke of New York all expected Jeannette Corporation to succeed under Brogan's management and under the financing arrangement Brogan had entered into with Security Pacific. They and Jeannette had no reason, motive, or intent to hinder, delay, or defraud creditors. *Compare, e.g., Voest-Alpine*, 919 F.2d at 210, 214; *Fidelity Trust Co. v. Union National Bank of Pittsburgh*, 313 Pa. 467, 480, 169 A. 209, 215 (1933), *cert. denied*, 291 U.S. 680, 54 S.Ct. 530, 78 L.Ed. 1068 (1934).

[16] Indeed, the defendants hoped to profit from Jeannette's success as an ongoing business. *See, e.g., In re Knox Kreations, Inc.*, 474 F.Supp. 567, 571 (E.D.Tenn. 1979), *aff'd in part and rev'd in part*, 656 F.2d 230 (6th Cir.1981). Brogan anticipated making a substantial amount of money and Security Pacific anticipated an ongoing lending relationship with Jeannette at a rate of prime plus 3¼ percentage points. Furthermore, Coke of New York would have been relieved of the prospect of being held responsible for Jeannette's unfunded pension liabilities. We are convinced from the above and from the evidence at trial that all of the parties entered into the Jeannette transaction with the intent that it be successful and not with "[a] general scheme or plan to strip the debtor of its assets without regard to the need of its creditors." *Wieboldt Stores*, 94 B.R. at 504.[8]

8. It is true that the Brogans took relatively large bonuses for themselves and granted the same to others, that they rented a BMW automobile for Robert Janowiak, and that numerous invoices of Mr. Brogan's were paid promptly and earlier than those of other creditors. All of this be-

Our finding in this regard is supported by the distinctions between this case and two recent Third Circuit cases which affirmed findings of intentional fraud. *Tabor Court*, for example, dealt with a transferor which had been unprofitable for several years before the transfers at issue and which was in serious financial difficulties within two months of the transfers, at the latest. 803 F.2d at 1293, 1297. The transferor was severely in debt, could not pay its bills, and could not fulfill its contracts. *Id.*, at 1293. There was no evidence that the conveyances at issue were part of a legitimate business transaction.

Voest–Alpine presented a more transparently fraudulent scheme. The defendants were the owners of a financially troubled business, who wished to put the assets of the business out of creditors' reach and to preserve their equity in a new business. 919 F.2d at 210. To accomplish their objectives, the defendants formed a new company and concealed their interest in it. They then caused the old company's lender to foreclose on the old company's assets. The new company purchased those assets at deflated prices. In writing to creditors of the old company, the defendants claimed that it had suffered a foreclosure upon and sale of all its assets. They did not reveal, however, that their new company purchased the assets at deflated prices. 919 F.2d at 210. On those facts, the Court of Appeals had no difficulty affirming a finding of intentional fraud. *Id.*, at 214.

Unlike these cases, the defendants here did not conceal the nature of the transaction. In fact, there was testimony that not only all of Jeannette's personnel, but also nearly everyone in the town of Jeannette knew of the transaction. Furthermore, Jeannette continued to operate as an ongoing business and to pay its creditors for over a year after the transfer. While many of Brogan's actions bespeak an intent to profit handsomely from ownership of Jeannette, they do not reveal an intent to hinder, defraud, and delay creditors. Similarly, Security Pacific intended to profit from an ongoing lending relationship with Jeannette, rather than to hinder, defraud, and delay creditors. Finally, Coke of New York did receive over $12 million for Jeannette's stock. Nevertheless, it had paid some $40 million for the company in 1978, and had agreed to sell it for $19 million a few months before the July 31, 1981, transaction. Coke of New York sold Jeannette, at a substantial loss, to focus on its core businesses, rather than to defraud Jeannette's creditors. There is no basis on this record for us to find or to infer that Jeannette or any of the defendants intended to defraud Jeannette's creditors.

We reach the same conclusion after examining the "badges of fraud" used by some courts. *See In re Pinto Trucking Service, Inc.*, 93 B.R. at 386; *In re Compton*, 70 B.R. at 62; *Wieboldt Stores*, 94 B.R. at 504. The transfer here was not concealed, nor made when the transferor was threatened with suit. Jeannette also did not abscond with, remove, or conceal assets. *See In re Pinto Trucking*, 93 B.R. at 386. Furthermore, the transfer was not a sham designed to permit a transferor to retain possession or control of property allegedly transferred. *Id., Voest–Alpine*, 919 F.2d at 211. Plaintiff has not met his burden of proving through "clear and convincing evidence" that the conveyances at issue here were made with the actual intent to hinder, defraud, or delay creditors.

[17] We also find that the plaintiff has failed to prove that there was a fraudulent conveyance under 39 Pa.Stat. § 356. That section provides:

> Every conveyance made and every obligation incurred without fair consideration, when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.

39 Pa.Stat. § 356. *See Gleneagles*, 565 F.Supp. at 582–583. As discussed below,

speaks an intent to profit from his operation and control of Jeannette Corporation. While these payments may indicate questionable business judgment, they do not prove an intent to hinder, delay, or defraud creditors in light of all the evidence adduced at trial.

we do find that the transfers here were made without fair consideration. Nevertheless, plaintiff should not recover under § 356. We have found that defendants are not liable to plaintiff under § 357 of the Pennsylvania Act. For substantially the same reasons, we find that Jeannette Corporation, through the defendants, did not enter into obligations or make conveyances intending or believing that it would "incur debts beyond [its] ability to pay as they mature." Rather, the defendants intended and believed that Jeannette would prosper, and would be able to pay its debts in a timely manner.

Constructive Fraud

[18] Plaintiff also attacks the conveyances in this case as constructively fraudulent. First, he contends that the conveyances should be set aside as conveyances by an insolvent. The Pennsylvania Act provides:

> Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent, is fraudulent as to creditors, without regard to his actual intent, if the conveyance is made or the obligation is incurred without a fair consideration.

39 Pa.Stat. § 354. In analyzing the conveyances in this case, we are convinced that we should "collapse" the various steps in the July 31, 1981, leveraged buyout and treat them as "one integral transaction." *Voest-Alpine*, 919 F.2d at 212; *Tabor Court*, 803 F.2d at 1302. *See* Queenan, *The Collapsed Leveraged Buyout and the Trustee in Bankruptcy*, 11 Cardozo L.Rev. 1, 26 (1989). Security Pacific would never have made the initial unsecured loan to J. Corp. without being assured of a first security interest in all of Jeannette's assets. Without the funds from Security Pacific, J. Corp. obviously could not purchase Jeannette Corporation from Coke of New York, which, therefore, could not have received the $12.1 million. No part of the July 31, 1981, transaction would have taken place without the occurrence of all of the other parts. Finding of Fact 107.

Under § 354, we may set aside the conveyances only if Jeannette Corporation was rendered insolvent by the July 31, 1981, transaction,[9] and if the conveyances were made and the obligations incurred "without a fair consideration." Under the Pennsylvania Act:

> Fair consideration is given for property or obligation:
>
> (a) When, in exchange for such property or obligation, as a fair equivalent therefor and in good faith, property is conveyed or an antecedent debt is satisfied; or
>
> (b) When such property or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property or obligation obtained.

39 Pa.Stat. § 353.

[19] In exchange for undertaking to repay an $11.7 million loan at 3¼ percent above the prime interest rate, and for granting security interests to Security Pacific to insure repayment of that loan, Jeannette Corporation received nothing which would constitute fair consideration. Finding of Fact 108. The funds Security Pacific provided went to J. Corp., and then to Coke of New York. None of the initial $11.7 million advance was used for the operation of Jeannette's business.

[20, 21] Jeannette did receive access to additional funds under the revolving line of credit, and new management. While these may have been worth something, they were woefully inadequate consideration for the obligations Jeannette Corporation assumed. Access to working capital is valuable, but it is not fair consideration for undertaking to pay an $11.7 million loan at 3¼ percent above the prime interest rate when the loan proceeds actually went to a parent corporation. *Credit Managers Association of Southern California v. Federal Company*, 629 F.Supp. 175, 182 (C.D.Cal.1985).

9. There is no dispute that Jeannette Corporation was solvent prior to the July 31, 1981 transaction.

Furthermore, we agree with those courts which have held that new management "does not fall within the definition of fair consideration." *Gleneagles*, 565 F.Supp. at 576; *Credit Managers*, 629 F.Supp. at 182. *See* Queenan, pp. 8–13. The transfers made by Jeannette were made for less than a fair consideration. *See In re Ohio Corrugating Co.*, 91 B.R. 430, 436 (Bankr.N.D. Ohio 1988); Cieri, Heiman, Henze, Jenks, Kirschner, Riley, & Sullivan, *An Introduction to Legal and Practical Considerations in the Restructuring of Troubled Leveraged Buyouts*, 45 Bus.Law 333, 354 (1989) (expressing doubt that any leveraged buyout could meet the fair consideration standards).

[22] We may not set aside Jeannette's conveyances, although made for less than a fair consideration, unless we decide that Jeannette was rendered insolvent by the July 31, 1981, transaction. As a preliminary matter, we must resolve the question of who bears the burden of proof on this issue. The case law seems to support the plaintiff's argument that the burden shifts to the proponent of the transfer if its opponent proves the transfer was for less than a fair consideration. *Gleneagles*, 565 F.Supp. at 577; *In re Ohio Corrugating Co.*, 70 B.R. 920, 927 (Bankr.N.D.Ohio 1987) (under Ohio fraudulent conveyance law the burden to prove solvency shifts to the defendant upon a showing of less than fair consideration). *See In re Pinto*, 93 B.R. at 388. *Compare, Kupetz v. Continental Illinois National Bank & Trust Co.*, 77 B.R. 754, 762 (C.D.Cal.1987), *aff'd sub nom., Kupetz v. Wolf*, 845 F.2d 842 (9th Cir.1988), and *In re O'Day Corp.*, 126 B.R. 370, 390 (Bankr.D.Mass.1991) (under Massachusetts law trustee carries the burden of proving solvency, while under Pennsylvania law the burden to prove solvency shifts to the defendants). More precisely, Pennsylvania courts hold that if the transferor was "in debt," then the transferee must establish by clear and convincing evidence either "that the person conveying was then solvent and was not by such conveyance rendered insolvent or that a fair consideration had been paid for the conveyance." *First National Bank of Marietta v. Hoffines*, 429 Pa. 109, 114, 239 A.2d 458, 462 (1968); *In re Glenn*, 108 B.R. 70, 75 (Bankr.W.D.Pa.1989). Since the conveyances here clearly were not for "a fair consideration," the only true issue in the case under § 354 is whether Jeannette was rendered insolvent by the July 31, 1981, transaction.

Our review of the case law under the Pennsylvania Act convinces us, as it did the *Gleneagles* court, that the weight of authority clearly does support the conclusion that the burden of proving solvency rests with the defendants because the conveyances were not made for fair consideration and because Jeannette was "in debt" at the time of the conveyances. *See, e.g., Gleneagles*, 565 F.Supp. at 577; *In re Joshua Slocum Ltd.*, 103 B.R. 610, 620 (Bankr.E.D.Pa.), *aff'd*, 121 B.R. 442 (E.D.Pa.1989); *In re Leinheiser*, 51 B.R. 164, 166 (Bankr.E.D.Pa.1985); *Baker v. Geist*, 457 Pa. 73, 78, 321 A.2d 634, 637 (1974).

The defendants have argued that they should not bear the burden of proof in this case because it does not involve an interfamilial transfer. Pennsylvania courts do give heightened scrutiny to transfers between spouses for nominal or inadequate consideration. They have adopted the rule that such a conveyance "is presumptively fraudulent as to the [spouse's] creditors." *Speiser v. Schmidt*, 387 Pa.Super. 30, 38, 563 A.2d 927, 931 (1989), *quoting Hoffines*, 429 Pa. at 115, 239 A.2d at 463. This does not mandate a holding, however, that the burden of proving solvency has not passed to the defendants here.

[23, 24] First, Pennsylvania courts appear to treat the presumption in cases involving spouses as distinct from the rule shifting the burden of proof on the solvency issue to the transferee. *See Hoffines*, 429 Pa. at 114–115, 239 A.2d at 462–463; *Speiser*, 387 Pa.Super. at 37–38, 563 A.2d at 931. Furthermore, "this allocation of the burden of proof has never expressly been restricted only to cases involving transfers between related parties." *Soda Rental Service, Inc. v. Ford*, 334 Pa.Super. 486, 491 n. 2, 483 A.2d 556, 559 n. 2 (1984).

See, e.g., Gleneagles, 565 F.Supp. at 577. Finally, there is no reason to hold that the rule is limited to interfamilial transfers. In a complex transaction such as this one, we see nothing warranting an exception to the general rule that a recipient of a conveyance made for less than a fair consideration must bear the burden of proving the transferor's solvency. As discussed below, we believe that the defendants have met their burden.[10] The Pennsylvania Act defines insolvency as follows:

> A person is insolvent when the present, fair, salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured.

39 Pa.Stat. § 352(1). Pennsylvania courts have held that this solvency definition contains two components. First, in the bankruptcy sense, a transferor may be insolvent if it has "a deficit net worth." *Larrimer v. Feeney,* 411 Pa. 604, 608, 192 A.2d 351, 353 (1963). Second, insolvency "in the equity sense" means "the inability to meet obligations as they mature." *Id.*

[25] As plaintiff points out, Pennsylvania courts have emphasized that the word "present" should not be read out of the definition of insolvency. *Larrimer,* 411 Pa. at 608, 192 A.2d at 353; *Fidelity Trust,* 313 Pa. at 474–475, 169 A. at 213; *Gleneagles,* 565 F.Supp. at 578. Plaintiff, therefore, urges us to attribute no value to Jeannette's PP & E because it was not readily salable as of July 31, 1981. We must be careful, however, not to apply reflexively the word "present" without considering why the Pennsylvania courts have emphasized the word and what a reasonable construction of the word "present" entails. Indeed, the illiquid nature of assets "is not dispositive of the issue of solvency." *Gleneagles,* 565 F.Supp. at 579. The cases demonstrate that we must determine whether the present fair salable value of Jeannette's assets "are less than the amount required to pay existing debts *as they mature.*" *Larrimer,* 411 Pa. at 608, 192 A.2d at 353 (emphasis added). *See Gleneagles,* 565 F.Supp. at 578. While the PP & E here was specialized property related to the manufacture of housewares and presumably could not be sold on a moment's notice, the cases do not mandate that we assign it no value.

For example, the transferor in *Fidelity Trust* was engaged in unlawful stock speculation and fraudulent conduct involving a bank of which he was president. The transferor inflated the market value of the bank's stock, by causing the bank to purchase it. 313 Pa. at 473, 169 A. at 212. He engaged in this scheme because the stock was actually worthless and because he owned a large number of shares, all of which were pledged as security for his loans, which were payable on demand. 313 Pa. at 474, 169 A. at 212. Shortly before the transfers at issue, bank examiners discovered the dire financial condition of the bank. On these facts, the Pennsylvania Supreme Court held that it was error for the lower court to ascertain the stock's "fair salable value" without consideration of its "present" value. 313 Pa. at 474–475, 169 A. at 213. The court was concerned because the transferor knew that the actual value of the stock was far below the value at which the stock was trading, in part because of his own fraudulent conduct.

[26] *Fidelity Trust* thus held that an exception to the general rule that market values are controlling in determining

10. If the burden of proof did not shift to the defendants, however, we would hold that the plaintiff has failed to prove that Jeannette Corporation was rendered insolvent by the July 31, 1981 transaction. Plaintiff's evidence on this issue was the selling price and transaction costs of J. Corp.'s purchase of Jeannette. While the price J. Corp. paid for the stock of Jeannette Corporation is certainly evidence of the net value of Jeannette Corporation's assets, it is not conclusive evidence of that value. Indeed, the record clearly supports our conclusion that J. Corp. purchased the stock of Jeannette Corporation from Coke of New York at a bargain price. Therefore, we could not and would not find that Jeannette was rendered insolvent by the July 31, 1981 transaction based upon the analysis advanced by the plaintiff and the plaintiff's expert. To the extent that this conclusion is inconsistent with the holding of the Bankruptcy Court in *In re Metro Communications,* 95 B.R. 921, 934 (Bankr.W.D.Pa.1989), we do not follow it.

present fair salable value was in order. 313 Pa. at 475, 169 A. at 213. The Pennsylvania Supreme Court believed the lower court erred in failing to examine the facts to ascertain the true value of the stock. *Id.* *Fidelity Trust* obviously did not involve a business with valuable assets but only a limited market for those assets, such as Jeannette Corporation, and does not mandate that Jeannette's PP & E be assigned no value. At a logical extreme, a strict reading of the word "present" would require the defendants to shoulder the burden of proving that all of Jeannette's assets could be sold within a few days. We are convinced that the law does not require this. Rather, *Fidelity Trust* stands for the proposition that we may not ignore the economic realities of the transfer before us.

Similarly, *Gleneagles* does not require us to consider Jeannette's PP & E worthless. *Gleneagles* was concerned that the excess lands owned by the transferor were "highly illiquid assets which could not be sold except over an extended period of time." 565 F.Supp. at 579. Nevertheless, the court did not hold that the lands were worthless. Rather, it held that their value "did not exceed or even approach the [transferor's] debts and could not produce enough cash to pay the debts of the [transferor] as they matured." *Id.* The transferor in *Gleneagles* was unable to pay routine expenses such as utilities immediately after the transfers except by liquidating mining equipment, 565 F.Supp. at 572, and its financial and tax situations were such that sales of the surplus lands at issue actually produced a cash loss. *Id.* at 569. Therefore, the surplus lands did not have sufficient value for the transferor to meet its debts as they matured.

[27, 28] In contrast to *Gleneagles,* this case involved a transferor which was able to pay its debts immediately after the July 31, 1981, transaction. Other than the Security Pacific debt, Jeannette's current assets far exceeded all of its liabilities. The record amply supports our conclusion that the parties did not expect Jeannette to repay the Security Pacific loan in the short term, even though it was classified as a demand loan. While Jeannette's PP & E could perhaps not be sold immediately, therefore, there is nothing on this record to support the conclusion that it had to be sold immediately to pay Jeannette's debts "as they mature[d]." *Larrimer,* 411 Pa. at 608, 192 A.2d at 353. *Compare Gleneagles,* 565 F.Supp. at 572. We conclude that to determine the "present fair salable value" of Jeannette's PP & E, we need not presume an immediately available market and we decline plaintiff's invitation to assign these assets no value.

[29] In considering the "present" fair salable value of Jeannette's assets, including its PP & E, we hold that we must value them on a going concern basis, rather than on a liquidation basis. Several courts which have considered fraudulent conveyance suits have held that courts should use going concern values rather than liquidation values, unless the company's failure is clearly imminent. *See, e.g., In re Ohio Corrugating,* 91 B.R. at 437 n. 7, 438; *In re Vadnais Lumber Supply, Inc.,* 100 B.R. 127, 131 (Bankr.D.Mass.1989); *Credit Managers,* 629 F.Supp. at 187 (considering value of licenses, which could not be sold, because they produced a stream of income and "have some value"). *See Voest-Alpine,* 919 F.2d at 213. Jeannette was not a company whose failure was clearly imminent on July 31, 1981. Jeannette's assets, including its PP & E, had substantial value. As set forth in Findings of Fact 140–156, we believe the present fair salable value of that PP & E was approximately $5–6 million. Our findings of fact regarding that present fair salable value are rather conservative in comparison to Jeannette's probable liability on its debts "as they mature." *Larrimer,* 411 Pa. at 608, 192 A.2d at 353. Furthermore, based on Findings of Fact 125–175, we find that Jeannette Corporation certainly was solvent after the July 31, 1981, transaction in the "bankruptcy sense." This conclusion follows not only from Jeannette's net worth on its balance sheet, *see In re Joshua Slocum,* 103 B.R. at 623–624; *Ohio Corrugating,* 91 B.R. at 438 (both using GAAP values as starting points in solvency analysis), but

also from our detailed examination of its assets and liabilities.

Pennsylvania courts also hold that one may be insolvent under the Pennsylvania Act in an "equitable" sense. "Insolvency in the equity sense .... is the inability to meet obligations as they mature." *Larrimer,* 411 Pa. at 607, 192 A.2d at 353. The equity component of insolvency "conceives of it as a *status* or *condition* to be differentiated from mere symptomatic occurrences such as chronic defaults in current payments." *Id.* We must decide whether Jeannette Corporation was insolvent in this sense as well.

Our analysis and findings of fact with respect to Jeannette's equitable insolvency apply also to the issue of whether Jeannette was left with an unreasonably small capital for the business in which it was engaged, under § 355 of the Pennsylvania Act. Courts finding that a conveyance was made by a transferor who was thereby rendered insolvent often also find that the transfer violates § 355 of the Pennsylvania Act. *See, e.g., Gleneagles,* 565 F.Supp. at 580; *In re Pinto,* 89 B.R. 486, 501 (Bankr. E.D.Pa.1988). Under that section:

> Every conveyance made without fair consideration, when the person making it is engaged, or is about to engage, in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors, and as to other persons who become creditors during the continuance of such business or transaction, without regard to his actual intent.

39 Pa.Stat. § 355.

[30] This equation of "insolvency" and "unreasonably small capital" has been criticized as an "unwarranted *per se* rule." Markell, *Toward True and Plain Dealing: A Theory of Fraudulent Transfers Involving Unreasonably Small Capital,* 21 Ind. L.Rev. 469, 492 (1988). The "equity" component of the Pennsylvania Act's definition of insolvency, however, is concerned with "a *status* or *condition* " of being unable to pay one's debts as they become due. *Larrimer,* 411 Pa. at 608, 192 A.2d at 353. Likewise, § 355 is concerned with protecting present and future creditors from a business which is unable to pay its debts. *See Fidelity Trust,* 313 Pa. at 482, 169 A. at 215–216. In addressing both issues, we must consider whether Jeannette would be able to meet its obligations as it carried on its business. While we may agree that "insolvency" should be conceptually distinct from "unreasonably small capital," the equity component of the Pennsylvania Act's definition of insolvency renders them nearly the same. Therefore, we will discuss the two issues together.

[31, 32] In addressing these issues, we first note that a company may be adequately capitalized even if it is not "sufficiently well capitalized to withstand any and all setbacks to [its] business." *Credit Managers,* 629 F.Supp. at 187. Furthermore, we view the question of the adequacy of that capitalization as of the date of the transaction, *Credit Managers,* 629 F.Supp. at 187; *In re Vadnais Lumber,* 100 B.R. at 139, although adequacy of capitalization should also encompass a reasonable period of time after the transaction. *Barrett v. Continental Illinois Bank and Trust,* 882 F.2d 1, 4 (1st Cir.1989), *cert. denied,* — U.S. —, 110 S.Ct. 1476, 108 L.Ed.2d 613 (1990). Likewise, Pennsylvania courts consider insolvency as of the date of the transaction at issue. *Angier v. Worrell,* 346 Pa. 450, 453–454, 31 A.2d 87, 89 (1943). In arriving at a proper capital structure for a company, parties may rely upon reasonable cash flow projections made at the time of the transaction. *Credit Managers,* 629 F.Supp. at 187. *See In re O'Day Corp.,* 126 B.R. at 405–07 (holding that projections in the case before it, unlike those in *Credit Managers,* were unreasonable). As stated in Findings of Fact 79, 88, 90, 94, 99, 112, and 182, we have concluded that the financial projections made by the defendants were indeed reasonable and prudent when made. Had the projected results come to pass, Jeannette would have been a successful company.

Also important in our analysis is the proper characterization of availability under the Security Pacific line of credit. De-

fendants argue that "capital" should include "reasonably foreseeable future cash flow" whether from operations, equity, or cash "from secured or unsecured loans over the relevant period." Markell, at 496; *Credit Managers*, 629 F.Supp. at 184, 186 (financing company's agreement to lend further amounts supports finding that the company was not undercapitalized, even though adjusted projections showed negative cash flow).

Plaintiffs counter this argument by claiming that the Pennsylvania Supreme Court has held that access to credit is not sufficient. While holding that the transferor in *Fidelity Trust* had engaged in an intentionally fraudulent conveyance, 313 Pa. at 481, 169 A. at 215, the Pennsylvania Supreme Court also held that the transferor violated the constructive fraud sections of the Act. In so holding, the court was unimpressed by the transferor's ability to trade on credit. The court concluded:

> what he did to this end was done by concealment and false pretenses, made with knowledge that they were false. Such false pretenses support the inferences of actual intent. In dealing with this element of credit, it must be remembered "that the test of a trader's insolvency is ability to pay his debts in the ordinary course, not inability to raise the money for them in the ordinary course."

313 Pa. at 480, 169 A. at 215 (footnote and citations omitted). This ability to trade on credit did not establish the transferor's solvency. Furthermore, the transferor was engaged in business with an unreasonably small capital because "the possibility of continuing operations depended on the manipulation of equities in a widely fluctuating stock market." 313 Pa. at 482, 169 A. at 215.

Similarly, *Larrimer* involved a transferor who was engaged in the business of "buying and selling of listed and unlisted securities." 411 Pa. at 605, 192 A.2d at 352. After finding that the transferor had a deficit net worth for some four years in a row, the court went on to reject the contention that the transferor was solvent because he was able to pay his debts through borrowing funds at excessive interest rates:

> [The transferor's] sanguine expectations that the stock market would fluctuate sufficiently were in vain. He was neither able to meet his debts in the ordinary course of business, nor was the present fair salable value of his assets sufficient to meet his existing debts as they matured. He was insolvent from December 31, 1952, to the date of his adjudication.

411 Pa. at 605, 192 A.2d at 354. The transferors in *Fidelity Trust* and in *Larrimer* were found to be engaged in business with an unreasonably small capital and to be insolvent in the equity sense, respectively.[11] Their trading on credit in the hopes that the stock market and the value of their assets would rise did not forestall the courts' conclusions.

[33] *Fidelity Trust* and *Larrimer* are distinguishable and do not compel the conclusion that we should find Jeannette insolvent or left with unreasonably small capital merely because Security Pacific provided it with its working capital. While the transaction here may have involved risk, it was not at all like a transferor's borrowing funds at excessive rates with "sanguine expectations" that the stock market would rise. *Larrimer*, 411 Pa. at 609, 192 A.2d at 354. *See Fidelity Trust*, 313 Pa. at 482, 169 A. at 215. Rather, the defendants relied on their reasonable projections, and the projections of Jeannette management, that Jeannette's sales would stay relatively constant or improve. Jeannette was a successful company over the years, and the Brogan group had the benefit of the continued presence of Jeannette management, including Mr. Silverberg. The financing of Jeannette's working capital through a revolving line of credit does not answer the question of whether it was left with unreasonably small capital. Rather, we must analyze the

11. The transferor in *Fidelity Trust* had a positive net worth of less than $80,000. 313 Pa. at 476, 169 A. at 213.

adequacy of that line of credit. *See Gleneagles,* 565 F.Supp. at 579 (company would be solvent if "the operation of its business produced sufficient cash for the payment of its debts as they matured"); *Credit Managers,* 629 F.Supp. at 184.

[34] As set forth above in Finding of Fact 199, to determine the true availability under the Security Pacific line of credit we must refer to Jeannette's books and records. Jeannette Corporation could and did relay figures to Security Pacific based upon Jeannette's accounting data in order to establish its borrowing availability. Finding of Fact 200. Jeannette never exhausted its availability under the line of credit and never asked for an excess advance. Finding of Fact 201–202. The parties also expected that the Security Pacific line of credit would function not as a short term and current liability, but rather would be paid over time. Finding of Fact 165. Based upon the reasonable projections made by the parties as discussed above, on the availability at the relevant time periods, on the cash flow analysis prepared by Mr. Pfingstler, and on Jeannette's historical cash flow needs, we find that the availability under the Security Pacific line of credit was adequate. *See* Findings of Fact 176–202. Jeannette was able to, and did, pay its creditors until it experienced a dramatic downturn in orders and sales. *See* Findings of Fact 203–213. Had Jeannette performed as it was reasonably expected to, the parties projected that the line of credit would have been more than adequate. Finding of Fact 94. The demise of Jeannette was caused by a dramatic sales decline, the continued recession, and mismanagement. Findings of Fact 214–235. Jeannette was not left with unreasonably small capital in its hands after the July 31, 1981, transaction nor was it insolvent in the equity sense.

[35] Plaintiff relies upon *Barrett,* 882 F.2d at 4–5, for the proposition that in analyzing whether Jeannette Corporation was left with an unreasonably small capital we must decide whether it was able "to continue operations ... in the same manner as it conducted them before the transfer." *Id.* at 5. In support of his contention that Jeannette Corporation was not able to do so, plaintiff offered the expert testimony of Mr. Gustafson regarding the rise in accounts payable in August of 1981, and regarding his comparison of Jeannette's operations under Mr. Brogan with its operations one year before. While we do believe that there probably was a delay in payments to creditors from 30 to 45 days not long after the transfer, Findings of Fact 205, 211, and 212, we are not convinced that this proves Jeannette was insolvent or left with unreasonably small capital. Jeannette was not forced to delay payments to creditors because of the July 31, 1981, transaction. Rather, it was attempting, under Mr. Brogan's direction, to equalize its payments and receipts. *Id.* This decision probably did cause poor creditor relationships. It may have reflected poor business judgment. There is no basis, however, to conclude that this policy reflects that Jeannette had unreasonably small capital. Furthermore, there is no reason for us to find that Mr. Gustafson's "projections" for Jeannette, made for the purposes of his testimony, years after the July 31, 1981, transaction, were any more reasonable than those made by Mr. Brogan or Security Pacific or than the sales projections made by Jeannette's own management.

It is true that Jeannette Corporation was ultimately placed into bankruptcy and in October of 1982 was in a dire financial position. The bankruptcy, however, was caused by a number of complex factors including a continued recession, intense competition from foreign glassware manufacturers, mismanagement of the Jeannette Corporation due to poor communications between the Brogan management and other officers of Jeannette Corporation and, to a lesser degree, Mr. Brogan's illness and inability to attend to the business.[12] Nevertheless, we cannot say that as of July

12. We intimate here no view on whether that mismanagement may be a breach of fiduciary duty to the creditors of Jeannette Corporation under Count Six of the amended complaint, which will be tried to a jury.

31, 1981, Jeannette Corporation was unable to meet its obligations as they became mature or was left with an unreasonably small capital in its hands for the continuation of its business. Accordingly, we conclude that the transfers were not constructively fraudulent under 39 Pa.Stat. §§ 354 and 355. Plaintiff has failed to show that he is entitled to recover on Counts Two and Three of the amended complaint.[13]

Bankruptcy Code

[36, 37] In Count Five of the amended complaint, plaintiff relies on 11 U.S.C. §§ 548–9 in attempting to have the court set aside the repayments made by Jeannette Corporation on the initial $11.7 million advance. Under these Bankruptcy Code fraudulent conveyance provisions, we must engage in the same type of inquiry as we did with respect to the Pennsylvania Act.[14] As the Third Circuit has noted:

> the fraudulent conveyance provisions of the Code are modeled on the UFCA, and uniform interpretation of the two statutes is essential to promote commerce nationally....

Tabor Court, 803 F.2d at 1299, *quoting Cohen v. Sutherland,* 257 F.2d 737, 741 (2d Cir.1958). *See* 1 Pa.C.S. § 1927 (uniform laws shall be construed so as to effect the general purpose of making law among the various states uniform). For the reasons set forth above with respect to the Pennsylvania Act, we conclude that the plaintiff may not prevail under § 548, to the extent that he can rely on that section.[15]

[38] We also conclude that plaintiff has failed to establish that Jeannette's repayments of the Security Pacific loan should be set aside under 11 U.S.C. § 549. That section permits the trustee to avoid a post-petition transfer of property of the estate "that is not authorized under this title or by the court." 11 U.S.C. § 549(a)(1)(B). Plaintiff asserts that Jeannette's repayments to Security Pacific were unauthorized because Security Pacific did not hold an "allowable secured claim against the bankruptcy estate," Amended Complaint, p. 56, because the grant of security interests was a fraudulent conveyance. As set forth above, however, the conveyances involved in the July 31, 1981, transaction were not fraudulent. Therefore, plaintiff has not proven that the repayments of the secured loan were "not authorized." 11 U.S.C. § 549(a)(1)(B).

Unlawful Dividend and/or Distribution

[39] In Count Eight of the amended complaint, plaintiff has sought to recover the $11.7 million initial advance from the defendants under 15 Pa.Stat. §§ 1701 and

13. Because we conclude that Jeannette was solvent and was not left with an unreasonably small capital in its hands after the July 31, 1981 transaction, we need not reach the question of whether any of the parties, specifically Security Pacific, is protected by 39 Pa.Stat. § 359.

14. The Code provides in pertinent part:

> (a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—
>
> (1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
>
> (2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
>
> (ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or
>
> (iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

11 U.S.C. § 548.

15. Any difference in interpretation of the statutes would actually buttress our conclusion that the plaintiff has failed to demonstrate that the conveyances involved in the July 31, 1981 transaction were fraudulent. To the extent that the statutes differ, the concept of insolvency in the Pennsylvania Act is broader than that in the Code. *In re Glenn,* 108 B.R. at 74; *Larrimer,* 411 Pa. at 608, 192 A.2d at 353. As Jeannette was solvent under the Pennsylvania Act, it clearly was solvent under the Code.

1702.[16] The first cause of action under Count Eight alleges that the stock purchase from Coke of New York by the Brogan defendants constituted an unlawful withdrawal or distribution of corporate assets. The second cause of action asserts that the defendants violated 15 Pa.Stat. § 1702 by paying an unlawful dividend of the purchase price to Coke of New York and/or J. Corp.

Plaintiff sought to recover under both 15 Pa.Stat. §§ 1701 and 1702 under the theory that the corporation was insolvent at the time of the alleged unlawful dividend or distribution.[17] As set forth above, Jeannette Corporation was not rendered insolvent as a result of the July 31, 1981, transaction. Therefore, even if the July 31, 1981, transaction constituted a distribution or dividend, plaintiff cannot recover under §§ 1701 and 1702 of the Pennsylvania Business Corporation Law.[18]

Conclusion

The demise of Jeannette Corporation, and the resultant harm to its employees, was tragic. Nevertheless, we cannot say, on this record, that it was the result of fraudulent conveyances during the July 31, 1981, leveraged buyout. The law, as it now stands, does not require participants in a leveraged buyout to become insurers of the company's ultimate success. For the reasons set forth above in our findings of fact and legal discussion and conclusions of law, we find that plaintiff is not entitled to relief under Counts Two, Three, Five and Eight of the amended complaint.

16. While 15 Pa.Stat. §§ 1701 and 1702 have been repealed, and the general subject matter of the provisions of those statutes is now contained in 15 Pa.C.S. § 1551, the provisions of §§ 1701 and 1702 apply here. *See* 1 Pa.C.S. § 1976(a) (repeal of statute does not affect pending civil actions seeking to recover for violation of right existing under the statute).

17. The law permitted a corporation to purchase or redeem its own shares unless, in part, a corporation "is not insolvent." 15 Pa.Stat. § 1701 B(4). Similarly, a corporation may declare dividends "except when the corporation is insolvent." 15 Pa.Stat. § 1702 A.

18. The defendants also have raised the statute of limitations defense against Count Eight of the amended complaint. Given our conclusion that Jeannette was not rendered insolvent by the July 31, 1981 transaction, we need not address this issue.

In re Donald J. WALLACE, III Debtor.

Duke SALISBURY, Plaintiff,

v.

Donald J. WALLACE, et al., Defendants.

Civ. A. No. 3-91-0459-H.

United States District Court, N.D. Texas, Dallas Division.

June 10, 1991.

Adversary proceeding defendant moved to withdraw reference on ground that it had constitutional right to jury trial. The District Court, Sanders, Chief Judge, held that bankruptcy courts can preside over jury trial where right to such a trial exists.

Motion denied.

Bankruptcy ⚷**2130**

Bankruptcy courts can preside over jury trial where right to such a trial exists.

M. Bruce Peele, James V. Roberts, J. Mark McPherson, Mankoff Hill Held & Goldburg, Dallas, Tex., for plaintiff.

Michael P. Massad, Jr., Thomas E. Kirkland, Taylor & Mizell, Van Oliver, Tim K. Goss, Dallas, Tex., for defendants.

MEMORANDUM OPINION AND ORDER

SANDERS, Chief Judge.

Before the Court is the Motion to Withdraw the Reference of Defendant Team

pleading is inadequate the case should again be dismissed.

James MOODY, Trustee of the Estate of Jeannette Corporation and the Committee of Unsecured Creditors of Jeannette Corporation

v.

SECURITY PACIFIC BUSINESS CREDIT, INC., the Coca-Cola Bottling Company of New York, Inc., KNY Development Corp., J. Corp., John P. Brogan, John J. Brogan, Hanley Dawson, III, James A. McLean, James R. Winoker, Robert M. Janowiak, Alan MacLachlan, Interdyne, Inc., Muench-Kreuzer Candle Company

v.

Frank W. STOREY, Calvin MacCraken, Individuals,

James Moody, Trustee of the Estate of Jeannette Corporation, Appellant.

No. 91-3544.

United States Court of Appeals, Third Circuit.

Argued Feb. 25, 1992.

Decided Aug. 7, 1992.

Chapter 7 trustee brought action against participants in leveraged buyout of corporate debtor, alleging fraudulent conveyance under Pennsylvania's Uniform Fraudulent Conveyance Act and the Bankruptcy Code. The United States District Court for the Western District of Pennsylvania, Gustave Diamond, J., 127 B.R. 958, found that conveyances were not fraudulent, and trustee appealed. The Court of Appeals, Scirica, Circuit Judge, held that: (1) district court's valuation of Chapter 7 debtor's assets on going concern basis, rather than relying on $12.1 million paid for debtor's stock in leveraged buyout, was not improper; (2) leveraged buyout did not render debtor insolvent in equity sense or leave it with unreasonably small capital; and (3) trustee failed to establish that those involved in leveraged buyout intended to defraud creditors, and thus failed to establish that transaction violated intentional fraud provisions of Uniform Fraudulent Conveyance Act.

Affirmed.

1. Federal Courts ⚷431, 755

Court of Appeals' review of district court's interpretation and construction of the Uniform Fraudulent Conveyance Act is plenary and in applying Act, Court is bound by Pennsylvania law, but can look to law of other jurisdictions that have adopted the Act, when Pennsylvania law is silent. 39 P.S. § 351 et seq.

2. Federal Courts ⚷869

Questions of fair consideration and intent, in fraudulent conveyance proceeding, are questions of fact, as to which district court's findings are reviewed under clearly erroneous standard. 39 P.S. § 351 et seq.

3. Bankruptcy ⚷3780, 3782, 3787

Whether leveraged buyout rendered Chapter 7 debtor insolvent was "mixed question of law and fact," so that Court of Appeals reviewed findings underlying district court's solvency analysis under clearly erroneous standard, but review of district court's application of Act to findings, including its decision to value debtor's assets on a going concern basis, was plenary. 39 P.S. § 351 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

4. Bankruptcy ⚷3780, 3782, 3787

Adequacy of capital, for fraudulent conveyance purposes, presents "mixed question of law and fact," and Court of Appeals review was plenary as to whether district court properly considered availability of credit in determining whether leveraged buyout left debtor with unreasonably small capital, but reviewed under clearly

erroneous standard district court's finding underlying its adequacy of capital analysis. 39 P.S. § 351 et seq.

5. Fraudulent Conveyances ⇔57(1)

Insolvency has two components under Pennsylvania fraudulent conveyance law: "insolvency in the bankruptcy sense," a deficit net worth immediately after conveyance, and "insolvency in the equity sense," which is inability to pay debts as they mature. 39 P.S. § 354.

See publication Words and Phrases for other judicial constructions and definitions.

6. Corporations ⇔542(1)

Fraudulent conveyance provisions of Pennsylvania's Uniform Fraudulent Conveyance Act extend to leveraged buyouts. 39 P.S. § 351 et seq.

7. Fraudulent Conveyances ⇔57(1)

Under constructive fraud provision of Pennsylvania's Uniform Fraudulent Conveyance Act, solvency element requires solvency in both "bankruptcy" and "equity" sense, and is determined as of time of conveyance. 39 P.S. § 354.

8. Corporations ⇔542(1)

District court's valuation of Chapter 7 debtor's assets on going concern basis, in finding that immediately after leveraged buyout present fair salable value of debtor's total assets was at least $26.2 million, for purposes of determining "solvency" in the bankruptcy sense under Pennsylvania fraudulent conveyance law, rather than relying on $12.1 million paid for debtor's stock in leveraged buyout, was not improper; although debtor's real estate and machinery used in production of glass and pottery were not highly liquid, bankruptcy was not clearly imminent on date of buyout. 39 P.S. §§ 352(1), 354.

9. Corporations ⇔547(4)

District court's finding that Chapter 7 debtor's property, plant and equipment at date of leveraged buyout was from $5 to $6 million, for purposes of determining whether debtor was insolvent at such time so as to make leveraged buyout a fraudulent conveyance under Pennsylvania law, was supported by evidence; debtor received $5.65 million for plant, property, and equity in liquidating its divisions and subsidiaries, which were sold as going concerns on something approaching a liquidation basis long after leveraged buyout. 39 P.S. §§ 352(1), 354.

10. Corporations ⇔542(1)

District court's consideration together of whether leveraged buyout rendered Chapter 7 debtor insolvent in equity sense or left it with unreasonably small capital was not improper, even though unreasonably small capital denotes financial condition short of equitable insolvency; district court recognized that issues were "conceptually distinct," and, for corporation, adequacy of capital is typically major component of any solvency analysis. 39 P.S. §§ 354, 355.

11. Fraudulent Conveyances ⇔57(3)

"Unreasonably small capital," for purposes of Pennsylvania's Uniform Fraudulent Conveyance Act section proscribing conveyance made without fair consideration that leave debtor with unreasonably small capital, denotes financial condition short of equitable insolvency. 39 P.S. §§ 354, 355.

See publication Words and Phrases for other judicial constructions and definitions.

12. Corporations ⇔542(1)

Under "reasonable foreseeability" test for "unreasonably small capital," for purposes of Pennsylvania's Uniform Fraudulent Conveyance Act, district court could consider availability of credit in determining whether Chapter 7 debtor, which was acquired in leveraged buyout that allegedly was fraudulent, was left with unreasonably small capital; critical question was whether parties' projections were reasonable. 39 P.S. § 355.

13. Corporations ⇔542(1)

Chapter 11 debtor was not left with unreasonably small capital following leveraged buyout, for purposes of the Pennsylvania's Uniform Fraudulent Conveyance Act, merely because after leveraged buy-

out its sole source of operating capital was line of secured credit. 39 P.S. § 355.

14. Corporations ⟹542(1)

Failed leveraged buyouts merit close scrutiny under Pennsylvania's fraudulent conveyance laws. 39 P.S. § 351 et seq.

15. Corporations ⟹542(1)

Participants in leveraged buyout are responsible under Uniform Fraudulent Conveyance Act as adopted in Pennsylvania when it is reasonably foreseeable that an acquisition will fail, but at same time it must be remembered that businesses fail for all sorts of reasons and that fraudulent conveyance laws are not a panacea for all such failures, and thus, test for "unreasonably small capital" under Act is reasonable foreseeability. 39 P.S. § 354.

16. Corporations ⟹542(1)

Because projections tend to be optimistic, their "reasonableness" in determining whether leveraged buyout left corporation with "unreasonably small capital," for fraudulent conveyance purposes under Pennsylvania law, must be tested by objective standard anchored in company's actual performance; among reasonable data are cash flow, net sales, gross profit margins, and net profit losses, but historical data alone is not enough, and parties must also account for difficulties that are likely to arise, including interest rate fluctuations and general economic downturns, and otherwise incorporate some margin for error. 39 P.S. § 354.

17. Corporations ⟹542(1)

Projections relied on by involved parties in leveraged buyout of Chapter 7 debtor, one of which was based on month-by-month analysis of balance sheet and income statement, and the other of which was based on interviews with personnel and financial records, were "reasonable and prudent" when made, so that leveraged buyout neither left debtor with "unreasonably small capital" nor rendered it "equitably insolvent," and thus, buyout was not fraudulent conveyance under constructive fraud provisions of Pennsylvania's Uniform Fraudulent Conveyance Act. 39 P.S. §§ 354, 355.

18. Corporations ⟹547(4)

Chapter 7 trustee failed to establish that those involved in leveraged buyout of Chapter 7 debtor intended to defraud creditors, and thus failed to establish that transaction violated intentional fraud provisions of Pennsylvania's Uniform Fraudulent Conveyance Act. 39 P.S. §§ 356, 357.

Robert J. Cindrich (argued), David B. Mulvihill, Cindrich & Titus, Douglas A. Campbell, Campbell & Levine, Pittsburgh, Pa., for appellant.

William F. Lloyd (argued), Michael J. Sweeney, Sidley & Austin, Chicago, Ill., James D. Morton, Buchanan Ingersoll Professional Corp., Pittsburgh, Pa., for appellee Security Pacific Business Credit, Inc.

George E. McGrann (argued), David J. Armstrong, Dickie, McCamey & Chilcote, Pittsburgh, Pa., Philip M. Halpern, Collier, Cohen, Shields & Bock, New York City, for appellees The Coca-Cola Bottling Co. of New York, Inc. and KNY Development Corp.

Robert B. Sommer (argued), H. Woodruff Turner, Terry Budd, Kirkpatrick & Lockhart, Pittsburgh, Pa., for appellees J. Corp., John P. Brogan, John J. Brogan, Hanley Dawson, III, James A. McLean, James R. Winoker, and Muench-Kreuzer Candle Co.

Before: SLOVITER, Chief Judge, and SCIRICA and NYGAARD, Circuit Judges.

OPINION OF THE COURT

SCIRICA, Circuit Judge.

This bankruptcy case requires us to address, once again, the application of the fraudulent conveyance laws to a failed leveraged buyout. In *United States v. Tabor Court Realty Corp.*, 803 F.2d 1288, 1297 (3d Cir.1986), *cert. denied sub nom. McClellan Realty Corp. v. United States*, 483 U.S. 1005, 107 S.Ct. 3229, 97 L.Ed.2d 735 (1987), we established that the Pennsylvania Uniform Fraudulent Conveyance Act (UFCA) extends to leveraged buyouts. This case raises several questions about

the application of this Act to the failed leveraged buyout of Jeannette Corporation.

On July 31, 1981, a group of investors acquired Jeannette in a leveraged buyout. Less than a year and a half later, Jeannette, which had been profitable for many years, was forced into bankruptcy. The bankruptcy trustee brought this action to set aside the advances made and obligations incurred in connection with the acquisition. The trustee alleges that the leveraged buyout constitutes a fraudulent conveyance under the UFCA and is voidable under the Bankruptcy Code. After a bench trial, the district court entered judgment for defendants. *Moody v. Security Pac. Business Credit, Inc.*, 127 B.R. 958 (W.D.Pa.1991). We will affirm.

I

A

Founded in 1898, Jeannette Corporation manufactured and sold glass, ceramic, china, plastic, and candle houseware products in the United States and Canada.[1] For many years, Jeannette was a profitable enterprise. From 1965 to 1978, its annual net sales grew on a consolidated basis from $9.6 million to $61.7 million and its annual gross profit margin ranged from 18% to 32.9%. In each of those years, Jeannette earned a net profit. From 1975 to 1977, Jeannette's sales increased annually by 16%. Its consolidated pre-tax profit was $3.4 million in 1977 and $6.1 million in 1978.

In 1978, the Coca-Cola Bottling Company of New York, Inc. acquired Jeannette for $39.6 million. Shortly thereafter, Coca-Cola increased the total net book value of Jeannette's property, plant, and equipment (PP & E) by $5.7 million after a manufacturer's appraisal valued these assets at $29 million. From 1978 to 1981, Coca-Cola invested $6 million in Jeannette for capital expenditures, and $5 million for maintenance and repair of its physical plant.

At first, Jeannette was not as profitable under Coca-Cola's ownership. It suffered a consolidated $5 million pre-tax loss in 1979, in part because of the adoption of new valuation procedures for inventory, and net sales fell by $4 million. However, Jeannette's performance rebounded in 1980. Net sales increased by $9 million and the company's gross profit margin doubled. Although 1980 was a break-even year before recognition of acquisition costs, Jeannette reported a $1.3 million pre-tax profit and had a $3 million positive cash flow.

Jeannette projected that this trend would continue into 1981. Although Jeannette had an operating loss of $1.1 million in the first half of 1981, because its business cycle produced stronger cash flows in the latter half of the year, the company projected a pre-tax profit of $500,000 before interest expenses.

B

In late 1979, Coca-Cola decided to sell Jeannette and focus attention on its core bottling business. In June 1981, John P. Brogan expressed an interest in acquiring Jeannette. Brogan was affiliated with a small group of investors in the business of acquiring companies through leveraged buyouts, the hallmark feature of which is the exchange of equity for debt.[2] On July 22, 1981, Coca-Cola agreed to sell Jeannette for $12.1 million on condition that Brogan complete the transaction by the end of the month.

1. In 1981 Jeannette comprised four principal entities: the Jeannette Glass division, Brookpark division, Royal China subsidiary, and Old Harbor Candle subsidiary.

2. As this court recently explained:
A leveraged buyout refers to the acquisition of a company ("target corporation") in which a substantial portion of the purchase price paid for the stock of the target corporation is borrowed and where the loan is secured by the target corporation's assets. Commonly, the acquirer invests little or no equity. Thus, a fundamental feature of leveraged buyouts is that equity is exchanged for debt.
Mellon Bank, N.A. v. Metro Communications, Inc., 945 F.2d 635, 645 (3d Cir.1991), *cert. denied sub nom. Committee of Unsecured Creditors v. Mellon Bank, N.A.*, — U.S. —, 112 S.Ct. 1476, 117 L.Ed.2d 620 (1992). *See generally* Cieri *et al., An Introduction to Legal and Practical Considerations in the Restructuring of Troubled Leveraged Buyouts*, 45 Bus.Lawyer 333, 333–49 (1989) (discussing the characteristics of leveraged buyout transactions).

Brogan contacted Security Pacific Business Credit Inc., a lending group that had financed one of his prior acquisitions, about obtaining financing. He submitted one year of monthly projections, based in large part on Jeannette's 80-page business plan for 1981, which showed that Jeannette would have sufficient working capital under the proposed financing arrangement in the year following the acquisition. Before agreeing to finance the transaction, however, Security Pacific undertook its own investigation of Jeannette.

Security Pacific assigned this task to credit analyst Stephen Ngan. Based on his discussions with Jeannette personnel and a review of the company's financial records, Ngan made his own set of projections. He concluded that Jeannette would earn a pretax profit of $800,000 after interest expenses in its first year of operation, and recommended that Security Pacific finance the acquisition. He thought Jeannette was a "well-established" company with "a good track record for growth and earnings."

After reviewing Ngan's recommendation, together with an inventory report, the 1978 appraisal of Jeannette's PP & E, Brogan's projections, and a 55-page report on Jeannette prepared by another bank, Security Pacific decided to finance the acquisition. At that point, Coca-Cola formally approved the sale of Jeannette to J. Corp., which had been incorporated for the purpose of acquiring Jeannette.

C

The acquisition of Jeannette was consummated on July 31, 1981. J. Corp. purchased Jeannette with funds from a $15.5 million line of credit Security Pacific extended Jeannette secured by first lien security interests on all Jeannette's assets. J. Corp. never repaid Jeannette any portion of, or executed a promissory note for, the amount ($11.7 million) Security Pacific initially forwarded to J. Corp. on behalf of Jeannette to finance the acquisition. Other than new management, the only benefit Jeannette received was access to credit from Security Pacific.[3]

As with most leveraged buyouts, the acquisition left Jeannette's assets fully encumbered by the security interests held by Security Pacific. Jeannette could not dispose of its assets, except in the ordinary course of business, without the consent of Security Pacific, and was prohibited from granting security interests to anyone else. As a result, Jeannette's sole source of working capital after the transaction was its line of credit with Security Pacific.

Although Jeannette's total outstanding balance never exceeded the amount of the initial advance ($11.7 million), the total credit advanced Jeannette was many times this amount because of the "revolving" nature of its line of credit with Security Pacific. Jeannette's accounts receivable were forwarded to Security Pacific by way of the Mellon Bank, and were credited against its outstanding loan balance. As this balance was paid down, more credit was made available, which Jeannette drew on to finance operations and generate sales.

Although the initial advance was payable on demand, Jeannette carried this obli-

3. The transaction comprised the following steps, which were deemed by the parties to have taken place at once: (1) J. Corp. entered into an agreement with Coca-Cola and KNY Development Corporation, a wholly owned subsidiary of Coca-Cola, to purchase all outstanding stock of Jeannette; (2) J. Corp. obtained a $12.1 million unsecured loan from Security Pacific and executed a demand note therefor; (3) these funds were transferred from Security Pacific to Coca-Cola to fund the purchase of Jeannette stock, which was transferred from KNY Development to J. Corp.; (4) upon acquisition of the stock, J. Corp. appointed a new board of directors for Jeannette and named Brogan chairman; (5) Jeannette entered into a $15.5 million revolving credit arrangement with Security Pacific, in exchange for which it granted Security Pacific first lien security interests in all its assets; (5) on behalf of Jeannette, Brogan directed Security Pacific to remit $11.7 million from the revolving credit facility to J. Corp., which was used to repay all but $400,000 of the demand note to Security Pacific; and (6) Jeannette and Security Pacific entered into a "lock box" agreement, whereby Jeannette's accounts receivable would be forwarded to the Mellon Bank and credited against the outstanding balance on Jeannette's line of credit.

gation as long-term debt. This reflected the parties' understanding that the transaction would give rise to a long-term lending relationship in which the balance on the revolving credit facility would be paid down over several years. Security Pacific obtained no up-front fees and stood to profit by earning interest on the line of credit at 3¼% above prime (at that time about 20%).

D

Jeannette operated as a going concern from the latter half of 1981 into 1982. From August through December 1981, its net sales exceeded $31 million and the company realized a $6 million gross profit. During the same period, Jeannette had a positive cash flow of $3 million. Part of Jeannette's success during this period is attributable to its business cycle, which produced stronger cash flows in the latter half of the year.

By the end of 1981, Jeannette had received over $43 million in credit advances from Security Pacific, and had $4 million of available credit. A year after the leveraged buyout Jeannette had received $77 million in advances, and had $2.3 million in available credit. Jeannette never exhausted its credit and Security Pacific never refused a request for funds, although on several occasions it suggested that Jeannette withdraw smaller amounts.

Although Jeannette's performance initially tracked expectations, its financial condition deteriorated steadily in 1982. Jeannette experienced a shrinking domestic glassware market, a marked increase in foreign competition, dramatic price slashing and inventory dumping by its domestic competitors, and a continued nationwide recession. In January 1982, orders for Jeannette products fell to 86% of projected levels and in February orders fell to 70%. This decline in sales constricted cash flow and contributed to an inventory build-up.

Jeannette responded by reducing production and lengthening its accounts payable schedule. From late 1981 to early 1982, the company extended its payment period from 30 days to 45 days and then to 60 days. In late February (or early March) 1982, it invoked an 88-day period. However, it remained unable to pay its creditors in a timely fashion. In March 1982, Jeannette was forced to shut down one of the three glass tanks at its Jeannette Glass division, and, in late July, it shut down another. Shortly thereafter, Jeannette sold the inventory and fixed assets of its Old Harbor subsidiary for $2 million. In August 1982, the last tank was shut down at the Jeannette Glass division, bringing operations there to a halt.

Still, Jeannette's financial condition deteriorated. By August 1982, sales had fallen to 69% of traditional levels, and by October sales were 44% of 1981 levels. On October 4, 1982, an involuntary bankruptcy petition was filed under Chapter 7 of the Bankruptcy Code.[4] Jeannette's trade creditors filed $2.5 million in proof of claims, over 90% for goods or services provided after June 1982, none for goods or services supplied before the leveraged buyout.

In November 1982, Jeannette sold the assets of its Brookpark division for $1.1 million in cash and notes and the assumption of $62,000 of liabilities. Jeannette's Royal China subsidiary was placed in bankruptcy in 1983, and, a year later, its operating assets were sold for $4.2 million and the assumption of liabilities. Finally, in September 1983, Jeannette's remaining assets were auctioned off for $2.15 million.

E

On September 22, 1983, plaintiff James Moody, the trustee of the bankruptcy estate of Jeannette, filed this action in federal district court against defendants Security Pacific, Coca-Cola, KNY Development, J. Corp., M-K Candle, Brogan, and other individuals. He alleges that the leveraged buyout constitutes a fraudulent conveyance under the UFCA, 39 Pa.Cons.Stat.Ann.

4. The bankruptcy case was converted to a voluntary case under Chapter 11 of the Bankruptcy Code in December 1982, with Jeannette as the debtor-in-possession, and James Moody was appointed trustee. On May 1, 1990, however, the district court reconverted the bankruptcy case to a Chapter 7 case.

§§ 354–57, and is voidable under § 544(b) of the Bankruptcy Code, 11 U.S.C. § 544(b).[5] After a bench trial, the district court made findings of fact and conclusions of law and entered judgment for defendants.

According to the district court, the leveraged buyout was not intentionally fraudulent because it was "abundantly clear" that defendants expected the transaction to succeed and hoped to profit from it. *Moody,* 127 B.R. at 990. Likewise, although the leveraged buyout was made for less than fair consideration to Jeannette, the district court held that it was not constructively fraudulent.

Because the leveraged buyout was made for less than fair consideration, the district court placed on defendants the burden of proving solvency by clear and convincing evidence. *Id.* at 992–93. The court, however, concluded that defendants met this burden. Jeannette was not rendered insolvent in the "bankruptcy sense" because the "present fair salable value" of Jeannette's assets immediately after the leveraged buyout exceeded total liabilities by at least $1–2 million. *Id.* at 995. In making this determination, the district court valued assets on a going concern basis. *Id.*

Nor was Jeannette rendered insolvent in the "equity sense" or left with an unreasonably small capital. *Id.* at 996. Based on the parties' projections, which it found "reasonable and prudent when made," and the availability on Jeannette's line of credit with Security Pacific, the district court found that Jeannette was not left with an unreasonably small capital after the acquisition. *Id.* at 984. Rather than a lack of capital, the district court attributed Jeannette's demise to intense foreign and domestic competition, a continued recession, and, to a lesser degree, mismanagement, which led to a drastic decline in sales beginning in early 1982. *Id.* at 989.

After entry of judgment, plaintiff moved for final judgment under Fed.R.Civ.P. 54(b), which the district court granted. This appeal followed.

II

We have jurisdiction under 28 U.S.C. § 1291. The principal question is whether the leveraged buyout of Jeannette constitutes a fraudulent conveyance under the UFCA. In deciding this question, we must address whether the leveraged buyout was made for less than fair consideration to Jeannette; whether the leveraged buyout either rendered Jeannette insolvent or left it with an unreasonably small capital; and whether defendants entered into the leveraged buyout with an intent to defraud creditors of Jeannette.

5. Section 544(b) of the Bankruptcy Code provides that "[t]he trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under *applicable law* by a creditor holding an unsecured claim...." 11 U.S.C. § 544(b) (emphasis added). The "applicable law" here is the UFCA, and it is clear that there is an unsecured creditor into whose shoes plaintiff trustee may step. *See Moody,* 127 B.R. at 989 n. 6.

Plaintiff also alleges that the leveraged buyout is voidable under the fraudulent conveyance provisions of the Bankruptcy Code, 11 U.S.C. §§ 548–549, and that certain defendants engaged in an unlawful dividend and/or distribution of Jeannette's assets under the Pennsylvania Business Corporations Law, 15 Pa.Stat.Ann. §§ 1701–02, superseded by 15 Pa.Cons.Stat.Ann. § 1552–53. After concluding that the transaction did not constitute a fraudulent conveyance under the UFCA, however, the district court summarily rejected these claims. It reasoned that, because the fraudulent conveyance provisions of the Bankruptcy Code are modeled after and typically interpreted in conjunction with those of the UFCA, it follows that if the leveraged buyout is not fraudulent under the UFCA, it is not fraudulent under § 548 of the Bankruptcy Code. And if the transaction does not constitute a fraudulent conveyance under § 548, it is not voidable as an "unauthorized" transfer under § 549. Likewise, if Jeannette was not rendered insolvent by the leveraged buyout, no unlawful dividend and/or distribution of assets could have occurred under §§ 1701 and 1702 of the Pennsylvania Business Corporations Law because those provisions proscribe transfers of shares and dividends made by insolvents. *See id.* at 999–1000.

We agree with the district court's analysis of plaintiff's federal bankruptcy and unlawful dividend and/or distribution of assets claims. Accordingly, because we conclude that the leveraged buyout does not constitute a fraudulent conveyance under the UFCA, we do not address these claims.

[1] Our review of the district court's interpretation and construction of the UFCA is plenary. *Voest-Alpine Trading USA Corp. v. Vantage Steel Corp.*, 919 F.2d 206, 211 (3d Cir.1990). In applying the UFCA, we are bound by Pennsylvania law. *United States v. Gleneagles Inv. Co.*, 565 F.Supp. 556, 573 (M.D.Pa.1983), *aff'd in part and vacated in part sub nom. United States v. Tabor Court Realty Corp.*, 803 F.2d 1288 (3d Cir.1986), *cert. denied sub nom. McClellan Realty Corp. v. United States*, 483 U.S. 1005, 107 S.Ct. 3229, 97 L.Ed.2d 735 (1987). Where Pennsylvania law is silent, we may look to the law in other jurisdictions that have adopted the UFCA, *id.* (citing 39 Pa.Stat.Ann. § 362), and decisions construing analogous provisions of the Bankruptcy Code, *Tabor Court Realty Corp.*, 803 F.2d at 1298–99.

[2] We review the district court's findings of fact under the clearly erroneous standard, *Voest-Alpine Trading USA Corp.*, 919 F.2d at 211, and will accept these findings unless they are "completely devoid of a credible evidentiary basis or bear[ ] no rational relationship to the supporting data," *American Home Prods. Corp. v. Barr Lab., Inc.*, 834 F.2d 368, 371 (3d Cir.1987). "In Pennsylvania, the existence of actual intent is a question of fact." *Tabor Court Realty Corp.*, 803 F.2d at 1304. The question of fair consideration is also a question of fact.

[3] We review whether the leveraged buyout rendered Jeannette insolvent as a mixed question of law and fact. *Id.* at 1303. We review the findings underlying the district court's solvency analysis, including the values it assigned to particular items of Jeannette's PP & E, under the clearly erroneous standard. However, our review of the district court's application of the UFCA to these findings, including its decision to value Jeannette's assets on a going concern basis, is plenary.

[4] Likewise, adequacy of capital presents a mixed question of law and fact. Our review whether the district court properly considered availability of credit in determining whether the leveraged buyout left Jeannette with an unreasonably small capital is plenary. However, we review the findings underlying its adequacy of capital analysis under the clearly erroneous standard. *See Barrett v. Continental Ill. Nat'l Bank & Trust*, 882 F.2d 1, 4 (1st Cir.1989), *cert. denied*, 494 U.S. 1028, 110 S.Ct. 1476, 108 L.Ed.2d 613 (1990).

III

A

The UFCA proscribes both intentional and constructive fraud. Under the Act's intentional fraud provisions, any conveyance made or obligation incurred either without fair consideration by one who "intends or believes that he will incur debts beyond his ability to pay as they mature," 39 Pa.Stat.Ann. § 356,[6] or with an "actual intent ... to hinder, delay, or defraud ... creditors" is fraudulent, *id.* § 357.[7] Actual intent to defraud may be inferred from the circumstances surrounding a transfer. *Tabor Court Realty Corp.*, 803 F.2d at 1304–05.

[5] The UFCA's constructive fraud provisions operate without regard to intent. Under § 4, any conveyance made or obligation incurred "by a person who is or will be thereby rendered insolvent" is fraudulent if it is made or incurred for less than fair consideration. 39 Pa.Stat.Ann. § 354.[8]

6. § 356. Conveyances by a person about to incur debts

Every conveyance made and every obligation incurred without fair consideration, when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.

39 Pa.Stat.Ann. § 356.

7. § 357. Conveyances made with the intent to defraud

Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

39 Pa.Stat.Ann. § 357.

8. § 354. Conveyances by insolvent

Insolvency has two components under Pennsylvania law: insolvency in the "bankruptcy sense" (a deficit net worth immediately after the conveyance), and insolvency in the "equity sense" (an inability to pay debts as they mature). *Larrimer v. Feeney*, 411 Pa. 604, 192 A.2d 351, 353 (1963). Fair consideration requires a "good faith" exchange of "a fair equivalent." 39 Pa. Stat.Ann. § 353(a).

Under § 5, any conveyance made or obligation incurred by a person engaged in "a business or transaction" is fraudulent if it is made or incurred without fair consideration and leaves that person with an "unreasonably small capital." *Id.* § 355.[9] The relationship between "insolvency" under § 4 of the UFCA and "unreasonably small capital" under § 5 is not clear. However, as we discuss below, the better view would seem to be that "unreasonably small capital" denotes a financial condition short of equitable insolvency. The UFCA's constructive fraud provisions furnish a standard of causation that attempts to link the challenged conveyance with the debtor's bankruptcy.

[6] At first, the applicability of the UFCA's fraudulent conveyance provisions to leveraged buyouts was a matter of some dispute. *See* Note, *Fraudulent Conveyance Law and Leveraged Buyouts*, 87 Colum.L.Rev. 1491, 1510–13 (1987) (reviewing arguments for and against subjecting leveraged buyouts to fraudulent conveyance laws). However, we think it settled, as a general matter at least, that the fraudulent conveyance provisions of the UFCA extend to leveraged buyouts,[10] and defendants do not contest their applicability here.

Because of the difficulty in proving intentional fraud, challenges to leveraged buyouts tend to be predicated on the constructive fraud provisions of the UFCA. *See* Cieri *et al., supra* note 2, at 353. In the few instances in which leveraged buyouts have been set aside under the Act's intentional fraud provisions, an intent to defraud has been inferred from the circumstances surrounding the transaction. *See, e.g., Gleneagles Inv. Co.*, 565 F.Supp. at 582–83, *aff'd in relevant part sub nom. Tabor Court Realty Corp.*, 803 F.2d at 1304–05. Accordingly, the question wheth-

> Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent, is fraudulent as to creditors, without regard to his actual intent, if the conveyance is made or the obligation is incurred without a fair consideration.
>
> 39 Pa.Stat.Ann. § 354.

9. § 355. Conveyances by persons in business

> Every conveyance made without fair consideration, when the person making it is engaged, or is about to engage, in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors, and as to other persons who become creditors during the continuance of such business or transaction, without regard to his actual intent.
>
> 39 Pa.Stat.Ann. § 355.

10. In *Tabor Court Realty Corp.* we upheld the district court's determination that certain mortgages executed in connection with a leveraged buyout constituted fraudulent conveyances under the UFCA. We noted that "[t]he Act's broad language ... extends to any 'conveyance' which is defined as 'every payment of money ... and also the creation of any lien or incumbrance,'" and declined to exempt from the fraudulent conveyance laws the leveraged buyout challenged there simply because it was "innovative" or "complicated." "If the UFCA is not to be applied to leveraged buyouts," we said, "it should be for the state legislatures, not the courts, to decide." 803 F.2d at 1297. *Cf. Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d at 644–46 (holding that the fraudulent conveyance provisions of the Bankruptcy Code are applicable to leveraged buyouts).

This conclusion is consistent with that reached by the other courts that have considered the applicability of the fraudulent conveyance provisions of the UFCA to leveraged buyouts. *See, e.g., Aluminum Mills Corp. v. Citicorp N. Am., Inc. (In re Aluminum Mills Corp.)*, 132 B.R. 869, 885 (Bankr.N.D.Ill.1991); *Crowthers McCall Pattern, Inc. v. Lewis*, 129 B.R. 992, 998 (S.D.N.Y.1991); *Murphy v. Meritor Sav. Bank (In re O'Day Corp.)*, 126 B.R. 370 (Bankr.D.Mass.1991); *Ohio Corrugating Co. v. DPAC, Inc. (In re Ohio Corrugating Co.)*, 91 B.R. 430, 433–34 (Bankr.N.D.Ohio 1988); *Wieboldt Stores, Inc. v. Schottenstein*, 94 B.R. 488, 499–500 (N.D.Ill.1988). *But cf. Kupetz v. Wolf*, 845 F.2d 842, 848 (9th Cir.1988) (declining to analyze leveraged buyout under the *constructive* fraud provisions of the California UFCA on the theory that it would be "inappropriate to utilize constructive intent to brand most, if not all, LBOs as illegitimate").

er a leveraged buyout constitutes a fraudulent conveyance will typically turn on application of the UFCA's constructive fraud provisions.

With these general principles in mind, we turn now to an analysis of the leveraged buyout of Jeannette under the constructive and then intentional fraud provisions of the UFCA.

B

1

According to the district court, the leveraged buyout was without fair consideration to Jeannette because, in exchange for granting Security Pacific security interests in all its assets and undertaking an $11.7 million demand obligation at 3¼% above prime, all Jeannette received was new management and access to credit. *Moody,* 127 B.R. at 992. Defendants do not challenge this finding, and we accept it for purposes of our analysis here. *Cf. Mellon Bank, N.A. v. Metro Communications, Inc.,* 945 F.2d 635, 646 (3d Cir.1991), *cert. denied sub nom. Committee of Unsecured Creditors v. Mellon Bank, N.A.,* — U.S. —, 112 S.Ct. 1476, 117 L.Ed.2d 620 (1992) ("The target corporation ... receives no direct benefit to offset the greater risk of now operating as a highly leveraged corporation.").

The district court's allocation of the burden of proving solvency is a different matter. Defendants assert that if the burden of proof shifts upon a showing of no fair consideration, it should be by a preponderance of the evidence. This position is contrary to the Pennsylvania cases relied on by the district court, which apply the clear and convincing evidence standard. *See, e.g., Baker v. Geist,* 457 Pa. 73, 321 A.2d 634, 637 (1974); *First Nat'l Bank v. Hoffines,* 429 Pa. 109, 239 A.2d 458, 462 (1968). Defendants, however, contend these cases are inapposite because they involved "intrafamilial transfers."

Because leveraged buyouts are consummated between distinct corporate entities at arm's length, defendants assert that the potential for collusion and concealment is less than in intrafamilial transfers and, therefore, judicial scrutiny should be less searching. However, the stakes are higher in the typical leveraged buyout, and, at least from the perspective of unsecured creditors, the potential for abuse is great. As we noted in *Mellon Bank, N.A.:*

> The effect of an LBO is that a corporation's shareholders are replaced by secured creditors. Put simply, stockholders' equity is supplanted by debt. The level of risk facing the newly structured corporation rises significantly due to the increased debt to equity ratio. This added risk is borne primarily by the unsecured creditors, those who will most likely not be paid in the event of insolvency.

945 F.2d at 646. *See also* Queenan, *The Collapsed Leveraged Buyout and the Trustee in Bankruptcy,* 11 Cardozo L.Rev. 1, 3–5 (1989) (discussing the risks inherent in leveraged buyout transactions). Accordingly, we do not believe the Pennsylvania Supreme Court would scrutinize leveraged buyouts less closely than intrafamilial transfers.[11]

Although we are inclined to hold that the Pennsylvania Supreme Court would impose the same burden on defendants in leveraged buyouts as that imposed in intrafamilial transfers, we need not decide the issue here because we conclude that defendants have met even the clear and convincing evidence standard. Similarly, because we conclude that defendants have proven adequacy of capital by clear and convincing evidence, we need not decide the standard applicable to defendants' burden of proving adequacy of capital.[12]

2

[7] We turn now to the thrust of plaintiff's attack, the district court's solvency and adequacy of capital analyses. As we have discussed, under § 4 of the UFCA a

11. Judge Nygaard would conclude that the preponderance of evidence standard applies to defendant's burden.

12. We believe, however, that the same standard of proof applies to defendants' burden of proving adequacy of capital as applies to defendants' burden of proving solvency.

conveyance is fraudulent if it is made without fair consideration and renders the transferor insolvent. *See* Pa.Stat.Ann. § 354. "A person is insolvent when the *present, fair, salable value* of his assets is less than the amount that will be required to pay his probable liability on his existing debts *as they become absolute and matured.*" *Id.* § 352(1) (emphasis added). The Pennsylvania Supreme Court has interpreted this provision as requiring solvency in both the "bankruptcy" and "equity" sense, *Larrimer v. Feeney,* 192 A.2d at 35.[13] Insolvency is determined "as of the time of the conveyance." *Angier v. Worrell,* 346 Pa. 450, 31 A.2d 87, 89 (1943).

[8] The district court valued Jeannette's assets on a going concern basis and found that immediately after the leveraged buyout the present fair salable value of Jeannette's total assets was at least $26.2–$27.2 million (of which $5–6 million comprised PP & E). It then found that the company's total liabilities were $25.2 million. *Moody,* 127 B.R. at 982. Thus, the district court concluded that Jeannette was solvent in the bankruptcy sense "by at least $1–2 million and most probably by more, given the conservative value ... assigned Jeannette's PP & E." *See id.*[14]

At trial, plaintiff argued that Jeannette was rendered insolvent in the bankruptcy

13. The *Larrimer* court stated:

> A reasonable construction of the foregoing statutory definition of insolvency indicates that it not only encompasses insolvency in the bankruptcy sense i.e. a deficit net worth, but also includes a condition wherein a debtor has insufficient presently salable assets to pay existing debts as they mature [i.e. insolvency in the equity sense]. If a debtor has a deficit net worth, then the present salable value of his assets must be less than the amount required to pay the liability on his debts as they mature. A debtor may have substantial paper net worth including assets which have a small salable value, but which if held to a subsequent date could have a much higher salable value. Nevertheless, if the *present* salable value of assets are less than the amount required to pay existing debts as they mature the debtor is insolvent.

192 A.2d at 353 (emphasis in original) (citing *Fidelity Trust Co. v. Union Nat'l Bank,* 313 Pa. 467, 169 A. 209 (1933), *cert. denied,* 291 U.S. 680, 54 S.Ct. 530, 78 L.Ed. 1068 (1934)).

14. The district court found that the balance sheet accounts of Jeannette immediately before and after the July 31, 1981 transaction were as follows:

Assets	*Before*	*After*
Cash	$ 265,000	$ 265,000
Net accounts receivable	7,929,000	8,300,000
Inventory	14,370,000	12,200,000
Intercompany accounts	519,000	0
Other current assets	46,000	46,000
Total current assets	$ 23,129,000	$21,225,000
PP & E	17,731,000	*5,000,000
Goodwill	11,377,000	0
Other assets	119,000	119,000
Total assets	$ 52,356,000	*$26,344,000
Liabilities		
Accounts payable	**$ 2,964,000	$ 3,100,000
Current portion, long-term debt	500,000	500,000
Accrued liabilities	4,168,000	4,340,000
Current liabilities	$ 7,632,000	$ 7,940,000
Long-term debt	1,856,000	***13,567,000
Accrued pensions	2,441,000	3,700,000
Total liabilities	$ 11,929,000	$25,207,000
NET WORTH	$ 40,427,000	*$ 1,137,000

* As we have noted, the district court assigned a value of $5–6 million to Jeannette's PP & E. The figures denoted by the single asterisk assume a $5 million figure.

** This figure includes the $140,000 of acquisition costs incurred by Jeannette in connection with the July 31, 1981 transaction.

*** This figure includes the $11,711,000 Jeannette owed to Security Pacific on the initial advance from the revolving credit facility to J. Corp. As we have noted, this obligation was payable on demand, and therefore could be characterized as a current liability, but the parties viewed it as long-term debt and Jeannette carried it on its books as such. *See Moody,* 127 B.R. at 978–82.

sense because the present fair salable value of Jeannette's total assets could not have exceeded the $12.1 million J. Corp. paid for Jeannette's stock. *Id.* at 994 n. 10. The district court rejected this argument and undertook its own valuation of Jeannette's assets. We find no error here. Although purchase price may be highly probative of a company's value immediately after a leveraged buyout, it is not the only evidence. *Cf. Mellon Bank, N.A.*, 945 F.2d at 649 (rejecting as "cavalier" valuation of target's assets solely on the basis of amount paid to company's former shareholders). The parties here viewed the $12.1 million purchase price as a "significant bargain," made possible by Coca-Cola's decision to focus attention on its bottling business and Brogan's ability to close the deal quickly. *Moody*, 127 B.R. at 970.

On appeal, plaintiff focuses on the district court's valuation of Jeannette's PP & E. He argues that the district court erred in valuing Jeannette's PP & E on a going concern basis because these assets were not "presently salable" at the time of the leveraged buyout. In addition, he asserts that the $5–6 million the district court assigned Jeannette's PP & E is unsupported by the record. If the district court overstated Jeannette's PP & E by more than $1 million, the company is left with a deficit net worth and we must find that Jeannette was rendered insolvent in the bankruptcy sense.

To be "salable" an asset must have "an existing and not theoretical market." *Gleneagles Inv. Co.*, 565 F.Supp. at 578. *See also* Rosenberg, *Intercorporate Guaranties and the Law of Fraudulent Conveyances: Lender Beware*, 125 U.Pa. L.Rev. 235, 255 (1976). Jeannette's PP & E, which comprised real estate and machinery used in the production of glass and pottery, was not highly liquid. Therefore, in determining the present fair salable value of Jeannette's PP & E, the time frame in which these assets must be valued is critical.

Plaintiff argues that valuation on a going concern basis fails to give effect to "present" in the UFCA's "present fair salable value" language, *see* 39 Pa.Stat.Ann. § 352(1), and the district court should have calculated the amount the company would have received had it attempted to liquidate its PP & E on the date of the acquisition or immediately thereafter. We disagree. Where bankruptcy is not "clearly imminent" on the date of the challenged conveyance, the weight of authority holds that assets should be valued on a going concern basis. *See, e.g., In re Taxman Clothing Co.*, 905 F.2d 166, 169–70 (7th Cir.1990) (under Bankruptcy Code going concern valuation is proper unless "business is on its deathbed"); *Kupetz v. Continental Ill. Nat'l Bank & Trust Co.*, 77 B.R. 754, 763 (C.D.Cal.1987) (valuing assets on going concern basis under UFCA), *aff'd sub nom. Kupetz v. Wolf*, 845 F.2d 842 (9th Cir.1988); *Vadnais Lumber Supply, Inc. v. Byrne (In re Vadnais Lumber Supply, Inc.)*, 100 B.R. 127, 131 (Bankr.D.Mass.1989) ("The proper standard of valuation to be applied in determination of solvency in a bankruptcy proceeding is the value of the business as a going concern, not the liquidation value of its assets less its liabilities."); *Fryman v. Century Factors, Factor for New Wave (In re Art Shirt Ltd.)*, 93 B.R. 333, 341 (E.D.Pa.1988) (under Bankruptcy Code assets should be valued on going concern basis unless company is "on its deathbed").[15]

Although most of these cases involve application of the Bankruptcy Code, we have previously looked to the federal bankruptcy laws in interpreting the UFCA. As

15. *See also 2 Collier on Bankruptcy* ¶ 101.32[5] (15th ed. 1991) ("overwhelming authority" supports the proposition that assets should be valued on a going concern basis under Bankruptcy Code except where target "was already defunct at the critical date"); Queenan, *supra*, at 15 ("[T]he question of a debtor's solvency as of a particular date is determined under a going concern standard of valuation, provided that the debtor was then operating the business as a going concern.").

we noted in *Tabor Court Realty Corp.*, "[t]he fraudulent conveyance provisions of the [Bankruptcy] Code are modeled on the UFCA, and uniform interpretation of the two statutes [is] essential to promote commerce nationally." 803 F.2d at 1298–99 (citing *Cohen v. Sutherland*, 257 F.2d 737, 741 (2d Cir.1958)) (internal quotations omitted). Thus, although the UFCA's "present fair salable value" language differs from the Bankruptcy Code's "fair valuation" requirement, *see* 11 U.S.C. § 101(31)(A), we find the bankruptcy cases instructive on the proper valuation standard here. *See* Cieri *et al.*, *supra* note 2, at 361 ("The UFCA's 'present fair salable value' and the Bankruptcy Code and UFTA's 'fair valuation' probably should be viewed as interchangeable standards for valuing an LBO's target's assets.").

Moreover, we think valuation on a going concern basis strikes the proper balance between "present" and "fair" in the UFCA's "present fair salable value" language. *See* 39 Pa.Stat.Ann. § 352(1). The approach set forth in *United States v. Gleneagles Investment Co.* is instructive. There the district court valued the debtor's assets, which included mining and coal processing equipment, according to the amount that would have been obtained if they were "liquidated with reasonable promptness in an arms-length transaction in an existing and not theoretical market." 565 F.Supp. at 578. *See also Fraudulent Conveyance Law and Leveraged Buyouts*, *supra*, at 1505 n. 113.[16]

As plaintiff points out, the Pennsylvania Supreme Court applied a more immediate valuation standard in *Fidelity Trust Co. v. Union National Bank*, 313 Pa. 467, 169 A. 209 (1933). Although recognizing that "market value of an asset is generally controlling," it held that the trial court erred in declining to consider the "*actual* value" of stock subject to the debtor's speculation scheme on the date of the challenged conveyance. *Id.* at 213 (emphasis in original).[17] The district court here concluded that *Fidelity Trust Co.* "stands for the proposition that we may not ignore the economic realities of the transfer before us," and, therefore, does not compel valuation on a liquidation basis in every instance. *Moody*, 127 B.R. at 995. We agree.

To determine whether the district court properly valued Jeannette's PP & E on a going concern basis, then, we must ascer-

16. There is also some support for the application of a going concern valuation standard in the Pennsylvania Business Corporations Law. Section 1551 prohibits shareholder distributions "if, after giving effect thereto: (1) the corporation would be unable to pay its debts as they become due in the usual course of business; or (2) the total assets of the corporation would be less than the sum of its total liabilities...." 15 Pa.Cons.Stat.Ann. § 1551(b). The commentary to § 1551 provides:

> No particular method of valuation is prescribed in the statute, since different methods may have validity depending upon the circumstances, including the type of enterprise and the purpose for which the determination is made. For example, it is inappropriate in most cases to apply a "quick-sale liquidation" method to value an ongoing enterprise, particularly with respect to the payment of normal dividends. On the other hand, a "quick-sale liquidation" valuation method might be appropriate in certain circumstances for an enterprise in the course of reducing its asset or business base by a material degree. In most cases, a fair valuation method or a going-concern basis would be appropriate if it is believed that the enterprise will continue as a going concern.

Id. cmt. 2(b). This commentary is at least instructive on how the Pennsylvania General Assembly views the proper valuation of assets in the case of a transfer (*i.e.*, shareholder distribution) alleged to have rendered a corporation insolvent.

17. In *Fidelity Trust Co.* the debtor, a bank president, was engaged in unlawful speculation in the bank's stock. He owned a large number of shares of the bank's stock, which he had pledged as security for demand obligations of his own. At the time of the challenged transfer, he was attempting to inflate the market value of bank stock by causing the bank to purchase additional shares. The debtor's own solvency was dependent on his ability to manipulate the value of bank stock so that the collateral on his loans would remain secure. Against this backdrop, the Pennsylvania Supreme Court said that it was error for the lower court not to consider the value of the debtor's shares of bank stock on the date of the challenged conveyance, as opposed to the amount he would have received for the stock had he sold it at some point later in time to take advantage of his stock manipulation efforts. *See* 169 A. at 212–13.

tain whether Jeannette was either insolvent or on the brink of insolvency on the date of the leveraged buyout. The district court found that "Jeannette was not a company whose failure was clearly imminent on July 31, 1981." *Moody*, 127 B.R. at 995. This conclusion is supported by the record. Prior to the transaction, Jeannette had a net worth of over $40 million. *See supra* note 14. Moreover, at the time of the transaction Jeannette had a positive cash flow and was coming off a break-even year before acquisition costs. Accordingly, we think the district court properly valued Jeannette's assets, and, in particular, its PP & E, on a going concern basis.

[9] Plaintiff also maintains that the district court erred in finding that the present fair salable value of Jeannette's PP & E on the date of the acquisition was $5–6 million. At trial, plaintiff presented no evidence on the going concern value of Jeannette's PP & E, or any other assets, because he argued that the company could not be worth more than the amount J. Corp. paid for Jeannette's stock. Plaintiff now asserts that the district court used a "hodgepodge of irrelevant numbers" to arrive at the $5–6 million figure it set for Jeannette's PP & E. We disagree. The record supports the district court's finding that the present fair salable value of Jeannette's PP & E on the date of the acquisition was at least $5–6 million and probably more.

The district court arrived at its $5–6 million figure after finding that: (1) Jeannette assigned its PP & E a book value of $17.7 million on the date of the leveraged buyout; (2) in 1978 a manufacturer's appraisal of Jeannette's assets valued PP & E at $29 million; (3) Coca-Cola invested $11 million in capital improvements and repairs of PP & E; (4) defendants' expert valued Jeannette's PP & E on the date of the acquisition at $12.7 million; and (5) Jeannette received $5.65 million for PP & E in selling off its component parts after the financial downturn ($1.3 million for PP & E at its Old Harbor subsidiary, $550,000 for real property at its Brookpark division, $2 million for PP & E at its Royal China subsidiary, and $1.8 million for PP & E at its Jeannette Glass division).

We find the $5.65 million Jeannette received for PP & E in liquidating its divisions and subsidiaries particularly probative of the going concern value of Jeannette's PP & E on July 31, 1981 because these components were sold as going concerns on something approaching a liquidation basis. Therefore, although these assets were sold long after the leveraged buyout, the conditions under which they were sold approximated, and may have been more immediate than, that required by the UFCA's "present fair salable value" language.[18] Accordingly, we conclude that the district court did not err in finding that Jeannette was solvent in the bankruptcy sense after the leveraged buyout.

3

[10] Next, we look at whether the leveraged buyout either rendered Jeannette insolvent in the equity sense or left it with an unreasonably small capital. Although it recognized that these issues were "conceptually distinct," the district court considered them together. *Moody*, 127 B.R. at 996. Plaintiff contends this was improper because "unreasonably small capital" denotes a financial condition short of equitable insolvency.

[11] As we have discussed, under § 5 of the UFCA any conveyance made or obligation incurred by a person engaged in "a business or transaction" is fraudulent if it is made or incurred without fair consideration and leaves that person with an "unreasonably small capital." 39 Pa.Stat.Ann.

18. Citing *Gruber v. Owens-Illinois Inc.*, 899 F.2d 1366, 1370 (3d Cir.1990), plaintiff argues that the district court erred in considering the amounts Jeannette received for the PP & E of its Old Harbor and Royal China subsidiaries because ownership of a subsidiary's stock does not constitute ownership of its assets. However, as defendants point out, although ownership of a subsidiary's stock may not constitute ownership of its property, evidence of the value of a company's property is admissible to establish the value of its stock. *Wagoner v. Wallace Turnbull Corp. & Lumber Terminals, Inc.*, 160 A. 105, 170 (1932) (citing *Jarvis v. Bell*, 296 Pa. 568, 146 A. 153 (1929)). We find no error here.

§ 355. Unlike "insolvency," "unreasonably small capital" is not defined by the UFCA. This has engendered confusion over the relationship between these concepts: some courts have equated a finding of equitable insolvency with that of unreasonably small capital,[19] whereas others have said that unreasonably small capital encompasses financial difficulties short of equitable insolvency.[20]

We believe the better view is that unreasonably small capital denotes a financial condition short of equitable insolvency. As plaintiff points out, there is some support for this position in *Fidelity Trust Co. v. Union National Bank*, discussed *supra* note 17, where the Pennsylvania Supreme Court said that "insolvency at the time" of the challenged conveyance is "of no moment" under § 5. 169 A. at 215.[21]

Moreover, we think it telling that having adopted § 4 of the UFCA, which proscribes conveyances made without fair consideration that render the debtor "insolvent," the drafters saw fit to add § 5, which proscribes conveyances made without fair consideration that leave the debtor with an "unreasonably small capital." If the drafters viewed these concepts interchangeably, one would expect them to have employed the same language. *Cf. In re Vadnais Lumber Supply Co.*, 100 B.R. at 137 (noting that if Congress had intended to equate unreasonably small capital with equitable insolvency under § 548 of the Bankruptcy Code it would not have used different terms).

Finally, whereas § 4 covers conveyances by persons generally, § 5 covers conveyances by "persons in business." *See* 39 Pa.Stat.Ann. § 355 (heading). In the business setting, "capital" is a term of art. As a general matter, it refers to "[a]ccumulated goods, possessions, and assets, used for the production of profits and wealth." *Black's Law Dictionary* 189 (5th ed. 1979). Viewed in this light, an "unreasonably small capital" would refer to the inability to generate sufficient profits to sustain operations. Because an inability to generate enough cash flow to sustain operations must precede an inability to pay obligations as they become due, unreasonably small capital would seem to encompass financial difficulties short of equitable solvency.[22]

19. *See, e.g., Gleneagles Inv. Co.*, 565 F.Supp. at 580 ("[A] finding of insolvency is *ipso facto* a finding that the debtor was left with unreasonably small capital after the conveyance."). We did not address the issue of unreasonably small capital in *Tabor Court Realty Corp.*

20. *See, e.g., Murphy v. Meritor Sav. Bank (In re O'Day Corp.)*, 126 B.R. 370, 407 (Bankr.D.Mass. 1991) ("It must be remembered that '[u]nreasonably small capitalization need not be so extreme a condition of financial debility as to constitute equitable insolvency....'") (quoting Queenan, *supra*, at 18); *In re Vadnais Lumber Supply, Inc.*, 100 B.R. at 137 ("Unreasonably small capitalization ... encompasses difficulties which are short of insolvency in any sense but are likely to lead to insolvency at some point in the future.").

21. The *Fidelity Trust Co.* court stated:

> Considered in another aspect, the transaction is condemned by section 5 (39 P.S. § 355) *under which neither intent nor insolvency at the time is of the moment.* If the donor were considered solvent in October, 1929, his surplus must have been too small for the conduct of his speculative business. With his property pledged, ... possibility of continued operations depended on the manipulation of equities in a wildly fluctuating stock market. The precarious chance of successful issue of business conducted with such slender margin must be considered and would warrant finding that conduct was fraudulent.

169 A. at 215 (emphasis added).

22. One commentator has explained the difference between the notions of insolvency and that of unreasonably small capital under the UFCA as follows:

> The second requirement [of § 5] can most easily be seen as an analogue to § 4 of the UFCA dealing with transfers by insolvents. The objective of § 4 was creditor protection by requiring the transferor to retain sufficient assets to meet all debts. Yet ... many debtors took advantage of the vagaries surrounding asset valuation and difficulties regarding proof of intent, and left themselves solvent, but just barely so. Section 5 of the UFCA was an attempt to close these gaps. It imposes an additional burden on transferors; they must not leave themselves with unreasonably small—or inadequate—capital or reserves.

Markell, *Toward True and Plain Dealing: A Theory of Fraudulent Transfers Involving Unreasonably Small Capital*, 21 Ind.L.Rev. 469, 498 (1988). *See also* Queenan, *supra*, at 18 (discussing the relationship between the concepts of unreasonably small capital and equitable solvency under the UFCA).

In any event, we do not think the district court erred in considering whether the leveraged buyout left Jeannette with an unreasonably small capital in conjunction with whether it rendered the company equitably insolvent. These distinct but related concepts furnish a standard of causation which looks for a link between the challenged conveyance and the debtor's insolvency. Moreover, where the debtor is a corporation, adequacy of capital is typically a major component of any solvency analysis. This is true of the district court's analysis here.

4

[12] In undertaking its adequacy of capital analysis, the district court focused on the reasonableness of the parties' projections, but also considered the availability on Jeannette's line of credit with Security Pacific. It found the parties' projections reasonable and, based on the availability of credit as well as the company's historical cash flow needs, determined that Jeannette was not left with an unreasonably small capital under the circumstances. *Moody,* 127 B.R. at 998. Rather than a lack of capital, the district court attributed Jeannette's demise to the "substantial drop in orders and sales that began in 1982," which it attributed in turn to increased foreign and domestic competition and the continued recession. *Id.* at 989.

Because creditors cannot execute on a debtor's ability to borrow, plaintiff maintains that the district court erred in considering Jeannette's line of credit with Security Pacific in undertaking its adequacy of capital analysis. He relies on *Larrimer v. Feeney,* 192 A.2d at 353, and *Fidelity Trust Co. v. Union National Bank,* 169 A. at 215, where the Pennsylvania Supreme Court said that the ability to survive on borrowed funds does not render an individual debtor solvent for purposes of § 4 of the UFCA. The district court found these cases inapposite. We agree.

Larrimer and *Fidelity Trust Co.* involved individual debtors who had engaged in speculative stock trading schemes and borrowed funds to stay afloat.[23] In *Larrimer* the Pennsylvania Supreme Court observed that the debtor's "sanguine expectations that the stock market would fluctuate sufficiently [to cover his losses] were in vain," 192 A.2d at 354; and in *Fidelity Trust Co.* the court referred to the debtor's stock manipulation efforts as "highly speculative" and "unlawful," 169 A. at 212. By contrast, defendants' decision to enter into the lending arrangement challenged here was predicated on their projections that the acquisition would succeed, and, as we discuss below, these projections were reasonable.

Moreover, unlike the debtors in *Larrimer* and *Fidelity Trust Co.*, at least initially, Jeannette did not borrow funds to stay afloat. As we have noted, the company was solvent by $1–2 million immediately after the leveraged buyout. Finally, we think the lending relationship here is different in important respects from those in *Larrimer* and *Fidelity Trust Co.* Jeannette granted Security Pacific first priority security interests in all its assets, which the district court valued at $26 million, to secure a $15.5 million line of credit to provide Jeannette with working capital in the

23. The debtor in *Larrimer* borrowed money from customers to invest in securities, in exchange for which he agreed to pay them a 2% monthly return on their investments. The debtor fell behind in interest payments to some customers but made excessive payments to others. Still, he continued to "borrow[ ] money at interest rates in excess of the legal rate in order to keep his head above water." 192 A.2d at 353. Eventually, the debtor was unable to meet his debts as they became due and posted a deficit net worth for four successive years. 192 A.2d at 353–54.

As we have discussed, *see supra* note 17, the debtor in *Fidelity Trust Co.* was the president and large stockholder of a bank. He had pledged his bank stock as security on his own demand obligations and, at the time of the challenged transfer, was attempting to inflate the market value of this stock by causing the bank to purchase additional shares. 169 A. at 212–13. As the market value of bank stock fell, the debtor began borrowing to repay his existing demand obligations in "a hopeless struggle to stay afloat." *Id.* at 214.

year following the transaction.[24]

In the absence of controlling Pennsylvania caselaw, it was proper for the district court to look to caselaw in other jurisdictions, and, in particular, *Credit Managers Ass'n v. Federal Co.*, 629 F.Supp. 175 (C.D.Cal.1985). In that case the district court held that the focus of the adequacy of capital inquiry in a leveraged buyout should be the reasonableness of the parties' cash flow projections. In finding that the target corporation was not left with an unreasonably small capital after the leveraged buyout, the court also considered availability of credit. *See id.* at 185–86.[25]

Plaintiff urges us to follow *Murphy v. Meritor Savings Bank (In re O'Day Corp.)*, 126 B.R. 370, 407 (Bankr.D.Mass. 1991),[26] in which the bankruptcy court said that availability of credit alone does not establish adequate capitalization after a leveraged buyout. 126 B.R. at 408. However, this statement is not necessarily at odds with *Credit Managers Ass'n*, which the *In re O'Day Corp.* court explicitly embraced. The *Credit Managers Ass'n* analysis turns on the reasonableness of projections, not availability of credit *per se*. If projections are unreasonable, as was the case in *In re O'Day Corp.*, *see supra* note 26, it will follow that the debtor was left with an unreasonably small capital even though it may not have exhausted its credit.

[13] We cannot say that Jeannette was left with an unreasonably small capital merely because after the leveraged buyout its sole source of operating capital was its line of credit with Security Pacific. As we noted in *Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d at 647, "[t]he

24. Finally, it is worth noting that, strictly speaking, *Larrimer* and *Fidelity Trust Co.* held that the ability to borrow is not pertinent for purposes of a § 4 solvency analysis, not a § 5 adequacy of capital analysis. As we have explained, in the business setting, where § 5 applies, capital has a special meaning. One commentator has said that "the test for unreasonably small 'capital' should include ... all reasonably anticipated sources of operating funds, which may include new equity infusions, cash from operations, or cash from secured or unsecured loans over the relevant time period." Markell, *supra* note 22, at 496. The precise definition of "capital" under § 5 of the UFCA is of course open to dispute. However, because the Pennsylvania cases involve the construction of § 4 of the UFCA, they are not controlling for purposes of § 5.

25. *Credit Managers Ass'n* involved a challenge to the failed leveraged buyout of the Crescent Food Company under § 5 of the California UFCA. Despite a $10 million line of credit, less than a year and a half after the acquisition, Crescent had accounts payable of $3 million and insufficient cash flow to continue operations. Although it recognized that the acquisition placed Crescent "heavily in debt," the district court found it "was not undercapitalized and had sufficient *expected* cash flow to stay in business." *Id.* at 184 (emphasis added). In reaching this conclusion, the district court focused on the reasonableness of the lender's cash flow projections entering into the acquisition, and, to a degree, the resulting availability on Crescent's line of credit. *Id.* at 186. Rather than a lack of capital, the district court attributed Crescent's demise to a series of unexpected setbacks—in particular, a two-month strike. *Id.* at 178.

26. *In re O'Day Corp.* involved a challenge to the failed leveraged buyout of Prindle Boats Corp. and O'Day/Cal Sail Boats Corp, later merged into The O'Day Corporation. Meritor Savings Bank financed the transaction, which included a $7.2 million loan and $2.5 million revolving credit facility secured by the assets of Prindle and O'Day/Cal. 126 B.R. at 381. Less than two years after the leveraged buyout, O'Day was forced into bankruptcy and the trustee of the bankruptcy estate brought an action alleging that the leveraged buyout was voidable under the UFCA. *Id.* at 372–73.

The bankruptcy court held that the leveraged buyout left O'Day with an unreasonably small capital under § 5 of the UFCA. In reaching this conclusion, it observed:

> In perhaps the leading case on the issue of unreasonably small capital, the court concluded that its task in determining whether a company had sufficient working capital as evidenced by cash flow projections was not to examine what happened to the company but whether the projections employed prior to the LBO were prudent. *Credit Managers*, 629 F.Supp. at 187.

Id. at 404. Because the parties' projections did not take into account O'Day's performance prior to the leveraged buyout, the bankruptcy court found them unreasonable. Indeed, as the court noted, they rested in part on the assumption that, "in a *worst case scenario*, O'Day would somehow match or exceed its *best* financial performance of the 1980's." *Id.* at 406 (emphasis in original). "Thus, using the *Credit Managers* test outlined above, the [c]ourt conclude[d] that O'Day was left with unreasonably small capital." *Id.* at 407.

ability to borrow money has considerable value in the commercial world." This is particularly true in the case of leveraged buyouts, which are predicated on the exchange of equity for debt and the ability to borrow. Refusal to consider availability of credit in the adequacy of capital determination would result in a *per se* rule that failed leveraged buyouts are voidable under § 5 of the UFCA.

[14] Because a leveraged buyout may fail for reasons other than the structure of the transaction itself, we think the determination whether a leveraged buyout leaves a target corporation with an unreasonably small capital requires a more careful inquiry. At least from the viewpoint of the unsecured creditor, leveraged buyouts present great potential for abuse. As we noted in *Mellon Bank, N.A.*, "[a]n LBO may be attractive to the buyer, seller, and lender because the structure of the transaction ... allow[s] all parties to shift most of the risk of loss to other creditors...." 945 F.2d at 646. *But cf. C-T of Virginia, Inc. v. Barrett (In re C-T Virginia, Inc.)*, 958 F.2d 606, 612-13 (4th Cir.1992).[27] Therefore, we believe failed leveraged buyouts merit close scrutiny under the fraudulent conveyance laws.

[15] The *Credit Managers Ass'n* analysis appears to strike a proper balance. It holds participants in leveraged buyout responsible under § 5 of the UFCA when it is reasonably foreseeable that an acquisition will fail, but at the same time takes into account that "businesses fail for all sorts of reasons, and that fraudulent [conveyance] laws are not a panacea for all such failures." Markell, *supra* note 22, at 506. Therefore, we hold the test for unreasonably small capital is reasonable foreseeability. Under this analysis, it was proper for the district court to consider availability of credit in determining whether Jeannette was left with an unreasonably small capital. The critical question is whether the parties' projections were reasonable.

5

[16] Because projections tend to be optimistic, their reasonableness must be tested by an objective standard anchored in the company's actual performance. Among the relevant data are cash flow, net sales, gross profit margins, and net profits and losses. *See Credit Managers Ass'n*, 629 F.Supp. at 184-86. However, reliance on historical data alone is not enough. To a degree, parties must also account for difficulties that are likely to arise, including interest rate fluctuations and general economic downturns, and otherwise incorporate some margin for error. *See* Queenan, *supra*, at 19.

[17] Defendants here relied on two sets of one-year projections, one prepared by Brogan and the other by Ngan. Brogan's projections were based on a month-by-month analysis of Jeannette's balance sheet, income statement, and resulting credit availability. Ngan's projections were grounded in his interviews with Jeannette personnel and examination of the company's financial records for the year and a half preceding the acquisition. The district court found these projections reasonable and prudent when made. *See Moody*, 127 B.R. at 984. We agree.

Plaintiff contends that Brogan's projections were unreasonable because they did not include a separate set of month-by-month cash flow projections. Yet the record shows that Brogan undertook a detailed month-by-month analysis of Jeannette's ability to handle added debt in the year after the acquisition. Moreover, although Brogan did not prepare a separate month-by-month cash flow analysis, his projections were based in part on Jeannette's business plan for 1981, which projected a $3 million positive cash flow through 1981.

Therefore, although the failure to undertake an independent cash flow analysis will often be unreasonable, we cannot say the

27. We recognize that certain voluntary creditors may be able to protect themselves against leveraged buyouts through loan agreements. However, not all creditors have the bargaining power to obtain such contractual protection and most creditors are involuntary. *See Tabor Court Realty Corp.*, 803 F.2d at 1297 n. 2.

district court erred in finding Brogan's projections reasonable. This conclusion is bolstered by the fact that during the five months following the leveraged buyout, Jeannette's cash flow tracked the projections contained in company's 1981 business plan.

Plaintiff also asserts that the parties' projections were unreasonable because, like the projections in *In re O'Day Corp.*, they "ignored Jeannette's recent historical experience" and were "founded instead on Brogan's apparent belief that, in the midst of a severe recession, he could suddenly 'turn around' a company which had been losing money for two-and-a-half years." We disagree. As we have discussed, Jeannette was profitable for many years. It suffered a downturn in 1979, but rebounded in 1980. Although 1980 was a break-even year after interest expenses, the company enjoyed a $1.3 million pre-tax profit and had a $3 million positive cash flow. Jeannette projected a continuation of this trend into 1981, and, as of July 14, 1981, was projecting a year's end pre-tax profit of $500,000 before interest expenses.

In hindsight it is clear that the figures employed by Brogan and Ngan were not entirely on the mark. Brogan assumed net sales of $70 million and a gross profit margin of 16.9%; and Ngan assumed net sales of $75 million and a gross profit margin of 17%. However, Ngan's sales projection was based on expected price increases and new product lines and still was $15 million less than that contained in Jeannette's own 1981 business plan. Moreover, although both Brogan's and Ngan's gross profit margins (about 17%) represented a 2.5% increase over 1980, they were below Jeannette's average gross profit margin from 1965 to 1978 (20%). Therefore, the projections here are different from those found unreasonable in *In re O'Day Corp.*, where the parties' worst case scenario exceeded the company's best financial performance in the preceding years. *See* 126 B.R. at 406.[28]

Finally, Jeannette's actual performance after the acquisition supports the district court's finding that the parties' projections were reasonable. As we have noted, in the five months following the acquisition, Jeannette had a positive cash flow and realized $6 million in gross profits.[29] Of the $2.5 million in proof of claims filed by trade creditors, over 90% were for goods or services provided Jeannette after June 1982; none were for goods or services provided prior to July 31, 1981.[30]

This is not to say that Jeannette did not experience grave financial problems in the wake of the leveraged buyout. As we have discussed, it suffered a build-up of an unusually large inventory, which the district court attributed in part to mismanagement. *Moody*, 127 B.R. at 989. From late 1981 to early 1982, Jeannette's payment period for accounts payable increased from 30 days to 88 days. Less than a year after the acquisition, the company began shutting down operations at its Jeannette Glass division and selling off its subsidiaries. By October 1982, it had gone into bankruptcy.

The district court properly found that Jeannette's failure was caused by a dra-

28. Ngan thought Brogan's projections were "overly optimistic." However, Brogan's calculations differed from Ngan's, and, as a result, were not as optimistic as Ngan perceived. Brogan accounted for the substantial reduction in annual depreciation expense that would result from his anticipated write down of Jeannette's fixed assets, whereas Ngan based his projections on depreciation levels recorded during Coca-Cola's ownership of Jeannette. Assuming lower depreciation expenses, Brogan's projections were consistent with Jeannette's actual and projected sales and operations up to that point in 1981. *See Moody*, 127 B.R. at 973.

29. During this time period, Jeannette's net sales exceeded $31 million. Plaintiff argues that this figure is misleading because the company had implemented an inventory reduction program in October 1981, where products were sold at 50–60% below list prices. However, only 8% of Jeannette's sales from August through December 1981 comprised inventory moved through this program.

30. In addition, as we have discussed, Jeannette's revolving line of credit with Security Pacific remained positive throughout the year after the leveraged buyout. That the availability of credit increased in 1981 and, in the end, was never exhausted is evidence that Jeannette's cash flow remained positive through 1981 and into 1982.

matic drop in sales due to increased foreign and domestic competition, rather than a lack of capital.[31] Plaintiff plausibly contends that defendants should have anticipated some of these problems and incorporated a margin for error. But we cannot say the district court erred in finding that the drastic decline in sales was unforeseeable as of the date of the leveraged buyout. Therefore, we conclude that the district court properly determined that the leveraged buyout did not leave Jeannette with an unreasonably small capital.

Because we assume the notion of unreasonably small capital denotes a financial condition short of equitable insolvency, it follows that the transaction did not render Jeannette equitably insolvent either. And because the leveraged buyout neither left Jeannette with an unreasonably small capital nor rendered it equitably insolvent, we agree with the district court that the acquisition does not constitute a fraudulent conveyance under either §§ 4 or 5 of the UFCA.

C

[18] All that remains to be decided is whether the district court properly determined that the leveraged buyout did not violate the UFCA's intentional fraud provisions. As we have discussed, a conveyance is intentionally fraudulent if it is made either without fair consideration by one who "intends or believes that he will incur debts beyond his ability to pay as they mature," 39 Pa.Stat.Ann. § 356, or with an "actual intent ... to hinder, delay, or defraud either present or future creditors," *id.* § 357. Actual intent to defraud need not be shown by direct evidence, but rather may be inferred from the circumstances surrounding a conveyance. *United States v. Tabor Court Realty Corp.*, 803 F.2d at 1304.

The district court found that "defendants did not know or believe that Jeannette's creditors could not be paid, and did not intend to hinder, defraud, or delay creditors." *Moody*, 127 B.R. at 990. This conclusion followed from the absence of any direct evidence of fraud, as well as defendants' profit motives, the parties' awareness of the transaction's leveraged nature, and Jeannette's operation as a going concern for at least five months following the acquisition. *Id.* at 991.

Plaintiff apparently concedes that there is no direct evidence that defendants intended to defraud Jeannette's creditors. However, he asserts that the district court erred in failing to consider the "well-established principle" that "parties are held to have intended the natural consequences of their acts." Applying this principle, plaintiff reasons that because the leveraged buyout had the foreseeable "effect" of hindering and delaying creditors of Jeannette, it follows that defendants intended to defraud them. We cannot agree.

In *Tabor Court Realty Corp.* we relied in part on the principle that "a party is deemed to have intended the natural consequences of his acts" in upholding the district court's finding of intentional fraud. 803 F.2d at 1305. The facts of that case, however, are more egregious than those here. The target corporation in *Tabor* was "clearly on the brink of insolvency" at the time of the challenged leveraged buyout. *Gleneagles Inv. Co.*, 565 F.Supp. at 581. Thus, the leveraged buyout was not only voidable under the intentional fraud provisions of the UFCA, but also under the Act's constructive fraud provisions.

By contrast, Jeannette was not on the brink of insolvency at the time of the leveraged buyout, and the acquisition was not constructively fraudulent. Therefore, even assuming participants in leveraged buyouts may be held accountable under the intentional fraud provisions of the UFCA for the natural consequences of their actions, we

31. Plaintiff argues that the dramatic decline in sales was a result of—not the cause of—Jeannette's demise. Although the decline in sales may not have worsened to the point of calamity until summer 1982, the record supports the district court's finding that it began in early 1982. January and February orders were 86% and 70% of projected levels, and by August sales had dropped to 69% of 1981 levels. Moreover, the intense foreign and domestic competition started in early 1982.

do not believe Jeannette's insolvency was a natural consequence of the leveraged buyout. We conclude, then, that the district court properly held that the leveraged buyout was not intentionally fraudulent.

IV

In sum, we will affirm the district court's conclusions that the leveraged buyout does not constitute a fraudulent conveyance under either the constructive or intentional fraud provisions of the UFCA. Because the leveraged buyout was without fair consideration to Jeannette, defendants bore the burden of proving that Jeannette was neither rendered insolvent nor left with an unreasonably small capital.

Jeannette was not rendered insolvent in the bankruptcy sense because the present fair salable value of Jeannette's total assets immediately after the leveraged buyout exceeded that of its total liabilities by at least $1–2 million. Because bankruptcy was not clearly imminent on the date of the leveraged buyout, the district court properly valued Jeannette's assets on a going concern basis. In applying this valuation standard, the district court did not err in finding that Jeannette's PP & E was worth at least $5–6 million on July 31, 1981.

Nor was Jeannette rendered insolvent in the equity sense. This follows from the district court's finding that Jeannette was not left with an unreasonably small capital because the concept of unreasonably small capital under § 5 of the UFCA denotes a financial condition short of equitable insolvency under § 4. In analyzing the adequacy of Jeannette's capital after the leveraged buyout, the district court properly considered the availability of Jeannette's line of credit with Security Pacific and focused on the reasonableness of the parties' projections.

The district court found the parties' projections reasonable. We find no error. Both Brogan's and Ngan's projections were based on a historical analysis of Jeannette's performance and a month-by-month assessment of the company's ability to operate successfully in the year following the acquisition. Jeannette's actual performance in the five months after the leveraged buyout supports the finding that defendants' projections were reasonable.

Although prudence dictates incorporation of some margin for error, we agree with the district court that the extent of Jeannette's decline in sales in 1982, resulting from increased foreign and domestic competition, was not foreseeable at the time of the leveraged buyout. Thus, we agree that ultimately Jeannette's failure was caused by the decline in sales rather than a lack of capital.

Finally, the district court did not err in finding that defendants did not intend to defraud creditors of Jeannette. Even assuming that parties are deemed to have intended the natural consequences of their actions, it follows that if Jeannette's demise was not clearly imminent as of the date of the leveraged buyout and the leveraged buyout was not constructively fraudulent, the leveraged buyout was not intentionally fraudulent.

V

For the foregoing reasons, we will affirm the district court's order entering judgment for defendants.

UNITED STATES of America, Plaintiff-Appellee,

v.

Malcolm FRAZIER, Defendant-Appellant.

No. 91-5865.

United States Court of Appeals, Fourth Circuit.

Argued April 10, 1992.

Decided June 12, 1992.

Defendant was convicted in the United States District Court for the Southern Dis-

any such provision. Rather, the WPCL imposes liability on statutory employers without exception under the WPCL. Thus, even under the majority's view that its result is consistent with the policy of the WPCL, which I reject, the majority should not read a bankruptcy exception into that act. Rather, it should heed the point we made so recently in *In re Barshak*, 106 F.3d 501, 506 (3d Cir.1997), that we "are not free to ignore the clear language of a Pennsylvania statute merely because by rewriting the statute we arguably would act consistently with a legislative policy." In fact, the majority's creation of a bankruptcy exception in the WPCL has frustrated the purpose of the Act because relegating the employees to a remedy against the corporate employer means that they can recover only as provided in a plan of reorganization or, as I explain below, not recover at all. This relegation almost surely will mean that the employees will not receive the payments due under the WPCL. Thus, I cannot understand why the majority suggests that this case merely involves a situation where the corporation is "temporarily stayed, by operation of the Bankruptcy Code," Maj. Op. at 640 n. 8, from paying the employees' claims. In fact, the employees' claims against Shenango largely have been discharged. Shenango itself makes this point clear for it explains in its brief that "the Former Employees hold allowed unsecured claims against Shenango's estate and pursuant to the Plan the claims were discharged except to the extent that they will receive pro rata payments under the confirmed Plan of reorganization in satisfaction of the Wage Claims." Br. at 3.

I also point out that there is no principled way to distinguish between large corporations in which claims against the statutory employers could be "staggering" and small one-person corporations. Thus, according to the logic of the majority opinion, if a small corporation owned and operated by a single person receives a discharge under Chapter 7 of the Bankruptcy Code, even if, as is likely, the owner is a statutory employer under the WPCL and is not in bankruptcy personally, he or she will be discharged from liability under the WPCL. After all, the Bankruptcy Code restrains a corporation being liquidated under Chapter 7 from using its funds as it sees fit just as its restrains a corporation reorganizing under Chapter 11 in its use of its funds. In such a case under Chapter 7 the employees may receive nothing on their WPCL claims even though the statutory employer has substantial assets. I cannot conceive that the legislature intended such a result.

For the foregoing reasons, I respectfully concur in part and dissent in part.

PITTSBURGH FOOD & BEVERAGE, INC., Appellant

v.

Lawrence F. RANALLO, Trustee for the estate of Pittsburgh Food & Beverage, Inc.; Integra Business Credit Company; Pitney Bowes Credit Corporation; Commonwealth of Pennsylvania Department of Revenue; Commonwealth of Pennsylvania Department of Labor & Industry; Emery Worldwide; American Flint Glass Workers Union; Kathryn O'Brien; Helen B. Schachte, Tax Collector for Mt. Pleasant Township, Pennsylvania and the Mt. Pleasant Area School District; Mt. Pleasant Township, Pennsylvania; Mt. Pleasant Area School District; Westmoreland County Tax Claim Bureau; Fayette Bank; Ford Motor Credit Co.

Nos. 95–3633, 95–3634.

United States Court of Appeals,
Third Circuit.

Submitted under Third Circuit LAR 34.1(a)
April 14, 1997.

Decided May 1, 1997.

After involuntary Chapter 11 petition was filed against debtor-corporation, trustee

sought approval for sale of assets of debtor's wholly-owned subsidiary. The Bankruptcy Court approved the sale and denied debtor's motion for stay of its order pending appeal. Debtor appealed and requested stay. The United States District Court for the Western District of Pennsylvania, Donald E. Ziegler, Chief Judge, denied the stay, the sale closed, and the court then granted motions of trustee and purchaser of assets to dismiss appeal. Debtor appealed. The Court of Appeals, Greenberg, Circuit Judge, held that appeal to district court was moot because that court could not have granted effective relief without affecting the validity of the sale.

Affirmed.

1. Bankruptcy ⚡3776.5(5)

Statute governing reversal or modification on appeal of authorization of sale or lease of estate property fosters policy of not only affording finality to bankruptcy court's judgments, but particularly to give finality to those orders and judgments upon which third parties rely. Bankr.Code, 11 U.S.C.A. § 363(m).

2. Bankruptcy ⚡3776.5(5), 3781

Chapter 11 debtor's appeal of asset sale approval to district court was moot because, due to debtor's inability to obtain stay pending appeal and subsequent sale of debtor's subsidiary's assets, district court could not have granted effective relief without affecting validity of sale, even though debtor challenged bankruptcy court's jurisdiction over subsidiary's assets. Bankr.Code, 11 U.S.C.A. § 363(m).

Gary W. Short, Phillip S. Simon, Pittsburgh, PA, for Appellant.

Robert G. Sable, Thomas M. Ferguson, Sable, Makoroff & Gusky, Pittsburgh, PA, for appellee, Lawrence F. Ranallo.

Morris D. Weiss, Weil, Gotshal & Manges, Miami, FL, for appellee American Glass, Inc.

Before: GREENBERG, ALITO, and SEITZ, Circuit Judges.

OPINION OF THE COURT

GREENBERG, Circuit Judge.

I. FACTUAL AND PROCEDURAL HISTORY

Appellant, Pittsburgh Food and Beverage, Inc. ("PFB"), appeals from two orders of the district court dismissing its appeal from a bankruptcy court order that approved a sale of assets of PFB's wholly owned subsidiary L.E. Smith Glass Company ("Smith") to American Glass, Inc. ("American"). American and the trustee of PFB, Lawrence Ranallo, are the appellees.

On February 20, 1995, creditors of PFB filed an involuntary bankruptcy petition seeking relief under Chapter 11 of the Bankruptcy Code against PFB. The bankruptcy court entered an order for relief against PFB on February 27, 1995, and on March 24, 1995, it appointed Ranallo trustee of PFB's bankruptcy estate. On July 8, 1995, Ranallo petitioned the bankruptcy court for approval of the sale of Smith's assets free and clear of all liens under 11 U.S.C. § 363(b). PFB, acting through its own attorney who was independent of the trustee and apparently represented its prior management, objected to the sale, but at a hearing on July 25, 1995, the bankruptcy court approved the sale to American for $5,725,000, a price which included an assumption of $3,508,190 of Smith's liabilities.

At the end of the hearing on July 25, 1995, PFB made an unsuccessful oral motion to the bankruptcy court for a stay of the order approving the sale pending appeal. On August 4, 1995, PFB appealed to the district court from the order approving the sale. PFB then requested a stay of the sale from the district court, but on August 14, 1995, the district court, after hearing argument, denied the motion. Then, on that same day, the sale of Smith's assets to American Glass closed. PFB has not appealed the denial of the stay by the district court.

In view of the closing of the sale, American and Ranallo filed motions in the district court to dismiss PFB's appeal on the grounds that the appeal was moot under 11 U.S.C. § 363(m) by virtue of PFB's inability to obtain a stay of the order approving the sale.

Section 363(m) provides that a reversal or modification of an order approving a sale under section 363(b) "does not affect the validity of [the] sale ... under such authorization to an entity that purchased ... such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale were stayed pending appeal." In two orders issued on October 16 and 17, 1995, the district court granted the motions and dismissed PFB's appeal. On November 15, 1995, PFB filed this appeal seeking a reversal of the orders of the district court dismissing the appeal and a remand to that court for consideration of the merits of PFB's appeal.

The bankruptcy court had jurisdiction under 28 U.S.C. § 157(b)(2)(N), and the district court had jurisdiction under 28 U.S.C. § 158(a). We have jurisdiction under 28 U.S.C. § 158(d) and exercise plenary review over the district court orders. *See In re Continental Airlines,* 91 F.3d 553, 557 (3d Cir.1996) (in banc), *cert. denied,* — U.S. —, 117 S.Ct. 686, 136 L.Ed.2d 610 (1997); *In re Swedeland Dev. Group, Inc.,* 16 F.3d 552, 559 (3d Cir.1994) (in banc).

II. DISCUSSION

PFB argues that its appeal to the district court was not moot, contending that Smith's assets were not property of the bankruptcy estate so that the Bankruptcy Code provisions governing sales of property of an estate and appeals from orders approving such sales are inapplicable in this case. PFB also claims that because Smith's assets were not property of the bankruptcy estate, the bankruptcy court did not have jurisdiction over the sale, so its order approving the sale was void and thus was not insulated from review in the district court. Finally, PFB contends that consummation of the sale did not render its appeal moot for, in its view, notwithstanding section 363(m) if the district court reversed the order approving the sale it could have granted PFB meaningful relief.

Ranallo first responds that Smith's assets were property of the bankruptcy estate. He argues, however, that we need not decide whether he is correct on this point because under section 363(m) PFB's inability to obtain a stay of the order approving the sale rendered the appeal to the district court moot even though PFB predicated the appeal on jurisdictional grounds. Ranallo also argues that the district court could not have granted effective relief even if PFB's appeal had been successful.

American contends that the appeal to the district court of the order approving the sale was moot under section 363(m). American, like Ranallo, argues that Smith's assets were property of the bankruptcy estate, and it also claims that we need not consider PFB's argument to the contrary because PFB did not obtain a stay pending appeal. Finally, American argues that section 363(m) does not require a finding that effective relief cannot be granted before an appeal properly may be dismissed. Rather, American contends that section 363(m) sets forth the only requirements for dismissal of the appeal: *i.e.,* that the bankruptcy court authorized the sale under section 363(b); the sale was proposed in good faith and made to a good faith purchaser; and the order approving the sale was not stayed pending appeal. American asserts that these criteria have been satisfied and thus section 363(m) bars appellate review of the bankruptcy court's order approving the sale. Alternatively, American contends that the appeal to the district court was moot because the district court could not have granted effective relief to PFB inasmuch as American and Ranallo consummated the sale during the pendency of the appeal.

[1] Section 363(b)(1) provides that the "trustee, after notice and a hearing, may ... sell ... other than in the ordinary course of business, property of the estate." We reiterate that section 363(m) then provides that "[t]he reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale ... of property does not affect the validity of a sale ... under such authorization to an entity that purchased ... such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale ... were stayed pending appeal." We have explained that section 363(m) fosters the "policy of not only affording finality to the judgment of the bankrupt-

cy court, but particularly to give finality to those orders and judgments upon which third parties rely." *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143, 147 (3d Cir. 1986) (internal quotation marks and citation omitted).

We also have recognized that section 363(m) is one of only two provisions in the Bankruptcy Code explicitly requiring a stay of a bankruptcy court order pending appeal. *See, e.g., In re Joshua Slocum Ltd.*, 922 F.2d 1081, 1085 (3d Cir.1990); *In re Highway Truck Drivers & Helpers Local Union 107*, 888 F.2d 293, 297 (3d Cir.1989). In *Highway Truck Drivers* we noted, however, that the absence of such a requirement in a code section would not necessarily relieve appellants of the burden to obtain stays because "in the context of bankruptcy proceedings ... '[g]enerally, an appeal will be dismissed as moot when events occur during the pendency of the appeal which prevent the appellate court from granting any effective relief.'" *Id.* at 297 (citations omitted). Many bankruptcy proceedings, particularly those involving operating businesses, are likely to include such events. *Cf. Swedeland*, 16 F.3d at 556 ("Not surprisingly, in the fluid situation presented by the ongoing construction of a major real estate project, events moved rapidly in the bankruptcy court.").

We seem not to have addressed conclusively in any published opinion the immediate consequences of an appellant's failure to obtain a stay of an order approving a sale on an appeal of that order. We, recently, however, addressed the other code provision which requires a stay pending appeal of a bankruptcy order: 11 U.S.C. § 364(e), which relates to appeals from orders creating liens with preferential position or authorizing debt against the bankruptcy estate under 11 U.S.C. § 364(d). *In re Swedeland Dev. Group, Inc.*, 16 F.3d 552. Section 364(e) provides:

> The reversal or modification on appeal of an authorization under [section 364] to obtain credit or incur debt, or of a grant under [section 364] of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

In *Swedeland* we held that section 364(e), by its terms, does not require dismissal of an appeal if the appellant does not obtain a stay. *Id.* at 559. We explained that section 364(e) "does not preclude a court from reversing an authorization absent a stay. What it limits is the effect of a reversal." *Id.* at 562 (footnote omitted). We found that the statute contemplated that the appeal might go forward in the absence of a stay for, as we explained, "how ... can [there] be a 'reversal or modification' of an order, if the appeal from the order has been dismissed." *Id.* at 559. Thus, we looked beyond section 364(e) to determine whether the appeal in *Swedeland* was moot, and in doing so we examined cases, principally Church of Scientology v. *United States*, 506 U.S. 9, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992), holding that appeals should not be dismissed as moot unless the court cannot grant any relief upon a reversal or modification of the order appealed. *Swedeland*, 16 F.3d at 559–60.

Swedeland is significant here because the language of section 363(m) with respect to a stay pending appeal is almost identical to that in section 364(e). Accordingly, we could apply *Swedeland* and hold that section 363(m) does not in itself require dismissal of an appeal where a stay is not obtained. Such a conclusion would require us to consider whether, in accordance with general principles of mootness pending appeal, the district court could have granted any effective relief if it modified or reversed the order approving the sale. However, *Swedeland*'s possible application in this case may be somewhat circumscribed. In *Swedeland* we noted that an analogy to section 363(m) in a case involving section 364(e) was "not particularly helpful because a consideration of whether a successful appellant can be granted effective relief upon the reversal of an order depends on the circumstances in each case." *Id.* at 560 n. 6. In particular, we explained that there were significant differences between a consummated sale and an executory lien: "Obviously it

might be more difficult to fashion effective relief in the case of a completed and unassailable sale or lease of a property than in a case involving a loan in which the transaction is partially executory." *Id.*

[2] We need not decide, however, whether we should construe section 363(m) as we construed section 364(e) in *Swedeland* because the outcome of this case would not differ whether we read section 363(m) to mandate dismissal based solely on PFB's failure to obtain a stay barring the closing of the sale or to require dismissal only because the district court could not have granted effective relief without affecting the validity of the sale. Clearly, an appeal which is moot under the second formulation, *i.e.,* a *Swedeland*-type analysis, also would be moot under a reading of section 363(m) requiring the dismissal of the appeal merely because the appellant did not obtain a stay pending appeal. Thus, we proceed here as we did in *Swedeland* inasmuch as our conclusion that the appeal was moot because the district court could not grant effective relief requires that we affirm its orders of dismissal.[1]

With the foregoing considerations in mind, we reiterate the parties' positions. PFB makes the following specific suggestions as to what relief the court could grant if the sale cannot be undone. It contends that the bankruptcy court, presumably on remand from the district court, can determine whether: (1) "the Trustee and American knew that the Bankruptcy Court did not have authority to sell these assets"; (2) "the Trustee's conduct depressed the value of the estate's interest in [American]"; (3) "the sale procedure discouraged significant offers and additional bidding"; and (4) "the value of the estate's interest in [American], if retained as a going concern under a confirmed plan, was substantially greater than the value received by the Debtor's estate through this sale." Br. at 18–19. PFB then indicates that, if warranted, the court could "fashion an appropriate equitable remedy." Br. at 19. This equitable remedy would require Ranallo or American "to reimburse [PFB] for the loss caused by their participation in the sale process." *Id.*

In response, Ranallo argues that there is no relief that could be granted and that PFB has not presented any evidence of how its requested relief could be quantified or effected. American responds to PFB's argument by pointing out that during the sale transaction American wire transferred more than $2.1 million to Ranallo; Smith conveyed its property to American by bill of sale and special warranty deed; and American assumed Smith's liabilities in excess of $3.5 million. Then, because of the debt assumptions, some of Smith's secured and unsecured creditors released Smith from certain liabilities. Additionally, third parties have extended credit to American. American argues that any relief granted would affect many third parties, and might do serious injustice to them. Finally, American contends that any relief awarded in effect would modify a term of the sale of assets (*e.g.,* if American "reimbursed" PFB, it would be paying a higher than agreed upon sale price) in violation of section 363(m). *See, e.g., In re The Charter Co.,* 829 F.2d 1054, 1056 (11th Cir. 1987) ("One cannot challenge the validity of a central element of a purchase, the sale price, without challenging the validity of the sale itself.").

We agree with Ranallo and American. PFB in making its suggestions does not accommodate the fact that section 363(m) does not say that absent a stay the reversal or modification of an order authorizing a sale

1. In *In re Continental Airlines,* 91 F.3d 553, we recently addressed the doctrine of equitable mootness in the bankruptcy context; this doctrine permits dismissal of an appeal " 'when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable.' " *Id.* at 559 (citation omitted). Obviously, equitable mootness is broader than mootness under a *Swedeland* analysis, and thus we need not consider *Continental Airlines* here. In this case we are concerned with mootness predicated on the statutory and prudential considerations of whether it is possible to grant relief as opposed to equitable considerations of the type involved in *Continental Airlines.* Thus, while *Continental Airlines* speaks of "prudential," "considerations," "reasons," or "factors" leading to a finding of mootness, *id.* at 559–60, "prudential" in that context relates to equitable mootness rather than mootness predicated on a court's inability to grant relief.

cannot lead to the nullification of a sale. Instead, section 363(m) provides that without a stay the reversal or modification "does not affect the validity" of the sale. Plainly, a finding against Ranallo as the trustee or American as the buyer on any of the inquiries that PFB proposes the bankruptcy court undertake ultimately leading to the imposition of the "equitable remedy" PFB seeks, though not nullifying the sale would affect its validity, as the inquiries all seek to demonstrate that the sale was flawed. For example, what would be the purpose in an appeal from an order approving a sale of a finding that Ranallo and American "knew that the Bankruptcy Court did not have authority to sell" Smith's assets other than to affect the validity of the sale? Furthermore, if the bankruptcy court, on remand from the district court, required Ranallo or American to pay PFB additional money, as PFB suggests that it could do, surely the court's order would affect the validity of the sale because the order would be founded on a holding that the sale price was inadequate. Thus, the appeal to the district court was moot.

PFB's argument that the bankruptcy court did not have jurisdiction over Smith's assets does not undermine our conclusion because section 363(m) does not distinguish between a challenge to an order approving a sale predicated on jurisdictional grounds and a challenge based on other grounds. We recognize that it might be claimed that a bankruptcy court usurped power so that even absent a stay, notwithstanding section 363(m), an order reversing an order approving a sale permissibly could affect the validity of the sale of assets. Such a case in theory could arise if the bankruptcy court approved the sale of assets not even colorably within its jurisdiction. But we are not concerned with that possibility as the bankruptcy court, at least arguably, had jurisdiction over Smith's assets which PFB indirectly owned through its ownership of Smith. Thus, we have no occasion to consider whether the bankruptcy court acted appropriately when it reached through Smith's corporate structure to approve a sale of its assets.

Opinions of other courts of appeals support our result. The Court of Appeals for the Seventh Circuit, in a case directly on point, has explained that "an appeal of a bankruptcy sale is moot if the stay required by [section] 363(m) is not obtained." *In re Sax,* 796 F.2d 994, 997 (7th Cir.1986) (footnotes and citations omitted). In *Sax,* the appellant, an entity with a claim on the debtor's yacht, challenged the sale of the yacht to another entity. The appellant argued that the yacht was not part of the debtor's estate so that its sale was not authorized under section 363(b). Therefore, according to the appellant, the bankruptcy court lacked the subject matter jurisdiction necessary to authorize the sale so section 363(m) did not apply. The court of appeals refused to address this jurisdictional argument, explaining that: "In the case of a bankruptcy sale, the failure to obtain a stay of the sale, pending appeal, allows the sale to be completed, thus preventing an appellate court from granting relief and thereby rendering the appeal moot." *Id.* at 997 (citation and internal quotation marks omitted).

Addressing the appellant's argument in *Sax* that the yacht was not property of the debtor's estate, the court indicated that appellant:

> misses the point. Section 363(m) does not say that the sale must be *proper* under § 363(b); it says the sale must be *authorized* under § 363(b). There is no doubt that when the bankruptcy court authorized the sale and ordered that the Yacht be turned over to the purchaser, it was acting under § 363(b). At this juncture, it matters not whether the authorization was correct or incorrect. The point is that the proper procedures must be followed to challenge an authorization under § 363(b). As stated earlier, § 363(m) and the cases interpreting it have clearly held that a stay is necessary to challenge a bankruptcy sale authorized under § 363(b).

Id. at 997–98 (footnote omitted).

The court went on to explain that appellant "essentially has asked us to create an exception such that a stay is required to challenge a § 363(b) authorized sale *except* when the appellant argues that the property did not belong to the debtor's estate. To create such an exception would seriously undermine the purpose of § 363(m) and could destroy the

rule altogether." *Id.* at 998; see also In re CGI *Indus., Inc.,* 27 F.3d 296, 299 (7th Cir. 1994).

The Court of Appeals for the Fifth Circuit also has considered a jurisdictional argument similar to that raised by PFB. In *In re Gilchrist,* 891 F.2d 559 (5th Cir.1990), the appellant appealed from an order of the district court dismissing as moot its appeal from the order of the bankruptcy court denying his motion for a new trial. The bankruptcy court initially had entered an order approving the sale of certain assets; the debtor neither appealed the order nor obtained a stay pending appeal. Two years later the debtor filed a motion for reconsideration, which the bankruptcy court denied. The debtor then appealed to the district court. The district court dismissed the appeal as moot under section 363(m).

The court of appeals affirmed the dismissal, explaining: "Section 363(m) patently protects, from later modification on appeal, an authorized sale where the purchaser acted in good faith and the sale was not stayed pending appeal. We have interpreted this section to moot an appeal in the absence of a stay." *Id.* at 560 (citation and footnote omitted). The court of appeals rejected the debtor's argument that section 363(m) should not apply because the bankruptcy court did not have jurisdiction over the sale:

> We pretermit the jurisdictional question because [the debtor] failed properly to obtain a stay or to attack the validity of the sale for more than two years after that sale occurred.... [The debtor's] failure to obtain a stay is fatal to his position, regardless of whether there was jurisdiction; he forfeited the opportunity to contest jurisdiction and cannot be heard to complain at this late date.

Id. at 561 (citing as support *In re Sax*). Similarly, PFB's argument attacking the jurisdiction of the bankruptcy court does not lead us to a different result than we would have reached if jurisdiction had not been an issue.

Other courts of appeals also have considered section 363(m) mootness and have concluded that a stay is required before a sale order can be challenged on appeal. *See United States v. Salerno,* 932 F.2d 117, 122–23 (2d Cir.1991) (where sale order not stayed and sale consummated, appeal is moot); *In re Stadium Management Corp.,* 895 F.2d 845, 847 (1st Cir.1990) ("[E]ffect of [section] 363(m) is that 'when an order confirming a sale to a good faith purchaser is entered and a stay of that sale is not obtained, the sale becomes final and cannot be reversed on appeal....' Absent a stay, the court must dismiss a pending appeal as moot because the court has no remedy that it can fashion even if it would have determined the issues differently.") (citations omitted); *In re The Charter Co.,* 829 F.2d at 1056 ("Because [section 363(m)] prevents an appellate court from granting effective relief if a sale is not stayed, the failure to obtain a stay renders the appeal moot.") (citations omitted); *In re Magwood,* 785 F.2d 1077, 1080 (D.C.Cir.1986) (under section 363(m), where no stay has been obtained, court cannot reverse sale of property to good faith purchaser); see also In re District 65, United Auto. *Aerospace and Agric. Implement Workers of America,* 184 B.R. 196, 200 (S.D.N.Y.1995) (Appeal is moot and "the court must dismiss the appeal of a sale once it has been consummated because there is no remedy that it can fashion even if it would have determined the issues differently.") (citation omitted); In re Vista Del Mar Assoc., *Inc.,* 181 B.R. 422, 424 (B.A.P. 9th Cir.1995) ("[W]hen an appellant fails to obtain a stay from an order that permits a sale of the debtor's asset, the appeal will be rendered moot regardless of whether the purchaser has taken irreversible steps following the sale.") (citation omitted). While these cases have not necessarily followed our methodology they support our result.

It is clear from section 363(m) and the case law that because of PFB's inability to obtain a stay of the bankruptcy court's order approving the sale of Smith's assets, the district court was unable to grant effective relief to PFB without affecting the validity of the sale. Thus, PFB's appeal to the district court was moot, and that court properly dismissed the appeal.

III. CONCLUSION

The orders of October 16 and October 17, 1995, will be affirmed.

ATLANTIC COAST DEMOLITION & RECYCLING, INC., Plaintiff,

v.

BOARD OF CHOSEN FREEHOLDERS OF ATLANTIC COUNTY; Atlantic County Utilities Authority; Board of Chosen Freeholders of Camden County; Pollution Control Financing Authority of Camden County; Scott A. Weiner, Individually and in his capacity as Commissioner of New Jersey Department of Environmental Protection and Energy, Defendants,

Mercer County Improvement Authority; Hudson County Improvement Authority; Essex County Utilities Authority; Passaic County Utilities Authority; Cape May County Municipal Utilities Authority; Camden County Energy Recovery Associates, L.P., Intervenor–Defendants

C & A CARBONE, INC.; Bret Schundler, Mayor, in his capacity as Mayor of city of Jersey City; John Rooney, Mayor, in his capacity as Mayor of Borough of Northvale; National Solid Waste Management Association, New Jersey Chapter; Waste Management Association of New Jersey; City of Passaic; City of Paterson; Dwight Destefan, Mayor, Individually and in his capacity as Mayor of the Township of River Vale, Plaintiffs,

v.

Robert C. SHINN, Jr., Individually and in his capacity as Commissioner of New Jersey Department of Environmental Protection and Energy; New Jersey Department of Environmental Protection and Energy; Larry J. McClure, Individually and in his official capacity as Executive Director of the Bergen County Utilities Authority; Bergen County Utilities Authority; Mark Guarino, Individually and in his official capacity as Director of the Bergen County Health Department; Bergen County Health Department; Kenneth Blane, Individually and in his official capacity as Executive Director of the Hudson County Improvement Authority; Hudson County Improvement Authority; Carol Ann Wilson, Individually and in her official capacity as Director of the Hudson County Health Department; William P. Schuber, Individually and in his official capacity as County Executive for Bergen County; Robert C. Janiszewski, Individually and in his official capacity as County Executive for Hudson County; Passaic County Utilities Authority; Anthony Ross, Individually and in his capacity as Executive Director; Nicola R. Didonna, Individually and in his capacity as County Executive for the County of Passaic.

National Solid Wastes Management Association; Waste Management Association of New Jersey; and C & A Carbone, Appellants in 96–5567.

New Jersey Department of Environmental Protection; Scott A. Weiner; and Robert C. Shinn, Jr., Commissioner, Appellants in 96–5568.

Cape May County Municipal Utilities Authority ("CMCMUA"), Appellants in 96–5569.

Essex County Utilities Authority; Hudson County Improvement Authority; Mercer County Improvement Authority; and Passaic County Utilities Authority, Appellants in 96–5570.

Nos. 96–5567 to 96–5570.

United States Court of Appeals, Third Circuit.

Argued Dec. 17, 1996.

Decided May 1, 1997.

Out-of-state waste processing facilities and businesses engaged in collection and dis-

IN RE: TRUSTEES OF CONNEAUT LAKE PARK, INC., Debtor–in–Possession.

Park Restoration, LLC, Plaintiff,

v.

Summit Township, a Municipal Corporation; The Trustees of Conneaut Lake Park, a Charitable Trust; Crawford County, a Political Subdivision; The Tax Claim Bureau of Crawford County; and The Conneaut School District, Defendants.

Bankruptcy No. 14–11277–JAD
Adversary No. 15–1010–JAD

United States Bankruptcy Court,
W.D. Pennsylvania.

Signed December 22, 2015

Background: Company that held leasehold interest in beach club and had elected to insure debtor's interest as fee owner of club brought adversary proceeding seeking declaratory judgment regarding the relative rights of company, debtor, and certain tax creditors of debtor as to fire insurance proceeds. Parties cross-moved for summary judgment.

Holdings: The Bankruptcy Court, Jeffery A. Deller, Chief Judge, held that:

(1) debtor did not have a claim to fire insurance proceeds;

(2) tax creditors were entitled to be paid from fire insurance proceeds; and

(3) payment of fire insurance proceeds to tax creditors did not violate takings clause of federal or Pennsylvania constitution.

Ordered accordingly.

1. Insurance ⚷1790(1)

Under Pennsylvania law, a person need not have any property interest in the subject matter insured, and has an insurable interest in property if he holds such relation to the property that its destruction by the peril insured against involves pecuniary loss to him.

2. Insurance ⚷2129, 3443

Under Pennsylvania law, debtor that was fee owner of beach club was not an insured under property protection insurance policy, by which company that held leasehold interest in beach club had elected to insure debtor's ownership interest, and therefore did not have a claim to fire insurance proceeds, as company was the sole named insured, and petition for interpleader filed by insurer in state court referenced only company as the insured party under the policy and did not refer to debtor as an additional named insured nor did the petition mention debtor as having any rights of the insured.

3. Insurance ⚷3446

Under Pennsylvania law, tax creditors of debtor that was fee owner of beach club were entitled to be paid from fire insurance proceeds under property protection insurance policy by which company that held leasehold interest in beach club had elected to insure debtor's ownership interest. 40 Pa. Stat. Ann. § 638.

4. Statutes ⚷1111

With language of statute being clear and unambiguous, the court must adhere to the plain meaning of the applicable language.

5. Constitutional Law ⚷990

There is a strong presumption that Pennsylvania statutes duly and appropriately enacted by the legislature and signed into law by the executive branch are constitutionally sound.

6. Constitutional Law ⚩990, 1002

A statute is not to be declared unconstitutional unless it clearly and plainly violates the Pennsylvania Constitution and all doubts are to be resolved in favor of finding that the legislative enactment passes constitutional muster.

7. Eminent Domain ⚩81.1

To succeed on a takings claim, a plaintiff must demonstrate that the state's action affected the plaintiff's legally cognizable properly interest. U.S.C.A. Const. Amends. 5, 14.

8. Eminent Domain ⚩2.1

There is no set formula for determining when governmental action constitutes a taking; to the contrary, courts must engage in a factual inquiry to determine whether a taking has been effected. U.S.C.A. Const.Amends. 5, 14.

9. Eminent Domain ⚩2.1

In ascertaining whether a taking has affected a property interest, relevant considerations include the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations, and the nature of the action; while a physical invasion of land is more likely to constitute a taking, a public program adjusting the benefits and burdens of economic life to promote the common good ordinarily will not be compensable. U.S.C.A. Const. Amends. 5, 14.

10. Eminent Domain ⚩2.5

Payment of fire insurance proceeds to tax creditors of debtor that was fee owner of beach club under property protection insurance policy, by which company that held leasehold interest in beach club had elected to insure debtor's ownership interest, did not violate takings clause of federal or Pennsylvania constitution; distribution of the insurance proceeds first to tax creditors was something that company had voluntarily agreed to accept in its insurance policy at its inception, which stated unambiguously that "[t]his policy conforms to the laws of the state in which your principal office is located" and further stated that the insurer would adjust all losses and pay company unless some other person was legally entitled to receive payment, and tax creditors were always legally entitled to receive payment. U.S.C.A. Const.Amends. 5, 14; Pa. Const. art. 1, § 10.

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MEMORANDUM OPINION

Jeffery A. Deller, Chief U.S. Bankruptcy Judge

This adversary proceeding is a civil action that was removed to this Court from the Court of Common Pleas of Crawford County, Pennsylvania.

This adversary proceeding seeks a declaratory judgment regarding the relative rights of the Trustees of Conneaut Lake Park, Inc. (the "Debtor"), Park Restoration, LLC (the "Plaintiff") and certain tax creditors of the Debtor (specifically Summit Township, Crawford County, the Tax Claim Bureau of Crawford County and

Conneaut School District (collectively, the "Taxing Authorities")) as to fire insurance proceeds in the original amount of $611,000.

This Court has subject-matter jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b), and this action is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A),(E), (K), (M) and (O).

Procedurally, the parties seek a final determination of this matter by way of dueling Motions for Summary Judgment. The Court describes the motion practice as "dueling" because the Taxing Authorities filed their own Motion for Summary Judgment (which was met with opposition by the Plaintiff). In turn, the Plaintiff filed its Motion for Summary Judgment which received opposition from both the Debtor and the Taxing Authorities.

Because the Plaintiffs claim to the insurance proceeds rests, in part, upon a Constitutional challenge to a state statute, the matter was certified to the Attorney General of the Commonwealth of Pennsylvania pursuant to 28 U.S.C. § 2403. The Commonwealth, through its Attorney General, subsequently filed various response briefs in opposition to the Plaintiffs Motion for Summary Judgment.

After briefing was completed and the Court having conducted numerous hearings, the dueling motions are now ripe for determination.

For the reasons that are set forth below, the Court shall enter an order that grants partial summary judgment in favor of the Plaintiff and grants partial summary judgment in favor of the Taxing Authorities. Towards that end, the Court finds that no genuine issue of material fact exists and that a judgment as a matter of law is appropriate insofar as: (a) the Taxing Authorities are entitled to be paid $478,260.75 of the Insurance Proceeds (as defined in footnote 1 below); and (b) the Plaintiff is entitled to the remaining Insurance Proceeds that are held in the registry maintained by the Clerk of the United States Bankruptcy Court for the Western District of Pennsylvania.[1]

I.

A fair reading of the pleadings and briefs filed by all of the parties in this case is that the parties concede that (a) the material facts are not in dispute, and (b) this case is ripe for determination according to the standards by which federal courts enter summary judgment. For the sake of completeness, however, this Court has undertaken an independent review of the record and agrees that this case is ripe for summary judgment.

II.

The standard upon which federal courts determine motions for summary judgment is found at Fed.R.Civ.P. 56 (which is incorporated into bankruptcy proceedings by operation of Fed.R.Bankr.P. 7056). This rule states, in pertinent part, as follows: "the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the

1. By Order dated April 21, 2015, the total amount of $613,879.95 was transferred from the Court of Common Pleas of Crawford County into the registry maintained by the Clerk of the United States Bankruptcy Court for the Western District of Pennsylvania. The amount of insurance proceeds originally was $611,000. Presumably some sort of interest accrued on the funds in the state system. Parties, however, are not entitled to any interest on funds maintained in the registry of the Clerk of the United States Bankruptcy Court. *See Leider v. United States*, 301 F.3d 1290 (Fed.Cir.2002). As such, the term "Insurance Proceeds" as used in this Memorandum Opinion and any accompanying Order shall refer to the amount of funds deposited into the Clerk's registry, which is $613,879.95.

movant is entitled to judgment as a matter of law." *See* Fed.R.Civ.P. 56(a).

When considering a motion for summary judgment, the court should "(i) resolve conflicting evidence in favor of the nonmovant, (ii) not engage in credibility determinations, and (iii) draw all reasonable inferences in favor of the nonmovant." *Fuentes v. Perskie,* 32 F.3d 759, 762 n. 1 (3d Cir.1994).

The moving party also has the initial burden of pointing out evidence which the moving party believes entitles it to judgment as a matter of law, after which the nonmoving party must "respond by pointing to sufficient cognizable evidence to create material issues of fact concerning every element as to which the nonmoving party will bear the burden of proof at trial." *Id.* (*citing Davis v. Portline Transportes Maritime Internacional,* 16 F.3d 532, 536 & n. 3 (3d Cir.1994)).

To prevail on a motion for summary judgment, "the non-moving party must present more than a mere scintilla of evidence; there must be evidence on which the jury could reasonably find for the [nonmovant]." *Jakimas v. Hoffmann–La–Roche, Inc.,* 485 F.3d 770, 777 (3d Cir.2007)(quotation marks omitted, and quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

With these standards in mind, the Court analyzes the dueling motions for summary judgment and determines that relief is appropriate given the state of the law and the uncontested facts presented to the Court.

III.

The facts of this case are not in genuine dispute; nor are the facts overly complicated.

In a nutshell the Plaintiff managed and operated what is commonly known as the "Beach Club," which was situated on the Debtor's property at or near the shore of Conneaut Lake. (*See* Response to Motion for Summary Judgment at ¶ 10 filed at Dkt. # 35).[2]

The Beach Club Management Agreement dated November 24, 2008 has been described by some of the parties as being akin to a lease of the Beach Club, but recently the parties have waffled as to this characterization. (*Compare id.* (denying lease nature of transaction) with the Complaint for Declaratory Judgment at ¶ 8 and Amended Complaint for Declaratory Judgment at ¶ 10 and filed at Dkt. # 1 (acknowledging lease nature of transaction); *see also* Debtor's Answer and New Matter at ¶¶ 8 and 9, and Crawford County Tax Claim Bureau Answer and New Matter at ¶ 10 (suggesting that the Plaintiff leased the Beach Club from the Debtor).

What is not in dispute is that at all times relevant hereto (a) the Debtor was the fee owner of both the subject real estate and Beach Club on which it sits, and (b) the Plaintiff had physical control (i.e., possession) of the Beach Club for the term described in the Beach Club Management Agreement.[3] (Response to Motion for Summary Judgment filed at Dkt. # 35; *see also id.* at Ex. A).

In connection with its control and use of the Beach Club, the Plaintiff obtained a policy of insurance from Erie Insurance Exchange which included "Property Pro-

2. Unless expressly stating otherwise, all references to "Dkt. #___" in this Memorandum Opinion shall refer to the document number as appearing on the Clerk's docket report for Adversary Proceeding No. 15–1010–JAD.

3. The Beach Club Management Agreement had a term of occupancy of twenty (20) years.

tection" covering "Buildings" in case of fire damage in the amount of $611,000. (*See* Motion for Summary Judgment filed at Dkt. # 30 at ¶ 12). Although the Plaintiff had the option of purchasing coverage for "Income Protection," it declined to do so. (*See* Renewal Certificate attached as Ex. C (docketed as Ex. B) to the Reply Brief in Support of Plaintiffs Motion for Summary Judgment filed at Dkt. # 53)(reflecting no "Income Protection").

On August 1, 2013, the Beach Club was completely destroyed by fire. (*See* Motion for Summary Judgment filed at Dkt. # 30 at ¶ 13). As a result of the destruction, the Plaintiff submitted a claim for the proceeds of the underlying insurance policy with Erie Insurance Exchange. (*Id.* at ¶ 14). At that juncture, the Taxing Authorities were owed outstanding taxes on the real estate in the amount of $478,260.75. (*Id.* at 18–23).

Erie Insurance Exchange, in turn, indicated that it was going to comply with 40 P.S. § 638 (the "State Statute"). It did so because the Tax Collector of Summit Township presented Erie Insurance Exchange with a certificate specifying that the Beach Club property remained subject to the outstanding tax obligations of the Taxing Authorities in the amount of $478,260.75. (*Id.* at 115).

The State Statute provides that an insurance company presented with "a claim of a named insured for fire damage to a structure located within a municipality" may not pay such a claim in excess of $7,500 without first receiving a "certificate" explaining whether "delinquent taxes, assessments, penalties or user charges against the [insured] property" are owed to the municipality. *See* 40 P.S. § 638(a), (b)(1)(i)-(ii). After receiving a "certificate and bill" indicating that the covered property remains subject to a municipal tax liability, the State Statute further provides that an insurance company must "return the bill to the [municipal] treasurer and transfer to the treasurer an amount from the insurance proceeds necessary to pay the taxes, assessments, penalties, charges and costs shown on the bill." *Id.* at § 638(b)(2)(ii).[4]

Notwithstanding the express terms of the State Statute, the Plaintiff disputed (and continues to dispute) payment of any of the Insurance Proceeds to the Taxing Authorities, and commenced an action against them, the Debtor and Erie Insurance Exchange on September 10, 2013 in the Court of Common Pleas of Crawford County, Pennsylvania.

In the action, the Plaintiff sought a declaration that the delinquent taxes owed by the Debtor did not entitle the relevant Taxing Authorities to any of the Insurance Proceeds otherwise payable to the Plaintiff under the applicable policy. Erie Insurance Exchange then filed an interpleader action in the Court of Common Pleas, and the funds were deposited with the state trial court.

After the commencement of the Debtor's bankruptcy case on December 4, 2014, the declaratory judgment action was removed to this Court by way of a Notice of Removal that was filed on February 3, 2015. (Dkt.# 1). Erie Insurance Exchange was then stricken from the caption of this case because it had previously interpleaded the funds with the Court of Common Pleas and was previously dismissed as a party to

4. The State Statute applies "only to municipalities that have adopted an ordinance authorizing the procedure set forth" therein, and "only to fire losses [occurring] after the effective date of the ordinance." *See* 40 P.S. § 638(h). The Board of Supervisors of Summit Township, Pennsylvania adopted such an ordinance on November 1, 1997. (*See* Response to Motion for Summary Judgment at ¶ 19 filed at Dkt. # 35).

the lawsuit by way of an order of the state court dated December 9, 2013 (which was well prior to the commencement of the Debtor's bankruptcy case and the filing of the Notice of Removal). (Dkt.# 15).

IV.

The parties to this lawsuit do not dispute that if the State Statute is to be enforced as written, the Taxing Authorities should be paid $478,260.75. This, however, is the limit of where the parties agree.

The Plaintiff disputes the application of the State Statute as written. The Plaintiff contends that the State Statute applies solely to those situations where the fee owner of the property is the insured and where the tax liabilities at issue are the financial responsibility of the owner as well. Stated in other words, the Plaintiff contends that the applicability of the State Statute does not extend to situations where the insured neither owns the property nor where the tax obligation in the first instance is the primary financial responsibility of some party other than the named insured. The Plaintiff contends that to construe the State Statute otherwise would result in a "gratuitous confiscation" of the Insurance Proceeds in violation of the Takings Clause found in both the Fifth Amendment of the United States Constitution and in Article I, Section 10 of the Pennsylvania Constitution.

The Debtor and the Taxing Authorities contend that the State Statute applies to the undisputed facts of this case (i.e., that the Insurance Proceeds are first payable to the Taxing Authorities) and that the application of the State Statute according to its plain and ordinary meaning does not run afoul of the Takings Clause(s) found in the U.S. and Pennsylvania Constitutions. The Commonwealth of Pennsylvania joins in this contention as well.

In addition, the Debtor further claims that the Plaintiff is entitled to none of the Insurance Proceeds after payment to the Taxing Authorities (despite the fact that the Plaintiff bought and paid for the insurance). In this regard, the Debtor contends that the beneficiary of the policy is the Debtor (and not the Plaintiff) because the Plaintiff elected to insure the interests of the Debtor as "Owner" of the Beach Club in question. Thus, the Debtor requests payment of any remaining Insurance Proceeds above and beyond the $478,260.75 due the Taxing Authorities.

Each of the arguments of the parties are addressed below and in the following order: (a) Whether the Debtor should be paid any proceeds as an insured under the policy in question; (b) Whether the State Statute in question provides for the payment of the Debtor's tax obligations to the Taxing Authorities; and (c) Whether the application of the State Statute to the facts and circumstances of this case is contrary to the Takings Clauses found in the U.S. and Pennsylvania Constitutions.

(a). Absent Application of the State Statute, the Insurance Proceeds Would be Payable to Park Restoration, LLC as it is the Insured Under the Policy

If the plain language of the insurance policy provides that the Insurance Proceeds are payable to the Debtor, the outcome of this declaratory judgment action is simple—that is the Insurance Proceeds would be the Debtor's subject to the claim of the Taxing Authorities. If this were the outcome, the parties also agree that no Constitutional question would be posed by this contested matter.

To short circuit this case, this is exactly what the Debtor has asserted. In summary, the Debtor argues that the Plaintiff elected to insure the Debtor's interest as the fee owner of the Beach Club. The

Debtor further argues that because the Plaintiff elected to insure the Debtor's ownership interest, the Insurance Proceeds are payable to or for the benefit of the Debtor. In support of this contention, the Debtor cites not the insurance policy itself. Rather, the Debtor cites the Renewal Certificate issued by Erie Insurance Exchange. (*See* Renewal Certificate attached as Ex. C (docketed as Ex. B) to the Reply Brief in Support of Plaintiff's Motion for Summary Judgment filed at Dkt. # 53). The Debtor's argument in this regard is not persuasive.

[1] To avoid confusion, the Court first observes that it is possible for the Plaintiff to obtain an insurable interest even though it was not the fee owner of the Beach Club. The Court reaches this conclusion because Pennsylvania law provides that "a person need not have any property interest in the subject matter insured and that a person [has] an insurable interest in property 'if he holds such relation to the property that its destruction by the peril insured against involves pecuniary loss to him.'" *A.K. Nahas Shopping Ctr., Inc. v. Reitmeyer (In re Nahas),* 161 B.R. 927, 931 (Bankr.W.D.Pa.1993)(citing *Commonwealth v. Rodebaugh,* 102 Pa.Cmwlth. 592, 519 A.2d 555, 563 (1986)). Pennsylvania courts have also held that it "is an elementary principal of insurance law that an insurable interest exists in any party who would be exposed to financial loss by the destruction of certain property." *Kellner v. Aetna Casualty and Surety Co.,* 605 F.Supp. 331, 333 (M.D.Pa.1984).

Clearly under these standards, the Plaintiff has an insurable interest. Support for this conclusion can be found in both the Beach Club Management Agreement and the applicable insurance policy.

As to the Beach Club Management Agreement, the Plaintiff had a significant interest in the Beach Club. Specifically, the Beach Club Management Agreement granted to the Plaintiff operational control (which is a euphemism for possession) [5] of the Beach Club premises and business for a twenty year period, commencing on or about November 24, 2008. Recognizing the financial importance of this asset, and even though the Plaintiff's interest does not rise to the level of fee ownership, the Plaintiff sought to protect its investment and its rights under the Beach Club Management Agreement by purchasing and paying for a casualty insurance policy issued by Erie Insurance Exchange.

That policy-called an Ultraflex Package Policy-states that "[i]n return for [Plaintiffs] timely premium payment, [Plaintiffs] compliance with all of the provisions of this policy, and [Plaintiffs] signing of a 'Subscriber's Agreement' ... we [i.e., Erie Insurance Exchange] agree to provide the coverages ***you*** have purchased." (*See* Exhibit A, p. 2, attached to the Declaration of Francis Murrman, Esq. at Dkt. # 52)(emphasis added).

The policy further reflects that payment of proceeds under it will be made to "you," which is defined in the policy to be the named insured under the policy. (*Id.* at pp. 13, 37, 74, and 100). Of course, the named insured is the Plaintiff.

It is true that the policy also provides that "We [i.e., Erie Insurance Exchange] will pay you unless some other person is named in the policy or is legally entitled to receive payment." (*Id.* at p. 37). The Debtor, however, has not pointed to any

5. The Debtor even acknowledges such in its brief where it admits that "Plaintiff was in possession, using, and occupying the Beach Club at the time of the August 1, 2013 fire." (*See* Debtor's Brief in Opposition to Motion for Summary Judgment at p. 7 and filed at Dkt. # 42).

provision in the policy where it is a named insured; nor has the Debtor cited any compelling legal authority upon which bases its claim of entitlement to the Insurance Proceeds. Rather, the Debtor rests its case upon the Renewal Certificate issued by Erie Insurance Exchange as opposed to the policy document itself.[6]

The Debtor's reliance on the Renewal Certificate can be summarized by the following syllogism: One, the insured property was the "Building;" two, the insured interest covered by the policy is that of "Owner;" three, because the Plaintiff was not the "Owner" of the "Building," the Plaintiff is not entitled to any of the Insurance Proceeds; and four, because the Debtor is the "Owner" of the "Building," the Debtor must be recognized as the true insured under the policy even though the policy was bought and paid for by the Plaintiff.

At the surface, the syllogism propounded by the Debtor does seem logical. However, once one digs under the surface and examines the circumstances closely, the syllogism fails. In fact, examination of the Renewal Certificate itself results in the Court finding flaws in the Debtor's argument.

The Renewal Certificate that is being relied upon by the Debtor to make a claim to the insurance proceeds is a renewal certificate issued by Erie for the policy period in which the fire occurred. The Renewal Certificate covering a policy period of May 21, 2013 to May 21, 2014 states unequivocally that the Plaintiff, Park Restoration LLC, is the sole named insured. (*See* Doc. # 42, Exhibit 1).

The Renewal Certificate also states that it is "subject to all applicable terms of the policy and attached forms and endorsements," and that "[t]he insurance applies to those premises described as per the attached supplement declarations." (*Id.* at p. 2). The "attached supplemental declarations" further state that the location of the premises as "12324 Lake Street," that the occupancy/operations is the "Beach Club Restaurant," and that the "Owner" under the Renewal Certificate is the "Interest of Named Insured in Such Premises." (*Id.* at p. 3). Obviously, the "Named Insured" is the Plaintiff, as reflected on the very first page of the Renewal Certificate. (*Id.* at p. 2).

Given these plain terms of the Renewal Certificate, it is quite clear that Erie Insurance Exchange and the Plaintiff intended that the Plaintiff be the named insured under the applicable policy renewal and not the Debtor.

Notwithstanding this fact, the Debtor is now attempting to have itself treated as an insured by contending that the use of the word "Owner" on the Renewal Certificate catapults it into insured status. However, the use of the word "Owner" in the Renewal Certificate does not change the fact that the Plaintiff is the sole named insured, and does not confer an interest to the Debtor under the policy in question.

The use of the word "Owner" appears to connote that the Plaintiff has some sort of property interest in the premises—which is true. The Plaintiff had a possessory interest for a term of twenty (20) years under the Beach Club Management agreement which is akin to either a leasehold interest in the property or a license with respect to the same. The Plaintiff even admits in its Complaint for Declaratory Relief that "the 'Beach Club Management

6. A copy of the Renewal Certificate is attached to this Memorandum Opinion at Appendix A.

Agreement' is essentially a lease of the premises." (*See* Complaint for Declaratory Relief at ¶ 8 and Amended Complaint for Declaratory Relief at 10 and filed at Dkt. # 1). Additionally, the answers and new matter filed by the Debtor and certain of the Taxing Authorities also appear to concede that the Plaintiff held some sort of leasehold interest in the Beach Club premises. (*See e.g.,* Debtor's Answer and New Matter at ¶¶ 8 and 9, and Crawford County Tax Claim Bureau Answer and New Matter at ¶ 10).

The fact of the matter is that the Renewal Certificate expressly states that the renewal was subject to all applicable terms of the policy and attached forms and endorsements. *Couch on Insurance* states:

> In the absence of a clear provision in the policy defining the nature of the renewal, some courts regard the renewed or renewal contract as though it were merely a continuation or extension of the original contract. By this view, the renewal of a policy continues it in force without interruption, and the renewal certificate is simply a contract to continue in force a preexisting policy of insurance. Where the policy of insurance is in a sense 'automatically' renewed when the insured pays an additional premium, the parties are deemed bound by the original contract of insurance.

2 *Couch on Ins.* (3d Ed.) § 29:35 (citations omitted).

In the instant case, the insurance policy references a renewal certificate as an indication that the policy is being renewed for another policy period. Because the Renewal Certificate was simply a contract to continue in force the preexisting insurance policy, the Court finds that the inclusion of the word "Owner" in the Renewal Certificate did not change the fact that the Plaintiff was the sole named insured. This conclusion is appropriate because, as set forth above, the policy expressly provides coverage for the benefit of "you," provides that payment of proceeds will be made to "you," and it is not in dispute that the term "you" in the policy itself means that payments shall be made to the Plaintiff.

Case law provides additional support for this conclusion. In *Summit Bank & Trust v. Am. Modern Home Ins. Co.,* 12–cv–02395, 2013 WL 1294273 (D.Colo. Mar. 27, 2013), the defendant insurance company moved to dismiss the bad faith complaint on the grounds that plaintiff had no insurable interest since the plaintiff was not a named insured on the underlying policy.

The plaintiff in *Summit Bank* asserted entitlement to recovery as an additional insured because a certificate of insurance had listed the insured as the "Insured/Borrower." The court, noting that the certificate of insurance stated that it was being issued "pursuant to the master policy issued to [the] mortgagee," found that such language showed it was not intended to change the underlying policy, and explicitly stated that "[w]hen a certificate expressly states it was issued subject to a policy, the language of the underlying policy controls." *Id.* at *2 (*citing Taylor v. Kinsella,* 742 F.2d 709, 711 (2d Cir.1984)). Thus, "simply labeling a hitherto unnamed party as an Insured/Borrower' is not a legally sufficient expression of intent to modify the underlying policy." *Id. See also Quincy Mut. Fire Ins. Co. v. Imperium Ins. Co.,* C.A. No. 14–612, 2015 WL 1759146, *6–7 (E.D.Pa. Apr. 17, 2015), *appeal docketed,* No. 15–2104 (3d Cir. May 5, 2015) (relying in part upon *Summit* and *Taylor,* the court found that the insurance certificate did not bind the insurer where the certificate contained the standard language regarding issuance for information purposes only and listed a party as an additional insured that was not on the underlying policy).

Further, in *Mountain Fuel Supply Co. v. Reliance Ins. Co.,* 933 F.2d 882 (10th Cir.1991), the Tenth Circuit noted that "[a]bsent a plain manifestation of intent to incorporate a certificate or endorsement into an insurance policy, the policy will remain in force as originally written." 933 F.2d at 889 (*citing Taylor,* 742 F.2d at 711–12)(observing the "majority view" that where a certificate of insurance states that it does not intend to alter policy coverage it will not cause a change in the policy).

This Court's conclusion that the Debtor is not an insured under the policy is further corroborated by the Petition for Interpleader filed in the Court of Common Pleas by Erie Insurance Exchange (the "Petition for Interpleader"). That Petition for Interpleader references only the Plaintiff as the insured party under the Insurance Policy, and does not refer to the Debtor as an additional named insured. (Doc. # 1, Exhibit 11, ¶ 3). In fact, the Petition for Interpleader contains no mention of the Debtor as having any rights of the insured; nor does the Petition refer to any other particular party as the "Owner." (*See id.*).

[2] Based on the intent of the Plaintiff to be the only named insured, the language of the policy itself, and the language of the Petition for Interpleader, the Court finds that the Debtor is not an insured under the insurance policy and has not otherwise set forth a successful claim to the Insurance Proceeds. Thus, absent the application of 40 P.S. § 638, the extent of the Plaintiffs interest in the insurance proceeds extends to the full amount of the proceeds.

Of course, the application of 40 P.S. § 638 is subject to dispute. If the State Statute applies, Summit Township would be entitled to payment as a statutory and contractual matter because the policy in question states that "We [i.e., Erie Insurance Exchange] will pay you unless some other person is named in the policy or is legally entitled to receive payment." (*See* Exhibit A, p. 37, attached to the Declaration of Francis Murrman, Esq. at Dkt. # 52).

(b). The Taxing Authorities Are Entitled Under the State Statute to be Paid From the Insurance Proceeds

[3] The Plaintiff argues that 40 P.S. § 638 should be interpreted to apply only where the "named insured" is also the actual fee owner of the property insured against fire damage. The Plaintiff also seems to argue that the State Statute does not apply when the named insured is not the delinquent taxpayer in the first instance. The plain language of the statute, however, is at odds with the Plaintiff's construction of 40 P.S. § 638.

The Court reaches this conclusion because the statute unequivocally states:

> (a) No insurance company, association or exchange doing business in this Commonwealth shall pay a claim of a ***named insured*** for fire damage to a structure located within a municipality where the amount recoverable for the fire loss to the structure under all policies exceeds seven thousand five hundred dollars ($7,500) unless the insurance company, association or exchange is furnished with a certificate pursuant to subsection (b) of this section and unless there is compliance with the procedures set forth in subsections (c) and (d) of this section.

See 40 P.S. § 638(a)(emphasis added).

Subsection (b) (1)(ii) of the State Statute further defines a certificate as a "certificate and bill showing the amount of delinquent taxes, assessments, penalties and user charges ***against the property*** as of the date specified in the request that have not been paid as of the date of the certificate ...," while subsection (b)(2)(ii)

of the State Statute provides that upon receipt of such a certificate and bill, "the insurance company, association or exchange shall return the bill to the treasurer and transfer to the treasurer an amount from the insurance proceeds necessary to pay the taxes, assessments, penalties, charges and costs as shown on the bill." 40 P.S. § 638(b)(emphasis added). The language of § 638(b)(2)(ii) also specifically requires payment of the delinquent taxes "from the insurance proceeds."

The end result of all of these provisions of § 638 is that the statutory language clearly prohibits an "insurance company, association or exchange doing business in this Commonwealth" from paying "a claim of a ***named insured*** for fire damage to a structure located within a municipality" in the absence of a "certificate." The statute also does not further qualify its terms by requiring that the named insured be the "owner" of the structure destroyed by the fire. Nor does the statute limit the imposition of the tax claim against insurance proceeds payable to the entity primarily liable for the tax debt in question. Rather, the tax claim itself is levied "***against*** [the insured] ***property***" in question. As such, in the case *sub judice,* the claim of the Taxing Authorities is also *in rem* in nature and runs with the real property. In a practical sense by operation of the State Statute, the claim then attaches to any fire insurance proceeds payable to any named insured as opposed to being limited solely to the beneficial insured interests (if any) of the primarily liable taxpayer.

[4] Thus, the plain language of the State Statute does not lend itself to the construction argued by the Plaintiff. With the language being clear and unambiguous, the Court must "adhere to the plain meaning of the [applicable] language." *City of Philadelphia v. F.A. Realty Investors Corp.,* 95 A.3d 377, 383 (Pa. Commw.Ct.2014).

This Court's conclusion is further supported by the fact that the State Statute is to be "liberally construed to accomplish its purpose to deter the commission of arson and related crimes, to discourage the abandonment of property[,] and to prevent urban blight and deterioration." 40 P.S. § 638(k). In this regard, the purpose of the statute is analogous to the purpose of similar statutes adopted in other states. That is, to deter the "prevalent practice of burning the buildings and pocketing the insurance proceeds, leaving the taxing district with unpaid taxes and only a value-depleted property upon which to foreclose." *LMWT Realty Corp. v. Davis Agency, Inc.,* 85 N.Y.2d 462, 626 N.Y.S.2d 39,649 N.E.2d 1183, 1187 (1995).[7]

For all of these reasons, the Court concludes that the Taxing Authorities are, under the State Statute, entitled to be paid $478,260.75 from the Insurance Proceeds.

(c). Payment of $478,260.75 of the Insurance Proceeds to the Taxing Authorities Does Not Violate the Takings Clauses Set Forth in Both the U.S. Constitution and the Pennsylvania Constitution

[5, 6] There is a strong presumption that statutes duly and appropriately enacted by the legislature and signed into law by the executive branch are constitutionally sound. A statute is not to be declared unconstitutional unless it clearly and plainly violates the Constitution and all doubts are to be resolved in favor of finding that the legislative enactment passes constitutional muster. *Pension Benefit Guar. Corp. v. R.A. Gray & Co.,* 467 U.S. 717,

7. The cause of the fire at the Beach Club is unknown. The Court is not aware of any person having been charged with the crime of arson.

729, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984); *Mistretta v. United States,* 488 U.S. 361, 384, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989); *Heller v. Doe,* 509 U.S. 312, 320–21, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993); *Mabey Bridge & Shore, Inc. v. Schoch,* 666 F.3d 862, 876 (3d Cir.2012); *Commonwealth v. MacPherson,* 561 Pa. 571, 752 A.2d 384, 388 (2000); *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth,* 583 Pa. 275, 877 A.2d 383, 393 (2005); *Commonwealth v. Craven,* 572 Pa. 431, 817 A.2d 451, 454 (2003).

The Plaintiff argues that allowing the Taxing Authorities to be paid their unpaid taxes from the Insurance Proceeds results in a "gratuitous confiscation" of the Plaintiffs property without just compensation in violation of the Takings Clause(s) found in both the U.S. Constitution and the Pennsylvania Constitution. This Court disagrees.

The Takings Clause of the Fifth Amendment of the U.S. Constitution provides that "private property" shall not "be taken for public use without just compensation." U.S. CONST. amend. V. The specific limitations found in the Takings Clause apply to the States by virtue of their incorporation within the Due Process Clause. *Palazzolo v. Rhode Island,* 533 U.S. 606, 617, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001). The Due Process Clause of the Fourteenth Amendment, in turn, prohibits a State from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

The Pennsylvania Constitution also has its own version of the Takings Clause found at Article I, § 10. This provision of the Pennsylvania Constitution provides that "private property [shall not] be taken or applied to public use, without authority of law and without just compensation being first made or secured." PA. CONST. art. I, § 10. The Pennsylvania Supreme Court "has continually turned to federal precedent for guidance" in determining whether state action implicating "private property" violates the Takings Clause of the Pennsylvania Constitution. *United Artists' Theater Circuit, Inc. v. City of Philadelphia,* 535 Pa. 370, 635 A.2d 612, 616 (1993). As a result, the standards governing claims arising under the Takings Clause of the Fifth Amendment ordinarily control similar claims made under the Takings Clause found at Article I, Section 10 of the Pennsylvania Constitution. *Corman v. Nat'l Collegiate Athletic Ass'n,* 74 A.3d 1149, 1167 (Pa. Commw.Ct.2013).

[7] The existence of a constitutionally protected property interest is a preliminary requirement for any "takings" challenge. As the United States District Court for New Jersey observed, to "succeed on a takings claim, a plaintiff must ... demonstrate that the state's action affected [the plaintiffs] legally cognizable properly interest." *Am. Express Travel Related Servs. Co. v. Sidamon–Eristoff,* 755 F.Supp.2d 556, 577 (D.N.J.2010) (citing *Prometheus Radio Project v. F.C.C.,* 373 F.3d 372, 428 (3d Cir.2004)).

Moreover, there is:

> **[8, 9]** ...no set formula for determining when governmental action constitutes a taking....To the contrary, courts must engage in a factual inquiry to determine whether a taking has been effected. In ascertaining whether a taking has affected a properly interest, relevant considerations include the economic impact of the regulation on the claimant and ... the extent to which the regulation has interfered with distinct investment-backed expectations.... The nature of the action is another relevant consideration. While a physical invasion of land [is] more likely to constitute a taking, ... a public pro-

gram adjusting the benefits and burdens of economic life to promote the common good . . . ordinarily will not be compensable.

Am. Express Travel Related Servs., 755 F.Supp.2d at 577 (citations and quotations omitted)(citing *State of New Jersey v. U.S.,* 91 F.3d 463, 468 (3d Cir.1996), which quoted *Penn Cent. Transp. Co. v. City of New York,* 438 U.S. 104, 123, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978)).[8]

[10] With these standards in mind, a fundamental question presented by the litigation before the Court is whether a "taking" exists as a result of the payment of Insurance Proceeds over to the Taxing Authorities? The Court answers "no" to this question because no state action has affected Plaintiffs legally recognized property interests in a negative fashion under the facts of this case.

The Court reaches this conclusion because the distribution of the Insurance Proceeds first to the Taxing Authorities is something that the Plaintiff voluntarily agreed to accept in its insurance policy at its inception. Having agreed to such a distribution waterfall as to insurance proceeds, the Plaintiff can hardly claim to have had any "property" that was "taken" or "confiscated" by government action.

The Court's conclusion is particularly acute because the Plaintiff conveniently ignores the fact that the State Statute, as well as the implementing local ordinance, were well into existence long before the Plaintiff obtained its insurance policy from Erie Insurance Exchange.

The Plaintiff also conveniently ignores the fact that the policy in question states unambiguously that "[t]his policy conforms to the laws of the state in which your principal office is located." (*See* Exhibit A at p. 3, attached to the Affidavit of Francis Murrman, Esq. at Dkt. # 52). This provision is consistent with applicable law which provides that pre-existing statutory provisions pertaining to the subject matter of a contract are deemed to be incorporated within the terms agreed to by the contracting parties. *Clairton City School District v. Mary,* 116 Pa.Cmwlth. 376, 541 A.2d 849, 851 (1988). This means that the insurance policy *sub judice* incorporates the State Statute. *Coolspring Stone Supply, Inc. v. American States Life Ins. Co.,* 10 F.3d 144, 147–148 (3d Cir.1993); *see also First Nat'l Bank v. Flanagan,* 515 Pa. 263, 528 A.2d 134, 137–38 (1987).

The policy also states plainly and unequivocally that "We [i.e., Erie Insurance Exchange] will adjust all losses' with you [i.e., the Plaintiff]. We will pay you unless some other person . . . is legally entitled to receive payment." (*See* Exhibit A at p. 37, attached to the Affidavit of Francis Murrman, Esq. at Dkt. # 52). Of course, the Taxing Authorities were always legally entitled to receive payment, and the parties have conceded that the tax obligations to the Taxing Authorities date back to 1999 or earlier—which is long before the policy was issued by Erie Insurance Exchange.

8. Decisions involving "regulatory" takings may not necessarily be regarded as controlling precedent in cases involving "per se" takings. *See Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 535 U.S. 302, 321–325, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002). Regardless, whether the Plaintiff has a vested right in property, and whether that property was effectively taken is an issue in the case *sub judice,* as well in the cases where either a "per se" taking is alleged or where a "regulatory" taking is contended. Thus, the distinction between a "per se" taking and a "regulatory" taking is of no moment as to the case at bar because the dispositive point made in this Memorandum Opinion is that the Plaintiff did not have a vested interest in the $478,260.75 of Insurance Proceeds claimed by the Taxing Authorities.

(*See* Plaintiffs Motion for Summary Judgment at ¶ 27 and filed at Dkt. # 36).

These circumstances all indicate that at the time the Plaintiff purchased the policy in question, its rights to insurance proceeds were always subject to the claim of the Taxing Authorities. That fact never changed from the outset of the Plaintiff's economic relationship under the policy until the present. The Plaintiffs failure to establish any greater entitlement to the proceeds under its policy (and Pennsylvania law) is fatal to its assertion that payment of Insurance Proceeds to the Taxing Authorities would violate the Takings Clause(s) of the U.S. Constitution and the Pennsylvania Constitution.[9] *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413, 43 S.Ct. 158, 67 L.Ed. 322 (1922)(the Takings Clause operates to prevent the uncompensated destruction of "previously existing rights of property and contract.").

Stated in other words, and as articulated by the Commonwealth in its brief, "Given the relevant provisions of § 638 were incorporated within the terms of the insurance contract, [the Plaintiff] never acquired a vested right to the $478,260.75 owed to the taxing authorities at the time of the fire." (Supplemental Response of the Attorney General of Pennsylvania at p. 14 and filed at Dkt. # 67). This fact is distinguishable from *United States v. Rodgers,* 461 U.S. 677, 103 S.Ct. 2132, 76 L.Ed.2d 236 (1983), which is the case where the term "gratuitous confiscation" is mentioned.

United States v. Rodgers did not result in the invalidation of a statute. Rather, it involved a challenge to an IRS lien against entireties property for taxes due solely from the husband (and not the wife). The wife objected to a sale to satisfy the lien, claiming she had a vested interest in the property under applicable local homestead law. The Supreme Court authorized the sale to go forward, but recognized that the wife (who was not subject to any claim of the IRS) did have a vested interest in the whole of the encumbered property by virtue of state homestead law and would be entitled to compensation for her loss. The case at bar, however, as it relates to the Insurance Proceeds stands in stark contrast to *Rodgers* because the Plaintiffs interests in the $478,260.75 of the Insurance Proceeds never became vested in a constitutional Takings sense. The Court reaches this conclusion because, as set forth above, the Plaintiffs right to Insurance Proceeds was at all times relevant hereto subject to the claim of the Taxing Authorities.[10] Absent any vested and matured right to the $478,260.75, no gratuitous confiscation has occurred.

9. To the extent the Plaintiff is making a similar challenge on "substantive due process grounds," the Court does not find the Plaintiff's arguments to be convincing. The Due Process Clause prohibits a governmental entity from destroying a party's rights under a *preexisting* contract. *Kuehner v. Irving Trust Co.,* 299 U.S. 445, 451–452, 57 S.Ct. 298, 81 L.Ed. 340 (1937). The State Statute was in existence long before the policy was issued, and the policy itself incorporates the State Statute into its terms. As such, the State Statute is part of the contract from the outset. For the same reason, and to the extent the Plaintiffs papers could be construed to argue otherwise, any Contracts Clause challenge by the Plaintiff (under U.S. Const., Art. I, § 10) fails as well. *Keystone Bituminous Coal Assoc. v. DeBenedictis,* 480 U.S. 470, 502–503, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987).

10. *Cf. Kim v. Dome Entm't Ctr., Inc. v. Kim (In re Kim),* 748 F.3d 647 (5th Cir.2014) (constitutional argument limited to where property was acquired prior to adoption of the statute) and *Thaw v. Moser (In re Thaw),* 769 F.3d 366 (5th Cir.2014)(absent certain circumstances, Takings Clause claim weakened when plaintiff acquired property after the statute was enacted).

V.

In rendering its decision today, the Court recognizes that the Plaintiff may be of the belief that the outcome of these proceedings is unfair—for, after all, the Plaintiff paid the premiums for the policy that resulted in the Insurance Proceeds.

The aura of unfairness is not as bright as the Plaintiff strenuously argues. This is because the Plaintiff is receiving in this lawsuit exactly what it bargained for under the insurance policy. That is, it is receiving proceeds payable after payment of outstanding taxes.

Had the Plaintiff desired a result different than what is to occur here, it certainly had options. One such option was that it could have refused to enter into the Beach Club Management Agreement until such time the Debtor furnished to the Plaintiff evidence that all taxes were paid. Another such option was that the Plaintiff could have obtained business interruption insurance coverage or "Income Protection" (which appears to be outside the scope of 40 P.S. § 638) as opposed to mere "Property Protection" covering "Buildings." The Plaintiff, however, did neither of these things.

The claim of unjust enrichment is further vitiated by the commitments of the Plaintiff to the Debtor in the Beach Club Management Agreement. (*See* Plaintiff's Motion for Summary Judgment at Ex. B (docketed as Ex. C) and filed at Dkt. # 36). Those commitments include the fact that the Plaintiff was required to pay all expenses associated with the operation of the Beach Club and to "insur[e] that the property is fully secured and maintained in a commercially reasonable fashion." (*Id.* at ¶ 1). The commitments also included the fact that the Plaintiff was required to indemnify the Debtor against any damages to the Building resulting from Plaintiffs possession, use and occupancy. (*Id.* at ¶ 7).

Given these circumstances, the outcome of this declaratory judgment action is not unjust or inequitable as the Plaintiff may suggest. Nor is the outcome "so unreasonable or onerous as to compel compensation." *Palazzolo,* 533 U.S. at 627, 121 S.Ct. 2448. Moreover, equity follows the law and the outcome of this matter is mandated by the application of the law to the facts (for which there is no genuine dispute.)

VI.

For the reasons that are set forth above, the Court shall enter an order that grants partial summary judgment in favor of the Plaintiff and grants partial summary judgment in favor of the Taxing Authorities.

Towards that end, the Court finds that no genuine issue of material fact exists and that a judgment as a matter of law is appropriate insofar as: (a) the Taxing Authorities are entitled to be paid $478,260.75 of the Insurance Proceeds; and (b) the Plaintiff is entitled to the remaining Insurance Proceeds that are held in the registry maintained by the Clerk of the United States Bankruptcy Court for the Western District of Pennsylvania.

ORDER OF COURT

AND NOW, this ***22nd*** day of ***December, 2015,*** for the reasons expressed in the Memorandum Opinion issued contemporaneously herewith, the Court hereby **ORDERS, ADJUDGES** and **DECREES** as follows:

1) The Motion for Summary Judgment filed by Defendants Summit Township, Crawford County, the Tax Claim Bureau of Crawford County and the Conneaut School District (the "Taxing Authorities") is granted in part in that the Court deter-

mines that the Taxing Authorities are entitled to be paid the sum of $478,260.75 of the Insurance Proceeds (as defined in in footnote 1 of the Memorandum Opinion issued this date) presently being held in the registry of the United States Bankruptcy Court for the Western District of Pennsylvania. Any further relief requested in the Taxing Authorities Motion for summary judgment is denied.

2) The Motion for Summary Judgment filed by Plaintiff Park Restoration, LLC is granted in part in that the Court determines that Park Restoration, LLC is entitled to be paid the remaining Insurance Proceeds presently being held in the registry of the United States Bankruptcy Court for the Western District of Pennsylvania after payment to the Taxing Authorities of $478,260.75 as ordered above. Any further relief requested in the Motion for Summary Judgment filed by Plaintiff Park Restoration, LLC is denied.

APPENDIX "A"

APPENDIX "A"—Continued

ERIE INSURANCE EXCHANGE
ULTRAFLEX POLICY

RENEWAL CERTIFICATE

Agent		ITEM 2. Policy Period	Policy Number
AA5322	THE GRIFFIN INS GRP INC	05/21/13 TO 05/21/14	Q41 2150674 P

ITEM 1. Named Insured and Address
PARK RESTORATION LLC
11805 MORNINGSHORE DR
CONNEAUT LAKE PA 16316-4057

ITEM 3. Other Interest

POLICY PERIOD BEGINS AND ENDS AT 12.01 A.M. STANDARD TIME AT THE STATED ADDRESS OF THE NAMED INSURED.
THE INSURANCE APPLIES TO THOSE PREMISES DESCRIBED AS PER THE ATTACHED SUPPLEMENTAL DECLARATIONS. THIS IS SUBJECT TO ALL APPLICABLE TERMS OF THE POLICY AND ATTACHED FORMS AND ENDORSEMENTS

DEDUCTIBLE (PROPERTY PROTECTION ONLY)- $ 10,000.

COVERAGES:	DEPOSIT PREMIUM
PROPERTY PROTECTION - AS PER THE ATTACHED SUPPLEMENTAL DECLARATIONS	
1. BUILDINGS	$ INCL
2. BUSINESS PERSONAL PROPERTY AND PERSONAL PROPERTY OF OTHERS	$ INCL
3. INCOME PROTECTION	$
4. GLASS AND LETTERING	$
5. SIGNS, LIGHTS AND CLOCKS	$
LIMITS OF INSURANCE	$

IPTIONAL COVERAGES	
MECHANICAL & ELECTRICAL BREAKDOWN	$ INCL
THEFT DISAPPEARANCE AND DESTRUCTION	$ INCL
ENHANCEMENT ENDORSEMENT - CONTRACTORS ENDORSEMENT	$ INCL
ENHANCEMENT ENDORSEMENT - HOSPITALITY ENDORSEMENT	$ INCL
BUILDERS RISK COVERAGE	$ INCL
TOTAL DEPOSIT PREMIUM - - - - -	$ 6,978.

PLICABLE FORMS - SEE SCHEDULE OF FORMS

See Reverse Sid

APPENDIX "A"

APPENDIX "A"—Continued

SUPPLEMENTAL DECLARATIONS
LOCATION 1, BUILDING 1

LOCATION OF PREMISES	OCCUPANCY/OPERATIONS
12324 LAKE ST, CONNEAUT LAKE, CRAWFORD CO, PA 16316	BEACH CLUB RESTAURANT PROPERTY COVERAGE ONLY

INTEREST OF NAMED INSURED IN SUCH PREMISES - OWNER

PROPERTY PROTECTION

COVERAGES		CO-INS %	AMOUNT OF INSURANCE
1. BUILDINGS		80	$ 311,000
2. BUSINESS PERSONAL PROPERTY AND PERSONAL PROPERTY OF OTHERS		80	$ 100,000
3. INCOME PROTECTION	OCCURRENCE		

OPTIONAL COVERAGES - PROPERTY PROTECTION	
MECHANICAL & ELECTRICAL BREAKDOWN	$ INCL

POLICYHOLDER RENEWAL SERVICE -
BUILDING AMOUNT INCREASED BY - 3 PERCENT COMMERCIAL STRUCTURE

LOCATION 1

CRIME COVERAGES	AMOUNT OF INSURANCE
THEFT, DISAPPEARANCE & DESTRUCTION OF MONEY & SECURITIES	
$ 200 DEDUCTIBLE	
INSIDE THE PREMISES	$ 5,000
OUTSIDE THE PREMISES, MESSENGER #1	$ 5,000

)41 2150674 CONTINUED ON NEXT PAGE

APPENDIX "A"—Continued

SCHEDULE OF FORMS

FORM NUMBER	EDITION DATE	DESCRIPTION
JLF	03/01	ULTRAFLEX PACKAGE POLICY
IL0910	07/02	PENNSYLVANIA NOTICE
IL0246	09/07	PENNSYLVANIA CHANGES - CANCELLATION AND NONRENEWAL
IU44	03/01	PENNSYLVANIA AMENDATORY ENDORSEMENT
IL0985*	01/08	DISCLOSURE PURSUANT TO TERRORISM RISK INSURANCE ACT
IFB705*	06/96	IMPORTANT NOTICE - NO FLOOD COVERAGE
IF4810*	03/08	IMPORTANT NOTICE - POLICY SERVICE FEES
IF6330*	08/09	IMPORTANT NOTICE: DO YOU USE SUBCONTRACTORS?
X0001	01/12	ULTRAFLEX COMMERCIAL PROPERTY COVERAGE PART
U51	03/01	PENNSYLVANIA AMENDATORY ENDORSEMENT
L0952	01/08	CAP ON LOSSES FROM CERTIFIED ACTS OF TERRORISM
F4110	01/10	IMPORTANT NOTICE TO POLICYHOLDERS - TERRORISM COVERAGE - PROPERTY
LNH	05/06	MECHANICAL AND ELECTRICAL BREAKDOWN COVERAGE
LOA	10/09	PRODUCTION OR PROCESS MACHINERY - DEDUCTIBLE
LBL	10/09	THEFT, DISAPPEARANCE AND DESTRUCTION
LKS	01/12	CONTRACTORS ERIEPLACEABLE ENHANCEMENTS ENDORSEMENT
LLW	01/12	HOSPITALITY ERIEPLACEABLE ENHANCEMENTS ENDORSEMENT

41 2150674 CONTINUED ON NEXT PAGE

APPENDIX "A"—Continued

ERIE INSURANCE EXCHANGE
ULTRAFLEX POLICY

RENEWAL CERTIFICATE

Agent		ITEM 2. Policy Period	Policy Number
AA5322	THE GRIFFIN INS GRP INC	05/21/13 TO 05/21/14	Q41 2150674 P

ITEM 1. Named Insured and Address
PARK RESTORATION LLC
11805 MORNINGHSHORE DR
CONNEAUT LAKE PA 16316-4057

ITEM 3. Other Interest

INLAND MARINE SCHEDULE

BUILDERS RISK COVERAGE - COMPREHENSIVE PERILS
$ 5000 DEDUCTIBLE 100% COINSURANCE

LOCATION 01 COMPREHENSIVE PERILS AMOUNT $ 750,000
12441 LAKE ST, CONNEAUT LAKE,
CRAWFORD CO, PA 16315
IN THE COURSE OF CONSTRUCTION INCLUDING MATERIALS AND SUPPLIES TO BE OCCUPIED AS HOTEL

LOCATION 02 COMPREHENSIVE PERILS AMOUNT $ 150,000
CORNER OF LAKE & KEPLAR ST, LAKE,
CRAWFORD CO, PA 16315
IN THE COURSE OF CONSTRUCTION INCLUDING MATERIALS AND SUPPLIES TO BE OCCUPIED AS ONE FAMILY DWELLING

See Reverse Side

APPENDIX "A"—Continued

ERIE INSURANCE EXCHANGE
ULTRAFLEX POLICY

RENEWAL CERTIFICATE

Agent		ITEM 2. Policy Period	Policy Number
AA5322	THE GRIFFIN INS GRP INC	05/21/13 TO 05/21/14	Q41 2150674 P

ITEM 1. Named Insured and Address
PARK RESTORATION LLC
11805 MORNINGSHORE DR
CONNEAUT LAKE PA 16316-4057

ITEM 3. Other Interest

SCHEDULE OF FORMS (CONTINUED)

FORM NUMBER	EDITION DATE	DESCRIPTION
:100	02/02	INLAND MARINE GENERAL CONDITIONS
MAH	08/03	EXCLUSION - FUNGUS, WET ROT AND BACTERIA
MBR	09/09	BUILDERS RISK COVERAGE - COMPREHENSIVE PERILS

See Reverse Side

IN RE: Marlene Denise EVANS, Debtor.

Case No. 10–51101–SCS

United States Bankruptcy Court, E.D. Virginia,

2016 WL 1467882
Only the Westlaw citation is currently available.
United States Bankruptcy Court,
W.D. Pennsylvania.

In re: Trustees of Conneaut Lake Park, Inc., Debtor–in–Possession.
Park Restoration, LLC, Plaintiff,
v.
Summit Township, a Municipal Corporation; The Trustees of Conneaut Lake Park, a Charitable Trust; Crawford County, a Political Subdivision; the Tax Claim Bureau of Crawford County; and the Conneaut School District, Defendants.

Bankruptcy No. 14–11277–JAD
|
Adversary No. 15–1010–JAD
|
Signed April 12, 2016

Attorneys and Law Firms

John F. Mizner, Esq., Counsel to Park Restoration, LLC

George T. Snyder, Esq. and Jeanne S. Lofgren, Esq., Counsel to the Trustees of Conneaut Lake Park, Inc.

Lawrence C. Bolla, Esq., Counsel to Summit Twp., Crawford County, the Tax Claim Bureau of Crawford County, and the Conneaut School District

The Office of the U.S. Trustee, Anthony Kovalchick, Esq., Counsel to the Commonwealth of Pennsylvania

MEMORANDUM OPINION Background

Jeffery A. Deller, Chief U.S. Bankruptcy Judge

Background

***1** This is a declaratory judgment action involving a dispute regarding the relative rights of the Trustees of Conneaut Lake Park, Inc. (the "Debtor"), Park Restoration, LLC (the "Plaintiff" or "Park Restoration") and certain tax creditors of the Debtor (specifically Summit Township, Crawford County, the Tax Claim Bureau of Crawford County and Conneaut School District (collectively, the "Taxing Authorities")) with respect to fire insurance proceeds (together with any interest that has accrued on such sums, the "Insurance Proceeds") in the original amount of $611,000.

On December 22, 2015, this Court determined that summary judgment was appropriate and that (a) the Debtor is not an insured under the applicable insurance policy, and is not entitled to be paid any of the Insurance Proceeds, (b) the Taxing Authorities should be paid $478,260.75 of the Insurance Proceeds, and (c) any principal sums remaining of the Insurance Proceeds after payment to the Taxing Authorities should be paid to the named insured—Park Restoration.

The background and reasoning for the Court's decision is set forth in the Court's Memorandum Opinion and Order of December 22, 2015. Because the Court writes this Memorandum Opinion primarily for the parties–who are familiar with the facts and procedural posture of this case–the Court hereby incorporates the findings and conclusions it made in its December 22, 2015 Memorandum Opinion and Order as if fully stated herein.

After entry of summary judgment, the Taxing Authorities filed a motion seeking payment of $478,260.75 of the Insurance Proceeds (which were previously interpleaded into the Court's registry). Unhappy that it was not awarded all of the Insurance Proceeds, Park Restoration filed an appeal to the United States District Court for the Western District of Pennsylvania (the "District Court"). Park Restoration also filed a *Motion for Stay Pending Appeal.*

Park Restoration's *Motion for Stay Pending Appeal* was met with opposition by the Taxing Authorities and by the Debtor. As to the latter, the Debtor filed a cross appeal. Also, by its response in opposition to the *Motion for Stay Pending Appeal* the Debtor made two requests. One, it asked that the Court deny Park Restoration's request for a stay and have the Clerk of the Bankruptcy Court be ordered to release $478,260.75 of the Insurance Proceeds to the Taxing Authorities. Second, because the Debtor challenged the Court's conclusion that the Debtor had no entitlement to any of the Insurance Proceeds, the Debtor requested that the Court stay its judgment as it relates to the payment of any remaining proceeds to Park Restoration.

On February 9, 2016, the Court conducted a hearing on Park Restoration's *Motion for Stay Pending Appeal.* Thereafter, the parties were ordered to supplement the record in the form of filing affidavits and additional briefs. Thereafter the parties putatively filed such documents, and this matter is now ripe for decision.

Standard for Analyzing a Request for a Stay Pending Appeal

***2** The Court must consider four factors when ruling on a motion for stay pending an appeal. Those factors are: (1) whether the movant is likely to succeed on the merits of the appeal; (2) whether the movant will suffer irreparable injury if a stay is not granted; (3) whether a stay would substantially harm other parties to the litigation; and (4) whether a stay is in the public interest. *See In re Revel AC, Inc.,* 802 F.32d 558, 568 (3d Cir. 2015)(quoting *Hilton v. Braunskill,* 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 ((1987)).

The Court notes that, to determine whether a stay pending appeal is warranted, the Court is to balance each of the factors at issue and "consider the relative strength of the four factors." *Id.* (citing *Brady v. Nat'l Football League,* 640 F.3d 785, 789 (8th Cir. 2011)(quoting *Fargo Women's Health Org. v. Schafer,* 18 F.3d 526, 538 (8th Cir. 1994)).

Of course, when considering the relative strength of the four factors, the United States Supreme Court has held that the "most critical" factors are the first two: (a) whether the movant has demonstrated a strong showing of the likelihood of success, and (b) whether the movant will suffer irreparable harm. *See Nken v. Holder,* 556 U.S. 418, 434, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009). As to the irreparable harm factor, it refers to the "harm that cannot be prevented or fully rectified" by a successful appeal. *In re Revel AC,* 802 F.3d at 568 (quoting *Roland Mach. Co. v. Dresser Indus.,* 749 F.2d 380, 386 (7th Cir. 1984)(Posner, J.)).

Once a movant satisfies the first two factors, the traditional stay inquiry then calls for balancing of the remaining two factors—i.e., the "harm to the opposing party and weighing the public interest." *Id.* (quoting *Nken,* 556 U.S. at 435, 129 S.Ct. 1749)).

The Third Circuit Court of Appeals recently summarized how the balancing test is to be applied:

> We weigh the likely harm to the movant (absent a stay) (factor two) against the likely irreparable harm to the stay opponent(s) if the stay is granted (factor three). This is called the balancing of harms or balancing of equities. We also take into account where the public interest lies (factor four)—in effect, how a stay decision has "consequences beyond the immediate parties." *Roland Mach.,* 749 F.2d at 388.

In re Revel AC, Inc., 802 F.3d at 569.

The Third Circuit also summed up the stay pending appeal analysis as follows:

> [A]ll four stay factors are interconnected, and thus the analysis should proceed as follows. Did the applicant make a sufficient showing that (a) it can win on the merits (significantly better than negligible but not greater than 50%) *and* (b) will suffer irreparable harm absent a stay? If it has, we balance the relative harms considering all four factors using a sliding scale approach. However, if the movant does not make the requisite showings on either of these first two factors, the inquiry into the balance of harms and the public interest is unnecessary, and the stay should be denied without further analysis.... But depending on how strong a case the stay movant has on the merits, a stay is permissible even if the balance of harms and public interest weigh against holding a ruling in abeyance pending appeal.

Id. at 571 (quoting *In re Forty–Eight Insulations,* 115 F.3d 1294, 1300–01 (7th Cir. 1997))(quotations and brackets omitted).

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With all of these factors and standards in mind, the Court considers the merits of the *Motion for Stay Pending Appeal.*

Park Restoration's Likelihood of Success

***3** In the context of stays pending an appeal, caselaw is all over the map in terms of the standard the Court is to use to determine what constitutes a likelihood of success on appeal.

For example, some courts focus on the strength of the case the movant will present on appeal. *See In re Countrywide Home Loans, Inc.,* 387 B.R. 467, 471 (Bankr.W.D.Pa.2008)(citing *In re Polaroid Corp.,* 2004 WL 253477 *1 (D.Del.2004)). As my colleague Judge Thomas Agresti noted: "Taking this approach does put a court in the somewhat awkward, though not impossible, position of trying to objectively assess the likelihood that its ruling will be upheld on appeal." *Id.*

To avoid the difficulties imposed by this form of self-assessment, other courts have focused "on whether the movant seeks to raise issues on appeal that are substantial, serious, and doubtful so as to make them fair ground for litigation." *Id.* (citing *In re Lickman,* 301 B.R. 739, 743 (Bankr.M.D.Fla.2003)).

In addition, a few other courts have adopted a "sliding scale" measure under which a court will examine the strength of the case on appeal, relative to the hardships to be suffered if a stay is not granted. *Id.* at 472 (citing *In re Cujas,* 376 B.R. 480, 486 (Bankr.E.D.Pa.2007)).

Most recently, the Third Circuit Court of Appeals weighed in on this issue in *In re Revel AC, Inc., supra.,* when it held:

> Just how strong of a merits case must a stay applicant show? The formulations used to describe the *degree* of likelihood of success that must be shown vary widely. To give but a sampling of the range that exists, some require a showing that the underlying appeal is more likely to succeed than fail. Others call for a substantial possibility, although less than a likelihood, of success. For our Court, a sufficient degree of success for a strong showing exists if there is a reasonable chance, or probability, of winning. Thus, while it is not enough that the chance of success on the merits be better than negligible, the likelihood of winning on appeal need not be more likely than not ...

In re Revel AC, Inc., 802 F.3d at 568–69 (citations, quotations and footnotes omitted).

Given the standard set forth in *Revel AC,* the question before the Court is whether Park Restoration has a reasonable chance, or probability of winning on appeal? Of course, there is no exact science for any court in making such a determination. Perhaps it turns on the complexity of the case and the novelty of the issues presented by the litigants. No matter what, the chance of success on appeal must be materially more than negligible, but need not be certain.

For purposes of deciding the *Motion for Stay Pending Appeal,* this Court assumes for sake of argument that Park Restoration has met its burden as to the first factor—the likelihood of success. The Court does so because the case on appeal is a case of first impression.

Specifically, during the course of deciding this matter, neither the Court nor any of the parties could locate any prior case where the statute at issue, 40 P.S. § 638, was found to apply (or found to not apply) in instances where the named insured is not the actual the owner of the property which was insured against fire damage. In addition, neither the Court nor the parties could locate any case precisely on point which addresses the primary question on appeal. That is, whether the application of the state statute at issue constitutes an unlawful "gratuitous confiscation" in contravention of the Takings Clauses found in both the Pennsylvania Constitution and the United States Constitution.

***4** To be clear, although this Court is concluding that Park Restoration has established the first factor in support of its *Motion for Stay Pending Appeal,* nothing in this holding should be construed as holding that Park Restoration's likelihood of success on appeal is "more likely than not." In fact, the opposite is true.

The undisputed record is that at the time the Plaintiff purchased the policy in question, its rights to insurance proceeds were always subject to 40 P.S. § 638 and the claim of the Taxing Authorities. That fact never changed from the outset of the Plaintiffs economic relationship under the policy until the present.

The Plaintiffs failure to establish any greater entitlement to the proceeds under its policy (and Pennsylvania law) is fatal to its assertion that payment of Insurance Proceeds to the Taxing Authorities would violate the Takings Clause(s) of the U.S. Constitution and the Pennsylvania Constitution. This conclusion is appropriate because the distribution of the Insurance Proceeds first to the Taxing Authorities is something that Park Restoration voluntarily agreed to accept by operation of its insurance policy in the first instance. Having agreed to such a distribution waterfall as a matter of law, Park Restoration can hardly claim to have had any vested property interest that was "taken" or "confiscated" by government action. *Kim v. Dome Ent. Ctr., Inc. (In re Kim),* 748 F.3d 647, 657 (5th Cir. 2014)(only property interests predating the enactment of the statutory provision in question enjoy constitutional protection under the Takings Clause); *Thaw v. Moser (In re Thaw),* 769 F.3d 366, 369–372 (5th Cir. 2014)(Takings claim weakened when plaintiff acquired property after the statute was enacted).

Park Restoration's Claim of Irreparable Injury

In *Revel AC, supra.,* the Third Circuit Court of Appeals also provided guidance as to the quantum of irreparable injury a stay proponent must demonstrate in support of its motion. According to the Third Circuit:

> On the second factor, the applicant must demonstrate that irreparable injury is *likely* not merely possible in the absence of a stay. While a reference to likelihood of success on the merits has been interpreted by courts to cover the generic range of outcomes, for irreparable harm we understand the Supreme Court's use of likely to mean more apt to occur than not.

In re Revel AC, Inc., 802 F.3d at 569 (citations, quotations and brackets omitted).

Through the lens of this standard, the Court concludes that Park Restoration has not established the existence of irreparable injury to support a stay pending appeal.

Specifically, in its *Motion for Stay Pending Appeal,* Park Restoration avers that if this Court's decision is reversed "it would be impossible for [Park Restoration] to have immediate access to the insurance proceeds." *See Motion for Stay Pending Appeal* at 17. The record, however, belies such an assertion.

In the unlikely event Park Restoration is successful in its appeal, the Taxing Authorities would be required to return any Insurance Proceeds that were paid to them. Notwithstanding Park Restoration's contention otherwise, the record reflects that the Taxing Authorities do maintain a fund balance sufficient within their respective approved budgets to remit any sums which they may be required to repay if Park Restoration is successful on appeal. *See Affidavit of Conneaut School District* at Dkt. No. 137; *Affidavit of Crawford County* at Dkt. No. 138; and *Affidavit of Summit Township* at Dkt. No. 141.

***5** The Court does recognize that Park Restoration complains that any such repayment would allegedly be subject to some sort of vote by the local governing bodies. This complaint, however, rings hollow because such municipalities have not objected to litigating these items in this Court. As such, the Taxing Authorities cannot hide behind any shield of sovereign immunity. *See Clark v. Barnard,* 108 U.S. 436, 447 (1883) and *Lapides v. Board of Regents,* 535 U.S. 613, 617–623 (2002). Parenthetically, the Court would note that this consideration assumes sovereign immunity could conceivably shield the Taxing Authorities from disgorgement in the first instance —which itself is a dubious proposition under the circumstances. *See N. Ins. Co. of New York v. Chatham Cnty.,* 547 U.S. 189, 193–194 (2006)("Municipalities, unlike States, do not enjoy a constitutionally protected immunity from suit." "This is true even when ... such entities exercise a slice of state power.")(quoting *Jinks v. Richland Cnty.,* 538 U.S. 456, 466 (2003) and *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency,* 440 U.S. 391, 401 (1979)). It therefore appears that the Taxing Authorities' obligation to disgorge funds is subject to any further orders entered by this Court or the District Court. To the extent any local law is contrary to orders of this Court or the District Court, the local law would be of

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no moment by operation of the Supremacy Clause of the United States Constitution.

Under these circumstances, the Court concludes that the movant has not established the second factor necessary for a stay pending appeal. This conclusion warrants the entry of an order denying the *Motion for Stay Pending Appeal* without the need for the Court to entertain any further analysis. *In re Revel AC, Inc.,* 802 F.3d at 568 ("if the movant does not make the requisite showings on either of these first two factors, the inquiry into the balance of harms and the public interest is unnecessary, and the stay should be denied without further analysis").

Therefore, for the reasons set forth above, an order shall be entered that denies the *Motion for Stay Pending Appeal* filed by Park Restoration.

The Debtor's Request for a Partial Stay

As set forth in the Background section of this Memorandum Opinion, the Debtor has lodged a cross appeal with respect to the Court's December 22, 2015 Memorandum Opinion and Order. The gist of the Debtor's cross appeal is that the Debtor contends that the Court erred when it concluded that Park Restoration has an interest in all of the Insurance Proceeds remaining after payment to the Taxing Authorities. Because the Debtor claims that the Court erred, the Debtor requests in its response papers that the Court stay its order as to all distributions to Park Restoration.

The Debtor's request for a stay does raise two concerns. One, the request may be procedurally improper. Pursuant to Fed. R. Bankr. P. 8007(a)(1)(A), any request for stay pending appeal must be done by way of motion. The Debtor here has not filed a motion. Rather, it has merely filed a response to Park Restoration's own motion. Nonetheless, the parties have argued the Debtor's request for a stay and the Court will not elevate form over substance.

Second, even if the Debtor's request constitutes a motion, a question exists as to whether the request is premature. The Court makes this inquiry because Local Rule 5095–2 sets forth the circumstances in which funds may be withdrawn from the Court's registry. This local rule states, in pertinent part, that in "order to withdraw deposited funds, a motion for disbursement of invested registry funds and a proposed order shall be filed." *See* W.PA.LBR 5095–2. To date, Park Restoration has not filed such a motion and an argument exists to the effect that there may not be a need for a stay until the time a motion to distribute is filed. Notwithstanding this argument, absent a stay there is nothing which would presently preclude Park Restoration from filing this type of motion and pursuing the immediate distribution of the remaining Insurance Proceeds. It therefore appears appropriate for the Court to address the Debtor's request for a stay pending the cross appeal.

***6** Like Park Restoration's request for stay pending appeal, the Debtor's request is subject to the same standards elucidated above–that is, a showing that: (1) the Debtor has a likelihood of success in its cross appeal, (2) the Debtor will suffer irreparable injury if the Court's prior order is not stayed pending the cross appeal, (3) whether the issuance of a stay would substantially harm the other parties to the litigation, and (4) the public interest.

As to likelihood of success, the Debtor's main charge of error on appeal deals with the nature of Park Restoration's interest in the Beach Club and the value of it.

As to the latter—the nature of Park Restoration's interest—the Debtor devotes much space in its papers addressing whether Park Restoration's interest was a license or a leasehold. Of course, in the Court's Memorandum Opinion, the Court observed that Park Restoration's interest was ***either a leasehold or a license***. *See* Memorandum Opinion at p. 14 ("The Plaintiff had a possessory interest for a term of twenty (20) years under the Beach Club Management Agreement which is akin to either a leasehold interest in the property or a license with respect to the same.").

The Court did not have to pick and choose the precise nature of Park Restoration's interest because the issue before the Court was ***not*** whether Park Restoration owned a leasehold interest in the Beach Club. Rather, the issue was whether it had an "insurable interest."

Therefore, the resolution of the issue of whether Park Restoration held an insurable interest was not premised upon the precise nature of Park Restoration's property interest. Rather, it was premised upon a determination of whether Park Restoration held such a relationship

with the property "that its destruction by the peril insured against involves pecuniary loss to [it]." *See A.K. Nahas Shopping Ctr., Inc. v. Reitmeyer,* 161 B.R. 927, 931 (Bankr.W.D. Pa. 1993)(citing *Commonwealth v. Rodebaugh,* 519 A.2d 555, 563 (Pa.Commw.Ct.1986)); *see also Kellner v. Aetna Casualty and Surety Co.,* 605 F.Supp. 331, 333 (M.D.Pa.1984).

The Court then held in its Memorandum Opinion and Order of December 22, 2015 that no genuine dispute of material fact existed and that the record supported the conclusion that Park Restoration had an insurable interest in the Beach Club because it derived much pecuniary benefit from its undisputed right to long term possession and use of the Beach Club. Thus, as to this issue, the Court finds that the Debtor's likelihood of success on appeal is negligible.

It is true that the parties waffled in their papers as to whether Park Restoration held a leasehold interest in the Beach Club, even though the Debtor has recently denied the existence of such waffling. For example, on page 4 of its response papers the Debtor avers that it "denied that Park Restoration was a lessee in its state court pleadings and never waffled on its position...." Such a statement is contrary to the record. On January 21, 2014, the Debtor filed an *Answer and New Matter to Plaintiff's Amended Complaint and Demand for Jury Trial,* and attached to it a "Lease Agreement" for the Hotel Conneaut. [1] In this same pleading, the Debtor asserted that: "It is believed and therefore averred that [Park Restoration] executed a substantially similar document for the property commonly referred to as the Beach Club." *See Answer and New Matter to Plaintiff's Amended Complaint and Demand for Jury Trial* at ¶ 37; *see also id.* at ¶ 9.

***7** Given these assertions, the Debtor did acknowledge in pleadings that Park Restoration was conveyed a leasehold interest in the Beach Club (but that the Debtor simply could not locate the written instrument memorializing it). Naturally, this admission in a pleading raises estoppel issues that have never been fully addressed by the parties. *Cf. Deutsche Bank Natl Trust Co. v. Evans,* 421 B.R. 193 (W.D.Pa.2009)(Cercone, J.)(where spouse admits having the benefit and knowledge of a mortgage transaction, he or she cannot hide behind the statute of frauds to avoid the burdens of the transaction).

The Court also observes that the Debtor's efforts to minimize Park Restoration's possessory interest in the Beach Club is disingenuous. The Court reaches this conclusion because Paragraph 1 of the Management Agreement unequivocally affords Park Restoration with "operational control of the Beach Club for a period of twenty years." *See Amended Complaint Seeking Declaratory Judgment, Ex. "B".* Paragraph 1 further states that "operational control shall include, but is not limited to, physical control and security ..." This paragraph of the Management Agreement also gives Park Restoration the ability to exclude the Debtor from the premises as the document itself permits the Debtor to utilize "nonexclusive areas" only when "not in conflict with any event planned by" Park Restoration.

In addition, where the Management Agreement affords the Debtor access to the premises, it does not permit the Debtor to have unfettered access (or unilateral access on a whim). Rather, pursuant to Paragraph 1 of the Management Agreement, the Debtor was only permitted "reasonable access." Of course, this provision of the Management Agreement operates to limit the Debtor's access from a temporal perspective, durational perspective, and location perspective (because surely it would be unreasonable access if the Debtor was to come into the premises whenever it wanted and preclude Park Restoration from effectively operating the Beach Club). The Court can only surmise that counsel for the Debtor recognized these facts when it affirmatively stated to the Court at the August 25, 2015 hearing on this matter: "I think the reading of both the management agreement and the insurance policy themselves evidence what the intent of the parties were. Under the management agreement Park Restoration had exclusive possession and control of the Debtor's property ..." *See Transcript of August 25, 2015 Hearing* filed at Dkt. No. 121 at p. 15, lines 21–25. [2]

***8** Given these provisions in the Management Agreement, it is beyond dispute that Park Restoration's interests were significant. Even if its rights under the Management Agreement were that of a mere license, scholars in this field of the law acknowledge that "a license is not a nothing interest" because it "reduces the completeness" of the owner's property interest. *See* Milton R. Friedman, *Friedman on Leases* at § 37.1, p. 1662 (Practising Law Institute, 3d ed.1990). For example, under Pennsylvania law, a licensee can in some instances enjoin a landowner from interfering with the license. *Id.*

at n.12 (citing *Leininger v. Goodman,* 277 Pa. 75, 120 A. 772 (1923)).

To reiterate, the ultimate resolution of the lease/license issue was not material to the Court's decision as the Court merely concluded that Park Restoration had an "insurable interest" by virtue of its possession of the Beach Club (regardless of whether it's interest is characterized as a lease or license).

In support of its cross appeal, the Court recognizes that Debtor does complain that Park Restoration is being paid Insurance Proceeds in excess of the value of its financial interest. The Court questions whether the Debtor has legal standing to even present such a challenge (inasmuch as the Debtor is neither an insured under the policy, nor is it a loss payee; additionally, the Debtor never paid any premiums whatsoever with respect to the policy).

It would seem to the Court that the party to challenge Park Restoration's insured interest would be Erie Insurance. However, Erie Insurance has been dismissed from the lawsuit upon consent of all parties in interest. Moreover, it appears that no one ever disputed the amount of "loss" incurred in this case because nothing in the record reflects that any party invoked the appraisal remedy found in Article X, § 2 of the insurance policy at issue. *See* Dkt. No. 52–1 at p. 37.

The Court also has questions as to which party has the burden of proof as to value. For example, in the summary judgment proceedings, the Debtor took the "all or nothing" position. It argued before the Court that since Park Restoration was not the the owner of the Beach Club, Park Restoration could have no insurable interest. [3] The Debtor, however, neither raised nor asserted an intermediate position [4] of asking that an appraised value of the insurable interest be determined. This failure of the Debtor is important because the Debtor is also claiming an interest in the insurance proceeds and is now the party challenging the value of the insured's financial interest. This posture of the case seems to support a conclusion that the Debtor bore the burden of proof, [5] and its failure to produce any evidence in this regard supports the entry of summary judgment in favor of Park Restoration. *See* *Berckeley Inv. Group, Ltd. v. Colkitt,* 455 F.3d 195, 201 (3d Cir. 2006)("In this respect, summary judgment is essentially 'put up or shut up' time for the non-moving party ..."). In addition, the Debtor's failure to preserve its intermediate value theory supports the notion that the Debtor has effectively waived its right to assert it in an "after the fact" basis on appeal. *Buncher Co. v. Official Comm. of Unsecured Creditors of Genfarm Ltd. P'ship IV,* 229 F.3d 245, 253 (3d Cir. 2000) (affirming district court's conclusion that issue was effectively waived on appeal by parties failure to raise issue before the trial court).

***9** As such, a neutral and detached view of the record leads the Court to conclude that the Debtor's odds of prevailing on appeal are not more likely than not.

Nonetheless, the Court admittedly concedes that the preceding issues are appropriate fodder for appeal. Given this Court's role as the trial court, it is not for this Court to ultimately decide the merits of these issues. Rather, all that the Court is called upon to do is to determine whether the Debtor's chances on appeal are materially greater than negligible. Given the fact that the record is not as robust as the Court would like, the Court concludes that perhaps the chances of the Debtor on appeal in this difficult case are greater than negligible–albeit "less than 50/50." As such, this Court concludes that the first factor of the four part test supports the entry of a stay as to distribution to Park Restoration.

The second factor that the Court considers is whether the Debtor will suffer irreparable injury if no stay is imposed. The Court concludes here that this factor supports the partial stay requested by the Debtor. The Court reaches this conclusion because nothing in the record suggests that Park Restoration could repay the funds if they are distributed to Park Restoration before the cross appeal is exhausted. Indeed, the record reflects that Park Restoration has been effectively out of business since the Beach Club was destroyed by fire. Park Restoration has also admitted its insolvent status when it asked the District Court for permission to opt out of court mandated ADR. In support of its request to opt out of ADR, Park Restoration cited its inability to pay the fees and costs associated with complying with the District Court's ADR process. Given these circumstances, it would appear that Park Restoration's ability to repay funds is in substantial doubt and that the Debtor would suffer irreparable injury (in the form of a loss of the funds) if no stay were to be put into place pending the outcome of the cross appeal.

Given the fact that the first two factors—likelihood of success and irreparable injury—support the Debtor's request for a partial stay, the Court considers the third and fourth factors as outlined by the Third Circuit's opinion in *Revel AC.* These remaining two factors require that the Court consider the harm to Park Restoration if a stay is imposed, and the impact that such a stay will have upon the public interest.

As to the harm to Park Restoration if a stay is imposed, the record reflects that Park Restoration has already been effectively put out of business. Nothing in the record suggests that Park Restoration's fate would be made any more worse off if a stay is imposed. In fact, Park Restoration has been without the funds for years, and to date it has not sought the affirmative release of the funds from the Court's registry (which itself appears to be a tacit admission that the delay in payment does not cause Park Restoration any more injury, let alone irreparable injury). Given these circumstances, the third factor weighs in favor of a stay.

As to the fourth factor—the public interest—this factor is neutral. Certainly putting a hold on the partial distribution protects and preserves the Debtor's disputed interest (which in-turn does not put a premature end to possible distributions to creditors or investment into the Debtor's bankruptcy reorganization). Denying the stay is not contrary to the public interest either, as no one has demonstrated that the public at large will benefit from a stay (or suffer a material detriment as a result of a stay).

***10** In sum, three of the four factors germane to the calculus as to whether to impose a stay supports the imposition of a stay as to Park Restoration, and the remaining factor the Court is to consider is neutral. Under these circumstances, the Court shall enter an order that grants the Debtor's request for a stay pending appeal as to the partial distribution of Insurance Proceeds to Park Restoration.

Conclusion

For the reasons set forth above, the Court concludes that Park Restoration has not met its burden of proof as to its *Motion for Stay Pending Appeal.* As a result, an Order shall be entered that denies Park Restoration's *Motion for Stay Pending Appeal.*

Conversely, the Court concludes that the Debtor has met its burden of proof as to the Debtor's request for the entry of a stay as to any partial distribution to Park Restoration pending the outcome of the Debtor's cross appeal. An Order shall therefore be entered which imposes such a stay pending further order of the Court.

The Clerk shall also be directed to transmit this Memorandum Opinion and Order to the District Court as a part of the record on appeal.

APPENDIX "1" is ATTACHED

IN THE COURT OF COMMON PLEAS OF CRAWFORD COUNTY,

PENNSYLVANIA

CIVIL DIVISION

PARK RESTORATION LLC, *Plaintiff*

vs.

ERIE INSURANCE EXCHANGE, SUMMIT TOWNSHIP, THE TRUSTEES OF CONNEAUT LAKE PARK, CRAWFORD COUNTY, THE TAX CLAIM BUREAU OF CRAWFORD COUNTY AND THE CONNEAUT SCHOOL DISTRICT, *Defendants*

No.2013–646

Type of Document:

Answer and New Matter to Plaintiff's Amended Complaint and Demand for Jury Trial

Filed on Behalf of:

Defendant, Trustees of Conneaut Lake Park, Inc.

Counsel of Record:

Brian J. Pulito, Esquire, (PA ID 203952),

STEPTOE & JOHNSON PLLC,

201 Chestnut Street, Suite 200,

Meadville, PA, 16335

Tel: (814) 333–4900

JURY TRIAL DEMANDED

IN THE COURT OF COMMON PLEAS OF CRAWFORD COUNTY,

PENNSYLVANIA

CIVIL DIVISION

PARK RESTORATION LLC, *Plaintiff*

vs.

ERIE INSURANCE EXCHANGE, SUMMIT TOWNSHIP, THE TRUSTEES OF CONNEAUT LAKE PARK, CRAWFORD COUNTY, THE TAX CLAIM BUREAU OF CRAWFORD COUNTY AND THE CONNEAUT SCHOOL DISTRICT, *Defendants*

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Brian J. Pulito, Esquire, (PA ID 203952),

STEPTOE & JOHNSON PLLC,

201 Chestnut Street, Suite 200,

Meadville, PA

16335 Tel: (814) 333–4900

JURY TRIAL DEMANDED

IN THE COURT OF COMMON PLEAS OF CRAWFORD COUNTY,

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PARK RESTORATION LLC, *Plaintiff*

vs.

ERIE INSURANCE EXCHANGE, SUMMIT TOWNSHIP, THE TRUSTEES OF CONNEAUT LAKE PARK, CRAWFORD COUNTY, THE TAX CLAIM BUREAU OF CRAWFORD COUNTY AND THE CONNEAUT SCHOOL DISTRICT, *Defendants*

No.2013–646

NOTICE TO PLEAD

To: Plaintiff, Park Restoration LLC:

You are hereby notified to file a written response to the enclosed New Matter within twenty (20) days from service hereof or a judgment maybe entered against you.

STEPTOE & JOHNSON PLLC

By: /s/

Brian J. Pulito, Esquire

201 Chestnut Street, Suite 200,

Meadville, PA 16335,

Tel: (814) 333–4900,

Attorneys for Defendant, Trustees of Conneaut Lake Park, Inc.

IN THE COURT OF COMMON PLEAS OF CRAWFORD COUNTY,

PENNSYLVANIA

CIVIL DIVISION

PARK RESTORATION LLC, *Plaintiff*

vs.

ERIE INSURANCE EXCHANGE, SUMMIT TOWNSHIP, THE TRUSTEES OF CONNEAUT

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LAKE PARK, CRAWFORD COUNTY, THE TAX CLAIM BUREAU OF CRAWFORD COUNTY AND THE CONNEAUT SCHOOL DISTRICT, *Defendants*

***11 No.2013–646**

ANSWER AND NEW MATTER TO PLAINTIFF'S AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

AND NOW, comes the Defendant, Trustees of Conneaut Lake Park, Inc., by and through its counsel of record in this matter, Steptoe & Johnson PLLC, and in response to Plaintiff's Amended Complaint Seeking Declaratory Judgment files its Answer and New Matter and Demand for Jury Trial, as follows:

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted in part and denied in part. It is admitted that the Trustees of Conneaut Lake Park, Inc., is a nonprofit company and has the principle address provided in this Paragraph. It is denied that the same is a charitable trust.

5. Admitted.

6. Admitted.

7. Admitted.

8. Denied, It is denied that the document attached as Exhibit A is a true and correct copy of the lease agreement between Park Restoration (“PR”) and the Trustees of Conneaut Lake Park, Inc. (“TCLP”). To the contrary and as more fully set forth in Defendant's new matter herein, a correct and true copy of the Lease for the Hotel is attached hereto as Exhibit A.

9. Denied, As with the lease identified in Paragraph 8, the document attached to the Complaint is not a true and correct copy of the management agreement for the Beach Club. As more fully set fort in the TCLP's New Matter below, the TCLP is searching diligently for a copy of the same, It is believed and therefore averred that its terms are identical to those attached as Exhibit A to TCLP's New Matter.

10. Paragraph 10 states a conclusion of law to which no response is required.

11. Paragraph 11 states a conclusion of law to which no response is required.

12. TCLP lacks sufficient information and belief as to the truth of the matter asserted in Paragraph 12.

13. Admitted in part and denied it part. Paragraph 13 refers to a written document. To the extent that Paragraph 13 properly construes that part of the written document it restates, the same is admitted. Conversely, to the extent that Paragraph 13 misconstrues that part of the written document it restates, the same is denied.

14. Admitted.

15. TCLP lacks sufficient information and belief as to the truth of the matter asserted in Paragraph 15.

16. Admitted.

17. TCLP lacks sufficient information and belief as to the truth of the matter asserted in Paragraph 17.

18. TCLP lacks sufficient information and belief as to the truth of the matter asserted in Paragraph 18.

19. Paragraph 19 states a conclusion of law to which no response is required.

20. Paragraph 20 states a conclusion of law to which no response is required.

21. Paragraph 21 states a conclusion of law to which no response is required.

22. Admitted in part and denied it part. Paragraph 22 refers to a statute. To the extent that Paragraph 22 properly construes that part of the statute that it restates, the same is admitted. Conversely, to the extent that Paragraph 22 misconstrues that part of the statute that it restates, the same is denied.

23. Paragraph 23 does not aver any facts. Therefore, no response to the same is required.

***12** 24. Paragraph 24 states a conclusion of law to which no response is required.

25. Paragraph 25 states a conclusion of law to which no response is required.

26. Paragraph 26 does not aver any facts. Therefore, no response to the same is required.

27. The above Paragraphs are incorporated herein as if set forth in their entirety,

28. Paragraph 28 does not aver any facts. Therefore, no response to the same is required.

29. Denied. It is believed and therefore averred that the Agreement referenced in this Paragraph is not a true and correct copy of the agreement between PR and TCLP to manage the Beach Club.

30. TCLP adopts Paragraph 29 herein.

31. TCLP adopts Paragraph 29 herein.

32. Admitted in part and denied it part. Paragraph 32 refers to a written document. To the extent that Paragraph 32 properly construes that part of the written document it restates, the same is admitted. Conversely, to the extent that Paragraph 32 misconstrues that part of the written document it restates, the same is denied.

33. Paragraph 33 states a conclusion of law to which no response is required.

34. Paragraph 34 does not aver any facts. Therefore, no response to the same is required.

WHEREFORE, Defendant, Trustees of Conneaut Lake Park, Inc., prays that this Honorable court dismiss the Plaintiff's Amended Complaint with prejudice and award it costs of suit.

NEW MATTER

35. TCLP adopts the above paragraphs as if set forth at length herein.

36. PR signed the document attached hereto as Exhibit A.

37. It is believed and therefore averred that PR executed a substantially similar document for the property commonly referred to as the Beach Club.

38. TCLP is searching diligently for a copy of the agreement to the Beach Club.

39. TCLP claims the affirmative defense of consent.

40. TCLP claims the affirmative defense of estoppel.

41. TCLP claims the affirmative defense of laches.

42. TCLP claims the affirmative defense of license.

43. TCLP claims the affirmative defense of release.

44. TCLP claims the affirmative defense of res judicata.

45. TCLP claims the affirmative defense of statute of limitations.

46. TCLP claims the affirmative defense of waiver.

47. TCLP claims the affirmative defense of collateral estoppel.

WHEREFORE, Defendant, Trustees of Conneaut Lake Park, Inc., prays that this Honorable court dismiss the Plaintiff's Amended Complaint with prejudice and award it costs of suit.

DEMAND FOR JURY TRIAL

Defendant, Trustees of Conneaut Lake Park, Inc. hereby demands a trial by jury in the above-captioned matter.

Respectfully submitted,

STEPTOE & JOHNSON PLLC

By: /s/

Brian J. Pulito, Esquire

201 Chestnut Street, Suite 200,

Meadville, PA 16335,

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Tel: (814) 333–4900,

Attorneys for Defendant, Trustees of Conneaut Lake Park, Inc.

LEASE AGREEMENT

THIS LEASE AGREEMENT, made this 18th day March, 2009, by and between the following designated parties:

TRUSTEES OF CONNEAUT LAKE PARK, INC.*, a Pennsylvania non-profit corporation with principal offices at 12382 Center Street, Crawford County, Pennsylvania, hereinafter referred to as* ***LANDLORD***

—AND—

PARK RESTORATION, LLC*, a Pennsylvania limited liability company, with offices at 11805 Morningshore Drive, Conneaut Lake, Crawford County, Pennsylvania, hereinafter referred to as* ***TENANT***

WITNESSETH:

13** ***THE SAID LANDLORD, IN CONSIDERATION OF the rents and covenant hereinafter mentioned, does demise and lease unto the said Tenant, all those premises described as the Hotel Conneaut, Conneaut Lake Park, Crawford County, Pennsylvania 16316.

TO HAVE AND TO HOLD unto said Tenant, subject to the conditions of this Agreement for the term commencing on the date and for a period of three hundred sixty (360) months.

IN CONSIDERATION for the use and occupancy of the said premises, the said Tenant agrees to pay to the said Landlord the sum One Thousand Five Hundred ($1,500.00) Dollars per month, The first payment is due and payable in advance on or before the commencement of the lease term and each monthly payment is due on or before the last day of the month preceding. The payment will increase at a rate of five percent annually plus the CPI–Urban areas for the Jar. to Jan. time frame for the first five (5) years of this agreement. Beginning with the sixth year, the payment amount will increase at the CPI rate set forth herein.

Additionally the Tenant warrants that the Tenant shall convey to file Trustees of Conneaut Lake Park, its successors or assigns, 10% of gross proceeds from the business conducted in these facilities for Gross proceeds exceeding $150,000.05per year for each year this lease is in effect.

AS FURTHER CONSIDERATION for the use and occupancy of said premises, the said Tenant hereby agrees to faithfully keep and be bound by the following covenants and agreements:

1. Tenant shall be responsible for payment of all utility charges incident to the property during the term of this Lease, including but not limited to electric, gas, and telephone, to make timely payment thereof and if requested, to provide to Landlord, at the expiration of the Lease, evidence of payment in full for all utilities.

2, Tenant agrees to maintain fire and casually insurance coverage on the leased premises. Tenant shall maintain adequate insurance coverage with respect to the personal and business property located on and within the leased premises. Tenant wall Indemnify, defend and hold Landlord harmless against all claims and demands and judgments for loss, damage or injury to property or person resulting or occurring as a result of the use or occupancy or the premises by Tenant. Tenant agrees to carry and pay for public liability insurance in limits of not less than $1,000,000.00 for injury to one person; $2,000,000.00 aggregate; The landlord shall be named as an additional insured and to deposit copies of Certificates of said Policy with the Landlord. Landlord shall not be liable for any damage, loss or destruction to Tenant's fixtures, business equipment and other contents that may at any time exist from the use or condition of said premises or building daring the term of this Lease.

3. Tenant has examined and knows the condition of the said premises and has received same in ‘as is' condition. Tenant agrees to keep said premises in good repair, replacing all broken glass and keeping the premises in a clean, safe and healthy condition according to Township Ordinances and the direction of the proper public officers during the term of this lease at Tenant's own expense, Tenant shall be

solely responsible for all repairs and improvements of any kind. Tenant shall deliver and surrender to the Landlord possession of the premises hereby leased upon the expiration of this lease, or its termination in anyway, in as good or better condition and repair as the same shall be at the commencement of said term, ordinary wear excepted, Tenant to pay all damages to premises, features, plumbing, loss of keys, and the like, and damage caused by neglect of said Tenant.

***14** 4. Current Real Estate taxes shall be the responsibility of Tenant.

5 If at any time during the term of this Lease, Tenant shall leave the premises without an occupant or said premises shall be locked, or entry shall be refused to Landlord, or its agent, either for inspection or other lawful purpose, or in the event of the removal of the goods, Tenant authorizes the Landlord, or any authorized agent or officer, to enter any premises or building where said goods may be found or located, either by duplicate keys or by forcible entrance and make levy thereon and the Tenant hereby releases said Landlord, its agents and officers, from any damage liability by reason of such entry, and hereby agrees to pay for such damage, the same to be added to and become a part of the costs for the collection of such rent as may be due and payable. While open for business, the tenant is to keep sidewalk and parking lot clear of snow and ice. While closed, the Tenant must keep the Parking Lot and Driveways clear of snow and ice to allow for Emergency Vehicle Access. The Tenant is responsible for all damages for neglect and the neglect to comply wife the provisions set forth in this agreement and shall be recovered as rent in arrears.

6. Tenant will not make say alterations of or upon any part of the Leased premises except by and wife the written, consent of the Landlord, which consent shall not be unreasonably withheld. All alterations and additions to said premises shall remain for the benefit of Landlord unless otherwise provided in said written consent, and Tenant further agrees in the event of making such alterations as herein provided to indemnify and save harmless the Landlord from any expenses, liens, claims damages to person or property on the Leased premises, arising out of or resulting from the undertaking or making of said alterations or additions.

7. Nothing shall be done upon said premises contrary to the condition of the policies of insurance on the buildings thereon, whereby the hazard may be increases or the insurance invalidated; neither the whole nor any portion of the said premises shall be sublet; nor shall this Lease, Or any interest therein, be assigned, nor shall the Tenant remove or attempt to remove from said premises during the term of this Lease, or any renewal thereof, Without the written consent of the Landlord, which shall not be unreasonably withheld; and no unlawful business shall at any time be carried on upon said premises.

8. It is agreed that either party may cancel the terms of this agreement; at any time, with thirty (30) days written notification. It is further agreed that the terms and conditions of this Agreement and Lease shall in no way be changed or altered except by a writing signed by all of the parties hereto.

9. This Agreement constitutes the entire agreement of the parties hereto and may only be modified by a subsequent writing signed by each of the parties hereto.

10. This Agreement shall be construed under the laws of the Commonwealth of Pennsylvania and shall bind the parties hereto and their respective heirs, executors, administrators and assigns.

15** ***IN WITNESS WHEROF, and with intent to be legally bound, the parties hereby set their hands and seals the day and yet first above written.

LANDLORD:

TRUSTEES OF CONNEAUT LAKE INC.

/s/

TENANT

PARK RESTORATION, LLC

By: /s/

Gregory E. Sutterlin, Manger and Member

Attest:

/s/

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Secretary

VERIFICATION

Brian J. Pulito, counsel for the Defendant, Trustees of Conneaut Lake Park, Inc. in the above matter, deposes and says that he is of counsel for said Defendant in the above matter; that he is authorized to make this Verification on behalf of said Defendant; that the facts set forth in the foregoing document are true and correct, not of his own knowledge, but from information supplied to him by said Defendant; that the purpose of this Verification is to expedite litigation; and that a Verification by Defendant will be furnished if requested. This statement is made subject to the penalties of 18 Pa.C.S.A. § 4904 relating to unsworn falsification to authorities and is given pursuant to the provisions for verification of pleadings as defined and provided for in Rule 1024 of the Pennsylvania Rules of Civil Procedure.

STEPTOE & JOHNSON PLLC

By: /s/

Brian J. Pulito, Esquire

Date: 1/21/14

STEPTOE & JOHNSON PLLC

201 Chestnut Street, Suite 200

Meadville, PA 16335,

(814) 333–4900

IN THE COURT OF COMMON PLEAS OF CRAWFORD COUNTY,

PENNSYLVANIA

CIVIL DIVISION

PARK RESTORATION LLC, *Plaintiff*

vs.

ERIE INSURANCE EXCHANGE, SUMMIT TOWNSHIP, THE TRUSTEES OF CONNEAUT LAKE PARK, CRAWFORD COUNTY, THE TAX CLAIM BUREAU OF CRAWFORD COUNTY AND THE CONNEAUT SCHOOL DISTRICT, *Defendants*

No.2013–646

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 21st day of January, 2014, a true and correct copy of the foregoing *Answer and New Matter to Plaintiff's Amended Complaint and Demand for Jury Trial* was served upon the following via U.S. First Class Mail, Postage Pre–Paid:

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All Citations

Slip Copy, 2016 WL 1467882

Footnotes

1 Given the confusion over this matter, a copy of the *Answer and New Matter to Plaintiff's Amended Complaint and Demand for Jury Trial* is attached to this Memorandum Opinion as Appendix 1. For the sake of completeness, both Park Restoration and the Taxing Authorities have acknowledged in their pleadings from time to time that Park Restoration had a leasehold interest in the premises. *See Complaint for Declaratory Judgment* at ¶ 8 and *Amended Complaint for Declaratory Judgment* at ¶ 10 (where Park Restoration acknowledged its interest as a lessee); *see Crawford County Tax Claim Bureau Answer and New Matter* at ¶ 10 (suggesting that the Plaintiff leased the Beach Club from the Debtor).

2 The Management Agreement *sub judice* is markedly different than the management agreement described in the case cited by the Debtor, *Cleveland Fin. Assocs. v. Cleveland Banquets, LLC,* 2009 Ohio Misc. LEXIS 554 (Ohio Mun.Ct. Nov. 4, 2009). In *Cleveland Fin. Assocs v. Cleveland Banquets,* the party alleging the existence of the lease had no right to exclude the plaintiff from designated areas. Conversely, the Management Agreement between the Debtor and Park Restoration does afford Park Restoration substantial rights. Thus, a fair reading of the document is that it is possible to construe it as a lease. As the Pennsylvania Supreme Court observed in *Schweitzer v. Evans,* “It is true that no particular form of words is necessary to constitute a lease and that any writing is sufficient which establishes the intention of one party voluntarily to dispossess himself of the premises, for a consideration, and of the other to assume the possession for a prescribed period ...” *Schweitzer v. Evans,* 63 A.2d 39, 40 (Pa.1949). But, again, the Court need not decide this issue.

3 During the summary judgment proceedings, counsel for the Debtor's “all or nothing” argument consisted of the following:

> I'd actually—I'd say that the legally entitled to payment [provision in the insurance policy] covers both the taxing authorities under 43 PS 638, and that it also covers the Debtor, too, as the owner of the interest insured, and of the covered property. The second sentence is important to that. It says the insurer will not pay the insured any more than their financial interest in the covered property. And the covered property, as we just went through and discussed what the different coverages are available, in this case it's the building, and that covered property, the only person with a—entity with a financial interest in it is the Debtor as the owner. Park Restoration does not have a financial interest in the building as the covered property, as that term is used and defined in the policy. It only has an interest in the personal property, at max an interest in the personal property and in business interruption or income protection.

See Transcript of August 25, 2015 Hearing filed at Dkt. No. 121 at p. 12, lines 3–19. No other arguments in this regard were made at any time relevant hereto.

4 The Court uses the phrase “intermediate position” because the Debtor now appears to contend that the value of Park Restoration's interest is somewhere between zero and the face amount of the Insurance Proceeds.

5 In declaratory judgment actions, the placement of a party in the caption is not determinative as to which party bears the ultimate burden of proof. The United States Court of Appeals for the Third Circuit suggests that courts examine the following factors in determining which party bears the burden of proof in declaratory judgment actions: (1) whether the plaintiff objected to assuming the burden of proof, (2) which party asserted the affirmative of the issue, (3) which party would lose in the absence of any evidence on the issue, and (4) what sort of relief is sought. *See Am. & Foreign Ins. Co.*

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v. Phoenix Petroleum Co., No. 97–3349, 1998 U.S. Dist. LEXIS 20411, at *9 (E.D.Pa. Dec. 23, 1998)(citing *Fireman's Fund Ins. Co. v. Videfreeze Corp.,* 540 F.2d 1171 (3d Cir. 1976), *cert. denied,* 429 U.S. 1053, 97 S.Ct. 767 (1977)).

End of Document

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firm the decision of the Bankruptcy Court, as memorialized in *Walsh v. Dively*, 522 B.R. 780, 784–85 (Bankr.W.D.Pa.2014), and *Walsh v. Dively*, 2015 Bankr. LEXIS 124 (Bankr.W.D.Pa. Jan. 7, 2015).

An appropriate order follows.

ORDER

AND NOW, this 8th day of February, 2016, upon consideration of Appellant's appeal (ECF No. 1), Appellant's brief in support of his appeal (ECF No. 2), and Appellee FedEx Corporation's brief in opposition to Appellant's appeal (ECF No. 7), **IT IS HEREBY ORDERED** that Appellant's appeal is **DENIED**. **IT IS FURTHER ORDERED** that the decision of the Bankruptcy Court, as memorialized in *Walsh v. Dively*, 522 B.R. 780, 784-85 (Bankr. W.D. Pa. 2014), and *Walsh v. Dively*, 2015 Bankr. LEXIS 124 (Bankr. W.D.Pa. Jan. 7, 2015), is **AFFIRMED**.

IN RE TRUSTEES OF CONNEAUT LAKE PARK, INC., Debtor

Park Restoration, LLC, Appellant and Cross-Appellee,

v.

Summit Township, a municipal corporation; the Trustees of Conneaut Lake Park, a charitable trust, Appellee and Cross Appellant; Crawford County, a political subdivision, the Tax Claim Bureau of Crawford County; and the Conneaut School District, Appellees.

CIVIL ACTION No. 1:16-cv-00006-BJR

United States District Court, W.D. Pennsylvania.

Signed May 4, 2016

Background: Company that, pursuant to written management agreement with debtor, operated historic beach club and had elected to insure debtor's interest as fee owner of club brought adversary proceeding, seeking declaratory judgment regarding the relative rights of company, debtor, and certain tax creditors of debtor as to fire insurance proceeds of $611,000. Parties cross-moved for summary judgment. The United States Bankruptcy Court for the Western District of Pennsylvania, Jeffery A. Deller, Chief Judge, 543 B.R. 193, determined that taxing authorities were entitled to $478,260.75 of the proceeds as payment for outstanding property taxes and that company was entitled to remaining principal balance of the proceeds after payment to taxing authorities. Cross-appeals were taken.

Holdings: The District Court, Barbara Jacobs Rothstein, J., held that:

(1) company did not agree to assume debtor's tax liability simply by purchasing an insurance policy on debtor's property;

(2) Pennsylvania statute requiring fire insurer to satisfy municipality's claims for delinquent taxes and assessments before paying named insured applies only in those situations where the insured party owns the insured property and, as such, any outstanding tax liability is the responsibility of the property owner;

(3) under Pennsylvania law, company was not required to have a possessory interest in the beach club in order to have an insurable interest in the structure; and

(4) debtor was not entitled to any portion of the insurance proceeds.

Affirmed in part and reversed in part.

1. Guaranty ⚷1

It is a fundamental underpinning of this nation's legal system that individuals

generally are not held responsible for the debt of others.

2. Contracts ⚷189

Under Pennsylvania law, in order to contractually foist the liability of another onto a contracting party, the contract must be sufficiently explicit to place the contracting party on reasonable notice that it is assuming the liability of another by entering into the contract.

3. Insurance ⚷1851
Taxation ⚷2219

Under Pennsylvania law, company that had entered into written management agreement with owner of historic beach club to operate club, and subsequently purchased casualty insurance policy on club structure, did not thereby agree to assume responsibility for owner's delinquent property taxes; boilerplate language in policy, which stated that "[t]his policy conforms to the laws of the state in which your principal office is located," incorporated all Pennsylvania law, not just statute requiring fire insurer to satisfy municipality's claims for delinquent taxes and assessments before paying named insured, and so policy also incorporated the fundamental principle that property taxes are the financial responsibility of the owner. 40 Pa. Stat. Ann. § 638.

4. Statutes ⚷1072

Polestar for interpreting a Pennsylvania statute is to ascertain and effectuate the intention of the General Assembly. 1 Pa. Cons. Stat. Ann. § 1921(a).

5. Statutes ⚷1079

Under Pennsylvania law, the starting point in every case involving construction of a statute is the language itself.

6. Statutes ⚷1108, 1152

In interpreting a Pennsylvania statute, the court's inquiry ends if the statutory language is unambiguous and the statutory scheme is coherent and consistent.

7. Statutes ⚷1102

Under Pennsylvania law, a statute is "ambiguous" if the disputed language is reasonably susceptible of different interpretations.

See publication Words and Phrases for other judicial constructions and definitions.

8. Statutes ⚷1104

Under Pennsylvania law, if a statute is ambiguous, the court then must employ other traditional tools of statutory interpretation.

9. Insurance ⚷2194, 3446
Taxation ⚷2168

Pennsylvania statute requiring fire insurer to satisfy municipality's claims for delinquent taxes and assessments before paying named insured applies only in those situations where the insured party owns the insured property and, as such, any outstanding tax liability is the responsibility of the property owner; statute, which uses terms "named insured" and "the insured property owner" interchangeably, is reasonably susceptible of different interpretations, and statute's legislative history demonstrates that the General Assembly intended it to apply only to insured property owners. 40 Pa. Stat. Ann. § 638.

10. Statutes ⚷1242

Under Pennsylvania law, legislative history is a useful and appropriate tool for an inquiry into legislative intent when the plain statutory text is ambiguous.

11. Insurance ⚷2194, 3446
Taxation ⚷2168

Pennsylvania statute requiring fire insurer to satisfy municipality's claims for delinquent taxes and assessments before paying named insured was enacted as a

means for collecting delinquent taxes in the event that the collateral for the taxes, that is, the property, was destroyed by fire. 40 Pa. Stat. Ann. § 638.

12. Statutes ⇔1404

Pennsylvania General Assembly, in enacting a statute, does not intend an absurd or unreasonable result. 1 Pa. Cons. Stat. Ann. § 1922(1).

13. Taxation ⇔2168

Under Pennsylvania law, the owner of property is the party responsible for taxes assessed against the property.

14. Insurance ⇔1790(1)

Under Pennsylvania law, company that had entered into written management agreement with owner of historic beach club to operate club, and subsequently purchased casualty insurance policy on club structure, was not required to have a possessory interest in the club in order to have an insurable interest in the structure; resolution of issue of whether company held insurable interest was not premised upon the precise nature of company's property interest but, rather, upon a determination of whether company held such a relationship with the property that its destruction by the peril insured against involved pecuniary loss to company, and destruction of club would have caused company pecuniary loss, as not only did company stand to suffer pecuniary loss from its loss of income related to operating the facility, but, per terms of management agreement, it had been obligated to invest its own money into club facilities.

15. Insurance ⇔2129, 3436, 3453

Under Pennsylvania law, owner of historic beach club destroyed by fire was not entitled to any portion of proceeds of casualty insurance policy on club structure that had been procured and paid for by company that operated club pursuant to management agreement with owner; owner was not listed as the named insured under the policy, section of policy meant to protect insurer from having to pay twice in the event that it was obligated to pay a third party for a loss could not be used as a means to convert owner into the named insured under the policy, there was no indication in insurance contract that owner was an intended third party beneficiary of the policy, nor did circumstances of case compel court to recognize owner as such, and, although owner had suffered a loss, company also had suffered pecuniary loss when club was destroyed.

16. Contracts ⇔187(1)

Under Pennsylvania law, a party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself, unless: (1) the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties, and (2) the performance satisfies an obligation of the promisee to pay money to the beneficiary, or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

17. Contracts ⇔187(1)

Under second prong of test used in Pennsylvania to determine if a party is a third party beneficiary to a contract, it is left up to the discretion of the court to decide if the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties.

18. Insurance ⇔3436, 3567

Under Pennsylvania law, owner of historic beach club destroyed by fire lacked standing to raise claim that company hired to operate club, which had purchased casualty insurance policy on club structure,

was being paid proceeds in excess of the value of company's financial interest, where owner was not a party to, nor a third party beneficiary of, the insurance policy.

Appeal from the United States Bankruptcy Court for the Western District of Pennsylvania, Bankruptcy Case No. 14-11227-JAD; Adv. Proc. No. 15-010101-JAD Order Entered December 22, 2015

Francis R. Murrman, Greensburg, PA, John F. Mizner, Mizner Firm, Erie, PA, for Appellant and Cross-Appellee.

Lawrence C. Bolla, Michael P. Kruszewski, Quinn, Buseck, Leemhuis, Toohey & Kroto, Inc., Erie, PA, George T. Snyder, Jeanne S. Lofgren, Stonecipher, Cunningham, Beard & Schmitt, Pittsburgh, PA, for Appellees.

ORDER AFFIRMING IN PART AND REVERSING IN PART BANKRUPTCY COURT DECISION

Barbara Jacobs Rothstein, U.S. District Court Judge

I. INTRODUCTION

This is a declaratory judgment action regarding the relative rights of the Trustees of Conneaut Lake Park, Inc. (the "Debtor"), Park Restoration, LLC ("Park Restoration"), and certain tax creditors of the Debtor (specifically, Summit Township, Crawford County, the Tax Claim Bureau of Crawford County, and Conneaut School District (collectively, "the Taxing Authorities")) with respect to insurance proceeds in the amount of $611,000 from a casualty insurance policy on a building owned by the Debtor. On December 22, 2015, the United States bankruptcy court for the Western District of Pennsylvania determined that the Taxing Authorities are entitled to $478,260.75 of the insurance proceeds as payment for outstanding property taxes and that Park Restoration is entitled to the remaining principal balance of the proceeds after payment to the Taxing Authorities. Park Restoration appeals the decision to this Court and Debtor filed a cross-appeal. Having reviewed the parties' filings, the record of this case, and the relevant legal authority, this Court will affirm in part and reverse in part the bankruptcy decision. Specifically, this Court affirms that Debtor is not entitled to any of the insurance proceeds, but reverses the bankruptcy court's conclusion that the Taxing Authorities are entitled to a portion of the proceeds; instead, the insurance proceeds, in their entirety, must be awarded to Park Restoration. The reasoning for this Court's decision is as follows.

II. BACKGROUND

The material facts of this case are not in dispute. *See* Dkt. No. 1, Ex. 5. Nor are they complicated. They are as follows: Debtor owns 55.33 acres of land in Crawford County that contains a number of amusement attractions, buildings, and other permanent fixtures. Pursuant to a written management agreement between Debtor and Park Restoration ("the Management Agreement"), Park Restoration operated an attraction located on Debtor's land. The attraction is commonly referred to as the Beach Club. The Beach Club is an historic 77-year old structure located on less than one acre of Debtor's 55.33 acre property. As such, while Debtor's full parcel of land has an assessed tax value of $152,195, the Beach Club itself has an assessed value of only $13,992 (*i.e.*, the Beach Club's assessed value is nine percent of the assessed value for the entire property). Park Restoration did not have access to the remaining approximately 54.33 acres of Debtor's land.

The Management Agreement granted Park Restoration the right to operate the Beach Club for a period of twenty years commencing on November 24, 2008 in return for a portion of the profits generated by the Beach Club. In addition to managing the Beach Club, Park Restoration was required to repair, improve, and secure the building at its own expense. The Management Agreement did not give Park Restoration any type of ownership in the Beach Club; to the contrary, Debtor remained the sole owner of the Beach Club and the land on which it is located.

In connection with its operation of the Beach Club, Park Restoration purchased, and paid insurance premiums, for a casualty insurance policy on the Beach Club structure from Erie Insurance Exchange ("Erie"). The policy insured the structure for $611,000.[1] On August 1, 2013, the Beach Club was destroyed by fire, rendering it unusable for its intended purpose. Thereafter, Park Restoration submitted a claim for the insurance proceeds to Erie. Erie did not dispute the insurance claim; however, it informed Park Restoration that pursuant to 40 Pa. Cons. Stat. § 638, before Erie could pay on the claim, Park Restoration must first obtain a certificate from the treasurer for the municipality where the Beach Club is located. The certificate must indicate whether there are any delinquent taxes (in addition to other costs not relevant to this lawsuit) assessed against the Beach Club. According to Erie, if there are delinquent property taxes, Erie is required to deduct the amount of the delinquent taxes from the insurance proceeds and transfer the funds to the Taxing Authorities to be credited against the delinquent taxes.

At the time of the fire, Debtor owed back taxes on the entire 55.33 acre parcel in the amount of $478,260.75. The tax debt dated back to at least 1996. Therefore, Erie notified Park Restoration that it intended to deduct $478,260.75 from the $611,000 insurance proceeds to satisfy the outstanding tax obligation on Debtor's property. Park Restoration objected and Erie commenced an interpleader action in the Court of Common Pleas. The matter was transferred to the bankruptcy court after the Debtor instituted its bankruptcy action.[2]

The Taxing Authorities and Park Restoration each moved for summary judgment before the bankruptcy court. The Taxing Authorities argued that pursuant to 40 Pa. Cons. Stat. § 638, Erie was required to transfer $478,260.75 to the Taxing Authorities to satisfy Debtor's outstanding tax liability on the insured property before it could release the remainder of the insurance proceeds to Park Restoration. Park Restoration opposed the Taxing Authorities' motion and filed its own motion for summary judgment. Park Restoration argued that 40 Pa. Cons. Stat. § 638 is not applicable to the present situation, but instead, applies only to those situations in which the insured owns the insured property and, therefore, is financially responsible for the delinquent taxes. In other words, Park Restoration argued that because it did not own the Beach Club and because it is not financially responsible for Debtor's delinquent taxes, § 638 cannot be invoked to force Park Restoration to assume responsibility for the debt. To do so, Park Restoration argued, would constitute an unconstitutional taking in violation of

1. The policy also insured Park Restoration's personal property located at the structure. The insurance proceeds associated with this coverage are not in dispute.

2. Erie was dismissed from the interpleader action on December 9, 2013, and as such, is not a party to the bankruptcy action or this appeal.

both the constitution of the United States as well as Pennsylvania's constitution.[3]

Debtor also opposed Park Restoration's motion for summary judgment. Debtor argued that Park Restoration is not entitled to any of the insurance proceeds, even that portion which would remain after the proceeds were applied to the tax debt. Debtor claimed that it is the beneficiary of the insurance policy (as opposed to Park Restoration) because it (Debtor) owns the Beach Club.

The bankruptcy court granted partial summary judgment in favor of the Taxing Authorities and partial summary judgment in favor of Park Restoration. The bankruptcy court concluded that: (1) 40 Pa. Cons. Stat. § 638 unambiguously mandates that the delinquent taxes be deducted from the insurance proceeds; (2) because the statute was enacted prior to the date that the insurance was purchased, Park Restoration was held to be on notice that it did not have a protected property interest in the insurance proceeds; (3) there was no "taking" of a protected property interest in violation of the Takings Clauses in the federal and Pennsylvania constitutions; (4) the Taxing Authorities are entitled to $478,260.75 of the insurance proceeds; (5) Debtor was not an insured beneficiary under the insurance policy, and (6) as such, the remaining $132,739.25 of the insurance proceeds belongs to Park Restoration.

III. STANDARD OF REVIEW

When a district court reviews a decision of a bankruptcy court, it reviews the factual findings for clear error and its legal conclusions *de novo*. Fed. R. Bankr. P. 8013; *Meridian Bank v. Alten*, 958 F.2d 1226, 1229 (3d Cir.1992).

IV. DISCUSSION

There are two appeals before this Court. First, Park Restoration challenges the bankruptcy court's construction of 40 Pa. Cons. Stat. § 638 and the constitutionality of the statute's application to this case. Park Restoration argues, for the first time on appeal, that because the insured property—the Beach Club—only constitutes nine percent of the total tax assessed value of Debtor's 55.33 acre parcel, Park Restoration should only be responsible for nine percent of the total delinquent tax debt. Taking anymore, Park Restoration argues, would violate the Takings Clauses of the United States and Pennsylvania constitutions.

The Taxing Authorities urges this Court to disregard Park Restoration's "pro rata share" argument. They assert that because Park Restoration did not raise this argument before the bankruptcy court, the argument is deemed waived pursuant to the Federal Rules of Bankruptcy Procedure. It is not necessary for this Court to address the waiver issue, because, for the reasons stated below, this Court resolves Park Restoration's appeal without reaching Park Restoration's "pro rata share" argument.

The second appeal is brought by Debtor. It challenges the bankruptcy court's conclusion that Park Restoration is entitled to that portion of the insurance proceeds remaining after the Taxing Authorities recovered for the delinquent taxes. It claims that Park Restoration is not entitled to any of the proceeds because it does not

3. The bankruptcy court certified the matter to the Attorney General of the Commonwealth of Pennsylvania pursuant to 28 U.S.C. § 2403 because Park Restoration's claim to the insurance proceeds rests, in part, on a constitutional challenge to a Pennsylvania statute. The Commonwealth, through the Attorney General, subsequently filed an amicus brief in response to the issues raised by the parties.

have a financial interest in the insured property (*i.e.*, the Beach Club). Instead, Debtor argues, the proceeds should be paid to it as owner of the Beach Club.

The Court will first address Park Restoration's challenges to the bankruptcy court's decision and then it will turn to Debtor's challenges to the decision.

A. Park Restoration's Challenge to the Bankruptcy Court's Decision

1. Individuals Generally Are Not Financially Responsible for the Debt of Third Parties

[1] It is a fundamental underpinning of our legal system that individuals generally are not held responsible for the debt of others. *See, e.g., United States v. Rodgers*, 461 U.S. 677, 697, 103 S.Ct. 2132, 76 L.Ed.2d 236 (1983); *Russell v. Clark's Ex'rs*, 11 U.S. 7 Cranch 69, 3 L.Ed. 271 (1812) ("To charge one person with the debt of another, the undertaking must be clear and explicit."). Here, the Taxing Authorities try to avoid the fundamental inequity of their claim by arguing that Park Restoration agreed to assume responsibility for Debtor's delinquent taxes when it purchased the insurance policy because 40 Pa. Cons. Stat. § 638 had already been enacted and was therefore incorporated into the policy. The Taxing Authorities base their argument on the following boilerplate language in the policy: "[t]his policy conforms to the laws of the state in which your principal office is located." Dkt. No. 10 at 3.

[2, 3] The Court is not persuaded by the Taxing Authorities' argument. In order to contractually foist the liability of another onto a contracting party, the contract must be sufficiently explicit to place the contracting party on reasonable notice that it is assuming the liability of another by entering into the contract. The above quoted boilerplate language fails this test for at least two reasons. First, the boilerplate language incorporates *all* Pennsylvania law, not just 40 Pa. Cons. Stat. § 638. This is significant because this means that the insurance policy also incorporated the fundamental principal that property taxes are the financial responsibility of the owner. *See*, *e.g.*, Black's Law Dictionary, Tax (10th ed. 2014) (property tax is: "[a] tax levied on the *owner* of property (esp. real property), usually based on the property's value.") (emphasis added); *North Philadelphia Trust Co. v. Heinel Bros.*, 315 Pa. 385, 172 A. 692, 693 (1934) ("[I]t is the policy of the law ... to make the real owner pay the [property] tax."). Second, incorporating 40 Pa. Cons. Stat. § 638 into the policy does not offer Tax Authorities the relief they seek. This is because, as will be discussed in more detail below, the statute is ambiguous.

Accordingly, this Court concludes that Park Restoration did not agree to assume the Debtor's tax liability simply by purchasing an insurance policy on Debtor's property. Indeed, imposing such a liability on Park Restoration through such a tenuous means might give credence to Park Restoration's constitutional challenges. However, the Court need not reach the constitutional issues because, as explained below, this Court finds 40 Pa. Cons. Stat. § 638 ambiguous.[4]

2. 40 Pa. Cons. Stat. § 638 Is Ambiguous

40 Pa. Cons. Stat. § 638 is part of a comprehensive scheme that governs the rights and obligations of both insurance companies and their insured in the Com-

4. In addition, imposing such significant liability on an innocent third party based on a contractual provision that the average lay person would not read may have the effect of an adhesion contract and raises serious equitable concerns.

monwealth. Relevant to this lawsuit, the statute conditions an insurance company's ability to pay out fire insurance proceeds by providing that "[n]o insurance company...shall pay a claim of a named insured for fire damage to a structure located within a municipality...unless the insurance company...is furnished with a certificate pursuant to subsection (b) of this section..." 40 Pa. Cons. Stat. § 638 (a) (2015). Subsection (b)(1)(ii), in turn, provides that the certificate shall set forth whether there are any "delinquent taxes, assessments, penalties and user charges" assessed "against the property" as of the date of the fire damage. If there are outstanding "delinquent taxes, assessments, penalties and user charges" assessed against the property, subsection (b)(2)(ii) requires that the insurance company "transfer to the [municipality] treasurer an amount from the insurance proceeds necessary to pay the taxes, assessments, penalties, charges and costs as shown on the bill."

In this case, $478,260.75 in delinquent property taxes had been assessed against the Beach Club and the property on which it was located at the time it was destroyed by the fire. In the bankruptcy court's view, the foregoing statutory provisions unambiguously mandate that Erie transfer $478,260.75 from the insurance proceeds to the municipal treasurer in satisfaction of the delinquent tax debt. The bankruptcy court reached this decision by concluding that the unambiguous statutory provisions had been incorporated into the Erie insurance policy by reference and that Park Restoration agreed to be bound by the same when it purchased the insurance policy. Therefore, the bankruptcy court concluded, 40 Pa. Cons. Stat. § 638, as applied, is constitutional, and no taking occurred by virtue of its application to this case.

[4–8] This Court respectfully disagrees that 40 Pa. Cons. Stat. § 638 is unambiguous. The polestar for interpreting a Pennsylvania statute is to ascertain and effectuate the intention of the General Assembly. *See* 1 Pa. Cons. Stat. Ann. § 1921(a)(2015); *White v. Lord Abbett & Co. LLC*, 553 F.3d 248, 254 (3d Cir.2009). Therefore, "[t] he starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756, 95 S.Ct. 1917, 1935, 44 L.Ed.2d 539 (1975) (Powell, J., concurring); *see also*, *Dobrek v. Phelan*, 419 F.3d 259, 263 (3d Cir.2005) (citing *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002) (a court must first "determine whether the language at issue has a plain and unambiguous meaning.")). The court's inquiry ends if the statutory language is unambiguous and the statutory scheme is coherent and consistent. *Dobrek*, 419 F.3d at 263 (citing *Barnhart*, 534 U.S. at 450, 122 S.Ct. 941). However, the statute is ambiguous if the disputed language is "reasonably susceptible of different interpretations." *Dobrek*, 419 F.3d at 264 (quoting *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 473 n. 27, 105 S.Ct. 1441, 84 L.Ed.2d 432 (1985)). If the statute is ambiguous, the court then must employ other traditional tools of statutory interpretation. *In re Philadelphia Newspapers, LLC*, 418 B.R. 548, 560 (E.D.Pa.2009).

[9] Thus, this Court must first determine whether 40 P.S. § 638 has a "plain and unambiguous meaning." *Dobrek*, 419 F.3d at 263. This Court concludes that it does not. The Court reaches this conclusion because the statute uses the terms "named insured" and "the insured property owner" interchangeably. As set forth above, the statute is a step-by-step procedure that the insured party must follow in

order to obtain the insurance proceeds. In subsections (a) and (b)(1), the statute refers to the insured party as the "named insured." However, in subsection (b)(2)(i), the statute refers to the same insured party as "the insured property owner." Then, inexplicably, the statute reverts to referring to the insured party as simply the "named insured" in the remaining subsections. A straight-forward reading of the statute demonstrates that it is referencing the same party when it refers to the "named insured" and "the insured property owner." Indeed, it makes no sense to read a previously unreferenced third party (*i.e.*, an insured property owner) into the statute and then never reference the third party again in the remainder of the statute. The only logical way to read this inconsistency is to assume that the General Assembly meant that the "named insured" and "the insured property owner" are synonymous.

Of course, this inconsistency in the statute is significant. If, for the purposes of the statute, the insured party means the "named insured" then, arguably the statute is applicable to the present situation. If, however, the term insured party means the "insured property owner," then the statute is not applicable to this case because the parties concede that Park Restoration does not own the Beach Club or the property on which it is located. Therefore, this Court concludes that 40 Pa. Cons. Stat. § 638 is "reasonably susceptible of different interpretations." *Dobrek*, 419 F.3d at 264.

3. The Legislative History Demonstrates that the General Assembly Intended 40 Pa. Cons. Stat. § 638 to Only Apply to Insured Property Owners

[10] Having determined that the statute is ambiguous, this Court must attempt to discern the Legislature's intent using the tools of statutory construction. *United States v. Cooper*, 396 F.3d 308, 310 (3d. Cir. 2005) (citing *Ki Se Lee v. Ashcroft*, 368 F.3d 218, 222 (3d. Cir.2004)). A frequent tool for parsing out ambiguity in the language of the statute is legislative history. It is recognized that legislative history is a "useful and appropriate tool for [an] inquiry into [legislative] intent" when the plain statutory text is ambiguous. *Francis v. Mineta*, 505 F.3d 266, 270–71 (3d Cir. 2007); *In re Philadelphia Newspapers*, 418 B.R. at 561 (same). In this case, the legislative history reveals that 40 Pa. Cons. Stat. § 638 was introduced to address "a problem that plague[d] many urban areas in the Commonwealth," namely the situation where a building is destroyed by fire "and the *property owner* walks away with the insurance proceeds and avoids the costs that may be incurred to protect the public from that property..." 1992 Pa. Legis. Journal, House, p. 1573 (June 29, 1992) (emphasis added). One Legislator specifically stated that the "reason that this legislation has been offered" is because property owners are frequently delinquent on their property taxes, so that "the municipality often will take these properties over for taxes, and the cost to the taxpayer then is not only the lost taxes but to pay to have the property demolished." *Id.* Meanwhile, "the *owners* of these properties take the [insurance] money and run." *Id.* (emphasis added). The legislative history notes that 40 Pa. Cons. Stat. § 638 solves this problem because before an insurance claim can be paid, the insured "[has] to go to the municipality and get a certificate indicating that *they* ha[ve] no back taxes..." (emphasis added). In other words, the purpose of this statute was to ensure that a property owner who owed delinquent property taxes did not walk away with the insurance proceeds without first satisfying the outstanding tax debt.

[11] Another way of describing the Legislature's intent in adopting 40 P.S. § 638 is that it sought a means for collecting delinquent taxes in the event that the collateral for the taxes (*i.e.*, the property) was destroyed by fire. If a property owner is delinquent on taxes, the Taxing Authorities' ultimate recourse is to place a lien on the property and foreclose on the lien. If, however, the property is destroyed by fire, the Taxing Authorities lose their collateral for the tax debt. Recouping the delinquent taxes from the insurance proceeds is a way of insuring that the municipality is paid even if the property is destroyed. This, of course, is consistent with the statute's stated purpose, which is "to deter the commission of arson and related crimes, to discourage the abandonment of property and to prevent urban blight and deterioration." *Id.* at § 638(k). If a property owner cannot escape its financial liability through the commission of arson, the property owner is disincentivized to commit arson.

4. Property Taxes Are the Responsibility of the Property Owner

[12, 13] What is more, the statute cannot be interpreted in isolation, but must be read against other general legal principles for it is axiomatic that the General Assembly does not intend an absurd or unreasonable result. *See* 1 Pa. Cons. Stat. Ann. § 1922(1) (2015). As the Commonwealth concedes in its amicus brief, under Pennsylvania law, the owner of property is the party responsible for taxes assessed against the property. Dkt. No. 17 at 4 (citing *Appeals of Baltimore & O.R.R.*, 405 Pa. 349, 175 A.2d 841, 843-844 (1961)) (noting that "[s]ince Park Restoration does not own [the Debtor's parcel] is bears no *direct* reasonability for paying the real estate taxes assessed against [it.]") (emphasis in original). As such, Pennsylvania courts have consistently held that the property owner is the party responsible for paying real estate taxes, even for instance, if another party is in possession of the property. *See, e.g.*, *Bergdoll v. Pitts*, 41 Pa.Super. 257, 258 (1909) ("The party who at law is responsible for the payment of taxes assessed on real estate is the real owner . . . The fact that he is out of possession and that another is enjoying the rents, issues and profits of the property is no reason why its real owner should escape the burden of paying the taxes on it."); *North Philadelphia Trust Co.*, 172 A. at 693 ("[I]t is the policy of the law . . . to make the real owner pay the tax."); *Pa. State Bldg. & Constr. Trades Council, AFL-CIO v. Prevailing Wage Appeals Bd.*, 570 Pa. 96, 808 A.2d 881, 886 (2002) ("owner of the . . . buildings, was responsible for paying the real estate taxes on the property to the taxing bodies."); *Nesley v. Rockwood Spring Water Co., Inc.*, 285 Pa.Super. 507, 428 A.2d 161, 162 (1981) (holding that "[t]he general rule is that, in the absence of an agreement to the contrary, the lessor is responsible for" payment of taxes assessed against the property); *Marcus Hook Devel. Park, Inc. v. Bd. of Assessment Appeals of Delaware Cnty.*, 68 Pa.Cmwlth. 229, 449 A.2d 70, 73 (1982) (holding that lessee of real estate was not the "real owner" for tax purposes despite the fact that the lessee had a contractual obligation to pay the taxes on the property); 8A Keith A. Braswell, Summ. Pa. Jur. 2d Property § 26:134 (April 2016) (same).

There is nothing in 40 Pa. Cons. Stat. § 638 to suggest that the General Assembly intended to depart from Pennsylvania's well-establish principle that property taxes are the financial responsibility of the property owner. To the contrary, the fact that the statute equates the "named insured" with "the insured property owner" in subsection (b)(2)(i) suggests that the Legislature intended for the statute to apply only

in those circumstances in which the named insured owned the insured property. This interpretation of the statute is substantiated by the legislative history that clearly demonstrates that the purpose of the statute was to dissuade "property owner[s]" from "tak[ing] the money and run[ning]." 1992 Pa. Legis. Journal, House, p. 1573 (June 29, 1992).

Based on the foregoing, this Court concludes that the drafters of 40 Pa. Cons. Stat. § 638 did not intend to depart from basic principles of equity and tax law and instead intended for the statute to apply only in those situations where the insured party owns the insured property, and as such, any outstanding tax liability is the responsibility of the property owner. Therefore, the statute cannot be used to shift Debtor's tax burden onto Park Restoration.[5]

B. Debtor's Challenges to the Bankruptcy Court's Decision

1. Park Restoration Has an Insurable Interest in the Beach Club

[14] As discussed above, Debtor argues that the bankruptcy court committed reversible error when it determined that Park Restoration has an insurable interest in the Beach Club. Dkt. No. 21 at 11. Debtor claims that in order to recover under the insurance policy, Park Restoration must have a "possessory interest" in the Beach Club and the bankruptcy court erred when it determined "that [Park Restoration] held a possessory interest in the Beach Club akin to a leasehold or license." *Id.* at 14. Debtor argues that Park Restoration did not have a possessory interest in the Beach Club; rather, Park Restoration simply had a contractual right to "manage and operate" the property. *Id.* at 15. According to Debtor, "[t]he fact that [Park Restoration] has a financial interest in personal property at the Beach Club or in the income that might have been generated by future Beach Club operations is irrelevant" to whether Park Restoration is entitled to the insurance proceeds. *Id.* at 14. *Id.*[6]

Debtor's argument rests on the faulty premise that Park Restoration must have a possessory interest in the Beach Club in order to have an insurable interest in the structure. This simply is not the law in Pennsylvania. Park Restoration need not have a possessory interest in the Beach Club in order to have an insurable interest in the structure. *See, e.g., Commonwealth v. Rodebaugh*, 102 Pa.Cmwlth. 592, 519 A.2d 555, 563 (1986) (Pennsylvania law provides that "a person need not have any property interest in the subject matter insured and that a person [has] an insurable interest in property 'if he holds such relation to the property that its destruction by the peril insured against involves pecuniary loss to him' "); *Kellner v.*

5. While not raised by Park Restoration, this Court also notes that the doctrine of laches may be applicable in this case given that Debtor's outstanding tax liability dates back to at least 1996. *Gruca v. U.S. Steel Corp.*, 495 F.2d 1252, 1258 (3d. Cir.1974) ("Laches conceptualizes the inequity which may inhere when a stale claim is permitted to be enforced."); *Muscianese v. U.S. Steel Corp.*, 354 F.Supp. 1394, 1399 (E.D.Pa.1973) ("The doctrine of laches is an equitable doctrine based on public policy which requires the discouragement of stale demands. Laches is not a mere lapse of time but is principally a question of the inequity of permitting a claim to be enforced where some change in condition has taken place which would make enforcement of the claim unjust.").

6. Debtor further notes that the insurance policy was organized by financial interest and covered property category. Cover I insured the building structure, Coverage 2 insured the personal property located in the structure, and Coverage 3 insured the income generated at the Beach Club. Park Restoration opted to purchase Coverage 1 and 2 only.

Aetna Cas. & Surety Co., 605 F.Supp. 331, 333 (M.D.Pa.1984) (noting that it "is an elementary principal of insurance law that an insurable interest exists in any party who would be exposed to financial loss by the destruction of certain property."). As the bankruptcy court points out "[t]he resolution of the issue of whether Park Restoration held an insurable interest was not premised upon the precise nature of Park Restoration's property interest. Rather, it was premised upon a determination of whether Park Restoration held such a relationship with the property 'that its destruction by the peril insured against involves pecuniary loss to [Park Restoration].' " Dkt. No. 25, Ex. 1 at 13 (quoting *A.K. Nahas Shopping Ctr., Inc. v. Reitmeyer*, 161 B.R. 927 (Bankr. W.D.Pa.1993)) (citing *Rodebaugh*, 519 A.2d at 563). The bankruptcy court determined that Park Restoration had an insurable interest in the Beach Club derived from "its undisputed right to long term possession and use of the Beach Club." *Id.* at 14. This Court agrees. Not only did Park Restoration stand to suffer pecuniary loss from its loss of income related to operating the facility, but per the terms of the Management Agreement, Park Restoration was obligated to invest its own money into the Beach Club facilities. Clearly, the destruction of the Beach Club caused Park Restoration "pecuniary loss."

2. Debtor Is Not Entitled to Any Portion of the Insurance Proceeds

[15] Next, Debtor argues that even if this Court were to determine that Park Restoration has an insurable interest in the Beach Club, Debtor is still entitled to the insurance proceeds because it owns the Beach Club. According to Debtor, the "fact that [it] is not a named insured under the policy does not preclude its recovery of the [i]nsurance [p]roceeds for three reasons." *Id.* at 9. First, Debtor claims that the policy contemplates that Erie may have to pay the proceeds to Debtor and not Park Restoration. Second, Debtor argues that it is the third party beneficiary of the insurance policy and therefore entitled to the proceeds. Lastly, Debtor argues that it is the entity that suffered the insured loss, so it should be awarded the proceeds. The Court rejects Debtor's arguments for the following reasons.

a. The Insurance Policy Language Does Not Dictate that the Proceeds Be Paid to Debtor

As an initial matter, this Court notes—and Debtor concedes—that Debtor is not listed as the named insured under the policy. Nevertheless, Debtor argues that it is entitled to the insurance proceeds because Section 10 of the policy "contemplates" payment of the insurance proceeds to the owner of the insured property regardless of whether the owner is a named insured. Section 10 states:

> If we are called upon to pay a "loss" for property of others, we reserve the right to adjust the "loss" with the owner. If we pay the owner, such payments will satisfy your claims against us for the owner's property.

Dkt. No. 10, Ex. A at 37, Art. X (Commercial Property Conditions), § 10. According to Debtor, this section applies "to the situation at issue here, i.e. where the loss to the covered property is suffered by someone other than the named insured." Dkt. No. 21 at 20. Debtor misconstrues the meaning of Section 10. Section 10 is meant to protect Erie from having to pay twice under the policy. In the event Erie was obligated to reimburse a third party for a loss, then, per Section 10, Erie would not also be obligated to pay Park Restoration for the same loss. However, Section 10 cannot be used as a means to convert

Debtor into the named insured under the policy. As the bankruptcy court correctly pointed out, Debtor has "not pointed to any provision in the policy where it is the named insured; nor has the Debtor cited any compelling legal authority upon which [it] bases its claim of entitlement to the [i]nsurance [p]roceeds." Dkt. No. 1, Ex. 5 at 12. Accordingly, this Court agrees with the bankruptcy court that Section 10 does not afford Debtor the relief it seeks.

b. Debtor Is Not a Third Party Beneficiary of the Insurance Policy

[16] Nor is this Court persuaded by Debtor's claim that it is an intended third party beneficiary of the insurance policy. Under Pennsylvania law:

> [A] party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself, *Spires v. Hanover Fire Ins. Co.*, 364 Pa. 52, 70 A.2d 828 (1950), unless, [1] the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties; and [2] the performance satisfies an obligation of the promisee to pay money to the beneficiary, or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

Two Rivers Terminal, L.P. v. Chevron USA, 96 F.Supp.2d 432, 450 (2000) (quoting *Scarpitti v. Weborg*, 530 Pa. 366, 609 A.2d 147, 150 (1992)). Debtor fails to cite to any provision in the insurance contract that expresses an intention to benefit Debtor, and thus does not satisfy the *Spies* test. *See Blue Mountain Mushroom Co., Inc. v. Monterey Mushroom, Inc.*, 246 F.Supp.2d 394, 401 (E.D.Pa.2002) (citing *Spires*, 70 A.2d at 828 ("To be a third party beneficiary entitled to recover on a contract it is not enough that it be intended by *one* of the parties to the contract and the *third person* that the latter should be a beneficiary, but *both parties to the contract* must so intend and must indicate that intention in the contract.")) (emphasis in original).

[17] Under the second test, it is left up to the discretion of this Court to decide if "the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties." *Blue Mountain*, 246 F.Supp.2d at 401 (citing *Scarpitti*, 609 A.2d at 150). The Court does not find that the circumstances of this case compel recognizing Debtor as a third party beneficiary under the insurance policy. First, Park Restoration is not indebted to Debtor. Debtor half-heartedly argues that under section seven of the Management Agreement, Park Restoration was required to indemnify Debtor for the loss it suffered due to the destruction of the Beach Club. *See* Dkt. No. 21 at 21 (claiming that Park Restoration must hold Debtor harmless and indemnify it from any loss that is the result of Park Restoration's use, misuse, occupancy, possession or abandonment of the Beach Club). However, section seven of the Management Agreement simply requires Park Restoration to hold harmless and indemnify Debtor for any losses claimed by third parties. Indeed, this section required Park Restoration to maintain "public liability insurance" with Debtor listed as an "additional named insured." Dkt. No. 9 at 50. There is no allegation in this case that a third party has brought a claim against Debtor; therefore, section seven is not applicable to this case. Furthermore, even if section seven could be read to apply to losses directly suffered by Debtor, there has been no showing that the fire was the result of Park Restoration's use, misuse, occupancy, possession or abandonment of the Beach Club. As there is no indication in the con-

tract that Park Restoration and Erie intended Debtor to be the beneficiary of the insurance policy and there exists no compelling circumstances that would warrant finding otherwise, the Court holds that Debtor is not a third party beneficiary here.

c. Debtor Is Not the Only Party that Suffered a Loss

[18] Debtor's final argument is that it "is the only party that suffered the insured loss," so it is entitled to the remainder of the insurance proceeds after payment to the Taxing Authorities. Once again, Debtor's argument is unavailing. As has already been discussed above, Park Restoration suffered a pecuniary loss when the Beach Club was destroyed. The relief Debtor seeks would bring about the result that through the proceeds of an insurance policy that was procured and paid for by another, Debtor would have all of its debt extinguished and would pocket the remaining $132,739.25. The law does not require such an unjust result.[7]

V. CONCLUSION

For the foregoing reasons, the Court affirms in part and reverses in part the bankruptcy court's decision. Specifically, the Court hereby concludes that:

(1) The bankruptcy court's grant of the Taxing Authorities' summary judgment motion is REVERSED;

(2) The bankruptcy court's denial of Park Restoration's summary judgment motion is REVERSED;

(3) Park Restoration is entitled to the full amount of the insurance proceeds; and

(4) The bankruptcy court's decision that Debtor is entitled to no part of the insurance proceeds is AFFIRMED.

IN RE: DIAMOND BEACH VP, LP, Debtor.

Randall J. Davis, Appellant,

v.

International Bank of Commerce, Appellee.

Case No. 1:14–cv–00046
Adversary Proceeding No. 12–01006

United States District Court,
S.D. Texas, Brownsville Division.

Signed 04/29/2016

Background: Proceeding was brought for determination of value of property securing deed of trust lender's claim, for purposes of determining lender's secured and unsecured deficiency claims. The Bankruptcy Court, Marvin Isgur, J., 506 B.R. 701, determined value, and guarantor of debtor's debt appealed.

Holdings: The District Court, Andrew S. Hanen, J., held that:

(1) bankruptcy court did not abuse its discretion in not basing its valuation on "cost" approach evidence proffered by experts;

7. Debtor also complains that Park Restoration is being paid proceeds in excess of the value of Park Restoration's financial interest. Given that this Court has already determined that Debtor is not a party to, nor a third party beneficiary of, the insurance policy, Debtor lacks standing to raise this claim. *See, e.g., Ryan v. Travelers Indem. Co.,* 2013 WL 3289075, at *3 (E.D.Cal. June 28, 2013); *Graphia v. Balboa Ins. Con.,* 517 F.Supp.2d 854, 859 (E.D.La.2007).

penalties as all sums would have been incurred based upon an underlying nondischargeable tax liability as well as within the three years prior to the Petition Date and, therefore, are nondischargeable. The IRS's general unsecured claim survived the Debtor's Chapter 7 bankruptcy discharge and the IRS is entitled to recoup this indebtedness.

It is hereby **ORDERED, ADJUDGED, and DECREED** that the Motion to Enforce Discharge and for Return of Seized Income Tax Refund (Doc. No. 63) is **DENIED.**

IN RE: TRUSTEES OF CONNEAUT LAKE PARK, INC., Debtor.

Trustees of Conneaut Lake Park, Inc., Plaintiff,

v.

Park Restoration, LLC, Defendant.

Bankruptcy Case No. 14–11277–JAD
Adv. Proc. No. 16–01029 JAD

United States Bankruptcy Court,
W.D. Pennsylvania.

Signed August 1, 2016

Background: Chapter 11 debtor, the owner of an historic beach club that was destroyed by fire, filed adversary complaint against company that had operated club pursuant to the parties' written management agreement, alleging claims for breach of contract, failure to vacate club without damage, failure to secure club in commercially reasonable manner, and contractual indemnity, and contemporaneously filed motion for preliminary injunction enjoining disbursement of fire insurance proceeds pending resolution of this proceeding.

Holding: The Bankruptcy Court, Jeffery A. Deller, Chief Judge, held that in this action for money damages, the court did not have the power to issue a preliminary injunction preventing defendant from use of assets in which plaintiff had no lien or equitable interest.

Motion denied.

See also 551 B.R. 577.

Bankruptcy ⟹2374

In adversary proceeding for money damages brought by Chapter 11 debtor, the owner of an historic beach club that was destroyed by fire, against management company, bankruptcy court did not have power to issue preliminary injunction preventing management company from use of insurance proceeds, assets in which debtor had no lien or equitable interest, pending adjudication of debtor's contract claim; although debtor's adversary complaint sought monetary damages for breach of the management agreement which, debtor argued, gave rise to management company's pecuniary interests and capacity to procure the insurance policy and receive the insurance proceeds, there was no evidence that debtor expressly required management company to procure the insurance, or of any lien held by debtor in the insurance proceeds, or of management company's express agreement to purchase the insurance for the benefit of debtor, nor were the insurance proceeds the subject of the complaint. Fed. R. Civ. P. 65; Fed. R. Bankr. P. 7065.

Jeanne S. Lofgren, Stonecipher Law Firm, Pittsburgh, PA, for Plaintiff.

John F. Mizner, Mizner Law Firm, Erie, PA, for Defendant.

MEMORANDUM OPINION REGARDING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Jeffery A. Deller, Chief U.S. Bankruptcy Judge

I. Summary

The Trustees of Conneaut Lake Park, Inc., Inc., debtor and debtor-in-possession, commenced an Adversary Proceeding on June 13, 2016, against Park Restoration, LLC, alleging breach of contract claims: Failure to Vacate the Beach Club without Damage;[1] Failure to Secure Beach Club in Commercially Reasonable Manner;[2] and Contractual Indemnity.[3] In each of the three Counts, the Plaintiff alleges "damages as a result of the Defendant's breach of Management Agreement in an amount not less than the full value of the Beach Club." This is the second adversary proceeding between these Parties (among others) filed in this Bankruptcy Case. In the first Adversary Proceeding, the Defendant herein sought title to certain insurance proceeds resulting from the destruction of the Beach Club, while the Debtor and certain Taxing Authorities asserted rights in the insurance proceeds. The insurance proceeds, $611,000.00, ("**Insurance Proceeds**"), which are the subject of the *first* Adversary Proceeding, were deposited into this Court's Registry.

Contemporaneous with the filing of the Complaint, the Debtor filed a Motion for Preliminary Injunction, which Motion is the subject of this Memorandum Opinion. The Defendant filed its response to the Motion, and after briefing and argument, this matter is now ripe for determination.

For the reasons set forth below, the Court shall enter an order denying the preliminary injunction.

II. Background

The background of the disputes between these parties is briefly summarized as follows.[4] The Plaintiff presently holds, in trust for the use of the general public, 208.213 acres of land and the improvements thereon (the "**Real Property**") located in Crawford County, Pennsylvania. Prior to 2014, a building, commonly referred to as the "Beach Club," was located on part of the Real Property. The Plaintiff and the Defendant were parties to the Beach Club Management Agreement dated on or about November 24, 2008 (the "**Management Agreement**"), pursuant to which the Defendant agreed to provide operational and management services for the Beach Club.[5] According to the Management Agreement, the Defendant agreed that its management services: (a) "include all services and functions necessary to insure that the Beach Club is a fully operational and full service club offering services commensurate with other commercially similar clubs," and (b) "include, but [are] not limited to, physical control and security, all maintenance at the facility, food and beverage, insuring that the property is fully secured and maintained in a commercially reasonable fashion." From at least November 2008 through and including August 1, 2013, De-

1. Count I of the Complaint, Adv. Case 16–01029–JAD, Adv. Dkt. No. 1 (the "**Complaint**").

2. Count II of the Complaint.

3. Count III of the Complaint.

4. Additional background can be found in this Court's Memorandum Opinion filed at Adv. No. 15–1010–JAD, Dkt. No. 82.

5. A copy of the Management Agreement is attached as *Exhibit A* to the Complaint.

fendant was in possession of, used, and occupied the Beach Club. On August 1, 2013, the Beach Club was destroyed by fire. By letter dated March 20, 2015, the Plaintiff, among other things, advised Defendant that all of its right, title, and interest in the Management Agreement terminated when the fire occurred.

The gist of the Complaint is that because the Beach Club was on the Real Property owned by the Plaintiff, the failure of the Defendant to "return" the Beach Club in good condition to the Plaintiff at the termination of the Management Agreement, was a breach of the Management Agreement, for which the Plaintiff is entitled to damages.

Failing to obtain an interest in the Insurance Proceeds in the first Adversary Proceeding,[6] the Debtor now seeks a preliminary injunction "enjoining disbursement of the Insurance Proceeds pending resolution of this Adversary Action and granting such further relief as this Court deems just and proper." [7]

III. Analysis

The first question this Court must answer is, whether, in an action for money damages, this Court has the power to issue a preliminary injunction preventing the Defendant from use of assets in which the Plaintiff has no lien or equitable interest. The United States Supreme Court has found that no such power exists under the law. *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 119 S.Ct. 1961, 144 L.Ed.2d 319 (1999).

A. *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*

The disposition of the Motion for Preliminary Injunction is controlled by the decision of the United States Supreme Court in *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 119 S.Ct. 1961, 144 L.Ed.2d 319 (1999). Below is a summary of the pertinent facts and application of the law as recited in *Grupo:*

> Grupo Mexicano de Desarrollo, S.A. (GMD), was a Mexican holding company. In 1994, GMD issued $250 million of 8.25% unsecured, guaranteed notes due in 2001 (Notes), which ranked pari passu in priority of payment with all of GMD's other unsecured and unsubordinated debt. Interest payments were due in February and August of every year. Between 1990 and 1994, GMD was involved in a toll road construction program sponsored by the Government of Mexico. Problems in the Mexican economy resulted in severe losses for the concessionaries, who were therefore unable to pay contractors like GMD. In response to these problems, in 1997, the Mexican Government announced the Toll Road Rescue Program, under which it would issue guaranteed notes (Toll Road Notes) to the concessionaries, in exchange for their ceding to the Government ownership of the toll roads. The Toll Road Notes were to be used to pay the bank debt of the concessionaries, and also to pay outstanding receivables held by GMD and other contractors for

6. In the Memorandum Opinion issued by this Court, I found that the Taxing Authorities were entitled to be paid first from the Insurance Proceeds, the balance to the Defendant herein. In reversing, the District Court found that all of the Insurance Proceeds were payable to the Defendant herein (*Park Restoration, LLC v. Summit Township, et al.*, (*In re Trustees of Conneaut Lake Park, Inc.*), 551 B.R. 577 (W.D.Pa.2016). Neither Court found in favor of the Debtor nor is the Debtor a party to the pending appeal before the Court of Appeals.

7. Motion for Preliminary Injunction, Adv. No. 16–01029, Adv. Dkt. No. 7.

services rendered to the concessionaries (Toll Road Receivables). In the fall of 1997, GMD announced that it expected to receive approximately $309 million of Toll Road Notes under the program.

By mid–1997 GMD was in serious financial trouble. In addition to the Notes, GMD owed other debts of about $450 million. As a result of these financial problems, neither GMD nor its subsidiaries (who had guaranteed payment) made the August 1997 interest payment on the Notes. Between August and December 1997, GMD attempted to negotiate a restructuring of its debt with its creditors. On October 28, GMD publicly announced that it would place in trust its right to receive $17 million of Toll Road Notes, to cover employee compensation payments, and that it had transferred its right to receive $100 million of Toll Road Notes to the Mexican Government (apparently to pay back taxes). GMD also negotiated with the holders of the Notes to restructure that debt, but by December these negotiations had failed.

On December 11, certain noteholders (hereafter the 'respondents') accelerated the principal amount of their Notes, and, on December 12, filed suit for the amount due in the United States District Court for the Southern District of New York (petitioners had consented to personal jurisdiction in that forum). The complaint alleged that 'GMD is at risk of insolvency, if not insolvent already;' that GMD was dissipating its most significant asset, the Toll Road Notes, and was preferring its Mexican creditors by its planned allocation of Toll Road Notes to the payment of their claims, and by its transfer to them of Toll Road Receivables; and that these actions would 'frustrate any judgment' respondents could obtain. Respondents sought breach-of-contract damages of $80.9 million, and requested a preliminary injunction restraining petitioners from transferring the Toll Road Notes or Receivables. On that same day, the District Court entered a temporary restraining order preventing petitioners from transferring their right to receive the Toll Road Notes.

On December 23, the District Court entered an order in which it found that 'GMD is at risk of insolvency if not already insolvent;' that the Toll Road Notes were GMD's 'only substantial asset;' that GMD planned to use the Toll Road Notes 'to satisfy its Mexican creditors to the exclusion of [respondents] and other holders of the Notes'; that '[i]n light of [petitioners'] financial condition and dissipation of assets, any judgment [respondents] obtain in this action will be frustrated'; that respondents had demonstrated irreparable injury; and that it was 'almost certain' that respondents would succeed on the merits of their claim.... It preliminarily enjoined petitioners 'from dissipating, disbursing, transferring, conveying, encumbering or otherwise distributing or affecting any [petitioner's] right to, interest in, title to or right to receive or retain, any of the [Toll Road Notes].' ... The court ordered respondents to post a $50,000 bond. The Second Circuit affirmed. 143 F.3d 688 (1998). We granted certiorari, 525 U.S. 1015, 119 S.Ct. 537, 142 L.Ed.2d 447 (1998).

Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 311–313, 119 S.Ct. 1961, 1965, 144 L.Ed.2d 319, 327 (1999).

Justice Scalia framed the issue: "This case presents the question whether, in an action for money damages, a United States District Court has the power to issue a preliminary injunction preventing the defendant from transferring assets ***in which***

***no lien or equitable interest is claimed*.**" [8]

In *Grupo*, the preliminary injunction had become permanent before the Supreme Court considered the appeal, and the respondents considered the appeal therefore moot. In its analysis, the Supreme Court compared the "usual preliminary injunction"—to enjoin action that was sought to be declared "unlawful," with the request by the noteholders—to enjoin an action that was valid and lawful pending the outcome of litigation:

> In the case of the usual preliminary injunction, the plaintiff seeks to enjoin, pending the outcome of the litigation, action that he claims is unlawful. If his lawsuit turns out to be meritorious—if he is found to be entitled to the permanent injunction that he seeks-even if the preliminary injunction was wrongly issued (because at that stage of the litigation the plaintiff's prospects of winning were not sufficiently clear, or the plaintiff was not suffering irreparable injury) its issuance would in any event be harmless error. The final injunction establishes that the defendant should not have been engaging in the conduct that was enjoined. Hence, it is reasonable to regard the preliminary injunction as merging into the final one: If the latter is valid, the former is, if not procedurally correct, at least harmless. A quite different situation obtains in the present case, where (according to petitioners' claim) the substantive validity of the final injunction does not establish the substantive validity of the preliminary one. For the latter was issued not to enjoin unlawful conduct, but rather to render unlawful conduct that would otherwise be permissible, in order to protect the anticipated judgment of the court; and it is the essence of petitioners' claim that such an injunction can be issued only after the judgment is rendered. If petitioners are correct, they have been harmed by issuance of the unauthorized preliminary injunction—and hence should be able to recover on the bond—even if the final injunction is proper. It would make no sense, when this is the claim, to say that the preliminary injunction merges into the final one.[9]

Having determined that the failure of the petitioners to appeal the permanent injunction does not forfeit their claim that the preliminary injunction was wrongful, the Supreme Court then considered the question that is the issue squarely before this Court: Whether the Court has the authority to issue the preliminary injunction pursuant to F.R.Civ.P. 65.

> The Judiciary Act of 1789 conferred on the federal courts jurisdiction over 'all suits ... in equity.' § 11, 1 Stat. 78. We have long held that '[t]he 'jurisdiction' thus conferred ... is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.' *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568, 59 S.Ct. 657, 83 L.Ed. 987 (1939). *See also, e.g., Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 382, n. 26, 69 S.Ct. 606, 93 L.Ed. 741 (1949); *Guaranty Trust Co. v. York*, 326 U.S. 99, 105, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945); *Gordon v. Washington*, 295 U.S. 30, 36, 55 S.Ct. 584, 79 L.Ed. 1282 (1935). 'Sub-

8. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 310, 119 S.Ct. 1961, 1964, 144 L.Ed.2d 319, 326 (1999)(emphasis added).

9. *Id.*, at 527 U.S. 308, 315, 119 S.Ct. 1961.

stantially, then, the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789 (1 Stat. 73).' A. Dobie, *Handbook of Federal Jurisdiction and Procedure* 660 (1928). '[T]he substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief are not altered by [Rule 65] and depend on traditional principles of equity jurisdiction.' 11A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2941, p. 31 (2d ed.1995). We must ask, therefore, whether the relief respondents requested here was traditionally accorded by courts of equity.

Respondents do not even argue this point. The United States as amicus curiae, however, contends that the preliminary injunction issued in this case is analogous to the relief obtained in the equitable action known as a 'creditor's bill.' This remedy was used (among other purposes) to permit a judgment creditor to discover the debtor's assets, to reach equitable interests not subject to execution at law, and to set aside fraudulent conveyances. [internal citations omitted] It was well established, however, that, as a general rule, a creditor's bill could be brought only by a creditor who had already obtained a judgment establishing the debt. [internal citations omitted] The rule requiring a judgment was a product, not just of the procedural requirement that remedies at law had to be exhausted before equitable remedies could be pursued, but also of the substantive rule that a general creditor (one without a judgment) had no cognizable interest, either at law or in equity, in the property of his debtor, and therefore could not interfere with the debtor's use of that property. As stated by Chancellor Kent: 'The reason of the rule seems to be, that until the creditor has established his title, he has no right to interfere, and it would lead to an unnecessary, and, perhaps, a fruitless and oppressive interruption of the exercise of the debtor's rights.' [internal citations omitted].

Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 320, 119 S.Ct. 1961, 1969, 144 L.Ed.2d 319, 332 (1999).

The Supreme Court reviewed it's decision in *De Beers Consol. Mines, Ltd. v. United States,* 325 U.S. 212, 65 S.Ct. 1130, 89 L.Ed. 1566 (1945), where United States sought a preliminary injunction restraining the defendants from removing their assets from this country pending adjudication of the merits of its complaint which sought equitable relief against alleged antitrust violations. In concluding that the injunction was beyond the power of the District Court, the Supreme Court stated:

> '[a] preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally,' but that the injunction in that case dealt 'with a matter lying wholly outside the issues in the suit.' *Id.,* at 220, 65 S.Ct. 1130. We pointed out that 'Federal and State courts appear consistently to have refused relief of the nature here sought,' and we concluded:
>
> > To sustain the challenged order would create a precedent of sweeping effect. This suit, as we have said, is not to be distinguished from any other suit in equity. What applies to it applies to all such. Every suitor who resorts to chancery for any sort of relief by injunction may, on a mere statement of belief that the defendant can easily make away with or transport his mon-

> ey or goods, impose an injunction on him, indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree. And, if so, it is difficult to see why a plaintiff in any action for a personal judgment in tort or contract may not, also, apply to the chancellor for a so-called injunction sequestrating his opponent's assets pending recovery and satisfaction of a judgment in such a law action. No relief of this character has been thought justified in the long history of equity jurisprudence. *Id.,* at 222–223, 65 S.Ct. 1130.

> The statements in the last two sentences, though dictum, confirms that the relief sought by respondents does not have a basis in the traditional powers of equity courts.

Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 327, 119 S.Ct. 1961, 1972, 144 L.Ed.2d 319, 336 (1999).

> The requirement that the creditor obtain a prior judgment is a fundamental protection in debtor-creditor law—rendered all the more important in our federal system by the debtor's right to a jury trial on the legal claim. There are other factors which likewise give us pause: The remedy sought here could render Federal Rule of Civil Procedure 64, which authorizes use of state prejudgment remedies, a virtual irrelevance. Why go through the trouble of complying with local attachment and garnishment statutes when this all-purpose prejudgment injunction is available? More importantly, by adding, through judicial fiat, a new and powerful weapon to the creditor's arsenal, the new rule could radically alter the balance between debtor's and creditor's rights which has been developed over centuries through many laws—including those relating to bankruptcy, fraudulent conveyances, and preferences. Because any rational creditor would want to protect his investment, such a remedy might induce creditors to engage in a 'race to the courthouse' in cases involving insolvent or near-insolvent debtors, which might prove financially fatal to the struggling debtor.

Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 331, 119 S.Ct. 1961, 1974, 144 L.Ed.2d 319, 338 (1999).

After reviewing the legal history of prejudgment attachment under early English law, the Supreme Court decided that "such a remedy was historically unavailable from a court of equity," and would create a "new rule [that] could radically alter the balance between debtor's and creditor's rights." Therefore, the Supreme Court held the District Court had no authority to issue a preliminary injunction preventing petitioners from disposing of their assets pending adjudication of respondents' contract claim for money damages." *Id.*

> 'A federal court has no authority generally to freeze a defendant's funds to help ensure satisfaction of a judgment should the plaintiff prevail on an underlying legal claim.' *F.T. Int'l, Ltd. v. Mason,* No. 00–5004, 2000 WL 1479819, *1, 2000 U.S. Dist. LEXIS 14601, at *3 (E.D.Pa. Oct. 5, 2000) (*citing Grupo Mexicano De Desarrollo v. Alliance Bond Fund,* 527 U.S. 308, 119 S.Ct. 1961, 144 L.Ed.2d 319 (1999)). 'A court also has no authority in any event to freeze assets in an amount which exceeds that recoverable in the underlying action.' *F.T. Int'l, Ltd.,* 2000 WL 1479819, at *1, 2000 U.S. Dist. LEXIS 14601 at *3 (*citing Hoxworth v. Blinder, Robinson & Co., Inc.,* 903 F.2d 186, 198–

99 (3d Cir. 1990)). 'Aside from the traditional showing necessary to obtain preliminary injunctive relief, a plaintiff may obtain a prejudgment freeze on a defendant's assets only if he has asserted a cognizable equitable claim, has demonstrated a sufficient nexus between that claim and specific assets of the defendant which are the target of the injunctive relief, and has shown that the requested interim relief is a reasonable measure to preserve the status quo in aid of the ultimate equitable relief claimed.' *F.T. Int'l, Ltd.,* 2000 WL 1479819, at *1, 2000 U.S. Dist. LEXIS 14601 at *3–4.

Akers v. Akers, No. 5:15–CV–2512, 2015 WL 4601155, at *2 (E.D.Pa. July 31, 2015).

B. *Strouse Greenberg Properties VI Limited Partnership et al. v. CW Capital Asset Management LLC* et al.

In support of its position that this Court has the authority to issue a preliminary injunction with respect to the Insurance Proceeds, the Plaintiff primarily relies on *Strouse Greenberg Properties VI Limited Partnership et al. v. CW Capital Asset Management LLC et al.,* 442 F.Supp.2d 313 (E.D.La.2006). The background of *Strouse* is as follows: Strouse Greenberg Properties VI Limited Partnership (Strouse Greenberg) and Oak Island II Limited Partnership (Oak Island Partnership) filed a complaint for declaratory judgment against CWCapital Asset Management LLC (CW Capital), successor in interest to CRIIMI MAE Services Limited Partnership, and LaSalle Bank National Association (LaSalle Bank). Strouse Greenberg was the owner of a 426–unit apartment complex located in New Orleans, Louisiana (Oak Island I). Oak Island Partnership was the owner of the Oak Island II Apartments (Oak Island II). CW Capital was the special servicer for LaSalle Bank, as trustee for the Registered Holders of Mortgage Capital Funding, Inc., Commercial / Multifamily Mortgage Pass–Through Certificates, Series 1997–MCI (the "**Trust**"). The Trust was the owner and holder of two Multifamily Notes and Addendum to Multifamily Notes (the Strouse Note and the Oak Island Partnership Note), dated November 13, 1996, in the principal amounts of $3,361,000 (the Oak Island I loan), and $3,840,000 (Oak Island II loan) made payable to The Patrician Financial Company. **In addition to a mortgage on the property, the contracts assigned to the Trust all proceeds of the hazard and title insurance as additional collateral and provided the Trust with the exclusive option to hold all proceeds of the insurance policies.** The mortgages each contain cross-collateralization and cross-default provisions such that security for one loan is security for the other and a default on one loan is a default on the other. Hurricane Katrina destroyed Oak Island I and II.

Oak Island I was covered by a $5,000,000 FEMA Standard Flood Insurance Policy. Without the knowledge of the Trust, in November 2005, Strouse Greenberg received 40 checks totaling $5,000,000 in compensation for damage to Oak Island I. All but one of the policies listed the Trust, as mortgagee/loss-payee. Thirty-eight of the checks ($4,750,000) were two-party checks payable to Strouse Greenberg and the Trust's agent; two checks in the amount of $250,000 were payable to only Strouse Greenberg. Without the Trust's authorization, Strouse Greenberg negotiated 39 of the 40 checks: 38 two-party checks and one check payable only to Strouse Greenberg. One additional check is missing.

On February 1, 2006, Strouse Greenberg informed the Trust that it had received the checks. When Strouse Greenberg refused to turn over the proceeds to the Trust, the Trust declared both the Oak Island I and Oak Island II mortgage loans to be in default on February 6, 2006, and accelerated both loans on February 27, 2006. The outstanding balance for the two loans is approximately $6.8 million. Strouse Greenberg and Oak Island Partnership filed a complaint for declaratory judgment, seeking a declaration that the defendants 1) are not entitled to accelerate the loans, 2) are not entitled to the insurance proceeds, 3) are not entitled to a prepayment premium, and 4) are entitled to no more than payment of the balance of the Oak Island I loan less any monies held in escrow. CWCapital filed an answer on its own behalf and on behalf of the Trustee and the Trust (collectively the Trust), a counterclaim against Strouse Greenberg and Oak Island Partnership, and a third-party complaint against Samuel M. Switzenbaum as guarantor. The counterclaim and third-party complaint allege claims of breach of contract and civil conversion. The court denied the Trust's motion for a temporary restraining order and held a hearing on the motion for a preliminary injunction.

Id., at 315.

The Trust argued that it was entitled to a preliminary injunction against Strouse Greenberg to preclude the borrower from spending the insurance proceeds or exposing the proceeds to other creditors without the knowledge or consent of the Trust. Strouse Greenberg contended that relevant loan document between it and the Trust, did not require that the insurance proceeds from the FEMA policies be delivered to the Trust because "Covenant 5 refers only to the Lexington Insurance Company policy and does not include the FEMA flood insurance policy, which Strouse Greenberg voluntarily purchased in addition to the coverage required by the contract." *Strouse Greenberg Props. VI LP v. CW Capital Asset Mgmt. LLC,* 442 F.Supp.2d 313, 316 (E.D.La.2006). Alternatively, Strouse Greenberg argued that, "even if the loan documents authorize the Trust to hold the insurance proceeds, the Trust is required to apply the proceeds to the restoration of the damaged property because, as long as Strouse Greenberg continues to make payments on the notes and restoration of the damage is economically feasible, there is no 'default' which would trigger the cross-collateralization and cross-default provisions of the contract." *Id.*

The Trust argued that it would suffer irreparable harm if injunctive relief were not granted, and that it was entitled to the injunctive relief as "a widely recognized exception to the rule against issuing an injunction to preserve money damages is when the property restrained is the subject of the lawsuit."

> 'A preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally.' *In re Fredeman Litigation,* 843 F.2d 821, 825 (5th Cir. 1988) (*quoting De Beers Consolidated Mines v. United States,* 325 U.S. 212, 65 S.Ct. 1130, 1134, 89 L.Ed. 1566 (1945)). '[A]n injunction may issue to protect assets that are the subject of the dispute or to enjoin conduct that might be enjoined under a final order.' *Id.* at 827. In each of the cases in which courts have restrained or enjoined the disbursement of funds, 'the assets frozen were in some way the subject of the litigation.' *Id.*

Strouse Greenberg Props. VI LP v. CW Capital Asset Mgmt. LLC, 442 F.Supp.2d 313, 320 (E.D.La.2006).

After reviewing the evidence, the court found the loan documents required that Strouse Greenberg purchase the insurance, and the Lender, as attorney in fact for the Borrower, would collect and receive the insurance proceeds and apply the insurance proceeds, at Lender's option, to the reconstruction of the property or to the loan balance. In addition to a mortgage on the property, the contracts assigned to the Trust all proceeds of hazard and title insurance as additional collateral and provided the Trust with the exclusive option to hold all proceeds of the insurance policies. Further finding the insurance proceeds were the subject to the dispute, the court granted the injunction as an appropriate remedy.

C. Whether the Court has the Authority to Issue the Preliminary Injunction pursuant to F.R.Civ.P. 65?

As in *Grupo Mexicano,* this Motion for Preliminary Injunction presents the question whether, in an action for money damages, this Court has the power to issue a preliminary injunction preventing the defendant from transferring assets in which no lien exists and which alleged equitable interest is not the subject of the dispute.[10]

The Plaintiff declares that the "Insurance Proceeds in this case are related to the dispute, and an injunction against their dissipation is permissible. The very agreement giving rise to the Defendant's pecuniary interests and capacity to procure the Policy and receive the Insurance Proceeds is the Agreement that is the subject of this litigation. Even more fundamentally, the Insurance Proceeds represent the replacement value for the loss of the building structure that the Defendant warranted to the Plaintiff it would vacate without damage." [11]

In *Strouse Greenberg,* the case relied on by the Plaintiff in support of its position, the lawsuit was brought by the Strouse Greenberg to determine the rights in the insurance proceeds. The court concluded, with ample evidence, the loan agreements provided the lender with a lien on the proceeds, expressly required the borrower to purchase the insurance, and granted to the lender sole control over the proceeds, to either rebuild or repay the loan, at its option. This express language is what the court relied on in finding that it had the power to adjudicate the preliminary injunction.

Here, the Complaint seeks monetary damages for breach of the Management Agreement. No evidence was offered whereby the Plaintiff expressly required the Defendant to procure the insurance, or of any lien held by the Plaintiff in the Insurance Proceeds, or of Defendant's express agreement to purchase the insurance for the benefit of the Plaintiff. Nor are the Insurance Proceeds the subject of the Complaint. Therefore, *Strouse Greenberg* does not support the granting of a preliminary injunction.

IV. Conclusion

For the reasons set forth in *Grupo Mexicano,* I find this Court lacks the authority to issue a preliminary injunction preventing the Defendant from disposing of the Insurance Proceeds—if and when they are disbursed to the Defendant from the Court's Registry—pending adjudication of

10. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.,* 527 U.S. 308, 310, 119 S.Ct. 1961, 1964, 144 L.Ed.2d 319, 326 (1999).

11. Plaintiff's Memorandum in Support of Motion for Preliminary Injunction, Adv. Dkt. No. 8, pp. 4–5.

the Plaintiff's contract claim for money damages.

Because I find this Court lacks the power to issue the preliminary injunction as requested by the Plaintiff, I need not consider whether the Plaintiff as met the elements for the granting of a preliminary injunction as set forth in Fed.R.Civ.P. 65 (which is incorporated into bankruptcy proceedings by operation of Fed. R.Bankr.P. 7065).

For the reasons set forth above, the Court shall enter an Order denying Plaintiff's Motion for Preliminary Injunction.

IN RE: NC & VA WARRANTY COMPANY, INC. dba 1st Choice Mechanical Breakdown Coverage, Debtor.

NC & VA Warranty Company, Inc. dba 1st Choice Mechanical Breakdown Coverage, Plaintiff,

v.

The Fidelity Bank, Defendant.

CASE NO.15–80016
ADV. PROC. NO. A–15–9032

United States Bankruptcy Court,
M.D. North Carolina,
Durham Division.

Signed June 29, 2016

Background: Chapter 7 debtor, a company in the business of administering a "vehicle service program" that provided customers of automobile dealerships protection against loss in the event of mechanical breakdown of their vehicles, brought adversary proceeding against trustee of trust account into which debtor, pursuant to insurance agreement with its re-insurer, had deposited premiums, reserves, and funds with which to pay customer claims and to indemnify re-insurer. Debtor subsequently filed motion to amend complaint to add re-insurer as a party defendant and to assert several claims against it, including a claim for breach of contract.

Holdings: The Bankruptcy Court, Benjamin A. Kahn, J., held that:

(1) in taking judicial notice of related district-court complaint, the bankruptcy court could take judicial notice of the factual allegations made in that pleading;

(2) debtor was not judicially estopped from asserting breach-of-contract claim;

(3) debtor stated a claim for breach of contract under Ohio law;

(4) debtor failed to state a claim for breach of fiduciary duty; and

(5) debtor failed to state a claim for breach of North Carolina's Unfair and Deceptive Trade Practices Act (UTPA).

Motion granted in part and denied in part.

1. Bankruptcy ⚷2162

Leave to amend a pleading, pursuant to a timely motion to amend, should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile. Fed. R. Civ. P. 15(a); Fed. R. Bankr. P. 7015.

2. Bankruptcy ⚷2162

Amendment is "futile" when the proposed amended complaint fails to state a claim and would be subject to dismissal on

Defendants are to settle an order on five days' notice. The proposed order must be submitted by filing a notice of the proposed order on the Case Management/Electronic Case Filing docket, with a copy of the proposed order attached as an exhibit to the notice. A copy of the notice and proposed order shall also be served upon counsel for the Plaintiffs.

IN RE: TRUSTEES OF CONNEAUT LAKE PARK, INC., Debtor,

Gary Harris, Individually and as Alter Ego for MM–E Holding Trust, Concore Holding Trust, Richman Holding Trust and 3470 Corp. d/b/a/ The Water Company, Plaintiff,

v.

Trustees of Conneaut Lake Park, Inc., Defendant.

Bankruptcy No. 14–11277–JAD
Adversary No. 16–1039–JAD

United States Bankruptcy Court, W.D. Pennsylvania.

February 3, 2017

Background: Party asserting interest in rides at debtor's amusement park brought adversary proceeding that was essentially in nature of replevin action, and debtor moved to dismiss.

Holdings: The Bankruptcy Court, Jeffery A. Deller, Chief Judge, held that:

(1) Pennsylvania two-year statute of limitations on replevin claim began to run, at very latest, when party asserting ownership interest in rides at debtor's amusement park was barred by court order, under threat of criminal trespass, from entering onto park grounds to exercise any control over rides;

(2) statute was not tolled by party's incarceration;

(3) statute was not tolled by appointment of receiver for debtor's assets; and

(4) expiration of statute of limitations, coupled with park owner's continuous, notorious or open, and exclusive possession of these disputed rides, served to extinguish any claim of title that party may have had to these rides and to transfer title to rides to park owner.

Motion granted.

1. Replevin ⚷1, 76

Under Pennsylvania law, replevin is action at law to recover possession of personal property and to recover damages incurred as result of defendant's illegal detention of property.

2. Replevin ⚷8(4)

To prevail in replevin action under Pennsylvania law, plaintiff must show, not only title, but also the exclusive right of immediate possession of property in question.

3. Bankruptcy ⚷2162

Statute of limitations defense may be considered in context of motion to dismiss where complaint facially shows noncompliance with the limitations period, and where

Motion to Dismiss for Lack of Personal Jurisdiction and Improper Service of Process [ECF No. 153]; AIRCO's Motion Dismiss for Lack of Personal Jurisdiction and Improper Service of Process [ECF No. 162]; Chubb Atlantic's Motion to Dismiss the Amended Complaint, or in the Alternative for a Stay Pending Arbitration [ECF No. 170], *in part*; Cross–Motion Pursuant to 11 U.S.C. Section 1142(b) for an Order Necessary for Consummation of the Bankruptcy Plan [ECF No. 187].

affirmative defense of the running of statute of limitations clearly appears on face of pleading.

4. Bankruptcy ⚷2162, 2163

Courts may consider statute of limitations defense on motion to dismiss where both the face of complaint and the public record of which court may take judicial notice demonstrate that limitations period has run.

5. Replevin ⚷20

Replevin claims are subject to two-year statute of limitations under Pennsylvania law. 42 Pa. Cons. Stat. Ann. § 5524(3).

6. Declaratory Judgment ⚷255

Under Pennsylvania law, claim for declaratory relief is governed by the applicable statute of limitations on the concurrent legal remedy.

7. Limitation of Actions ⚷45

Under Pennsylvania law, two-year statute of limitations on replevin claim does not begin to run until the right to bring cause of action arises, upon an act by the possessor that is inconsistent with the owner's rights. 42 Pa. Cons. Stat. Ann. § 5524(3).

8. Limitation of Actions ⚷45

Pennsylvania two-year statute of limitations on replevin claim began to run, at very latest, when party asserting ownership interest in rides at debtor's amusement park was barred by court order, under threat of criminal trespass, from entering onto park grounds to exercise any control over rides. 42 Pa. Cons. Stat. Ann. § 5524(3).

9. Limitation of Actions ⚷75

Under Pennsylvania law, mere fact that litigant is incarcerated does not relieve him of need to commence suit with applicable period of limitations. 42 Pa. Cons. Stat. Ann. § 5533(a).

10. Limitation of Actions ⚷104.5

Entry of state court order that appointed receiver to take possession of assets of financially troubled owner of amusement park, and that barred any person or entity from exercising self-help as to park owner's assets, did not foreclose use of judicial process in order to resolve competing claims to ownership of park rides, and thus did not equitably toll two-year statute of limitations on replevin action by party asserting interest in these park rides. 42 Pa. Cons. Stat. Ann. § 5524(3).

11. Limitation of Actions ⚷104.5

Even assuming that two-year statute of limitations on replevin action by party that asserted interest in rides at amusement park was tolled upon entry of court order appointing receiver to take control over park owner's assets, any such tolling ended more than two years prior to commencement of replevin action when custodianship was terminated. 42 Pa. Cons. Stat. Ann. § 5524(3).

12. Adverse Possession ⚷106(4)
Replevin ⚷20

Expiration of two-year statute of limitations on replevin action by party asserting interest in rides at amusement park, coupled with park owner's continuous, notorious or open, and exclusive possession of these disputed rides, served to extinguish any claim of title that party may have had and to transfer title to rides to park owner. 42 Pa. Cons. Stat. Ann. § 5524(3).

Jeanne S. Lofgren, George T. Snyder, Stonecipher Law Firm, Pittsburgh, PA, for Defendant.

MEMORANDUM OPINION

JEFFERY A. DELLER, Chief U.S. Bankruptcy Judge

The primary issue before the Court is whether the Plaintiff's claims and causes of action against the defendant are time barred.[1] For the reasons set forth below, the Court concludes that the Plaintiff's claims are stale and that this Adversary Proceeding should be dismissed.

I.

Allegations of the Complaint

This Adversary Proceeding is a property dispute that's been percolating since the mid to late 1990's.

The Defendant is the Trustees of Conneaut Lake Park, Inc. (referred to herein as the "**Defendant**" or "**TCLP**"). TCLP is the reorganized debtor who owns and/or operates an amusement park consisting of land, buildings, rides and other facilities located on or near the shore of Conneaut Lake in Crawford County, Pennsylvania.

The Plaintiff in this Adversary Proceeding is Mr. Gary Harris. Mr. Harris commenced this action in his own name and as the purported "alter ego" of various trusts or entities that he owns and/or controls. Those alleged trusts and/or entities are: MM–E Holding Trust, 16401 Holding Trust, Concore Holding Trust, Richman Holding Trust, Resort Holding Trust, and 3740 Corp. d/b/a The Water Company. Collectively, these entities are referred to herein as the "**Harris Entities**." The "**Harris Entities**" and Mr. Harris are collectively referred to herein as the "**Plaintiff**."

By this Adversary Proceeding, the Plaintiff seeks a judgment declaring it as "the owner of the water company and its systems and equipment at" Conneaut Lake Park. See Complaint at ¶ 19. As to the water company assets, the Plaintiff further seeks a judgment declaring it as the owner of the water company contracts and accounts. See Complaint at ¶ 20. The Plaintiff also seeks a judgment declaring it to be the "sole and exclusive owner of amusement park rides and games et al [sic] used or stored at" Conneaut Lake Park. See Complaint at ¶ 23.

The Plaintiff seeks to have all of the assets that are the subject of this Adversary Proceeding "returned and restored" to the Plaintiff. See Complaint at ¶¶ 20 and 24. In this regard, the Plaintiff seeks control of these assets by way of injunctive relief enjoining the Defendant from transferring or otherwise disposing the disputed assets. See Complaint at ¶¶ 21, 24 and 25.[2]

II.

Prior State Court Litigation [3]

Mr. Harris, through various entities he owned or controlled, purchased Conneaut

1. The Court has jurisdiction over this Adversary Proceeding pursuant to 28 U.S.C. § 1334. This Adversary Proceeding and the related objection to claim are core proceedings over which this Court may enter final judgment pursuant to 28 U.S.C. §§ 157(b)(2)(A), (B), (C), (E), (K), (M) and (*O*).

2. To obtain an injunction, the Plaintiff must prove, among other things, that the Plaintiff's cause of action has a "likelihood of success." Ferring Pharmaceuticals, Inc. v. Watson Pharmaceuticals, Inc., 765 F.3d 205, 215 n.9 (3d Cir. 2014). As set forth herein, the Plaintiff's Complaint is time barred and has no likelihood of success.

3. The authenticity of the documents filed of record in the state court proceedings is not in dispute. In addition, with respect to the copies of the state court record filed in this Adversary Proceeding, the Court takes judicial notice of the contents of the same pursuant to Federal Rule of Evidence 201.

Lake Park in 1996. Thereafter, he purportedly caused the park assets to be assigned or conveyed to various entities.

This Adversary Proceeding is not the first litigation involving the disputed assets. In an equity action filed in 1998 in the Court of Common Pleas of Crawford County (the "**Equity Action**"), the validity of a settlement agreement concerning the disputed assets was ruled to be unenforceable by way of an *Adjudication* rendered in February 20, 2003 by President Judge Gordon R. Miller. A copy of the *Adjudication* is annexed at Exhibit "B" to the Defendant's *Brief in Support of Motion to Dismiss Complaint or, in the Alternative, for a More Definite Statement*, which is filed at ECF Doc. # 13.[4]

As found by President Judge Miller, the directors of TCLP believed that TCLP owned all of the assets at the park "lock, stock and barrel" and Mr. Harris and/or the Harris Entities (through a separate entity owned, controlled or managed by Mr. Harris called Asset Management) disputed this assertion. See *Adjudication* at ¶¶ 15 and 75.

In his *Adjudication*, President Judge Miller defined the "Park" as the "land, buildings, rides and other facilities and asset[s]" at Conneaut Lake Park See *id.* at p. 3. President Judge Miller also found that "Mr. Harris expressly represented that the Park was being transferred to TCLP 'lock, stock and barrel.'" See *Adjudication* at p. 24. Ultimately, the Court of Common Pleas of Crawford County did not adjudicate the ownership issue as to the disputed rides when it rendered the settlement agreement unenforceable. See *Adjudication* at n. 6, p. 39.

Nonetheless, the record reflects that while the Equity Action was pending, Asset Management filed a replevin action against TCLP and others on July 13, 1999 at Case No. AD 1999–746 in the Court of Common Pleas of Crawford County.

The complaint in replevin was amended on April 11, 2001 (the "**Replevin Complaint**"). See ECF Doc. # 34 at Exhibit "1". Paragraph 2 of the Replevin Complaint avers that Asset Management "manages the affairs and has the express authority to act on behalf" of certain of the Harris Entities. Paragraph 3 of the Replevin Complaint avers that certain of the Harris Entities claimed ownership of the amusement rides at Conneaut Lake Park and demanded their replevy.

On July 10, 2002, President Judge Miller issued an order granting summary judgment in favor of TCLP and dismissed the Replevin Action on the basis that Asset Management lacked the authority to pursue the action on behalf of the averred Harris Entities. See ECF Doc. # 34 at Exhibit 7. The Court of Common Pleas also refused Asset Management's motion for reconsideration (which had requested permission of certain of the Harris Entities to intervene and to file an amended complaint in replevin). This determination of the trial court was affirmed by the Superior Court of Pennsylvania on August 22, 2003. Pursuant to its opinion the Superior Court of Pennsylvania wrote:

> We find no abuse of discretion in the court's refusal to allow Asset Management to name new plaintiffs to an action

4. In his *Adjudication*, President Judge Miller describes at length the tortured history regarding the conveyances and alleged conveyances of real and personal property at Conneaut Lake Park. Included in his *Adjudication* is a summary of the conveyances purportedly orchestrated by Mr. Gary Harris to avoid forfeiture of assets in connection with his criminal conviction for tax evasion and racketeering in the United States District Court for the Northern District of Ohio. See *Adjudication* at ¶¶ 9–48.

> originally filed in July 13, 1999. The motion for reconsideration was filed well beyond the expiration of the two-year statute of limitations for actions in replevin, and was also filed the day before trial was set to commence... Thus, amendment to name the four trusts as plaintiffs would clearly have been improper.

See ECF Doc. # 34 at Exhibit 7.

3740 Corp. is also no stranger to the litigation referenced above. In the Equity Action, 3740 Corp. opposed the custodian of TCLP's efforts to sell the sewer system at Conneaut Lake Park. 3740 Corp. sought to intervene in the Equity Action to block the sale. By *Memorandum Order* dated January 28, 2003, Judge Anthony J. Vardaro denied 3740 Corp.'s application to intervene in the Equity Action. See ECF Doc. # 31 at Exhibit "C".

In those proceedings Mr. Harris personally requested to intervene because the custodian of TCLP sought to sell other personal property in which Mr. Harris claimed an interest. Mr. Harris' request was denied as being untimely. In reaching its decision, the Court of Common Pleas noted that if Mr. Harris claimed ownership of personal property at Conneaut Lake Park "he could have filed a replevin action long ago to recover that property or if he believes the property was stolen or somehow no longer on the Conneaut Lake Property, he certainly could have filed a legal action to recover from those he felt to be responsible." See *Memorandum Order* at p. 11–12. Thereafter, in 2005, Mr. Harris filed within the Equity Action a *Motion to Release Personal Property*, which the Court of Common Pleas denied by way of an order dated March 18, 2005. See Exhibit "E" to the *Supplement/Addendum to Motion to Dismiss* filed at ECF Doc. # 37. The denial was based upon res judicata and lack of standing.

III.

The Instant Motion to Dismiss

The matter presently before the Court is the *Motion to Dismiss Complaint or, in the Alternative, for a More Definite Statement* (the "**Motion to Dismiss**") filed by the Defendant. By the Motion to Dismiss, the Defendant asserts a myriad of defenses sounding in want of jurisdiction or res judicata.

Given that the foundation of these defenses rested on the prior judgments made in the state court system, the Court directed the parties to supplement the record in this case by filing copies of the state court judgments and related documents. The Court also afforded the parties the opportunity to file supplemental briefs. See e.g. *Order Signed on 11/14/2016 Directing Parties To Jointly Produce Prior Court Orders Regarding Issues Presented In This Adversary Proceeding* filed at ECF Doc. # 27; and *Order Signed on 1/17/2017 Permitting Plaintiff To File Responsive Pleading To Defendant's Supplement In Support of Motion to Dismiss And Brief In Support Of Supplement To Motion to Dismiss no later than February 1, 2017* filed at ECF Doc. # 44.

In response to this Court's directives, the parties filed various documents with the Court. Of note, the Defendant filed a *Brief in Support of Supplement to Motion to Dismiss*, in which TCLP asserts that the Plaintiff's claims are barred by the applicable statutes of limitation and should be dismissed with prejudice pursuant to Fed.R.Civ.P. 12(b)(6) and Fed.R.Bankr.P. 7012. See *Brief in Support of Supplement to Motion to Dismiss* at pp. 4–6. The Plaintiff also filed a *Supplemental Brief* at ECF Doc. # 48 disputing the Defendant's

statute of limitations defense.[5] This Memorandum Opinion addresses the merits of this defense and the Plaintiff's opposition thereto.

Standard for Motions to Dismiss

Fed.R.Civ.P. 12(b)(6) provides that complaints may be dismissed for "failure to state a claim on which relief can be granted."

In deciding such a motion, the Court "may consider material which is properly submitted as part of the complaint . . . without converting the motion to dismiss into a motion for summary judgment." Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001). If the documents are not physically attached to the complaint, they may be considered if the documents' authenticity is not contested. Id.

The Court may also consider: documents the complaint incorporates by reference or are otherwise integral to the claim (see Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1178 (10th Cir. 2012), Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687, 690 (7th Cir. 2012), Building Indus. Elec. Contractors Ass'n v. City of New York, 678 F.3d 184, 187 (2d Cir. 2012)), information subject to judicial notice (see Schatz v. Republication State Leadership Comm., 669 F.3d 50, 55–56 (1st Cir. 2012), Skilstaf, Inc. v. CVS Caremark Corp., 669 F.3d 1005, 1016 n. 9 (9th Cir. 2012), Gee v. Pacheco, 627 F.3d 1178, 1186 (10th Cir. 2012)), and matters of public record such as orders and other materials in the record of the case (see Miller v. Redwood Toxicology Lab., Inc., 688 F.3d 928, 931 n. 3 (8th Cir. 2012)).

In order "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.' " Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)(quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (quoting Twombly, 550 U.S. at 556, 127 S.Ct. 1955); see also Erickson v. Pardus, 551 U.S. 89, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007)(applying Twombly standard to *pro se* complaint).

Determining whether a claim for relief is plausible is a "context-specific task" requiring the court to "draw on its judicial experience and common sense." Ashcroft v. Iqbal, 556 U.S. at 679, 129 S.Ct. 1937 (citing Iqbal v. Hasty, 490 F.3d 143, 157–58 (2d Cir. 2007)). "A pleading that offers 'labels and conclusions' or "a formulaic recitation to the elements of a cause of action will not do.' " Id. at 678, 129 S.Ct. 1937.

Additionally, the court need not accept as true bald assertions (or bald conclusions or inferences), legal conclusions couched or masquerading as facts, or conclusions contradicted by the complaint's own exhibits or other documents of which the court may take proper notice. See Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580, 588 (9th Cir. 2008); Bishop v. Lucent Tech., Inc., 520 F.3d 516, 519 (6th Cir. 2008); Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996)(the court is not obligated to "swallow the

5. The Plaintiff also alleges that the Defendant should not be permitted to assert the statute of limitations because of the Defendant's "unclean hands." ECF Doc. # 48 at 4. Nothing in the record reflects the preclusion of the Plaintiff from having properly filed his replevin action sooner. In fact, the record demonstrates that the Plaintiff is no stranger to the courthouse having litigated these matters in some fashion or another for more than ten years.

plaintiff's invective hook, line, and sinker, bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like need not be credited").

The Court also observes that while it analyzes a *pro se* plaintiff's allegations under the relaxed liberal pleading standard accorded to *pro se* litigants pursuant to Erickson v. Pardus, 551 U.S. at 94, 127 S.Ct. 2197, the law is clear in that the Court is also not required to assume the role of advocate on behalf of the Plaintiff.[6] See Merryfield v. Jordan, 584 F.3d 923, 924 n.1 (10th Cir. 2009).

Dismissal for Failure to State a Claim

[1] A fair reading of the Complaint is that the Plaintiff is asserting claims sounding in replevin. "Replevin is an action at law to recover the possession of personal property and to recover damages incurred as a result of the defendant's illegal detention of plaintiff's property." Transport Int'l Pool, Inc. v. United Transport Carriers, Civ. A. No. 02–8163, 2003 WL 1918973, at *3 (E.D. Pa. Apr. 21, 2003).

[2] "To prevail in a replevin action, 'the plaintiff must show not only title, but also the exclusive right of immediate possession of the property in question.' " Susquehanna Commercial Fin., Inc. v. French, Civ. A. No. 10–7481, 2011 WL 1743503, at *4 (E.D. Pa. May 5, 2011) (quoting Ford Motor Credit Co. v. Caiazzo, 387 Pa.Super. 561, 564 A.2d 931, 933 (1989)).

The Complaint filed by the Plaintiff falls squarely within the parameters of a replevin action (even though the text of the Complaint itself omits the word "replevin"). The Court reaches this conclusion because the Complaint unequivocally alleges that (a) the Plaintiff is the true owner of the disputed assets, (b) the Plaintiff is entitled to have the assets "returned and restored" to the Plaintiff, and (c) the Defendant should be enjoined from transferring or otherwise disposing the disputed assets.

With the Complaint being, in substance, a replevin action, the question before the Court is whether applicable statutes of limitation should bar the Plaintiff's cause of action?

[3] As a preliminary matter, it should be emphasized that courts have held that a statute of limitations defense may be considered in the context of a motion to dismiss when "the complaint facially shows noncompliance with the limitations period and the affirmative defense [of the running of the statute of limitations] clearly appears on the face of the pleading." Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n. 1 (3d Cir. 1994); see also Berkery v. Verizon Comm., Inc., 658 Fed.Appx. 172, 174 (3d Cir. 2016).

[4] In addition, courts may also consider a statute of limitations defense when both the face of the complaint and the public record of which the court may take judicial notice demonstrate that the running of the statute of limitations has occurred. Newman v. Krintzman, 723 F.3d 308, 309 (1st Cir. 2013); cf. Schmidt v. Skolas, 770 F.3d 241, 249–50 (3d Cir. 2014)(holding that pre-answer dismissal not appropriate, when decision rested on extrinsic affidavits in addition to public SEC documents and averments identified in the complaint).[7]

6. The Court would note that while Mr. Harris purports to have commenced this Adversary Proceeding on a *pro se* basis, the Complaint he filed was actually ghost written by legal counsel who had a limited, yet undisclosed, engagement agreement with Mr. Harris.

7. Considering TCLP's statute of limitations defense in light of the state court record submitted by the parties in this Adversary Proceeding is also appropriate under the summary judgment rules. When a court considers matters extrinsic to the complaint, the law

[5] There is a two-year statute of limitations for claims of replevin under Pennsylvania law. 42 Pa. Cons. Stat. Ann. § 5524(3); Zuk v. E. Pa. Psychiatric Inst. of the Med. Coll. of Pa., 103 F.3d 294, 300 (3d Cir. 1996)("The Pennsylvania statute of limitations on replevin is two years.").

[6] In addition, a claim for declaratory relief "is governed by the applicable statute of limitations on the concurrent legal remedy." Algrant v. Evergreen Valley Nurseries Ltd. P'ship, 126 F.3d 178, 184–85 (3d Cir. 1997) (applying the statute of limitations of 42 Pa. Cons. Stat. Ann. § 5524(7) to a declaratory relief action). Again, as set forth above, the concurrent legal remedy in this case is replevin—which has a two-year statute of limitations.

[7] In a replevin action, the statute of limitations does not begin to run until the right to bring an action arises; and the right to bring an action arises only upon an act by the possessor that is inconsistent with the owner's rights. See MacDonald v. Leverington Constr. Co., 331 Pa. 381, 200 A. 8, 9 (1938). See also Zuk, 103 F.3d at 300 (noting that claim for replevin had arisen once defendant's possession was "open, notorious, and under claim of right"); cf. Priester v. Milleman, 161 Pa.Super. 507, 55 A.2d 540, 542 (1947) ("When chattels are placed into the possession of another and are to be returned at a fixed time, as in the case of a conditional sale and undoubtedly in a bailment, the right of action accrues immediately upon a default.").

[8] Taking the factual allegations contained in the Plaintiff's Complaint as true, and duly considering the undisputed state court record filed by the parties, the Court finds that the Plaintiff was dispossessed from the disputed assets on January 29, 1999 at the latest. The Plaintiff admits as much in his *Objection to Defendant's Motion to Dismiss* and filed at ECF Doc. # 17 where he writes:

> The Plaintiff objects to the Debtor's claim that no attempt had been made to exercise any control, possession, or maintenance of the personal property in question. The Crawford County Court and its appointed custodians, William Jordan and Herbert Brill barred the Plaintiff from Park grounds under the threat of criminal trespassing (see Exhibit D/Court Order dated January 29, 1999 and Exhibit E/Jorden Letter).

See *Gary Harris, Plaintiff, Objection to Defendant's Motion to Dismiss* at p.2. As such, the two-year statute of limitation for Mr. Harris to bring his cause of action began to run in early 1999.

However, the instant Adversary Proceeding was commenced on August 3, 2016, more than fifteen years after Mr. Harris was aware that he was precluded from the disputed assets. This action was also filed (a) more than fourteen years after President Judge Miller both dismissed Asset Management's Replevin Action and denied as untimely the requests of Mr. Harris and certain of the Harris Enti-

provides that the court may convert a defendant's motion to dismiss into a motion for summary judgment pursuant to Fed.R.Civ. 56 and Fed.R.Bankr.P. 7056. See Fed.R. Civ.P. 12(d) and Fed.R.Bankr.P. 7012. In the case at bar, the Plaintiff filed his own extrinsic papers which provided no cognizable rebuttal to the Defendant's statute of limitations defense. As such, no genuine dispute of material fact exists, and judgment as a matter of law dismissing the Adversary Proceeding is warranted. Jakimas v. Hoffmann–La Roche, Inc., 485 F.3d 770, 777 (3d Cir. 2007)(citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) and holding that to overcome summary judgment, the non-moving party must produce more than a mere scintilla of evidence on which a jury could reasonably find for the non-movant).

ties to intervene, (b) more than thirteen years after President Judge Miller's *Adjudication* in the Equity Action wherein he summarized TCLP's view that it owned the park assets "lock, stock, and barrel," (c) more than thirteen years after Judge Vardaro denied the efforts of both 3740 Corp. and Mr. Harris to intervene in the Equity Action as being untimely, and (d) and more than eleven years after Mr. Harris unsuccessfully sought to compel the release of personal property by way of the *Motion to Release* filed in the Equity Action.

There can only be one conclusion resulting from this history: the Plaintiff's claims as to the disputed assets [8] are barred by the applicable statute of limitations.

The Plaintiff nonetheless disputes the statute of limitations defense posed by TCLP. In this regard, the Plaintiff contends that the undisputed record evidences that the statute of limitations has been tolled. Towards this end, the Plaintiff cites two facts in support of the Plaintiff's tolling argument. One, is the fact that Mr. Harris was incarcerated during a period of time while the custodianship was pending. Two, is the fact that the custodianship was pending in the first instance.

[9] As to incarceration, the mere fact that a litigant was imprisoned does not relieve a plaintiff from the passing of the applicable statute of limitations. 42 Pa. Cons. Stat. Ann. § 5533(a) provides as much because it plainly states that "imprisonment does not extend the time limited" by Pennsylvania's statutes of limitation.

[10] As to the custodianship, it is true that on January 29, 1999 an order was entered by Court of Common Pleas Judge Anthony J. Vardaro that appointed the custodian as a receiver to take control of TCLP's assets. See *Gary Harris, Plaintiff, Objection to Defendant's Motion to Dismiss* (filed at ECF Doc. # 17) at Exhibit "D". This order also precluded any person or entity from removing or tampering with property located at Conneaut Lake Park. Id. In essence, the relevant provisions of Judge Vardaro's order precluded any person or entity from exercising self-help as to TCLP's assets. Of course, the order itself noted that no party may remove, destroy or tamper with TCLP's assets "pending further Order of Court. . ." Thus, the order allowed for the judicial process to be utilized to determine any ownership issues as to property claimed by TCLP.[9] As such, the order of the Common Pleas Court does not toll any statute of limitations with respect to competing claims of ownership of any property at the park. This Court's conclusion in this regard is

8. The Court notes that none of the parties have asserted that the water system at Conneaut Lake is considered a fixture, and thus should be treated as real estate. To the extent the water system is a fixture and is real estate, this asset was deeded to TCLP in 1997. See *Adjudication* at pp. 8–10; see also Smith v. Weaver, 445 Pa.Super. 461, 665 A.2d 1215, 1218 (1995)("fixture is an article in the nature of personal property which has been so annexed to the realty that it is regarded as part and parcel of the land").

9. Under Pennsylvania law the appointment of a receiver does not change the debtor's rights or interests in property. Sovereign Bank v. Schwab, 414 F.3d 450, 455 (3d Cir. 2005)(citing Warner v. Conn, 347 Pa. 617, 32 A.2d 740, 741 (1943)(explaining that a receiver "takes only the interest of the owner subject to" valid interests of others in the property); Commonwealth Trust Co. v. Harkins, 312 Pa. 402, 167 A. 278, 281 (1933)(noting that a "receivers stand in the shoes of the owner and take only his interest in the property subject to all valid liens against it"); and Pearson Mfg. Co. v. Pittsburgh Steamboat Co., 309 Pa. 340, 163 A. 680, 682 (1932)(explaining that receiver takes only interest of owner of the property)).

consistent with later opinions and/or orders by Judge Vardaro and President Judge Miller which indicated that replevin actions by the Plaintiff were stale. This Court's conclusion is also consistent with the Superior Court of Pennsylvania which also concluded that the Plaintiff's replevin actions were time barred.

[11] The Court further observes that the state court record provides that the custodianship was terminated by an order of court dated June 29, 2007. See Exhibit "D" *Defendant's Supplemental/Addendum to the Record* (ECF Doc. # 31) at p. 110. Even if the custodianship's pendency served to toll the statute of limitations, the tolling period ended when the custodianship ended. As such, under circumstances viewed most favorable to the Plaintiff, the statute of limitations expired in June of 2009 (which is over seven years prior to the filing of this Adversary Proceeding).

[12] As a matter of law, the passing of the statute of limitations period (coupled with TCLP's continuous, notorious or open, and exclusive possession of the disputed assets) extinguished any claim of title that the Plaintiff may have to the disputed assets and transferred such title to the Defendant. See Gee v. CBS, Inc., 471 F.Supp. 600, 653–54 (E.D. Pa.)(opinion by Becker, J.), *aff'd*, 612 F.2d 572 (3d Cir. 1979); Priester v. Milleman, 161 Pa.Super. 507, 55 A.2d 540, 543 (1947); BuyFigure.com, Inc. v. Autotrader.com, Inc., 76 A.3d 554, 562 (Pa. Super. Ct. 2013); and Lightfoot v. Davis, 198 N.Y. 261, 91 N.E. 582, 583–84 (1910).

Accordingly an order shall be entered that dismisses this Adversary Proceeding for failure to state a claim. In addition, given that the Court is dismissing the Plaintiff's Adversary Proceeding on statute of limitations grounds, the Court need not consider the remaining defenses argued by the Defendant because those defenses have been rendered moot.

IV.

Impact of Statute of Limitations on the Objection to Claim

The Court's determination above impacts the allowability of the proof of claim filed by Mr. Harris in the underlying bankruptcy case.

By way of background, on July 14, 2015, Mr. Harris filed a proof of claim at Claim # 24 in the amount of $1,430,000.30 as "value paid for CLP contents, amusement rides, equipment, fixtures, tools, tractors, vehicles & water sewer system." The claim also seeks, as an alternative, the "return of contents." It also states "Park contents still owned by this creditor." The Debtor filed an objection to the allowance of Claim # 24 at Case No. 14–11277 at ECF Doc. # 465.

A fair reading of the proof of claim indicates that the claim is another vehicle by which Mr. Harris is seeking the replevy of the disputed assets; the Plaintiff essentially admitted as much at the October 28, 2016 hearing on the TCLP's objection to the claim. See *Transcript of Hearing Held 11/28/2016* filed at ECF Doc. # 36 at pp. 12–15.

Given the duplicative nature of the proof of claim with the instant Adversary Proceeding, the parties agreed that the Claim's Objection should be consolidated with the Adversary Proceeding. Id. The parties also agreed that the outcome of this Adversary Proceeding will result in a similar outcome with respect to the proof of claim filed by Mr. Harris. Id. As a result, the Court entered an order consolidating these two proceedings.

With the Court having determined that the Adversary Proceeding is barred by the applicable statute of limitations, the same

conclusion applies to the proof of claim filed by Mr. Harris. That is, the proof of claim filed by Mr. Harris at Claim # 24 is disallowed.

V.

Conclusion

Because the relief requested by Plaintiff's Complaint is time barred, dismissal of the Complaint, with prejudice, is warranted. Because the proof of claim filed by the Plaintiff at Claim # 24 mirrors the relief requested in the Complaint, disallowance of the claim is warranted as well. Appropriate Orders shall be issued consistent with this Memorandum Opinion.

ORDER

AND NOW, this **3rd** day of **February, 2017**, for the reasons expressed in the *Memorandum Opinion* entered this date, the Court hereby **ORDERS, ADJUDGES AND DECREES**, that the Defendant's Motion to Dismiss is **Granted**, and the Plaintiff's Complaint is hereby **Dismissed with prejudice**.

IN RE Jeffrey V. HOWES.

Civil Action No. ELH–16–840

United States District Court,
D. Maryland.

Signed 12/12/2016

Background: Orders were entered by the United States Bankruptcy Court, Gordon, J., requiring Chapter 13 debtor-mortgagor to make escrow payments on residential mortgage debt, and later dismissing case based on debtor's payment default. Debtor appealed.

Holdings: The District Court, Ellen L. Hollander, J., held that:

(1) pending appeal, which was concerned with identity of party entitled to receive Chapter 13 debtor-mortgagor's monthly mortgage payments, did not deprive bankruptcy court of jurisdiction to enter escrow or dismissal order;

(2) bankruptcy court did not abuse its discretion in requiring Chapter 13 debtor-mortgagor who, after filing for bankruptcy, had missed a total of 31 payments on residential mortgage debt to make lump sum payment to escrow account in total amount of these missed monthly payments and to continue making regular monthly mortgage payments going forward; and

(3) bankruptcy court did not abuse its discretion in dismissing Chapter 13 case with prejudice to debtor's ability to refile for period of 24 months, based on debtor's default in failing to make escrow payments.

Affirmed.

1. Federal Civil Procedure ⚷657.5(1)

Court has obligation to liberally construe a pro se litigant's pleadings, which are held to less stringent standards than formal pleadings drafted by lawyers.

2. Evidence ⚷1, 48

Court may properly take judicial notice of matters of public record and other information that constitutes adjudicative facts. Fed. R. Evid. 201.

3. Bankruptcy ⚷3782, 3786

On appeal, district court reviews bankruptcy court's findings of fact for clear error, and reviews bankruptcy court's conclusions of law de novo. Fed. R. Bankr. P. 8013.

tized over ten years at a 5.5% interest rate. At the December 1 confirmation hearing, counsel for Nationstar alluded to the fact that Nationstar *may* have an issue with the ten-year repayment term proposed under the plan. Although Nationstar contends that this argument was previously raised in its written objection to confirmation, the Court does not find this to be the case. Moreover, without contradictory evidence, the Court finds that re-amortization over ten years is reasonable and no basis exists to deny confirmation on this ground.

For purposes of plan confirmation, the Court finds that Nationstar holds an allowed secured claim in the amount of $24,000 to be paid over a 10–year term at an interest rate of 5.5%. It appears that this finding resolves all outstanding issues in the pending adversary proceeding. The Court also finds that the treatment of Nationstar's secured claim satisfies the fair and equitable standard set forth in section 1129(b). With the resolution of Nationstar's claim, no other outstanding issues prevent confirmation of the *Plan.* The *Summary of Ballots* [Dkt. No. 37] filed on June 8, 2016 indicates that no other impaired class rejects the *Plan.*

As all necessary requirements for confirmation under section 1129 of the Bankruptcy Code have been satisfied, the Court will issue an appropriate *Order* confirming the *Plan* and approving the *Disclosure Statement* on a final basis.[31] The Court will also issue a separate *Order* granting the relief requested by the Plaintiff in the *Complaint* filed at Dkt. No. 1 in Adv. No. 16–02067–GLT.

31. The *Disclosure Statement* was approved on a conditional basis by *Order* dated April 26, 2016. [Dkt. No. 27]. The Court did not receive any objections to the *Disclosure Statement.*

IN RE: Trustees of CONNEAUT LAKE PARK, INC., Debtor.

Trustees of Conneaut Lake Park, Inc., Plaintiff,

v.

Park Restoration, LLC, Defendant.

Bankruptcy No. 14–11277–JAD
Adversary No. 16–01029–JAD

United States Bankruptcy Court,
W.D. Pennsylvania.

Signed February 21, 2017

Background: Debtor brought adversary proceeding against party that had agreed to manage its beach club property for party's alleged breach of terms of management agreement, and debtor and property manager cross-moved for entry of judgment on the pleadings.

Holdings: The Bankruptcy Court, Jeffery A. Deller, Chief Judge, held that:

(1) under Pennsylvania law, termination of beach club management agreement could not relieve property manager of obligation which, by plain terms of agreement, was triggered only upon termination of agreement;

(2) property manager, in warranting that, if beach club management agreement was terminated for any reason, it would "vacate the premises ensuring that it [wa]s in broom clean condition without any damage to any equipment or property," did not merely agree to perform ordinary repairs and maintenance, but warranted against "any damage" to property, including catastrophic damage caused by fire; and

(3) doctrine of impossibility did not apply, after beach club property was destroyed in fire, to relieve property manager of its express contractual obligation.

Debtor's motion granted; defendant's motion denied.

1. Contracts ⚷326

Under Pennsylvania law, elements of breach of contract claim are (1) that there was contract upon which defendant owed to duty to plaintiff, (2) that defendant breached its contractual duty, and (3) that plaintiff suffered damages from the breach.

2. Contracts ⚷217

Under Pennsylvania law, termination of beach club management agreement could not relieve property manager of obligation which, by plain terms of agreement, was triggered only upon termination of agreement, when property manager became obligated to "vacate the premises ensuring that it [wa]s in broom clean condition without any damage to any equipment or property"; property manager's argument that its obligation to deliver premise broom-clean and undamaged did not survive termination of agreement was contrary to agreement's express terms.

3. Contracts ⚷147(1)

Under Pennsylvania law, fundamental rule in contract interpretation is that court must ascertain the intent of the contracting parties.

4. Contracts ⚷143(1)

Under Pennsylvania law, when written contract is clear and unequivocal, its meaning must be determined by its contents alone.

5. Contracts ⚷205.40

Property manager, in warranting that, if beach club management agreement was terminated for any reason, it would "vacate the premises ensuring that it [wa]s in broom clean condition without any damage to any equipment or property," did not merely agree to perform ordinary repairs and maintenance, but warranted against "any damage" to property, including catastrophic damage caused by fire.

6. Contracts ⚷205.5, 312(5)

Under a typical warranty, the warrantor agrees to fulfill a promise, and any failure to comply with that promise will represent a breach of contract.

7. Contracts ⚷309(2)

Doctrine of impossibility did not apply, after beach club property was destroyed in fire, to relieve property manager of its express contractual obligation, in event that property management agreement was terminated for any reason, to "vacate the premises ensuring that it [wa]s in broom clean condition without any damage to any equipment or property"; fact that property manager purchased insurance suggested that possibility of catastrophic event was not outside contemplation of parties, and inasmuch as property manager had not bargained for force majeure clause, but instead agreed to return property free of "any damage," it was inappropriate for court to apply doctrine of impossibility to disturb parties' agreed allocation of risk.

8. Contracts ⚷309(1)

"Impossibility of performance" doctrine is a form of judicial gap filling when a contract fails to allocate risks occasioned by unforeseen events.

9. Contracts ⚷309(1)

Under Pennsylvania law, when, after a contract is made, party's performance is

made impracticable without his fault by occurrence of an event the non-occurrence of which was a basic assumption on which contract was made, his duty to render performance is discharged, unless the language or the circumstances indicate to the contrary. Restatement (Second) of Contracts § 261.

10. Contracts ⚷309(1)

Under Pennsylvania law, if facts and circumstances of case provide for an agreed upon allocation of risk, that allocation generally will not be disturbed under doctrine of impossibility of performance.

11. Contracts ⚷1.3

Under Pennsylvania law, promisors are free to assume risks, even huge ones, and promisees are entitled to rely on those voluntary assumptions.

12. Landlord and Tenant ⚷1180

Under Pennsylvania law, tenant is obligated to return the leasehold property in the condition in which it was received, reasonable wear and tear excepted.

13. Contracts ⚷312(1)

Indemnity ⚷33(5)

Allegations in owner's complaint against party that had agreed to manage its beach club property, regarding catastrophic fire that burned beach club to the ground while it was under property manager's possession and care, stated plausible claim against property manager for not maintaining beach club in commercially reasonable manner and for indemnity.

14. Bankruptcy ⚷2162

Time for defendant to seek more definite statement was before it filed responsive pleading to debtor's complaint. Fed. R. Civ. P. 12(e); Fed. R. Bankr. P. 7012.

15. Bankruptcy ⚷3040.1

Motion practice is not substitute for discovery.

16. Damages ⚷15

Litigant is entitled to only one recovery.

17. Bankruptcy ⚷2156

Upon grant of debtor's motion for judgment on the pleadings on its breach of contract claim against party that agreed to manage its beach club property, it was appropriate for bankruptcy court to stay prosecution of debtor's other claims and to proceed to trial of damages as to breach of contract claim.

Jeanne S. Lofgren, Stonecipher Law Firm, Pittsburgh, PA, for Plaintiff.

John F. Mizner, Mizner Law Firm, Erie, PA, for Defendant.

MEMORANDUM OPINION [1]

The Hon. Jeffery A. Deller, Chief U.S. Bankruptcy Judge

The question presented to the Court, in the context of a *Motion for Judgment on the Pleadings* filed by the plaintiff, is

1. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334. The plaintiff asserts that this Adversary Proceeding is a "core proceeding" pursuant to 28 U.S.C. § 157(b)(2)(O). However, garden variety breach of contract claims are not core proceedings. In re AstroPower Liquidating Trust, 335 B.R. 309, 323 (Bankr. D. Del. 2005). Despite the non-core nature of this proceeding, the parties have consented to this Court's ability to enter final judgment. See *Order of Court Approving Joint Discovery Plan and Statement of Estimated Time of Trial* filed at ECF Doc. # 36; see also Wellness Int'l Network, Ltd. v. Sharif, ––– U.S. ––––, 135 S.Ct. 1932, 191 L.Ed.2d 911 (2015) and In re River Entertainment Co., 467 B.R. 808 (Bankr. W.D. Pa. 2012).

whether the language of a contract renders the defendant liable to the plaintiff for damages to property destroyed by fire. Because the contract at issue does result in such liability as to the defendant, the Court finds that the plaintiff's *Motion for Judgment on the Pleadings* shall be granted, in part, with respect to the cause of action asserted in Count I of the *Complaint*. Specifically, judgment on the pleadings shall be entered as to the defendant's liability for breach of contract, and a trial will be scheduled as to the amount of damages to be assessed against the defendant under Count I of the *Complaint*.

Given this disposition, and given the nature of notice pleading under the Federal Rules, it is also appropriate for the Court to enter an order which denies a dueling *Motion for Judgment on the Pleadings* filed by the defendant. It is also appropriate for the Court to stay the prosecution of the remaining counts of the plaintiff's *Complaint* because the plaintiff is entitled to only one recovery against the defendant.

I.

Summary of the Lawsuit as Framed by Both the Pleadings on File and the Record Made Before This Court

While this case is quite contested, the facts (as admitted in the pleadings and as contained in the undisputed record) are not complicated.

The plaintiff is the Trustees of Conneaut Lake Park, Inc. (referred interchangeably herein as the "plaintiff" or "TCLP"). See *Complaint* (filed at ECF Doc. # 1) at ¶ 6. TCLP owns real estate located in Crawford County, Pennsylvania. On this real estate sat a building known as the "Beach Club." See *Complaint* at ¶ 7; See *Park Restoration, LLC Amended Answer to Complaint and Counterclaim* (hereinafter referred to as the "*Answer*")(filed at ECF Doc. # 12) at ¶ 7 [2]

The defendant is an entity known as Park Restoration, LLC (referred interchangeably herein as the "defendant" of "Park Restoration"). On or about November 24, 2008, TCLP and Park Restoration entered into a *Beach Club Management Agreement*, pursuant to which the defendant agreed to provide operational and management services with respect to the Beach Club. See *Complaint* at ¶ 8; *Answer* at ¶ 8.

The *Beach Club Management Agreement* contained various terms and conditions, including provisions whereby for a term of twenty years the defendant agreed to undertake "physical control and security, all maintenance at the facility, . . . insuring that the property is fully secured and maintained in a commercially reasonable manner . . ." See *Complaint* at ¶ 9(b)(quoting the *Beach Club Management Agreement* at § 1); *Answer* at ¶ 9.

The *Beach Club Management Agreement* also provided that the defendant agreed to hold the plaintiff "harmless and fully indemnify the [plaintiff] from any loss, cost or damage with respect to any . . . damage claimed to . . . property . . . as a result of [defendant's] use, misuse, occupancy, procession [sic], or abandonment of the Beach Club." See *Complaint* at ¶ 15 (quoting § 7 of the *Beach Club Management Agreement*); *Answer* at ¶ 15.

2. In this litigation, Park Restoration asserted a counterclaim against TCLP as a result of the plaintiff's failure to have fire insurance. After filing the *Answer,* Park Restoration withdrew its counterclaim. See *Brief in Support of Defendant's Cross Motion for Judgment on the Pleadings and in Opposition to Trustee's Motion for Judgment on the Pleadings* (ECF Doc. # 46) at p. 4. Given the withdrawal, an order dismissing the counterclaim shall be entered by the Court.

The *Beach Club Management Agreement* contained additional terms and conditions which imposed certain duties upon the defendant in the event of termination of the agreement. Specifically, the agreement provided that "In the Event of termination for any reason, Park Restoration warrants and represents that it will vacate the premises ensuring that it is in broom clean condition without any damage to any equipment or property." See *Complaint* at ¶ 11 (quoting § 6(c) of the *Beach Club Management Agreement*); *Answer* at ¶ 11.

From the inception of the *Beach Club Management Agreement* through August 1, 2013, the defendant occupied, used and possessed the Beach Club. See *Complaint* at ¶ 16; *Answer* at ¶ 16. On August 1, 2013, the Beach Club was destroyed by fire. See *Complaint* at ¶¶ 17 and 18; *Answer* at ¶¶ 17 and 18. The Beach Club building was never rebuilt and by letter dated March 20, 2015, TCLP advised Park Restoration that the *Beach Club Management Agreement* has been terminated. See *Complaint* at Exhibit B; *Answer* at ¶ 19.

After the Beach Club was destroyed by the fire, a dispute arose with respect to the right to insurance proceeds payable by Erie Insurance on account of the calamity. By way of background, TCLP did not insure the Beach Club. Rather, Park Restoration insured the Beach Club building for $611,000.[3] After the fire, Park Restoration and TCLP made competing claims to the insurance proceeds. To further complicate the matter, various tax creditors of TCLP also claimed a right to be paid from the insurance proceeds.

Ultimately, after the insurance proceeds were deposited into the Court's registry, this Court determined that the defendant had an insurable interest in the Beach Club and that, but for the claims of the tax creditors, all of the insurance proceeds would be payable to the defendant. The Court also determined that the plaintiff was neither an insured nor loss payee under the policy and that the plaintiff was entitled to none of the proceeds. See *Memorandum Opinion dated 12/22/2015* (Adversary Proceeding 15–01010–JAD at ECF Doc. # 82) and *Memorandum Opinion Signed on 4/12/2016* (Adversary Proceeding No. 15–01010–JAD at ECF Doc. # 145).

An appeal was taken by Park Restoration and this Court's determination that the tax creditors were entitled to some of the insurance proceeds was reversed by the District Court. Thus, all of the insurance proceeds are payable to Park Restoration on account of the fire at the Beach Club. A further appeal was taken by the tax creditors to the Third Circuit Court of Appeals, which remains pending.

In any event, this Court determined that TCLP had no direct claim to any of the insurance proceeds payable to Park Restoration on account of the building destroyed by fire. Undaunted by this result, TCLP filed this adversary proceeding on June 13, 2016.

On June 20, 2016 the plaintiff also sought in this adversary proceeding a preliminary injunction enjoining the payment of any insurance proceeds to Park Restoration. In essence, TCLP sought a prejudgment attachment of all insurance proceeds payable to Park Restoration.

Finding that the prejudgment injunction (or attachment) sought by TCLP exceeded this Court's jurisdiction, this Court denied

3. Business personal property and personal property of others at the Beach Club were also insured up to the amount of $100,000.

the plaintiff's request for injunctive relief pursuant to the United States Supreme Court's holding in Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 119 S.Ct. 1961, 144 L.Ed.2d 319 (1999). See *Memorandum Opinion Regarding Plaintiff's Motion For Preliminary Injunction Signed on 8/1/2016* (filed at ECF Doc. # 25); *Order Signed on 8/1/2016 Denying Plaintiff's Motion For Preliminary Injunction* (filed at ECF Doc. # 26).

The current status of the proceeds of insurance is that $132,948.17 has been released to Park Restoration and the remaining balance remains on hand with the Clerk pending the outcome of the appeal lodged by the tax creditors. See *11/10/2016 Letter from Clerk's Office to Attorney John F. Mizner Regarding Payment of Registry Funds* (Adversary Proceeding No. 15–01010–JAD at ECF Doc. # 178).

As to the instant adversary proceeding, the *Complaint* alleges, among other things, that the *Beach Club Management Agreement* was terminated as a result of the cessation of operations occasioned by the fire (for after all the Beach Club ceased to exist). See *Complaint* at ¶ 18.

Indeed, under the *Beach Club Management Agreement*, Park Restoration was to insure "that the Beach Club is a fully operational and full service club;" but, again, after August 1, 2013 the Beach Club was not operational. See *Beach Club Management Agreement* at § 1.

By letter dated March 15, 2015, TCLP advised Park Restoration of the termination of the underlying agreement, and advised Park Restoration that TCLP reserved all rights and remedies that TCLP may have against Park Restoration. See *Complaint* at Exhibit B.[4]

The *Complaint* also alleges that upon the termination of the agreement, the defendant failed to "ensure" that the Beach Club was left in "broom clean condition without any damage to any equipment or property." See *Complaint* at ¶ 21. As a result, the plaintiff alleges two causes of action sounding in breach of contract and one cause of action sounding in contractual indemnity. See *Complaint* at ¶¶ 23–44.

Within each cause of action, TCLP contends that it has been harmed as a result of the destruction of the Beach Club (which the plaintiff alleges is valued of "no less than $611,000"). See *Complaint* at ¶¶ 21 and 22. The defendant disputes these allegations and denies any liability whatsoever with respect to the causes of action asserted in the *Complaint*.

II.

The Dueling Motions for Judgment on the Pleadings

After the pleadings closed, TCLP moved for judgment on the pleadings as to Count I of its *Complaint*.

Count I of the *Complaint* is a cause of action for breach of contract. In its *Motion for Judgment on the Pleadings*, the plaintiff contends that the admissions contained in the pleadings establish that, upon termination of the *Beach Club Management Agreement*, Park Restoration had a duty to vacate the Breach Club and return it to the plaintiff in a "broom clean" condition "without damage" for any reason.

The *Motion for Judgment on the Pleadings* further avers that, due to the fire, the defendant failed to return the property in

4. Park Restoration has offered no defense to the termination of the *Beach Club Management Agreement*. In addition, the parties have acknowledge that the termination of the agreement does not operate as a waiver or estoppel as to TCLP's rights and/or remedies.

a "broom clean" condition "without any damage" and is liable for the damages sustained by TCLP as a result of the same.

The plaintiff further contends that Park Restoration admitted in the insurance litigation that the value of the Beach Club building is at least $611,000. Given this value, the plaintiff contends that $611,000 is the amount of damages it has suffered as a result of Park Restoration's failure to return the Beach Club to TCLP "without any damage."

Park Restoration opposes TCLP's *Motion for Judgment on the Pleadings* by asserting two primary defenses to the plaintiff's claims.

One, Park Restoration contended at oral argument that termination of the agreement effectively terminated any executory obligation the defendant had to return the premises to the plaintiff in a "broom clean" condition that is "without any damage."

Two, even if Park Restoration's obligation to return the premises in a "broom clean" condition "without any damage" survived the termination of the *Beach Club Management Agreement*, Park Restoration contends that its obligation to perform should be excused under the doctrine of impossibility. In this regard, the defendant contends that the existence of the Beach Club's premises was necessary to the defendant carrying out the purpose of the *Beach Club Management Agreement*. According to Park Restoration, once the Beach Club was destroyed by fire, it was simply impossible for Park Restoration to return the building "broom clean" and "without damage to any equipment or property."

In light of these defenses, Park Restoration also filed its own *Motion for Judgment on the Pleadings* seeking to have Count I of the plaintiff's *Complaint* dismissed.

Park Restoration's *Motion for Judgment on the Pleadings* also asserted additional defenses and sought dismissal of Counts II and III of the *Complaint*.

As to Count II of the *Complaint*, it is a cause of action for breach of contract and seeks damages as a result of Park Restoration's alleged failure to secure the Beach Club in a "commercially reasonable manner." In its *Motion for Judgment on the Pleadings*, Park Restoration contends that Count II should be dismissed because the *Complaint* is devoid of any facts supporting a claim that Park Restoration did not operate the Beach Club in a commercially reasonable manner.

Count III of the *Complaint* is a cause of action sounding in indemnity. The defendant's *Motion for Judgment on the Pleadings* argues that this count should be dismissed because the *Beach Club Management Agreement*'s terms do not "clearly" and "expressly" provide that Park Restoration should bear the entire loss of the Beach Club in the event of the building's destruction. Moreover, even if the contract provided as much, Park Restoration contends that any indemnification obligation it had under the contract is void by operation of the doctrine of impossibility.

Suffice it to say, TCLP disputes the contentions of Park Restoration's *Motion for Judgment on the Pleadings*. After having afforded the parties the opportunity to file briefs and supplemental briefs in support of their respective positions, this matter is now ripe for determination.

III.

Legal Standard

Fed.R.Civ.P.12(c), as incorporated by reference in Fed.R.Bankr.P. 7012, permits

a party to move for judgment on the pleadings. When a party moves for judgment on the pleadings, the Court is to ascertain whether the pleadings raise any material factual disputes; and if there are none, the Court is to determine whether the moving party is entitled to judgment as a matter of law. See Inst. for Scientific Info., Inc. v. Gordon and Breach, Sci. Publishers, Inc., 931 F.2d 1002, 1005 (3d Cir. 1991). As to the latter component, the motion for judgment on the pleadings is akin to a motion to dismiss under Fed.R.Civ.P. 12(b)(6). See Turbe v. Gov't of the Virgin Islands, 938 F.2d 427, 428 (3d Cir. 1991).

Fed.R.Civ.P. 12(b)(6) provides that complaints may be dismissed for "failure to state a claim on which relief can be granted."

In deciding such a motion, the Court "may consider material which is properly submitted as part of the complaint ... without converting the motion to dismiss into a motion for summary judgment." Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001).

The Court may also consider: documents the complaint incorporates by reference or are otherwise integral to the claim (see Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1178 (10th Cir. 2012), Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687, 690 (7th Cir. 2012), Building Indus. Elec. Contractors Ass'n v. City of New York, 678 F.3d 184, 187 (2d Cir. 2012)), information subject to judicial notice (see Schatz v. Republican State Leadership Comm., 669 F.3d 50, 55–56 (1st Cir. 2012), Skilstaf, Inc. v. CVS Caremark Corp., 669 F.3d 1005, 1016 n. 9 (9th Cir. 2012), Gee v. Pacheco, 627 F.3d 1178, 1186 (10th Cir. 2010)), and matters of public record such as orders and other materials in the record of the case (see Miller v. Redwood Toxicology Lab., Inc., 688 F.3d 928, 931 n. 3 (8th Cir. 2012)).

In order "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.' " Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)(quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (quoting Twombly, 550 U.S. at 556, 127 S.Ct. 1955).

Determining whether a claim for relief is plausible is a "context-specific task" requiring the court to "draw on its judicial experience and common sense." Ashcroft v. Iqbal, 556 U.S. at 679, 129 S.Ct. 1937 (citing Iqbal v. Hasty, 490 F.3d 143, 157–58 (2d Cir. 2007)). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation to the elements of a cause of action will not do.' " Id. at 678, 129 S.Ct. 1937.

Additionally, the court need not accept as true bald assertions (or bald conclusions or inferences), legal conclusions couched or masquerading as facts, or conclusions contradicted by the complaint's own exhibits or other documents of which the court may take proper notice. See Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580, 588 (9th Cir. 2008); Bishop v. Lucent Tech., Inc., 520 F.3d 516, 519 (6th Cir. 2008); Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996)(the court is not obligated to "swallow the plaintiff's invective hook, line, and sinker; bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like need not be credited").

IV.

Discussion

In examining the dueling *Motions for Judgment on the Pleadings*, it appears

that the parties do not contest the fact that the parties entered into the *Beach Club Management Agreement*; nor do they contest other facts such as: the fact that the Beach Club was destroyed by fire, the fact that since the fire the Beach Club ceased operations, the fact that the agreement has been terminated, and the fact that Park Restoration did not return the Beach Club to TCLP in a condition that was "without any damage."

Given these admissions in the pleadings, the ultimate question before the Court is whether a judgment as a matter of law should be entered in favor of TCLP and against Park Restoration or *vice versa*? The answer to this question rests upon the resolution of the following four legal issues: One, does the *Beach Club Management Agreement* impose liability upon the defendant for failure to return the Beach Club to TCLP without damage? Two, if the contract imposes such liability upon the defendant, does the termination of the agreement vitiate the duty of the defendant to compensate the plaintiff for damages to the premises? Three, if the duty owed by the defendant survived termination of the contract, is the duty to perform excused by the doctrine of impossibility of performance? Four, do all or some of the causes of action asserted by the plaintiff fail due to the fact that TCLP has not alleged enough facts to support a claim based on an any alleged failure of Park Restoration to maintain the Beach Club in a commercially reasonable manner?

Claims Based on Failure to Return the Premises Without Any Damage

Count I of the plaintiff's *Complaint* is a breach of contract action based upon Park Restoration's alleged failure to honor Section 6(c) of the *Beach Club Management Agreement*, which states: "In the Event of termination for any reason, Park Restoration warrants and represents that it will vacate the premises ensuring that it is in broom clean condition without any damage to any equipment or property."

Park Restoration suggests that the plaintiff's complaint does not state a claim for relief and should be dismissed. Conversely, TCLP suggests that it has stated a claim and that Park Restoration offers no viable defense to it.

[1] As to whether Count I of the *Complaint* states a claim, the law of Pennsylvania provides that a plaintiff asserting a cause of action for breach of contract must demonstrate three elements to prove its case. These elements are: (1) that there was a contract upon which the defendant owed to duty to the plaintiff; (2) that the defendant breached its contractual duty; and (3) that the plaintiff suffered damages from the breach. See McShea v. City of Philadelphia, 606 Pa. 88, 995 A.2d 334, 340 (2010).

In the instant case before the Court, the admissions contained in the pleadings reflect that, absent one of the defenses analyzed below, TCLP has established a *prima facie* case for breach of contract against Park Restoration.

In the *Complaint* and *Answer* at paragraph 7 the parties admit that the plaintiff owned the Beach Club. At paragraph 8 of both the *Complaint* and *Answer*, the parties acknowledge entering into the *Beach Club Management Agreement*. At paragraphs 18 and 19 of the *Complaint* and *Answer* the parties acknowledge that the *Beach Club Management Agreement* was terminated. And, the parties do not dispute the fact that the agreement expressly provides that upon termination of the agreement Park Restoration was duty bound to "vacate the premises ensuring that it is in broom clean condition without any damage to any equipment or property." Further, the parties admit in paragraph 17 of both

the *Complaint* and *Answer* that the Beach Club was destroyed by fire and that it was not returned to the plaintiff in "broom clean" condition "without any damage to any equipment or property."

Given this state of the record, the admissions identified above warrant judgment on the pleadings in favor of TCLP and against Park Restoration as to liability for the breach of contract claim set forth in Count I of the *Complaint*. However, before the Court may enter such judgment it analyzes below the various defenses asserted by Park Restoration.

Impact of Termination of the Agreement Upon Park Restoration's Duty to Return the Premises "Without Any Damage to Any Equipment or Property"

[2] Park Restoration argues that since it is conceded by the parties that the *Beach Club* has been terminated, Park Restoration had no executory duty to return the premises to TCLP in a condition that is "broom clean without any damage to any equipment or property."

Absent the applicability of the defense of impossibility of performance, which is discussed more fully below, it appears that Park Restoration's argument is without merit. The Court reaches this conclusion because Park Restoration's argument is contrary to the provisions explicitly contained in the *Beach Club Management Agreement*.

[3, 4] The fundamental rule in contract interpretation is for the Court to "ascertain the intent of the contracting parties." Mason v. Range Resources–Appalachia, LLC, 120 F.Supp.3d 425, 439 (W.D. Pa. 2015)(citing Lesko v. Frankford Hosp. Bucks Cty., 609 Pa. 115, 15 A.3d 337, 342 (2011)(quoting Adjustment Bureau, Inc. v. Allstate Inso. Co., 588 Pa. 470, 905 A.2d 462, 468 (2006). When a written contract "is clear and unequivocal, its meaning must be determined by its contents alone." Id. (citing Lesko, supra. (quoting Steuart v. McChesney, 498 Pa. 45, 444 A.2d 659, 661 (1982)).

Sub judice, the contractual provision at issue is remarkably simple. Section 6(c) of the *Beach Club Management Agreement* states that "[i]n the Event of termination for any reason, Park Restoration warrants and represents that it will vacate the premises ensuring that it is in broom clean condition without any damage to any equipment or property."

The operative phrase in this section of the agreement is "in the Event of termination."[5] Park Restoration seems to contend that this phrase really means that Park Restoration owes its duties to TCLP "prior to an Event of termination." However, this is not what the agreement states.

In fact, Park Restoration's construction is demonstrably at odds with the plain language of the contract which, in no uncertain terms, triggers Park Restoration's duty to "vacate the premises ensuring that it is in broom clean condition without any damage" upon the occurrence of an "Event of termination." Clearly, the obligations imposed upon Park Restoration in this section of the contract survives termination.

This Court's conclusion is consistent with case law in the landlord-tenant context which construes a tenant's obligation to restore premises "at the end of the lease" to mean after the expiration of the term. See Milton R. Friedman, Friedman on Leases at § 18.1 at 1085 and n.40 (3d ed. 1990); see also United States Gypsum Co. v. Schiavo Brothers, Inc., 668 F.2d 172, 175 (3d Cir. 1981)(tenant obligated after

5. Capitalizing the letter "E" in the word "Event" is intentional, as that is how the word appears in the *Beach Club Management Agreement*.

lease termination to return premises in the condition in which it received it, reasonable wear and tear excepted).[6]

For these reasons, the Court finds Park Restoration's "termination" argument to be unavailing and not persuasive.

The Circumstances of this Case Precludes the Application of the "Impossibility of Performance" Defense

[5] The plain language of the *Beach Club Management Agreement* required Park Restoration to return the Beach Club to TCLP in a condition that was "without any damage to any equipment or property." In response to this plain language, Park Restoration contends that the contract does not mean what it plainly states.

A fair reading of Park Restoration's brief is that the defendant suggests that the preceding language merely obligated the defendant to perform ordinary repairs and maintenance to the Beach Club and did not require Park Restoration to return the Beach Club to TCLP in a condition that was free from damage. Unfortunately for Park Restoration, this is not what the *Beach Club Management Agreement* provides.

What the agreement states is that Park Restoration will, upon an event of termination, vacate the premises in a broom clean condition "without ***any damage*** to any equipment or property." See *Beach Club Management Agreement* at § 6(c)(emphasis added). The use of the phrase "any damage" is not limiting. It does not mean "some damage" which may require "some maintenance" or "some repairs." Rather, it is an explicit covenant to return the premises free from "any damage." This includes damage caused by catastrophic events that can materially affect a structure (such as fire).[7]

6. The Court need not decide today whether the *Beach Club Management Agreement* is to be construed as a lease of real property or a license. It should be noted that the parties have from time to time taken various positions as to whether Park Restoration held a leasehold interest in the Beach Club (whether under the *Beach Club Management Agreement* or some other instrument). This history is summarized in certain of the Court's prior opinions. See *Memorandum Opinion dated 12/22/2015* (Adversary Proceeding 15–01010–JAD at ECF Doc. # 82) and *Memorandum Opinion Signed on 4/12/2016* (Adversary Proceeding No. 15–01010–JAD at ECF Doc. # 145). The Court takes judicial notice of these proceedings.

7. Park Restoration relies on Brockett v. Carnes, 273 Pa.Super. 34, 416 A.2d 1075 (1979) for support of its argument that Park Restoration, as a manager in sole possession of the Beach Club, had no obligation to "restore" or "rebuild" the Beach Club. In Brockett v. Carnes, the court wrote:

> We need not decide whether the ... rule [found in Hoy v. Holt, 91 Pa. 88 (1879)] that a party who is obligated by a lease provision to repair the premises must rebuild them if they are accidentally destroyed is still the law in Pennsylvania. Assuming, *arguendo*, that the Hoy rule is still good law, we conclude that it is not controlling in the instant case because the lease herein provides that the lessors are liable for "maintenance," not "repairs." Although the dictionary definition of "maintenance" encompasses "repairs," it does not necessarily follow that the two words are synonymous when used in a commercial lease. It is arguable that because the Hoy rule has been the law in Pennsylvania for a century, parties providing in their lease that one party has the duty to repair the premises believe that it is unnecessary to specify that this duty includes rebuilding the premises if they are destroyed. However, no Pennsylvania court has ever held that a lease obligation to "maintain" the premises includes rebuilding them. Therefore, the parties in the instant case could not have reasonably believed that it was unnecessary to specify in their lease that the lessors were obligated to rebuild the premises should they be destroyed.

Brockett v. Carnes, 273 Pa.Super. at 38–39, 416 A.2d at 1077–78.

Brockett, however, is not applicable to the matter before the Court for various reasons.

Not only does the contractual provision at issue apply to "any damage," the promises contained in the contract are representations and warranties by Park Restoration to TCLP. The Court reaches this conclusion because the agreement unequivocally states: "In the Event of termination for any reason, Park Restoration ***warrants and represents*** that it will vacate the premises ensuring that it is in broom clean condition without any damage to any equipment or property." Id. (emphasis added).

[6] Because Park Restoration expressly warranted a particular result, Park Restoration was required to strictly comply with it. Absent such strict compliance, Park Restoration is liable for all damages occasioned by its breach. As noted by the Third Circuit Court of Appeals, "[i]n a typical warranty, the warrantor agrees to fulfill a promise, and any failure to comply with the promise would represent a breach of the contract." Princeton Ins. Co. v. Converium Reinsurance, 344 Fed.Appx. 759, 763 (3d Cir. 2009).

Given the plain and unambiguous language of the *Beach Club Management Agreement*, this Court is generally powerless to re-write it. As Chief Circuit Judge D. Brooks Smith observed when he was a district court judge: "In the overwhelming majority of circumstances, contractual promises are to be performed, not avoided." Specialty Tires of America, Inc. v. The CIT Group/Equipment Financing, Inc., 82 F.Supp.2d 434, 437 (W.D. Pa. 2000).

The latin phrase *pacta sunt servada* is operative. It means "agreements must be kept." In common parlance, it means either "a promise is a promise" or, according to Chief Circuit Judge Smith, "a deal is a deal." Id. (citing Waukesha Foundry, Inc. v. Industrial Engineering, Inc., 91 F.3d 1002, 1010 (7th Cir. 1996) and John D. Calamari & Joseph M. Perillo, The Law of Contracts § 13.1, at 495 (4th ed. 1998)). This is a sound doctrine because:

> a court cannot improve matters by intervention after the fact. [Intervening after the fact] can only destabilize the institution of contract, increase risk, and make parties worse off. . . . Parties to contracts are entitled to seek, and retain, personal advantage; striving for that advantage is the source of much economic progress. Contract law does not require parties to be fair, or kind, or reasonable, or to share gains or losses equally.

Id. (quoting Industrial Representatives, Inc. v. CP Clare Corp., 74 F.3d 128, 131–32 (7th Cir. 1996)(Easterbrook, J.).

The most obvious one is that the lease in Brockett was silent on "rebuilding" and expressly required the landlord (and not the tenant) to "maintain" the premises. As a result, the court in Brockett had to determine whether the word "maintain" was synonymous with the word "rebuild." In the instant case, under the *Beach Club Management Agreement*, TCLP clearly had no duty to provide "maintenance" or "repairs." Rather, under the agreement, TCLP abdicated full control of the premises over to Park Restoration who explicitly agreed to make sure that the "property is fully secured and maintained in a commercially reasonable fashion" See *Beach Club Management Agreement* at § 1. Moreover, the duties imposed upon Park Restoration under the *Beach Club Management Agreement* were far more expansive than "maintenance." As described elsewhere in this *Memorandum Opinion*, Park Restoration warranted and represented that the premises would be returned to TCLP "without any damage to any equipment or property." Id at § 6(c) In addition, TCLP agreed to hold the plaintiff "harmless and fully indemnify the [plaintiff] from any loss, cost or damage with respect to any . . . damage claimed to . . . property . . . as a result of [defendant's] use, misuse, occupancy, procession [sic], or abandonment of the Beach Club." Id. at § 7.

The undisputed facts are that Park Restoration did not comply with the promises it made in its contract with TCLP because the Beach Club was totally destroyed by fire and Park Restoration did not return the premises to TCLP free from "any damage." Park Restoration's failure to perform gives rise to a claim for damages by TCLP unless Park Restoration can interpose a defense to the claim.

[7] In the instant case, Park Restoration contends that its obligation to perform is excused by the doctrine of "impossibility of performance." However, the Court finds that Park Restoration cannot hide behind this defense.

[8] The "impossibility of performance" doctrine is a form of judicial "gap filling" when a contract between the parties fails to allocate risks occasioned by unforeseen events. Because of the unexpected nature of these events:

> . . . litigated cases usually involve, not interpretation of a contractual term, but the judicial filling of a lacuna in the parties agreement. Such "gap-filling," however, must be understood for what it is: a court-ordered, as opposed to bargained-for, allocation of risk between the parties. As such, it must be applied sparingly.

Specialty Tires, 82 F.Supp.2d at 437–38 (citations omitted).

The doctrine of impossibility of performance has its origins at common-law, and has been adopted in one form or another in the various RESTATEMENT OF CONTRACTS.

At common law, the first general formulation of the doctrine was announced in the landmark English case of Taylor v. Caldwell, 122 Eng. Rep. 309 (1863). In Taylor, the owner of a music hall was excused of his liability for failure to make the hall available due to an accidental fire that destroyed the building. The court in Taylor excused performance stating:

> . . . in contracts in which the performance depends on the continued existence of a person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.

Taylor, 122 Eng. Rep. at 314. Interestingly, the Court in Taylor observed that the facts and circumstances of that case provided that the "parties when framing their agreement evidently had not present to their minds the possibility of such a disaster, and have made no express stipulation with reference to it . . ." Id. Consequently, the court in Caldwell allocated the risk such that it discharged the music hall owner from his contractual obligation to make the venue available to the other contracting party.

In the United States, courts applying the common law doctrine of impossibility have focused on a number of factors to determine whether, and the extent to which, risk should be allocated between contracting parties. One such factor is whether the agreement between the parties contemplates a risk allocation.

For example, in Morrow, Inc. v. Paugh, 120 Ind.App. 458, 91 N.E.2d 858 (1950), the defendant contracted to lease a truck. The contract in Morrow expressly provided that the truck was to be returned in the same condition save normal wear and tear. Subsequent to entry into the contract, the truck was accidently destroyed by fire to no fault of the lessee. The court, however, refused to discharge the lessee's obligation to restore the truck citing that it was foreseeable that the property could suffer damage during the term of the contract—even if the destruction was caused exclusively by an accident and without fault on

the part of the lessee. Morrow, 91 N.E.2d at 860–61.[8]

The outcome of Morrow is consistent with the provisions of the RESTATEMENT (SECOND) CONTRACTS that deal with impossibility of performance.

[9] Section 261 of the RESTATEMENT (SECOND) OF CONTRACTS describes the workings of the doctrine of impossibility or impractibility.[9] This section provides for "Discharge by Supervening Impractibility" and states:

> Where, after a contract is made, a party's performance is made impractible without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render performance is discharged, ***unless the language or the circumstances indicate the contrary***.

See RESTATEMENT (SECOND) CONTRACTS § 261 (emphasis added).[10]

Comment *a.* to this section provides helpful guidance, where it states:

> . . . The principle . . . ***yields to a contrary agreement by which a party may assume a greater as well as a lesser obligation***. By such an agreement, for example, a party may undertake to achieve a result irrespective of supervening events that may render its achievement impossible, and if does so his non-performance is a breach even if it is caused by such event.

Id. at Comment *a.* (emphasis added).

Similarly, at Comment *c.* to Section 261, the drafters of the RESTATEMENT (SECOND) OF CONTRACTS acknowledged:

> . . . ***A party may, by appropriate language, agree to perform in spite of impractibility that would otherwise justify his non-performance*** . . . . He can then be held liable for damages although he cannot perform. ***Even absent an express agreement, a court may decide, after considering all the circumstances, that a party impliedly assumed such greater obligation*** . . .

Id. at Comment *c.* (emphasis added).

[10] What can be gleaned from these provisions of the RESTATEMENT is that if the facts and circumstances of the case provide for an agreed upon allocation of risk, that allocation generally will not be disturbed under the doctrine of impossibility of performance.

8. In the case at bar, no determination has been made with respect to the cause of the fire at the Beach Club. The police report advises that it "was caused by an unknown action." The report further states "Due to the duration of the burn and the intense heat a cause of the fire could not be determined at the time of this report, and for these reasons this fire shall be ruled as undetermined." See *Police Report* attached at Exhibit A to the *Plaintiff's Supplemental Brief in Support of Plaintiff's Motion for Judgment on the Pleadings* (ECF Doc. # 63).

9. Pennsylvania courts have adopted and/or utilized §§ 261, 263 and 265 of the RESTATEMENT (SECOND) CONTRACTS. See e.g., Step Plan Services, Inc. v. Koresko, 12 A.3d 401, 414 (Pa. Super. 2010).

10. RESTATEMENT (SECOND) CONTRACTS addresses what a "basic assumption on which a contract is made," and states as follows:

> If the existence of a specific thing is necessary for the performance of a duty, its failure to come into existence, destruction, or such deterioration as makes performance impracticable is an event the non-occurrence of which was a basic assumption on which the contract was made.

See RESTATEMENT (SECOND) CONTRACTS § 263. The comments to this section state that this section "does not apply if the language or the circumstances indicate the contrary." Id. at Comment *c*.

The facts and circumstances of this case before the Court, as reflected by the admissions contained in the pleadings and record, is such that the Court determines the parties did agree to allocate to Park Restoration the risk of damage to the Beach Club. The terms and conditions of the *Beach Club Management Agreement* supports this conclusion.

Under the agreement, TCLP abdicated full control of the premises over to Park Restoration who explicitly agreed to make sure that the "property is fully secured and maintained in a commercially reasonable fashion" See *Beach Club Management Agreement* at § 1.

In addition, TCLP agreed to hold the plaintiff "harmless and fully indemnify the [plaintiff] from any loss, cost or damage with respect to any ... damage claimed to ... property ... as a result of [defendant's] use, misuse, occupancy, procession [sic],[[11]] or abandonment of the Beach Club." Id. at § 7

Moreover, the plain language of the agreement provides that the duties imposed upon Park Restoration under the *Beach Club Management Agreement* were far more expansive than ordinary "maintenance." In fact, as described elsewhere in this *Memorandum Opinion*, Park Restoration warranted and represented that the premises would be returned to TCLP "without any damage to any equipment or property." Id. at § 6(c). The use of the phrase "any damage" encompasses the destruction of the premises, whether occasioned by fire, accident, or otherwise and regardless of fault.

The fact that the parties' agreement allocated the risk of damage to Park Restoration is further supported by the parties' course of conduct. That course of conduct, which is admitted by the parties, is that Park Restoration insured both the Beach Club building and its contents against loss occasioned by the fire, and TCLP did not.

That the agreement to allocate risk negates the applicability of the doctrine of impossibility is supported by various cases discussing the doctrine. For example, one court out of Massachusetts explains the doctrine of impossibility as follows:

> ... where it appears from the nature of the contract that the parties must from the beginning have contemplated the existence of some particular thing as the foundation of what was to be done, then, ***in the absence of any warranty that the thing shall exist***.... the parties shall be excused ... [when] performance becomes impossible from the accidental perishing of the thing without the fault of either party.

See Ford Motor Credit Co. v. Williams, 1998 Mass. Super. LEXIS 555 *5 (citing Chase Precast Corp. v. John J. Paonessa Co., Inc., 409 Mass. 371, 373, 566 N.E.2d 603 (1991)(emphasis added).

Similarly, in the case of Albert M. Greenfield & Co., Inc. v. Kolea, 475 Pa. 351, 380 A.2d 758 (1977) the Pennsylvania Supreme Court excused rental obligations of a tenant under a lease when the building was destroyed by fire because the agreement between the parties was silent as to allocation of the risk of damage. In Greenfield the court held:

> In reaching our decision that the accidental destruction of the building by fire excused the parties from further performance of their obligations under the lease agreements, we are cognizant of the fact that we are allocating

11. The word "procession" appears to be a scrivener's error and should be the word "possession."

> the risk to be assumed by the parties. Such an allocation of risk can be accomplished in one of two ways. First, the parties could specifically provide for risk assumption with respect to certain possible contingencies. [Second, in] the absence of an express recognition and assumption by the parties, the court is left with the task of determining what the parties would have done had the issue arisen in the contract negotiations. . . .
>
> . . . It is no longer reasonable to assume that in the absence of a lease provision to the contrary the lessee should bear the risk of loss in the event of total destruction of the building. Where the parties do not expressly provide for such a catastrophe, the court should analyze the facts and lease agreement as any other contract. Following such an analysis, if it is evident to the court that the parties bargained for the existence of a building, and no provision is made as to who bears the risk of loss if the building is destroyed, the court should relieve the parties of their respective obligations when the building no longer exists.

Albert M. Greenfield & Co., Inc., 475 Pa. at 356–58, 380 A.2d 760–61.

With the holding in Greenfield in mind, this Court concludes that the admissions contained in the pleadings reflect that the parties in this case bargained as to which party bore the risk of loss. The arms-length agreement was that Park Restoration bore the risk.

[11] Park Restoration cannot at this late hour avoid it because the law provides: "Promisors are free to assume risks, even huge ones, and promisees are entitled to rely on those voluntary assumptions." Specialty Tires of America, Inc., 82 F.Supp.2d at 437 (quoting Calamari & Perillo, supra. § 13.16, at 522). In this case, TCLP relied upon Park Restoration's warranty to return the premises free from any damage. As such, Park Restoration is liable for any damages resulting from its failure to do so.

This conclusion is neither unfair, nor is it unconscionable for it is precisely what the parties bargained. Had the defendant desired a different result, it could have negotiated a *force majeure* clause excusing its performance. Having not done so, the Court will not write a *force majeure* clause into the contract.

In addition, while Park Restoration does not have the capacity to tender the Beach Club to the plaintiff free from damage, Park Restoration does have the capacity to tender insurance proceeds to TCLP (which were paid by the insurance carrier on account of the Beach Club that was destroyed by fire).

That Park Restoration insured the premises against the loss at issue further supports the plaintiff's claim that, while not desirable, the calamity was in the range of possible foreseeable contingencies that could arise during the lengthy term of the agreement thereby precluding the defense of impossibility. See e.g., Portney v. Omnicare Pharm., Inc., 2004 U.S. Dist. LEXIS 12235 *10 (E.D. Pa. 2004)(finding that lessee's performance should not be excused because the "contemplation of flood was always there as evidenced by the fact that the Defendants purchased flood insurance, collected $4.5 million for this occurrence of which only 1.5 million was used to repair the premises.").

[12] The Court also notes that the outcome of this matter is consistent with the "obligation of a tenant to return the leasehold property in the condition in which it was received, reasonable wear and tear excepted." U.S. Gypsum Co. v. Schiavo Bros., Inc., 668 F.2d at 174. It is also

consistent with the opinion of the United States District Court for the Western District of Pennsylvania in J.E. Faltin Motor Trans., Inc. v. Eazor Express, Inc., 172 F.Supp. 175 (W.D.Pa. 1959), aff'd 273 F.2d 444 (3d Cir. 1960), where Judge Marsh held that the defendant who possessed a tractor trailer was liable for the destruction of the equipment by fire. The court made this finding even though the destruction was without fault of the defendant because the contract plainly and unequivocally provided, among other things, that the defendant would hold the plaintiff harmless for "any loss or damage thereto." J.E. Faltin Motor, 172 F.Supp. at 177–78; see also Caputo v. Blackstone Mut. Ins. Co., 323 F.Supp. 1252, 1254 (W.D. Pa. 1971).

For all of these reasons, the Court finds that Park Restoration's defense of impossibility is not persuasive and is without merit.

The Defendant's Motion for Judgment on the Pleadings Is Without Merit

[13] With respect to Count II of the *Complaint*, the plaintiff has asserted a breach of contract action against Park Restoration for failure to maintain the Beach Club in a commercially reasonable fashion. Count III of the *Complaint* asserts a cause of action for breach of indemnity. Park Restoration seeks judgment on the pleadings dismissing these two counts of the *Complaint*, citing the doctrine of impossibility and that fact that the *Complaint* lacks alleged specificity regarding Park Restoration's failure maintain the property.

As to the defense of impossibility, this Court has found Park Restoration's defense of impossibility to be without merit. As such, Park Restoration's *Motion for Judgment on the Pleadings* in this regard will be denied.

[14] As to the defense citing the lack of specificity in Counts II and III of the plaintiff's *Complaint*, Park Restoration's motion is also untimely. The Court reaches this conclusion because Fed.R.Civ.P. 12(e), as incorporated into Fed.R.Bankr.P. 7012, requires that a motion for a more definite statement be filed "before filing a responsive pleading." Park Restoration has already filed its *Answer*, and cannot now complain that the *Complaint* lacks specificity.

[15] The Court would also note that motion practice is not a substitute for discovery. As to the adequacy of pleadings, the Federal Rules of Civil Procedure require only that a pleader serve a short and plain statement showing an entitlement to relief. See Fed.R.Civ.P. 8(a)(2), as incorporated into these proceedings by Fed. R.Bankr.P. 7008. In this case, TCLP has done that.

TCLP has alleged breach of contract claims and indemnity claims against Park Restoration arising out of, or relating to, Park Restoration's use and/or possession of the Beach Club. It has also cited in detail the relevant contractual provisions giving rise to its claims for relief.

In addition, it is beyond dispute that the Beach Club burned to the ground while it was in Park Restoration's possession and care. It is also undisputed that no accounting has been provided for the loss occasioned by the fire because the cause of the fire is "undetermined." These facts give rise to a presumption that TCLP has met its burden of production and/or proof as to any claim that Park Restoration failed to adequately maintain the Beach Club. See e.g. Buckley v. Exodus Transit & Storage Corp., 744 A.2d 298, 306 (Pa. Super. 1999)("When a bailee has exclusive possession of the goods, the acts attending loss or injury must be peculiarly within his own

knowledge. Consequently, the bailee must excuse or justify the failure to deliver. This is an example of a presumption which arises as 'a rule of proof production based upon the comparative availability of material evidence of the respective parties.' ")(quoting Schell v. Miller North Broad Storage Co., 142 Pa.Super. 293, 16 A.2d 680, 684 (1940)).

In addition, the extent to which evidence exists supporting (or negating) the claim against Park Restoration for failure to maintain, such evidence will come to light during discovery if, and when, it occurs. The *Motion for Judgment on the Pleadings* filed by Park Restoration will therefore be denied.

V.

The Litigation Going Forward

[16] A litigant is entitled to only one recovery. Cf. Greenleaf v. Garlock, Inc., 174 F.3d 352, 357 (3d Cir. 1999) (citing Frank v. Volkswagenwerk, 522 F.2d 321, 324–26 (3d Cir. 1975)).

[17] Inasmuch as the Court is entering judgment on the pleadings in favor of TCLP and against Park Restoration as to Count I of the *Complaint*, it is appropriate to (a) stay the prosecution of Counts II and III of the *Complaint*, and (b) proceed to the trial of damages as to Count I. See Fed.R.Civ.P. 42; Fed.R.Bankr.P. 7042.

The Court is mindful that the plaintiff contends that the amount of damages it sustained is undisputed. In support of this proposition the plaintiff cites to the fact that Park Restoration admitted that the value of its "insured interest" is the policy limits of its insurance. Park Restoration, however, has contended that the value of its "insured interest" is different from the value of the Beach Club itself. No party, however, has fully briefed this distinction raised by Park Restoration.

Moreover, at prior hearings in this bankruptcy case, Park Restoration represented that it had made over $700,000 of improvements to the Beach Club before it burned to the ground. See *Transcript Regarding Hearing Held 6/2/2015* at p. 8 (filed at ECF Doc. # 128 at Adversary No. 15–01010–JAD).

These circumstances warrant an evidentiary hearing on the damages sustained by TCLP as a result of Park Restoration's failure to return the Beach Club to TCLP free from "any damage." A trial will therefore be scheduled on this matter.

VI.

Conclusion

For the reasons that are set forth above, judgment on the pleadings shall be entered in favor of the plaintiff, TCLP, and against defendant, Park Restoration, as to liability on account of the breach of contract claim found in Count I of the *Complaint*. By way of separate order, a trial will be scheduled to determine the amount of damages the defendant is liable to the plaintiff. The Court will also enter an order that denies the dueling *Motion for Judgment on the Pleadings* filed by the defendant. Notwithstanding this denial, the prosecution of Counts II and III of this adversary proceeding are stayed, pending further order of the Court, because the plaintiff is allowed only one recovery.

ORDER

For the reasons that are set forth in the *Memorandum Opinion* issued contemporaneously herewith, judgment on the pleadings is ENTERED and GRANTED in favor of the plaintiff, the Trustees of Conneaut Lake Park, Inc., and against the defendant, Park Restoration, LLC, as to

liability on account of the breach of contract claim found in Count I of the *Complaint*. By way of separate order, a trial will be scheduled to determine the amount of damages the defendant is liable to the plaintiff.

The dueling *Motion for Judgment on the Pleadings* filed by the defendant Park Restoration, LLC is DENIED. Notwithstanding this denial, the prosecution of Counts II and III of this adversary proceeding are STAYED pending further order of the Court, because the plaintiff is allowed only one recovery.

Marlene Denise EVANS, Appellant,

v.

R. Clinton STACKHOUSE, Jr., Trustee, Appellee.

CIVIL NO. 4:16cv17

United States District Court,
E.D. Virginia,
Newport News Division.

Signed 01/13/2017

Background: Deed of trust lender moved to dismiss or convert case based on Chapter 13 debtor's alleged material default in her payments under confirmed plan, and debtor objected on theory that, by completing all of the payments that plan had required her to make to trustee, but not her direct maintenance payments to lender, she had completed all "payments under the plan" and was entitled to Chapter 13 discharge. The Bankruptcy Court granted lender's motion and dismissed case, and debtor appealed.

Holdings: The District Court, Robert G. Doumar, J., held that:

(1) postpetition mortgage or deed of trust payments made by Chapter 13 debtor directly to the lender to which such payments are owed are still considered "payments under the plan," such as debtor is statutorily required to complete in order to receive a discharge, if plan provides for the curing of prepetition arrearages on the same mortgage or deed of trust debt;

(2) debtor's failure to complete her direct payments to deed of trust lender, under plan that provided for the cure of debtor's $400.00 prepetition arrearage and maintenance of her monthly deed of trust payments as payments directly from debtor to lender, was in nature of "material default" of terms of confirmed plan;

(3) appropriate remedy for debtor's "material default" of terms of her confirmed plan, in not completing the maintenance payments that she was to make directly to deed of trust lender, was dismissal of case.

Affirmed.

1. Bankruptcy ⚷3782, 3786

On appeal, bankruptcy court's application of the law is reviewed de novo, while its findings of fact will not be set aside unless clearly erroneous. Fed. R. Bankr. P. 8013.

2. Bankruptcy ⚷3711(2)

Chapter 13 debtors may cure a prepetition mortgage delinquency through plan, but must do so by staying current on their mortgage. 11 U.S.C.A. § 1322(b)(5).

3. Bankruptcy ⚷3711(1)

While a Chapter 13 plan does not necessarily need to provide for curing of debtor's default on long-term debt, if the plan does so, then it must also provide for maintenance of debtor's postpetition pay-

IN RE: the TRUSTEES OF CONNEAUT LAKE PARK, INC., Debtor

Park Restoration, LLC

v.

Erie Insurance Exchange; The Trustees of Conneaut Lake Park, a charitable trust; Crawford County, a political subdivision; Summit Township, a municipal corporation; Tax Claim Bureau of Crawford County; Conneaut School District

Summit Township, a municipal corporation; Crawford County, a political subdivision; The Tax Claim Bureau of Crawford County; The Conneaut School District, Appellants

No. 16-2516

United States Court of Appeals, Third Circuit.

Argued January 18, 2017

(Opinion Filed: May 2, 2017)

Background: Company that held leasehold interest in beach club property, and that had elected to insure debtor's interest as fee owner of club, brought adversary proceeding for declaratory judgment regarding the relative rights of company, debtor, and certain tax creditors of debtor as to fire insurance proceeds. Parties cross-moved for summary judgment. The United States Bankruptcy Court for the Western District of Pennsylvania, Jeffery A. Deller, Chief Judge, 543 B.R. 193, determined that taxing authorities were entitled to $478,260.75 of the proceeds as payment for outstanding property taxes and that company was entitled to remaining principal balance of the proceeds after payment to taxing authorities. Cross-appeals were taken. The District Court, Barbara Jacobs Rothstein, J., 551 B.R. 577, affirmed in part and reversed in part. Appeal was taken.

Holdings: The Court of Appeals, Hardiman, Circuit Judge, held that:

(1) by statute, insurance proceeds payable to named insured in connection with fire damage to beach club located on 55.33 acre tax parcel had to be paid first to taxing authorities for delinquent taxes on parcel before they were paid to named insured, and

(2) named insured under policy that provided coverage for fire damage to beach club property had no legally cognizable property interest in receiving entirety of insurance proceeds, of kind required to support a takings claim.

Reversed and remanded.

1. Bankruptcy ⚷3782

On appeal from district court's decision in its bankruptcy appellate capacity, the Court of Appeals' review of district court's determinations is plenary.

2. Federal Courts ⚷3008(2)

Decisions of the Pennsylvania Supreme Court are the authoritative source for federal court when ascertaining Pennsylvania law.

3. Federal Courts ⚷3103

In absence of decision by state's highest court on state law issue, federal court must predict how state's highest court would rule.

4. Federal Courts ⚷3010

Court of Appeals had to apply Pennsylvania rules of statutory interpretation when interpreting Pennsylvania statute.

5. Insurance ⚷3446
Taxation ⚷2761

By Pennsylvania statute, insurance proceeds payable to named insured in con-

nection with fire damage to beach club located on 55.33 acre tax parcel had to be paid first to taxing authorities for delinquent taxes on parcel before they were paid to named insured, regardless of whether named insured was owner of structure damaged by fire, or whether it had responsibility to pay taxes or to repair structure. 40 Pa. Stat. Ann. § 638.

6. Statutes ⚷1369

Under Pennsylvania law, statute's unambiguous words are presumed to be the best indication of legislative intent.

7. Constitutional Law ⚷3855

Takings Clause of the Fifth Amendment applies to states through the Fourteenth Amendment. U.S. Const. Amends. 5, 14.

8. Eminent Domain ⚷2.1

To determine whether an unconstitutional taking occurred, courts ask three questions: (1) whether there was a taking; (2) whether that taking was for public use; and (3) whether the claimant received just compensation. U.S. Const. Amend. 5.

9. Eminent Domain ⚷2.1

Taking, of kind subject to the Fifth Amendment, may occur either by physical appropriation of property or by regulatory activity. U.S. Const. Amend. 5.

10. Eminent Domain ⚷69

When government physically takes possession of interest in property, it has categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes entire parcel or merely a part thereof. U.S. Const. Amend. 5.

11. Eminent Domain ⚷2.1

While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. U.S. Const. Amend. 5.

12. Eminent Domain ⚷2.1

There are at least two discrete categories of regulatory action that violate the Fifth Amendment, those that compel property owner to suffer a physical invasion of his property, and those that deny all economically beneficial or productive use of land. U.S. Const. Amend. 5.

13. Eminent Domain ⚷2.1

In determining whether a regulatory taking has occurred, court may consider economic impact of regulation on claimant and the character of the governmental action. U.S. Const. Amend. 5.

14. Eminent Domain ⚷81.1

Party asserting a taking claim must have legally cognizable property interest. U.S. Const. Amend. 5.

15. Eminent Domain ⚷81.1

Named insured under policy that provided coverage for fire damage to beach club property had no legally cognizable property interest in receiving entirety of insurance proceeds, of kind required to support a takings claim under either the Fifth Amendment or the Pennsylvania Constitution, where Pennsylvania statute made its receipt of such proceeds conditional upon payment of delinquent taxes on parcel on which beach club property was located. U.S.C.A. Const. Amends. 5, 14; Pa. Const. art. 1, § 10; 40 Pa. Stat. Ann. § 638.

On Appeal from the United States District Court for the Western District of Pennsylvania (D.C. No. 1-16-cv-00006) District Judge: Honorable Barbara Jacobs Rothstein

John F. Mizner [Argued], Mizner Law Firm, 311 West Sixth Street, Erie, PA 16507, Counsel for Appellee

Lawrence C. Bolla, Michael P. Kruszewski, Arthur D. Martinucci [Argued], Quinn Buseck Leemhuis Toohey & Kroto, 2222 West Grandview Boulevard, Erie, PA 16506, Counsel for Appellants

Before: FISHER *, HARDIMAN, and GREENAWAY, JR., Circuit Judges.

OPINION OF THE COURT

HARDIMAN, Circuit Judge.

Pennsylvania law prohibits insurance companies from paying fire insurance proceeds to a "named insured" unless the local municipality certifies that no delinquent taxes are owed on the property where the insured structure was located. 40 Pa. Stat. § 638. The District Court held that "named insured" as used in Section 638 includes only those who own the structure at issue and are responsible for the delinquent taxes. Because the Bankruptcy Court rightly held that this interpretation contravenes the text of the statute, we will reverse.

I

This appeal involves Conneaut Lake Park, which abuts Conneaut Lake in Crawford County, Pennsylvania. The Park included a historic venue known as the Beach Club, which was owned by the Trustees of Conneaut Lake Park, Inc. Appellant Park Restoration, LLC, operated the Beach Club under a management agreement with the Trustees. Park Restoration insured the Beach Club against fire loss for $611,000 through Erie Insurance Exchange. When the Beach Club was destroyed by fire in 2013, Park Restoration submitted a claim to Erie. Erie did not dispute the claim, but in accordance with 40 Pa. Stat § 638, it required Park Restoration to obtain a certificate from the local municipal treasurer stating whether back taxes were owed on the property.

Park Restoration received a certificate showing a total of $478,260.75 in delinquent property taxes owed by the Trustees to Summit Township, Crawford County, the Tax Claim Bureau of Crawford County, and Conneaut School District (collectively, Taxing Authorities). These delinquent taxes dated back to 1996, well before Park Restoration signed its management agreement with the Trustees, and the taxes were owed on the entire 55.33 acre parcel on Conneaut Lake, not just the single acre that included the Beach Club. Nonetheless, because of the tax delinquency, Erie notified Park Restoration that it would transfer to the Taxing Authorities $478,260.75 of the $611,000 insurance proceeds. Park Restoration objected, prompting Erie to interplead the proceeds in the Court of Common Pleas of Crawford County.

The interpleader action was transferred to the United States Bankruptcy Court for the Western District of Pennsylvania after the Trustees filed for bankruptcy. In the Bankruptcy Court, Park Restoration argued that Section 638 "applies solely to those situations where the fee owner of the property is insured and where the tax liabilities at issue are the financial responsibility of the owner as well." *In re Trustees of Conneaut Lake Park, Inc.*, 543 B.R. 193, 198 (Bankr. W.D. Pa. 2015). Park Restoration argued that any other construction would violate the Takings Clauses of the United States Constitution and the Pennsylvania Constitution. The Trustees responded that Park Restoration was not entitled to any of the insurance pro-

* Honorable D. Michael Fisher, United States Circuit Judge for the Third Circuit, assumed senior status on February 1, 2017.

ceeds because Park Restoration insured the Trustees' property. Therefore, the Trustees sought the remaining insurance proceeds after the Taxing Authorities were compensated.

The Taxing Authorities and Park Restoration filed cross motions for summary judgment. The Bankruptcy Court granted partial summary judgment in favor of both parties. It held that under Section 638 the Taxing Authorities were entitled to full payment of the delinquent taxes ($478,260.75), and that Park Restoration, as the named insured, was entitled to the balance of the insurance proceeds.

Park Restoration and the Trustees filed cross-appeals to the United States District Court for the Western District of Pennsylvania. Park Restoration argued, for the first time, that because the insured property constituted only 9% of the tax value of the parcel, Park Restoration's insurance proceeds should apply pro rata to the tax debt. It also argued that anything more would be an unconstitutional taking. Meanwhile, the Trustees claimed entitlement to the balance of the insurance proceeds because they owned the Beach Club.

The District Court affirmed the Bankruptcy Court's summary judgment for Park Restoration as against the Trustees, but reversed the Bankruptcy Court's summary judgment for the Taxing Authorities as against Park Restoration. The Court held that Section 638 is ambiguous because it uses "named insured" and "insured property owner" interchangeably. *In re Trustees of Conneaut Lake Park, Inc.*, 551 B.R. 577, 584–85 (W.D. Pa. 2016). The District Court then considered legislative intent and concluded that the General Assembly intended Section 638 to apply only to property owners. The Court reasoned that because Park Restoration did not own the Beach Club or the parcel upon which it was located, it was not responsible for the Trustees' delinquent taxes. The Taxing Authorities appealed the District Court's judgment.

II

[1] The Bankruptcy Court had jurisdiction under 28 U.S.C. §§ 157(b) and 1334(b). The District Court had appellate jurisdiction under 28 U.S.C. § 158(a). Our jurisdiction lies under 28 U.S.C. §§ 158(d) and 1291. "Because the District Court sat as an appellate court, reviewing an order of the Bankruptcy Court, our review of the District Court's determinations is plenary." *In re Wettach*, 811 F.3d 99, 104 (3d Cir. 2016) (quoting *In re Bocchino*, 794 F.3d 376, 379 (3d Cir. 2015)).

III

The Taxing Authorities argue that the District Court erred in reversing the Bankruptcy Court's order granting them summary judgment. We agree. Section 638 required Erie to transfer funds from Park Restoration's insurance claim to the Taxing Authorities irrespective of Park Restoration's property interest in the Beach Club. Though Park Restoration's public policy and equitable arguments are not without force, they cannot vitiate the statutory language. Additionally, we agree with the Bankruptcy Court that Section 638 as applied in this case does not violate the Takings Clauses of the United States Constitution or the Pennsylvania Constitution.

A

[2–4] Although Pennsylvania courts have not addressed the question presented in this appeal, we believe that the text of Section 638 compels reversal. "When ascertaining Pennsylvania law, the decisions of the Pennsylvania Supreme Court are the authoritative source." *Spence v. ESAB*

Grp., Inc., 623 F.3d 212, 216 (3d Cir. 2010). Because the Pennsylvania Supreme Court has not ruled on this issue, "we must predict how it would rule." *Id.* (citing *Covington v. Cont'l Gen. Tire, Inc.*, 381 F.3d 216, 218 (3d Cir. 2004)). When interpreting Pennsylvania law, we apply its rules of statutory interpretation. *See* 1 Pa. Cons. Stat. § 1921 (providing guidance for courts interpreting Pennsylvania statutes); *see also United States v. Atiyeh*, 402 F.3d 354, 369–71 (3d Cir. 2005) (applying Pennsylvania rules of statutory interpretation to construe a statute). Pennsylvania's General Assembly also provided that Section 638 "shall be liberally construed to accomplish its purpose." 40 Pa. Stat. § 638(k).

[5] Section 638 is relatively straightforward and its application here proceeds in three steps. First, the statute prohibits insurance companies from "pay[ing] a claim of a named insured for fire damage to a structure located within the municipality," unless the insurance company is furnished with an appropriate certificate from the municipal treasurer. 40 Pa. Stat. § 638(a). Thus, Erie was prohibited from paying a claim to Park Restoration (the named insured) for fire damage to the Beach Club (the damaged structure) unless Erie was furnished with the appropriate certificate.

Second, there will be one of two types of certificates issued depending on whether delinquent taxes are owed on the property where the structure was located. When, as in this case, there is a tax delinquency, the municipal treasurer is required to issue "a certificate and bill showing the amount of delinquent taxes, assessments, penalties and user charges against the *property* as of the date specified in the request." 40 Pa. Stat. § 638(b)(1)(ii) (emphasis added). Here, the 55.33 acre tax parcel on Conneaut Lake had a tax delinquency of $478,260.75.

Finally, upon receipt of the certificate, Erie was required to "transfer to the treasurer an amount from the insurance proceeds necessary to pay the taxes." 40 Pa. Stat. § 638(b)(2)(ii).

As the Bankruptcy Court observed, the statute does not "qualify its terms by requiring that the named insured be the 'owner' of the structure destroyed by the fire. Nor does the statute limit the imposition of the tax claim against insurance proceeds payable to the entity primarily liable for the tax debt in question." *Conneaut Lake Park, Inc.*, 543 B.R. at 203. The tax claim is "levied against the insured property"—that is, it is "*in rem* in nature and runs with the real property." *Id.* (internal formatting and quotation marks omitted). So the Taxing Authorities' claim "attache[d] to any fire insurance proceeds payable to any named insured as opposed to being limited solely to the beneficial interests (if any) of the primarily liable taxpayer." *Id.*

Unlike the Bankruptcy Court, the District Court found the statute ambiguous. In doing so, the District Court cited 40 Pa. Stat. § 638(b)(2)(i), which uses the terms "insured property owner" and "named insured." Perceiving that these terms were used interchangeably, the District Court concluded that "[a] straight-forward reading of the statute demonstrates that it is referencing the same party when it refers to the 'named insured' and the 'insured property owner.' " *Conneaut Lake Park, Inc.*, 551 B.R. at 585. According to the District Court, the only way to resolve the inconsistency was to "assume that the General Assembly meant that the 'named insured' and 'the insured property owner' are synonymous" throughout the entire statute. *Id.* It followed, then, that this inconsistency rendered Section 638 "reasonably susceptible [to] different interpreta-

tions." *Id.* (quoting *Dobrek v. Phelan*, 419 F.3d 259, 264 (3d Cir. 2005)).

We need not opine as to whether the District Court is correct that the General Assembly used the terms "named insured" and "insured property owner" interchangeably for purposes of Section 638(b)(2)(i), which applies when a property is free from tax delinquency. It suffices to say that the subsection upon which the District Court relied has no application here, where property taxes undoubtedly were in arrears. And the subsection relevant to this case (Section 638(b)(1)(ii)) refers to "named insured" with nary a mention of "insured property owner."

[6] "When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. Cons. Stat. § 1921(b). The statute's unambiguous words "are presumed to be the best indication of legislative intent." *Reid v. City of Philadelphia*, 598 Pa. 389, 957 A.2d 232, 235 (2008) (quoting *Chanceford Aviation Props., L.L.P. v. Chanceford Twp. Bd. of Supervisors*, 592 Pa. 100, 923 A.2d 1099, 1104 (2007)). Because the Bankruptcy Court correctly held that the applicable statutory provision is unambiguous, we must reverse the District Court's order in that respect.

B

Park Restoration raises two other arguments in support of its position that Section 638 applies only to property owners. These arguments—that public policy and equity compel us to affirm the District Court—cannot vitiate the text of the statute.

1

Park Restoration argues that the public policy underlying Section 638 was to prevent property owners from "burn[ing] their buildings or structures to collect the insurance proceeds" by requiring that money "be first used to pay delinquent real estate taxes." Park Rest. Br. 16. From this premise, it concludes that this "rationale does not apply where the insured does not have a responsibility to pay . . . real estate taxes or to repair or secure a building or structure." *Id.*

We have little doubt that the statute's principal purpose is to stop property owners from profiting from arson. But that purpose does not compel the conclusion that "named insured" does not also apply to insured occupants who have no ownership interest. The public policy concern regarding misfeasance by property owners applies nearly as forcefully to lessees or others who have insured property they don't own. Moreover, Park Restoration's interpretation could incentivize an end run around Section 638 by permitting unscrupulous owners to use the corporate form to collect insurance proceeds without satisfying their delinquent taxes.

2

At oral argument, counsel for Park Restoration insisted that reinstatement of the Bankruptcy Court's order would bestow an inequitable windfall upon the Trustees. In response, the Taxing Authorities explained that the Joint Plan of Reorganization provides for payment on their first tax lien as follows: (a) net proceeds of sale of six separate lots owned by the Trustees; (b) payment of $478,260.75 due from Park Restoration's fire insurance proceeds; and (c) a "safeguard" for the prevention of an overpayment to the Taxing Authorities. Taxing Authorities Rule 28j Letter dated Jan. 23, 2017, at 3. In effect, this payment plan means that since the Taxing Authorities have won this appeal, it is possible that the net proceeds from the sale of

these lots will be used to satisfy delinquent taxes owed on other parcels or to satisfy other claims from the Trustees' creditors rather than to pay the tax debt owed by the Trustees on the parcel where the Beach Club was located. Park Restoration Rule 28j Letter dated Jan. 23, 2017, at 2–3. While Park Restoration makes a plausible case that it might be subject to an inequitable distribution of proceeds at a later date, the record on appeal neither compels that conclusion nor allows us to make a definitive judgment in that regard. Thus, we will rely on the Bankruptcy Court to consider those issues in due course and we emphasize that nothing in this opinion should be construed to preclude Park Restoration from seeking an accounting or any other equitable relief in the future.

C

Park Restoration argues here, as it did in the Bankruptcy Court, that "allowing the Taxing Authorities to be paid . . . from the Insurance Proceeds results in a 'gratuitous confiscation' of [Park Restoration's] property without just compensation in violation of the Takings Clause(s) found in both the U.S. Constitution and the Pennsylvania Constitution." *Conneaut Lake Park, Inc.*, 543 B.R. at 204. We find this argument tenuous at best.

[7] The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. The Fifth Amendment applies to the States through the Fourteenth Amendment. *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001). The Pennsylvania Constitution also provides that "private property [shall not] be taken or applied to public use, without authority of law and without just compensation being first made or secured." Pa. Const. Art. I, § 10. The Pennsylvania Supreme Court follows federal law in Takings Clause cases so our analysis under the Fifth Amendment applies equally to Pennsylvania's Constitution. *Corman v. NCAA*, 74 A.3d 1149, 1167 (Pa. Commw. Ct. 2013).

[8–13] To determine whether an unconstitutional taking occurred, we ask three questions: (1) was there a taking?; (2) was that taking for public use?; and (3) did the claimant receive just compensation? Takings may occur either by physical appropriation of property or regulatory activity. *See Horne v. Dep't of Agric.*, ––– U.S. ––––, 135 S.Ct. 2419, 2427, 192 L.Ed.2d 388 (2015). On the one hand, physical appropriation of property is "a *per se* taking, without regard to other factors." *Id.* Thus, "[w]hen the government physically takes possession of an interest in property . . . it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002) (citations omitted). Regulatory takings require a more detailed analysis, however. Although "property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322 (1922). There are "at least two discrete categories of regulatory action" that violate the Fifth Amendment: "regulations that compel the property owner to suffer a physical 'invasion' of his property" and "regulation [that] denies all economically beneficial or productive use of land." *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). When determining whether a regulatory taking has occurred, the Court may consider the "economic impact of the regulation on the claimant" and the "character of the

governmental action." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

[14, 15] In this appeal, we need not determine whether there was an actual or regulatory taking because the party asserting the claim must have a "legally cognizable property interest." *Prometheus Radio Project v. FCC*, 373 F.3d 372, 428–29 (3d Cir. 2004). Here, it is clear that Park Restoration had no legally cognizable property interest in the entirety of the proceeds from its insurance policy because Section 638 made receipt of such proceeds conditional on satisfying the delinquent taxes owed on the insured property. The policy states that "[Erie] will pay [Park Restoration] unless some other person is named in the policy or is legally entitled to receive payment," *Conneaut Lake Park, Inc.*, 543 B.R. at 199, and that "[t]his policy conforms to the laws of the state in which [Park Restoration's] principal office is located." *Id.* at 205. Section 638 had been enacted by the General Assembly and adopted by the required local ordinance long before Park Restoration obtained its insurance policy from Erie. Thus, the insurance policy incorporated the statute. *See Coolspring Stone Supply, Inc. v. Am. States Life Ins. Co.*, 10 F.3d 144, 147–48 (3d Cir. 1993) (finding that "pertinent statutory provisions of Pennsylvania insurance law are deemed incorporated into insurance policies" (quoting *Santos v. Ins. Placement Facility*, 426 Pa.Super. 226, 626 A.2d 1177, 1179 (1993))).

In sum, when Park Restoration insured the Beach Club, its rights to any insurance proceeds were subject to the claim of the Taxing Authorities. Without a legally cognizable property interest, Park Restoration has no cognizable takings claim. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 428–29 (3d Cir. 2004). Park Restoration's "failure to establish any greater entitlement to the proceeds under its policy (and Pennsylvania law) is fatal to its assertion that payment of Insurance Proceeds to the Taxing Authorities would violate the Takings Clause(s) of the U.S. Constitution and the Pennsylvania Constitution." *Conneaut Lake Park, Inc.*, 543 B.R. at 206 (citing *Mahon*, 260 U.S. at 413, 43 S.Ct. 158).

IV

For the reasons stated, we will reverse the judgment of the District Court and remand for entry of judgment in favor of the Taxing Authorities.

UNITED STATES of America

v.

Jose Angel RODRIGUEZ, Appellant

No. 16-3232

United States Court of Appeals,
Third Circuit.

Argued: January 25, 2017

(Opinion Filed: April 28, 2017)

Amended: May 1, 2017

Background: Defendant convicted of conspiracy to distribute cocaine and conspiracy to possess firearms in furtherance of drug trafficking moved for reduction of sentence. The United States District Court for the Middle District of Pennsylvania, D.C. No. 1-10-cr-00005-001, Christopher C. Conner, J., denied motion. Defendant appealed.

Olayer's burden rebutting the need to lift the stay despite any cause FSA may have presently demonstrated, aside from the lack of insurance.

III.

For the reasons set forth above, FSA's *Motion for Relief from Automatic Stay* is **GRANTED** in part and **DENIED** in part.

A separate Order will issue.

IN RE: TRUSTEES OF CONNEAUT LAKE PARK, INC., Debtor.

Trustees of Conneaut Lake Park, Inc., Plaintiff,

v.

Park Restoration, LLC, Defendant.

Bankruptcy No. 14–11277–JAD
Adversary No. 16–01029–JAD

United States Bankruptcy Court, W.D. Pennsylvania.

Signed December 15, 2017

As Amended December 27, 2017

Background: Debtor brought adversary proceeding against party that had agreed to manage its beach club property for party's alleged breach of terms of management agreement. The Bankruptcy Court, Jeffery A. Deller, Chief Judge, 564 B.R. 495, entered judgment on the pleadings as to liability only in favor of debtor. Trial was held on the issue of damages.

Holdings: The Bankruptcy Court, Deller, Chief Judge, held that:

(1) applicable measure of damages was the diminution of fair market value attributable to the injury, but

(2) debtor failed to establish damages by a preponderance of evidence.

Ordered accordingly.

1. Contracts ⚷326

Under Pennsylvania law, a party asserting a breach of contract claim must establish three elements: (1) the existence of a contract, (2) a breach of one or more of the duties imposed by the contract, and (3) damages.

2. Damages ⚷110

Where injury to real property is permanent, repair and replacement costs are irrelevant in awarding damages.

3. Damages ⚷108, 110

Under Pennsylvania law, the general measure of damages for permanent harm to real property is the diminution in market value attributable to the conduct, product, or instrumentality giving rise to liability, but when injury is reparable, damages are calculated at the lesser of the cost of repair or the market value of the affected property.

4. Damages ⚷108, 110

Under Pennsylvania law, while the measure of damages for harm to real property is different for permanent harm and reparable harm, in both situations, damages are limited by the pre-injury market value of the property.

5. Damages ⚷110

In debtor's adversary proceeding asserting breach of contract against party that had agreed to manage its beach club property, seeking to recover damages under Pennsylvania law after property was totally destroyed by fire, applicable measure of damages was the diminution of fair market value attributable to the injury; injury to the property was permanent, and cost of repair disproportionately exceeded

the diminution in fair market value to the property occasioned by the fire.

6. Damages ⚷110

Under Pennsylvania law, in measuring the diminution in value of injured real property for awarding damages, the fair market value of real property is measured as a whole even where permanent injury is sustained by only a portion thereof.

7. Damages ⚷111

Under Pennsylvania law, loss of income from an income-producing structure should be reflected in the fair market value of the property as a whole in awarding damages for harm to real property.

8. Damages ⚷110

Under Pennsylvania law, in measuring damages for permanent harm to real property, absent a showing that the "cost of repair" exception applies, not only is an injured structure to be valued inclusive of the underlying lot, but the income generated by the structure, and the loss thereof, should also be reflected in its overall fair market value.

9. Damages ⚷189

Under Pennsylvania law, in order for a party to succeed on a breach of contract claim, the party must, inter alia, establish damages with reasonable certainty as opposed to mathematical certainty.

10. Contracts ⚷326

Under Pennsylvania law, in order to show damages to a reasonable certainty, as element of breach of contract claim, a plaintiff must establish a causal connection between the breach and the loss.

11. Damages ⚷208(1)

Under Pennsylvania law, duty of assessing damages in breach of contract action is within the province of the fact-finder.

12. Damages ⚷108

Under Pennsylvania law, where harm causes property to appreciate in value, there are no damages.

13. Damages ⚷189

Under Pennsylvania law, debtor in adversary proceeding asserting breach of contract against party that had agreed to manage its beach club property failed to show by a preponderance of evidence it incurred damages after property was destroyed by fire; debtor's appraisal as to the fair market value of the property lacked credibility, as there was a lack of commonality between comparable properties and sales of the comparables occurred six to ten years before effective date and one sale occurred four years after the effective date, and according to debtor's prior filings with the court, debtor projected an increase in revenue associated with the property despite destruction of the beach club structure itself.

14. Bankruptcy ⚷2163

Under Pennsylvania law, it is within the province of the trier of fact to weigh the credibility of valuation witnesses' testimony and determine the fair value of the land.

15. Bankruptcy ⚷2163

Bankruptcy court is free to believe all, part, or none of evidence that is presented, to make all credibility determinations, and to resolve any conflicts in evidence.

Jeanne S. Lofgren, Stonecipher Law Firm, Pittsburgh, PA, for Plaintiff.

John F. Mizner, Mizner Law Firm, Erie, PA, for Defendant.

MEMORANDUM OPINION

JEFFERY A. DELLER, Chief United States Bankruptcy Judge

Trustees of Conneaut Lake Park, Inc. ("Plaintiff" or "TCLP") commenced the above-captioned adversary proceeding by filing its three-count Complaint against Park Restoration, LLC ("Defendant" or "Park Restoration", and together with Trustees of Conneaut Lake Park, Inc., "the Parties"). See *Complaint*, ECF No. 1.

Pursuant to the *Complaint*, TCLP alleges two counts of breach of contract (Counts I and II) and one count of contractual indemnification (Count III) against Park Restoration stemming from the Parties' Beach Club Management Agreement. See *Complaint*, ECF No. 1.

The details of the Beach Club Management Agreement are discussed more in-depth in this Court's *Memorandum Opinion* dated February 21, 2017, which addressed the Parties' cross motions for judgment on the pleadings. See *Mem. Op.*, ECF No. 67.

In the *Memorandum Opinion* and corresponding orders, the Court: (1) entered judgment on the pleadings as to liability only in favor of TCLP with respect to Count I of the *Complaint*, (2) stayed prosecution of Counts II and III, (3) denied Park Restoration's *Cross Motion for Judgment on the Pleadings*, and (4) set trial on the issue of damages relative to Count I. See id.; *Order*, ECF No. 68; and *Scheduling Order Regarding Trial on Damages*, ECF No. 69.

A trial was held on the issue of damages with respect to Count I of the *Complaint* on May 17, 2017 and July 24, 2017. Thereafter, the Parties were provided with an opportunity to brief the issues which are now ripe for decision.[1]

I.

Procedural and Factual History

TCLP seeks recovery from Park Restoration in relation to the Beach Club Management Agreement. As stated above, the details of the Beach Club Management Agreement are more specifically set out in this Court's February 21st *Memorandum Opinion*. However, the details pertinent to resolution of the issue of damages as to Count I only, are as follows:

TCLP owns certain real property located on the lakefront of Conneaut Lake in Crawford County, Pennsylvania and upon which sat a structure referred to as the Beach Club (the "Property"). See *Mem. Op.* 2, ECF No. 67. The Property is subject to a charitable use restriction (the "Charitable Use Restriction") which states that the Property is to be held:

> IN TRUST, NEVERTHELESS, for the use of the general public forever subject, however, to such rules and regulations for the use of said land to be known as "Conneaut Lake Park" as may be made from time-to-time by the Trustees of Conneaut Lake Park, Inc., and their

1. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334. The Plaintiff asserts that this Adversary Proceeding is a "core" proceeding pursuant to 28 U.S.C. § 157(b)(2)(O). However, garden variety breach of contract claims are not core proceedings. AstroPower Liquidating Tr. v. Xantrex Tech., Inc. (In re AstroPower Liquidating Tr.), 335 B.R. 309, 323 (Bankr. D. Del. 2005). Despite the non-core nature of this proceeding, the Parties have consented to this Court's ability to enter final judgment. See *Order of Ct. Approving Joint Disc. Plan and Statement of Estimated Time of Trial Dated July 25, 2016*, ECF No. 36; see also Wellness Int'l Network, Ltd. v. Sharif, — U.S. —, 135 S.Ct. 1932, 191 L.Ed.2d 911 (2015), and Ardi Ltd. P'ship v. The Buncher Co. (In re River Entm't), 467 B.R. 808 (Bankr. W.D. Pa. 2012).

> successors; AND FURTHER specifically, in part for use as a public amusement park and the like, and in part for use as a public park with open parkland and the like, and in part for the use for public buildings and the like forever; AND FURTHER in addition specifically in part for public access to and use of Conneaut Lake and the lake shore, for swimming and boating and the like, forever; AND FURTHER, for other like and similar and related public purposes; all forever.

See *Appraisal Report* ("TCLP's Appraisal") 27, ECF No. 103, Ex. P–11.

The Parties entered into the Beach Club Management Agreement on or about November 24, 2008, whereby Park Restoration agreed to provide operational and management services for the Beach Club. See *Mem. Op.* 3, ECF No. 67. The Beach Club Management Agreement stated that upon its termination, Park Restoration was duty bound to "vacate the premises ensuring that it is in broom clean condition without any damages to any equipment or property." Id. at 15.

On August 1, 2013, a fire completely destroyed the Beach Club. Thereafter, TCLP declared the Beach Club Management Agreement to be terminated at which time Park Restoration failed to return the Beach Club in "broom clean" condition free from damage. See *Complaint*, Ex. B, ECF No. 1; *Mem. Op.* 15, ECF No. 67.

After this bankruptcy was commenced, TCLP initiated this adversary proceeding alleging at Count I a claim of breach of contract due to Park Restoration's failure to return the Beach Club to TCLP in "broom clean" condition free from damage. See *Mem. Op.*, ECF No. 67.

Following the close of pleadings, the Parties filed their respective cross-motions for judgment on the pleadings, which were adjudicated in TCLP's favor as to liability on Count I only, with prosecution of Counts II and III stayed pending resolution of the issue of damages on Count I.

Contemporaneously with the issuance of the February 21st *Memorandum Opinion*, the Court issued a scheduling order setting the trial on damages for May 17, 2017, and *inter alia*, fixed the deadline for completing discovery as April 14, 2017. See *Scheduling Order Regarding Trial on Damages*, ECF No. 69.

On May 3, 2017, the Parties submitted their *Meet & Confer Stipulation*, ECF No. 76, wherein it was disclosed to the Court for the first time that Park Restoration intended to present at the May 17th trial a pre-fire and post-fire appraisal ("Park's Appraisal") of the Property. The gist of this evidence was that Park Restoration claimed that the subject Property was worth more after the fire and that TCLP had no cognizable claim for damages. TCLP, however, identified no appraisal evidence as part of its prepared witness list and exhibit list.

Park's Appraisal was identified in the section of the *Meet & Confer Stipulation* titled "Agreed, Marked Exhibits for Trial" and appraiser Vicki Gillette was listed as the associated witness. See ECF No. 76.

On May 5, 2017, Park Restoration filed a motion for summary judgment on the basis that the appropriate measure of damages for Count I was the diminution of fair market value of the Property occasioned by the fire, and since TCLP failed to identify in its pre-trial filings any appraisal or other evidence which would demonstrate a diminution, TCLP would be unable to sustain its burden at the May 17th trial. See *Def.'s Mot. to Lift Stay and for Summ. J.*, ECF No. 83. Due to the close proximity of the trial, the deadline to respond to the summary judgment motion was not set to

expire until after the May 17th trial. Accordingly, as of the date of trial, no responsive pleading was yet filed by TCLP.

At the May 17th trial, TCLP proceeded on its legal argument that the appropriate measure of damages is repair and replacement costs of the Beach Club, and presented evidence that the replacement costs were $1,978,375 and $830,917, with the latter figure taking into account depreciation attributable to age and condition of the Beach Club. See *Plaintiff's Exhibit List*, Ex. P–4, Ex. B, ECF No. 77. These replacement costs were stipulated to by Park Restoration. See id., *Tr. of Evidentiary Hr'g Regarding Damages* 7–9, ECF No. 117 ("May 17th Transcript").

At the trial, Park's Appraisal and the testimony of Vicki Gillette were offered into evidence by Park Restoration. TCLP's Counsel objected to the admissibility of Park's Appraisal, arguing that although Park's Appraisal was identified as an "Agreed, Marked Exhibit[ ] for Trial" in the *Meet & Confer Stipulation*, its inclusion was a courtesy. Counsel also argued that TCLP did not intend to stipulate to the alleged facts set forth in Park's Appraisal, and in fact, Park's Appraisal was only provided to TCLP on May 3, 2017—nearly three weeks after the close of discovery. See May 17th Transcript 6–15, 73–77.

Perhaps now wavering in her confidence of TCLP's legal theory of damages, TCLP's Counsel requested a continuance of the trial in order to allow TCLP to obtain its own appraisal of the Property. Unsurprisingly, Park Restoration objected.

In weighing the unique circumstances of the case, the Court recognized that Park Restoration failed to adequately disclose its appraisal, but noted that the Parties included it in the *Meet & Confer Stipulation* and TCLP failed to file a motion in limine despite having two weeks to do so prior to trial. See id.

Nonetheless, in the interest of fairness and finding no prejudice to Park Restoration, the Court continued the trial to July 24, 2017, in order to allow TCLP to obtain an appraisal. See May 17th Transcript 75–79; *Scheduling Order Regarding Continued Trial on Damages*, ECF No. 90 ("Order Continuing Trial"). The Court also directed that the Parties be permitted to conduct additional limited discovery until July 7, 2017, with depositions concluding no later than July 14, 2017. See Order Continuing Trial 5.

In the interim between the May 17th and July 24th trial dates, TCLP filed a response to the summary judgment motion. On July 17, 2017, Park Restoration filed a *Motion to Compel Production, or in the Alternative, In Limine to Exclude Testimony* ("Motion to Compel").

Central to the Motion to Compel, Park Restoration complained of TCLP's failure to provide records upon which TCLP's expert appraiser, Robert Glowacki, formulated his pre-fire opinion of value of the Property. See Motion to Compel, ECF No. 102. TCLP defended against the Motion to Compel by arguing that not only was the information confidential, but that it was irrelevant as TCLP agreed to stipulate to Park Restoration's pre-fire fair market value of $622,000. See *Resp. to Mot. to Compel Production,* ECF No. 106. Thus, the only question of value was the post-fire fair market value of the Property (and the extent to which it showed a diminution in fair market value occasioned by the fire damage).

Immediately prior to the continued trial on damages, a hearing was held on the Motion to Compel. The result of the hearing was that irrespective of TCLP's stipulation to pre-fire value, the documents underlying Glowacki's pre-fire valuation were

ordered to be provided post-trial for confidential review. See *Tr. of Mot. to Compel or, In the Alternative, In Limine to Exclude Testimony*, ECF No. 120 ("July 24th Transcript").

At the continued trial on damages, TCLP then presented the testimony of Glowacki as well as his written appraisal of the Property. In rebuttal of Glowacki's testimony, Park Restoration re-called Gillette and sought to introduce a prepared rebuttal appraisal. However, although Gillette was permitted to testify, the rebuttal appraisal was excluded on TCLP's objection as Park Restoration yet again failed to timely disclose it to TCLP.[2]

Following the close of testimony on July 24th, Park Restoration was provided time to review the previously undisclosed information subject of the Motion to Compel with the option of requesting further evidentiary proceedings related thereto. See *Consent Order Concerning Confidential Information*, ECF No. 109. No further proceedings were requested and the Parties were invited to file post-trial briefs. While TCLP inexplicably elected not to make such a submission, Park Restoration filed its post-trial brief on September 11, 2017.

II.

[1] Under Pennsylvania law, a party asserting a breach of contract claim must establish three elements: (1) the existence of a contract, (2) a breach of one or more of the duties imposed by the contract, and (3) damages. Ware v. Rodale Press, Inc., 322 F.3d 218, 225 (3d Cir. 2003) (quoting CoreStates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. Ct. 1999)). Finding that the first two elements were satisfied, this Court entered judgment on the pleadings in favor of TCLP and against Park Restoration as to liability only on Count I. As such, the issue addressed by the Court herein is the extent to which damages exist as to Count I of TCLP's *Complaint*.

A.

Applicable Measure of Damages for Injury to Real Property

[2–4] Where injury to real property is permanent, repair and replacement costs are irrelevant. Arch Ins. Co. v. Carol & Dave's Roadhouse, Inc., 567 Fed.Appx. 131, 134 (3d Cir. 2014) (quoting Babich v. Pittsburgh & New Eng. Trucking Co., 386 Pa.Super. 482, 563 A.2d 168, 170 (1989)). It is established law in the Commonwealth of Pennsylvania, that the "general measure of damages for permanent harm to real property is the diminution in market value attributable to the conduct, product, or instrumentality giving rise to liability," but when injury is reparable, damages are calculated at "the lesser of the cost of repair or the market value of the affected property." Pa. Dept. of Gen. Servs. v. U.S. Mineral Prods. Co., 587 Pa. 236, 898 A.2d 590, 596 (2006). See also Herring v. City of Jeannette, 47 A.3d 202, 204–205 (Pa. Commw. Ct. 2012), and Arch Ins. Co. v. Carol & Dave's Roadhouse, Inc., 567 Fed. Appx. at 134–35. Thus, "while the measure of damages for harm to real property is different for permanent harm and reparable harm, in both situations, damages are limited by the [pre-injury] market value of the property." Herring v. City of Jeannette, 47 A.3d at 204–205.

The purpose of limiting such recovery is rooted in the general purpose of compensatory damages as a remedy. Pennsylvania

2. The rebuttal appraisal was dated June 30, 2017, but was not provided to TCLP until July 18, 2017—just six days prior to the continued trial and well after the close of limited discovery. See July 24th Transcript 91–94.

courts have recognized that, "[t]he general principle upon which compensation for injuries to real property is given is that the plaintiff should be reimbursed to the extent of the injury to the property[,]" but that the plaintiff should not receive a windfall. Rabe v. Shoenberger Coal Co., 213 Pa. 252, 62 A. 854 (1906) (citations omitted); see also Duquesne Light Co. v. Woodland Hills Sch. Dist., 700 A.2d 1038, 1053 (Pa. Commw. Ct. 1997). A windfall could occur where, as in this matter, the cost of repair would exceed the pre-injury market value of the real property. See Duquesne Light Co. v. Woodland Hills Sch. Dist., 700 A.2d at 1053. In such instance, a land-owner, after being awarded the full cost to repair real property to its pre-injury state, could (instead of making repairs) sell the property and pocket the difference between the pre-injury market value and the cost of the repairs. Id. Thus, if this were to occur, the plaintiff would receive a windfall in excess of sums necessary to compensate it for its loss.

Further emphasizing the importance of avoiding a windfall recovery, the Commonwealth Court of Pennsylvania in Duquesne Light Co. found it appropriate to define "permanency" in the context of whether the repair costs (if repairs could be completed) would be "unfair or inappropriate under the circumstances." Id. at 1053.

> Where the cost of repair is shown to be reasonable, the injury to real property is not permanent and the cost of repair would be the appropriate measure of damages. However, where the cost of replacing the real property in its original condition disproportionately exceeds the diminution in the value of the property, the injury to real property is permanent and the cost of repair would not be fair or appropriate. Rather, the proper measure of damages for permanent injury would be the difference between the value of the property before and after the harm. Whether or not an injury to real property is "permanent" is an issue for the trier of fact.

Duquesne Light Co. v. Woodland Hills Sch. Dist., 700 A.2d at 1053. See also Vassell v. Travis, No. 04-1313, 2007 WL 2571634, at *4–5 (E.D. Pa. Sept. 4, 2007) (citing Duquesne Light Co.).

[5] In this matter, there is no dispute that the injury to the Property is permanent. In addition, the Parties have stipulated that the Beach Club structure was "totally destroyed" by fire on August 1, 2013. See *Meet & Confer Stipulation* 2, ECF No. 76. Moreover, as set forth more fully below, the credible evidence of record is that the cost of repair disproportionately exceeds the diminution in fair market value to the Property occasioned by the fire. Specifically, the stipulated cost of replacement or repair is $1,978,375 on the high end and $830,917 on the low end, and, as set forth below, TCLP has not produced any credible evidence that the fair market value of the Property was diminished as a result of the fire.

Accordingly, the applicable measure of damages is the diminution of fair market value attributable to the injury. See e.g. Arch Ins. Co. v. Carol & Dave's Roadhouse, Inc., 567 Fed.Appx. at 135 (with respect to real property, "where the injury is characterized as permanent as when a building is completely destroyed, the measure of damages becomes the decrease in the fair market value of the property." (citation and internal brackets omitted)), Penn Nat'l Ins. v. HNI Corp., Nos. 1:05–CV–2096, 4:06–CV–0747, 2007 WL 2907542, at *3 (M.D. Pa. Oct. 3, 2007) (finding it "beyond peradventure" that the complete destruction of a residence by fire was "permanent and irreparable"), Babich v. Pittsburgh & New Eng. Trucking Co., 563 A.2d at 170 (where a building is de-

stroyed the nature of damages is permanent and repair and replacement costs are irrelevant to the calculation of damages).

B.

Damages for Injury to Real Property Under Breach of Contract vs. Tort Claim

TCLP disputes that diminution of fair market value is the appropriate measure of damages in this matter by reason that TCLP seeks recovery under a breach of contract theory as opposed to having asserted a tort claim. See May 17th Transcript 15–22; *Pl.'s Br. in Opp'n to Def.'s Mot. to Lift Stay and for Summ. J.* 5–6, ECF No. 95.

TCLP points out that the cases upon which Park Restoration relies in advancing its "diminution in fair market value" measure of damages are tort cases. TCLP assigns error to reliance on such cases as TCLP argues that in contrast to actions sounding in tort, the purpose of damages for breach of contract claims is to place the non-breaching party in the position it would have occupied if the contract had been performed. Id.

Accordingly, TCLP avers that the only appropriate measure of damages in this matter is repair and replacements costs, as that is the only remedy that will place TCLP in the same position it would have occupied if the Beach Club Management Agreement was performed – i.e. the same position as if the Beach Club was returned to TCLP in broom swept condition. Id. Park Restoration disagrees, averring that the measure of damages for breach of contract and tort claims would be all but the same. Interestingly, in advancing their diverging positions, the Parties cite not only the same case, City of Allentown v. O'Brien & Gere Engineers, Inc., No. CIV. A. 94-2384, 1997 WL 256050 (E.D. Pa. May 8, 1997), but the same paragraph within that case, with Park Restoration relying on the earlier and TCLP relying on the later of the emphasized quotation below:

> **In a commercial context such as this, where a plaintiff has suffered economic loss resulting from an injury to its property, both the underlying purpose of a damage award and the measure of damages for tortious conduct and for breach of contract/warranty are substantively identical under Pennsylvania law.** Plaintiff is to be restored, insofar as possible, to the position it would have occupied if the negligent conduct had not occurred and/or if the contract had been properly performed to achieve the promised result. See, e.g., Commonwealth Department of Transportation v. Estate of Crea, 92 Pa. Cmwlth. 242, 483 A.2d 996, 1001 (Pa. Commwlth.1977), "The fundamental purpose of damages for an injury to or destruction of property by the tortious conduct of another is to compensate the injured party for the actual loss suffered;" Fort Washington Resources, Inc. v. Tannen, 901 F.Supp. 932, 943 (E.D.Pa. 1995), **"Under Pennsylvania law, courts generally award damages to the non-breaching party so as to place it in the economic position it would have occupied had the contract been performed." Thus, plaintiff is entitled to recover an amount of damages that will restore the economic value of the property lost, measured by the cost of correcting the defects caused by defendant's conduct or by the cost of replacing the property**. Douglas[s] v. Licciardi Construction Co., Inc., 386 Pa.Super. 292, 562 A.2d 913 (Pa.Super.1989). In addition, for breach of contract, plaintiff may recover incidental and consequential costs caused by the breach. Id.

City of Allentown, 1997 WL 256050, at *24 (emphasis added).

In City of Allentown, the City of Allentown contracted with the defendant, an engineering firm, to design and install a water intake system for the purpose of providing the City of Allentown with a supplemental source of drinking water. In selecting the design to be installed, the City of Allentown relied upon the reports and recommendations of the engineering firm, which were later shown to be unreliable. After completion, the system never worked as intended and after attempts to remedy the situation, the City of Allentown brought suit against the engineering firm for breach of contract, breach of express warranty, breach of implied warranty, and negligence, in connection with the engineering firm's failure to adequately design and install a functioning water intake system. Id.

After finding for the City of Allentown on all counts, the court awarded the City of Allentown the costs for the attempted repairs to make the defective intake system work as promised, as well as the costs incurred in replacing the system. It is this award of the costs associated with the attempted repair and eventual replacement of the water intake system upon which TCLP relies in advancing its theory of recovery. However, such reliance is misguided as the Court finds City of Allentown, which concerns a defendant's failure to design and install property—as opposed to compensation for injury to existing real property—uninformative to the matter at hand. As discussed at length above, the courts within the Commonwealth of Pennsylvania have articulated a specific measurement of damages for injury to existing real property which is neither invoked by the circumstances of the City of Allentown, nor distinguished by the opinion in its resolution of the issues therein.

TCLP cites no persuasive authority establishing that the measure of damages for injury to real property is different when evaluated in the context of breach of contract versus tort claims. Specifically, that diminution in fair market value is an inappropriate remedy in breach of contract actions. Indeed, there is case-law contrary to the position of TCLP.

In Giordano v. Brandywine Mushroom Corp., 32 Pa. D. & C.2d 522, 1963 WL 8448 (Pa. Com. Pl. 1963), the defendant-lessee contracted with the plaintiffs-lessors for the lease of a stone barn. As part of the lease agreement, defendant covenanted to "keep and maintain [the] barn in good condition[.]" Id. at 524. During the lease term, the barn sustained injury and the plaintiffs brought an action for damages. At trial, the plaintiffs presented testimony that at the time of the lease, the barn had a value of $7,500, but due to the damage the barn now had a value $5,000. Further, that it would cost $25,000 to put the barn in its original condition. Id. The trial judge instructed the jury that if they found the testimony to be credible, that damages would be limited to $2,500—the difference in fair market value—and the jury returned an award in that amount. The plaintiffs moved for a new trial on the basis that the judge's charge as to amount of damages was errant. Id. Specifically, the plaintiffs argued that while the decrease in fair market value was the appropriate measure of damages for an action in tort, that cost of repair was the correct measure of damages for the defendant's breach of the covenant to repair. The court rejected this argument, noting that in that case, as in the case *sub judice*, an award of repair costs would exceed the pre-injury value of the building itself. Id. at 525. Thus, the plaintiffs would receive a windfall recovery. Citing to the proposition set forth in the Restatement of Contracts that com-

pensatory damages are meant to put the injured party in as good as a position as it would have been had the contract been fully performed, the court stated that had the defendant performed its covenant:

> . . . plaintiffs would have had a barn worth $7,500 at the time this suit was started. They would not have had a stone barn worth but $5,000, plus upwards of $25,000 in cash, as plaintiffs contend. In order to put plaintiffs in the position in which they would have been had the covenant been performed, it then becomes necessary to award to them the difference in value between that which they would have had had there been performance and that which they now have without it.

Giordano v. Brandywine Mushroom Corp., 32 Pa. D. & C.2d at 525. Accordingly, the court found that it was not an error to limit damages to the diminution in fair market value of the barn.

This holding is in line with Duquesne Light Co.'s direction, discussed above, that "[i]n keeping with the purpose of compensatory damages and in prevention of windfall awards," where repair and replacement costs disproportionately exceed the decrease in fair market value of injured real property, the injury will be considered permanent and damages will be assessed at the difference in fair market value pre- and post-injury. Duquesne Light Co. v. Woodland Hills Sch. Dist., 700 A.2d at 1053. In such instance, an award of repair costs would be neither "fair [n]or appropriate." Id.

More recent case-law also suggests, while not addressing the tort versus breach of contract issue directly, that no distinction in the calculation of damages for injury to real property exists by applying the "diminution of fair market value" standard in a breach of contract case. In Penn National Insurance v. HNI Corp., a subrogee insurer brought breach of contract and negligence claims against an installer of a fireplace related to the complete fire destruction of a home. The insurer's breach of contract claims were resolved in its favor, but determination of damages was reserved for a later date. In assessing the damages, the United States District Court for the Middle District of Pennsylvania cited to the general standards of calculating damages for injury to real property iterated in the Supreme Court of Pennsylvania's holding in Pa. Department of General Services v. U.S. Mineral Products Co. In short, that the measure of damages for permanent injury to real property is the diminution in market value, but where the injury can be repaired (and is thus, temporary), damages are the lesser of the cost of repair or the market value of the affected property. Penn Nat'l Ins. v. HNI Corp., 2007 WL 2907542, at *2–3.

Outside of the Commonwealth of Pennsylvania, at least one court has squarely addressed the issue of whether damages for injury to real property are calculated differently in breach of contract versus tort actions. In Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Tex.), L.P., 449 S.W.3d 474 (Tex. 2014), the Supreme Court of Texas was asked to determine whether damages for injury to real property were calculated differently when the theory of recovery was breach of contract versus tort. Similar to the Commonwealth of Pennsylvania, the general measure of damages in the State of Texas for permanent injury to real property is the diminution of fair market value, whereas damages for temporary injury is the cost of repair, unless the cost of repair significantly exceeds the decrease in diminution of fair market value, then such decrease is the appropriate amount of damages. See generally, id. In Gilbert Wheeler, Inc., plaintiff

sued for injury to real property when the defendant impermissibly altered the terrain and removed vast swaths of trees from the plaintiff's real property in breach of the parties' contract. Acknowledging that the injury resulted in little to no diminution of fair market value of the real property, the plaintiff alleged that the question of whether the injury was temporary (i.e. reparable) or permanent was irrelevant in the context of a breach of contract action. Id. Specifically, the plaintiff argued that since damages for breach of contract actions intend to give the plaintiff the benefit of the bargain and place the plaintiff in the position it would have occupied if the contract had been performed, restoration damages were appropriate regardless of whether the injury was permanent or temporary. Id. at 479. This is an argument identical to the one advanced by TCLP.

The Supreme Court of Texas in Gilbert Wheeler rejected the plaintiff's position, finding that the temporary versus permanent distinction was applicable to breach of contract cases, reasoning that: "We see no reason to compensate a party differently because the wrongful conduct that caused the identical injury stems from breaching a contract rather than committing a tort." Id. at 479. Adding, that exceptions to the application of the general rule "operate to ensure land-owners are adequately compensated[,]" but no windfall is awarded. Id. at 479–481.

Given the prior holdings in Giordano and Penn National Insurance, and considering the similar structure and intent of damages—that the injured party be compensated for its loss but not receive a windfall—the Court finds Gilbert Wheeler persuasive and agrees that for purposes of measuring damages resultant from injury to real property, the "permanent" versus "temporary" analysis applies regardless of whether the underlying action sounds in tort or breach of contract. Accordingly, the Court rejects TCLP's argument that repair and replacement costs are the only appropriate measure of damages herein. The Court will apply the general measure of damages for injury to real property as set out in Pa. Department of General Services. That is, this Court will follow the so-called "before and after rule" and finds that the appropriate measure of damages is the diminution in the fair market value of the Property caused by Park Restoration's failure to return the premises in broom clean condition.[3]

For purposes of completeness, the Court notes that in the *Plaintiff's Brief in Opposition to Defendant's Motion to Lift Stay and for Summary Judgment*, ECF No. 95, TCLP postulates, without citation to authority, that if the change in fair market value is found to be the appropriate standard for an award of damages, the value of the underlying real property upon which the Beach Club sat is irrelevant. Instead, TCLP argues that the diminution in value of the Beach Club structure itself—without regard to the underlying land—should be the measure of damages and that such change in value should be measured solely

3. As an exception to the general rule of awarding the diminution in fair market value of real property in instances of irreparable harm, Pennsylvania courts have recognized that where the harmed property is subject to a special use or purpose which would render it unable to be valued in the commercial sense (i.e. a fair market value cannot be ascertained), the appropriate amount of damages to be awarded is the replacement costs accounting for pre-destruction depreciation. See Pa. Dept. of Gen. Servs., 898 A.2d at 596–600; see also Herring v. City of Jeannette, 47 A.3d at 205. However, neither party advanced this theory of recovery. To the contrary, both parties contended that the Property has an ascertainable market value and is capable of being appraised.

by the loss of income and profits to TCLP. See id. at 6. The Court rejects this argument.

[6, 7] Under Pennsylvania law, in measuring the diminution in value of injured real property, the fair market value of real property is measured as a whole even where permanent injury is sustained by only a portion thereof. See e.g. Rabe v. Shoenberger Coal Co., 213 Pa. 252, 62 A. 854 (1906) (where real property upon which a farm operated suffered, *inter alia*, the loss of five of its twelve springs due to injury caused by a coal company's operations, damages would be measured by the diminution in value of the real property as a whole and not by the independent value of the springs lost). Moreover, loss of income from an income-producing structure should be reflected in the fair market value of the property as a whole. See Vassell, 2007 WL 2571634, at *3–4.

In Vassell v. Travis, the plaintiffs owned a restored "historic" farmhouse which they used as a rental property. During a rental period, the defendants (who were not the tenants) injured the farmhouse when a vehicle operated by one of the defendants collided with the farmhouse. Citing the "historic" nature of the farmhouse, the plaintiffs averred that an exception to the general rule of real property damages applied as the market value for the property could not be ascertained (see footnote 3, *infra*). Thus, the plaintiffs sought cost of repair damages irrespective of whether the injury was permanent or reparable, and without consideration of the value of the property as a whole. Vassell, 2007 WL 2571634, at *3. The defendants countered that the property should be valued as a whole, and not the farmhouse individually. Id. at *3 n.4. Commenting on the defendants' position, the court in Vassell observed that:

> . . . the question of valuation of the [farm]house as distinct from the property essentially begs the question of whether there is anything special about the [farm]house to warrant application of a cost-of-repair theory of damages (which necessarily distinguishes the entity to be repaired from the real estate on which it is situated).

Id. Finding that the property (inclusive of the farmhouse) did have an ascertainable market value, the court determined that the "cost of repair" exception did not apply. Id. at *4. Further observing that:

> While the market value of the property as a whole may not reflect the value of or expenditures attendant to the [plaintiffs'] restoration efforts, it does reflect the value of the [farm]house as restored, including income earned from the [farm]house in the form of rent receipts. Likewise, the diminution in the value of the property as a result of the [farm]house's destruction should reflect the loss of any value attributable to the [farm]house. The [plaintiffs] have not presented any evidence thus far to justify finding some additional value of the [farm]house independent of the property on which it is situated that would not be reflected in the market value (e.g., if the market does not value "historic" houses). Therefore, the Court concludes that the standard rule governing the appropriate measure of damages applies.

Vassell, 2007 WL 2571634, at *4 (italics omitted).

[8] Accordingly, absent a showing that the exception applies, not only is an injured structure to be valued inclusive of the underlying lot, but the income generated by the structure—and the loss thereof—should also be reflected in its overall

fair market value.[4]

Consequently, this Court concludes that the measure of damages in this matter is the diminution in the fair market value of the Property caused by the Defendant's breach of the Beach Club Management Agreement. The remaining question then is whether TCLP has sustained its burden of proof. The record reflects that it did not.

III.

A.

Standard for Establishing Damages

[9, 10] Under Pennsylvania law, in order for a party to succeed on a breach of contract claim, the party must, *inter alia*, establish damages with "reasonable certainty" as opposed to "mathematical certainty." ATACS Corp. v. Trans World Communications, Inc., 155 F.3d 659 (3d Cir. 1998); see also Ware v. Rodale Press, Inc., 322 F.3d at 226 ("To prove damages, a plaintiff must give a factfinder evidence from which damages may be calculated to a 'reasonable certainty.' "); Penn Nat'l Ins. v. HNI Corp., 2007 WL 2907542, at *4 (the party claiming damages has the burden of proving damages by a preponderance of the evidence, to a reasonable degree of certainty). In order to show damages to a "reasonable certainty," a plaintiff must establish a causal connection between the breach and the loss. Bd. of Trs., Roofers Local No. 30 Combined Welfare Fund v. Int'l Fidelity Ins. Co., 63 F.Supp.3d 459, 471 (E.D. Pa. 2014) (citations omitted).

In ATACs Corp. v. Trans World Communications, Inc., the Third Circuit Court of Appeals, acknowledging the difficulty in defining "reasonable certainty," set forth the standard by which "reasonable certainty" is measured under Pennsylvania law:

> Although mathematical certainty is not typically required, the general rule in Pennsylvania, as in most jurisdictions, is that if damages are difficult to establish, an injured party need only prove damages with reasonable certainty. See Scobell, Inc. v. Schade, 455 Pa.Super. 414, 688 A.2d 715, 719 (1997); Sobers v. Shannon Optical Co., 326 Pa.Super. 170,

4. Further, to the extent that TCLP seeks loss of income or profits independent of the overall diminution in fair market value of the Property as a whole, the Court finds that TCLP has failed to show loss of income or profits with reasonable certainty and thus, is not entitled to such recovery. See e.g. Brisbin v. Superior Valve Co., 398 F.3d 279, 289 (3d Cir. 2005) (lost profits may be recovered if there is evidence to establish damages with reasonable certainty). In support of its claim for loss of income or profits, TCLP points to the income figures utilized by Park Restoration's appraiser in calculating the pre-fire fair market value of the Property. See *Plaintiff's Brief in Opposition to Defendant's Motion to Lift Stay and for Summary Judgment* 6–7, ECF No. 95. However, those figures represent the percentage of gross profits (less certain taxes) payable to TCLP as a direct result of Park Restoration's operation and management of the Property under the Beach Club Management Agreement. See Park's Appraisal 33. As raised by Park Restoration at the May 17th hearing in response to TCLP's claim for loss of income, the Parties have stipulated that the Beach Club Management Agreement terminated prior to the action constituting the breach—i.e. the failure to return the Beach Club in broom clean condition. See May 17th Transcript 74–75. As such, no further income was payable to TCLP by Park Restoration at the time of breach. TCLP has failed to aver, let alone show, that it is reasonably certain that going forward TCLP would have earned the same or similar levels of income or profits independent of Park Restoration's management and operation of the Property, but for the breach. Accordingly, TCLP has failed to establish lost income or profits with reasonable certainty. Further complicating TCLP's claim for loss of income or profits, as discussed *infra*, the cash flow projections attached to TCLP's disclosure statement ***reflect an increase in income*** attributable to the leasing of the Beach Club Pad, thereby undermining any loss of income or profits claim.

473 A.2d 1035, 1039 (1984); see also Restatement, supra, § 352; 5 Arthur L. Corbin, supra, §§ 1020, 1022. Doubts are construed against the breaching party. See Delahanty v. First Pennsylvania Bank, 318 Pa.Super. 90, 464 A.2d 1243, 1257 (1983); Restatement, supra, § 342 cmt. a.

"Reasonable certainty," as with most other standards of proof, is a difficult concept to quantify, but Pennsylvania courts have provided guidance as to what the term entails for purposes of assessing damages. At a minimum, reasonable certainty embraces a rough calculation that is not "too speculative, vague or contingent" upon some unknown factor. See Spang & Co. v. United States Steel Corp., 519 Pa. 14, 545 A.2d 861, 866 (1988). Conversely, applying the reasonable certainty standard does not preclude an award of damages because of "some uncertainty as to the precise amount of damages incurred." Pugh v. Holmes, 486 Pa. 272, 405 A.2d 897, 909 (1979). Pennsylvania jurisprudence governing the issue is summarized in Aiken Indus., Inc. v. Estate of Wilson, 477 Pa. 34, 383 A.2d 808 (1978), where the Pennsylvania Supreme Court ultimately concluded "that compensation for breach of contract cannot be justly refused because proof of the exact amount of loss is not produced, for there is judicial recognition of the difficulty or even impossibility of the production of such proof. What the law does require in cases of this character is that the evidence shall with a fair degree of probability establish a basis for the assessment of damages." Id., 383 A.2d at 812.

155 F.3d at 669–70; see also Ware v. Rodale Press, Inc., 322 F.3d at 226; Ins. Co. of Greater N.Y. v. Fire Fighter Sales & Service Co., 120 F.Supp.3d 449, 461 (W.D. Pa. 2015) (citing Ware and ATACS).

The Superior Court of Pennsylvania, in Printed Image of York, Inc. v. Mifflin Press, Ltd., further noted that: "[t]he question of whether damages are speculative has nothing to do with the difficulty in calculating the amount, but deals with the more basic question of whether there are identifiable damages." 133 A.3d 55, 60 (Pa. Super. Ct. 2016); see also Bd. of Trs., Roofers Local No. 30 Combined Welfare Fund v. Int'l Fidelity Ins. Co., 63 F.Supp.3d at 471 ("Whether damages are remote or speculative rests not on the difficulty of calculating the amount, but on the question of whether damages are identifiable."(citations omitted)), and AMCO Ins. Co. v. Emery & Assocs., Inc., 926 F.Supp.2d 634, 647 (W.D. Pa. 2013) (in the context of damages for a negligence claim, "[t]he test of whether damages are remote or speculative has nothing to do with the difficulty in calculating the amount, but instead asks the more basic question of whether there are identifiable damages. Damages are speculative only if the uncertainty concerns the fact of damages rather than the amount." (citations omitted)).

[11] In the within matter, although it is uncontested that the Beach Club structure was destroyed, there is no consensus as to whether TCLP incurred any resultant damages. Accordingly, TCLP has the burden of proving by a preponderance of the evidence (1) the existence of damages—that damages are not too remote or speculative, and (2) if such damages exist, that there is a "reasonably fair basis" for calculation. See James Corp. v. N. Allegheny Sch. Dist., 938 A.2d 474, 494–495 (Pa. Commw. Ct. 2007); see also Penn Nat'l Ins. v. HNI Corp., 2007 WL 2907542, at *4 (discussing the determination of damages incurred relative to the complete fire-destruction of a newly-constructed residence). "The duty of assessing damages is within the province of the fact-finder[.]"

James Corp. v. N. Allegheny Sch. Dist., 938 A.2d at 497.

[12] Again, as stated above, the measure of damages for a permanently harmed property is the difference between pre- and post-harm fair market value. Where the harm causes the property to appreciate in value, there are no damages. See Kenney v. Philadelphia, 21 Phila. 254, 1990 Phila. Cty. Rptr. LEXIS 60, 1990 WL 902451 (Pa. C.P. Sept. 12, 1990) ("The plaintiff, however, suffered no damage because the property's value appreciated.") *Sub judice*, the Parties stipulate that the pre-fire fair market value of the Property was $622,000. Accordingly, TCLP must demonstrate (1) with reasonably certainty that the post-fire fair market value of the Property fell below $622,000, and (2) if that can be shown, that there is a "reasonably fair basis" for calculation of damages.

B.

Appraisal of Post–Fire FMV of the Property

[13] TCLP contends that the post-fire fair market value of the Property is $35,000, whereas Park Restoration avers that the complete destruction of the Beach Club caused the Property to appreciate in value to $670,000. In support of their respective positions, the Parties introduced into evidence appraisals and expert witness testimony of the appraisers who authored such reports.

i. TCLP's Appraisal & Testimony of Robert E. Glowacki

At trial, TCLP presented the testimony of Robert E. Glowacki, a Certified General Appraiser, to support the post-fire fair market valuation of $35,000.

Glowacki's valuation of the Property was heavily influenced by the existence of the Charitable Use Restriction which affected his valuation by way of determination of the Property's size and the prospective use of the Property. In both his appraisal and testimony, Glowacki stated that the existence of the Charitable Use Restriction limited the potential development of the Property only to commercial ventures. See TCLP's Appraisal 42. As such, Glowacki only selected commercial sales for use as comparables in determining the Property's post-fire fair market value since, in his opinion, use of residential sales would be inappropriate under the circumstances.

At trial, Glowacki testified that in contrast to residential home sales abutting Conneaut Lake, which would be appraised by measuring the linear lakefront footage, for commercial sales the market has indicated that value is determined on a per square foot or per acre basis. Accordingly, the designation of the Property as being suitable only for commercial development not only affected the comparable properties to be utilized, but also the unit of measurement on which value is calculated. With respect to size of the Property, the Court notes that no survey of the Property was presented in connection with this litigation. Moreover, the size of the Property was a point of disagreement between the appraisers. For his part, Glowacki determined that due to the existence of the Charitable Use Restriction, the size of the Property was limited to the footprint of the prior Beach Club structure itself; approximately 17,924 square feet. See TCLP's Appraisal 40. Having determined the size of the Property, Glowacki utilized what he believed to be comparable sales to assign a value on a per acre basis.

In performing his sales comparison analysis, Glowacki selected eight sales for comparison ranging in age from approximately sixteen years prior to four years following the appraisal's effective date of August 1, 2013. See TCLP's Appraisal 38–39. After

making adjustments to the sale prices of the comparables on the basis of, *inter alia*, age of sale, conditions of sale, site area, location, inclusion in flood plain, and utilities, Glowacki opined that the applicable per acre price fell between $52,138 and $229,765. See TCLP's Appraisal at 38–39. Observing that one sale in particular skewed the per acre sales price upwards, Glowacki ultimately found that the value per acre was $85,000. See TCLP's Appraisal 43. Thus, given the Property's alleged .41 acre size, Glowacki determined that the Property's fair market value is $35,000. See TCLP's Appraisal 43.

ii. Park's Appraisal & Testimony of Vicki Gillette

In support of its valuation, Park Restoration presented the testimony of Vicki Gillette, who is also a Certified General Appraiser. Distinct from Glowacki's determination, Gillette concluded that post-fire, the highest and best use of the Property was either commercial or residential development which would conform with applicable zoning requirements. See Park's Appraisal 21. In forming this assessment, Gillette testified at trial that she did not take into consideration the Charitable Use Restriction when rendering her appraisal and that the fair market value was calculated as if the Property could be conveyed without such restriction. This assertion is reflected in the appraisal itself, which states that, "the [P]roperty is appraised free and clear of any or all liens or encumbrances unless otherwise stated." See Park's Appraisal 6. Indeed, at the May 17th trial, Gillette testified that although she was aware of the Charitable Use Restriction, she was not familiar with its details. Nonetheless, Gillette still determined that residential use would be permitted. At the July 24th trial, Gillette affirmed her position, testifying that based on this Court's prior orders approving the sale of neighboring properties free and clear of the Charitable Use Restriction, the Charitable Use Restriction could likewise be lifted as to the Property.

In contrast to Glowacki, Gillette testified that the appropriate unit of measurement for valuation for properties abutting Conneaut Lake is per linear foot of lake frontage. Gillette estimated that the subject Property measured approximately 222 feet long (road/beach frontage) by 198 feet deep, totaling approximately one acre. See Park's Appraisal 11. Notable to her valuation, Gillette estimated that the Property possesses 222 feet of linear lake frontage on the basis that the Beach Club structure was 190 feet long, had 12 feet of decking, and was subject to a 20 foot sideline setback. See Park's Appraisal 11. Unlike Glowacki, Gillette did not limit the size of the Property to the footprint of the Beach Club structure.

In calculating her post-fire valuation of the Property, Gillette utilized the sales comparison approach. Having concluded that the Property was suitable for residential development, Gillette used as comparable properties three recent sales of vacant residential lots located adjacent (but for an intervening road) to the Property, which were similar in topography and view of the lake (the "Flynn Lots").

In comparing the Flynn Lots to the Property, Gillette calculated that the price per foot of lake frontage for the Flynn Lots ranged from $2,965 to $3,291. Adjusting the sale prices of the Flynn Lots to account for the larger frontage of the Property, Gillette determined that the adjusted market value of the Flynn Lots, if comparable in linear lake frontage, was between $663,000 and $683,000. See Park's Appraisal 30. Gillette testified that after reviewing these comparables, she assigned the Property a per linear foot of lake

frontage value of just over $3,000, giving the Property a post-fire fair market value of $670,000.[5]

iii. Analysis of Appraisals

In this matter, both Glowacki and Gillette utilized the sales comparison method. The sales comparison method is one of the three [6] recognized approaches to real property valuation. However, while they used the same methodology, Glowacki and Gillette arrived at two very different values.

At the heart of this disparity is the extent to which each appraiser believed that the Charitable Use Restriction affected the potential market for the Property. This, in turn, caused each appraiser to select a different type of property for comparison.

Glowacki, who avers that the Charitable Use Restriction limits development to commercial use, utilized only commercial sale comparisons and ignored recent residential sales.

Conversely, Gillette opined that both commercial and residential use would be permitted, and utilized recent sales of residential lots as comparables. It is noteworthy that TCLP did not present any evidence as to the value of the Property if it were determined that residential development would be permitted, but Glowacki conceded at trial that if the Charitable Use Restriction was lifted the Flynn Lots would be good comparable sales. Thus, in order to sustain its burden of proving damages, TCLP must show that not only is its evidence of post-fire commercial fair market value credible, but that the use of the Property is, in fact, limited to commercial ventures by the Charitable Use Restriction. Otherwise, the undisputed or uncontroverted residential valuation places the fair market value of the Property above its pre-fire value of $622,000.

iv. Credibility of TCLP's Appraisal

The appraisal of real property is an inexact science and perhaps nowhere is this more evident than in a case such as this where two expert appraisers utilize the same method of valuation and arrive at widely disparate values. See In re Prussia Assocs., 322 B.R. 572, 583 (Bankr. E.D. Pa. 2005) (recognizing that the appraisal of real estate is an "inexact science").

[14] In assessing the evidence presented, "[t]he weight to be given to expert testimony on valuation of land is for the trier of fact. It is within the province of the trier of fact to weigh the credibility of valuation witnesses' testimony and determine the fair value of the land." Mellon Bank (E.) Nat'l Ass'n v. Pa. Rest. of A.B.E., Inc., 364 Pa.Super. 567, 528 A.2d 654, 655 (1987) (citations omitted) (finding no fault with the trial court's acceptance of a three-year old appraisal over a more recent competing appraisal where the older appraisal utilized what the trial court adjudged to be a better comparable and was viewed as being completed at "arm's length").

[15] This Court, sitting without a jury, is "free to believe all, part, or none of the evidence that is presented, to make all credibility determinations, and to resolve any conflicts in the evidence." Hodges v. Rodriguez, 435 Pa.Super. 360, 645 A.2d

5. $670,000.00/222 ft. = $3,018.02 per foot.

6. At trial, Glowacki testified that there appears to be a fourth method of valuation emerging which in short, requires the appraiser to walk across the street, look at the property, and ask himself/herself what the property is actually worth. The Court is not aware of any reputable appraisal methodology accepting this fourth alleged manner of valuing real estate.

1340, 1343 (1994); see also Matakitis v. Woodmansee, 446 Pa.Super. 433, 667 A.2d 228, 233 (1995) (affirming trial court's award of $300 for removal of trees where plaintiff's expert's testimony of a $30,000 diminution in fair market value was "neither credible nor realistic").

In this matter, TCLP bears the burden of proving damages. As such, the Court will first examine whether TCLP has presented credible evidence in support of its claim. Upon review of the evidence presented, the Court finds serious issues with the comparables selected by and relied upon by Glowacki in formulating his appraisal of the Property. Specifically, the lack of commonality between the "comparable" properties and the Property with respect to age of sale, location, and other physical attributes undermines Glowacki's opinion. Accordingly, the Court finds that TCLP's Appraisal and Glowacki's testimony lack credibility and the Court assigns no weight to such evidence.

Specifically, the age of the comparables selected by Glowacki for inclusion in his appraisal is troubling. Of the eight total comparable sales identified by Glowacki, five sales and a portion of a sixth (which was a compilation of sales between 2001 and 2008), were at least ten years old. Of the remaining sales, one was six years old and the other occurred four years after the effective date. To compensate for the age of the sales, Glowacki adjusted the sales price of each sale by one-percent per year. See TCLP's Appraisal 38–39. Glowacki testified that this one-percent adjustment was more than enough to off-set the ages of the sales as the total rate of property value appreciation in Crawford County over a twenty-year period was 10.4%—roughly one-half percent per year. As such, a yearly appreciation of one-percent allegedly over-estimated the actual increase in value.[7]

Gillette disagreed with Glowacki's contention, credibly testifying that lakefront property appreciated at a significantly greater rate than non-lakefront property. Thus suggesting that Glowacki's use of the county-wide appreciation rate was errant. Moreover, Gillette indicated that the age of some of the sales, specifically Sales 1 and 2 (respectively referred to as "the Salvation Army Property" and "the Wald Coleman Funeral Home"), in itself warranted exclusion. The Court agrees with Gillette's criticisms and, despite Glowacki's attempts to offset the age of the comparables, finds that the age of the comparable sales weigh against a finding that TCLP's Appraisal is credible.

In addition to the age of the comparables, Gillette criticized Glowacki's selection of comparable property sales on the basis that none of the properties were located lakefront to Conneaut Lake; which again, Gillette indicated was the most improved market in the area. The Court finds merit with Gillette's criticism and what's more, is further concerned by Glowacki's failure to adjust the comparable sales prices upwards to compensate for their non-lakefront locations. See TCLP's Appraisal 38–39. In fact, to the contrary, Glowacki adjusted the sale price of two comparable properties, the Salvation Army Property and the Low–Rise Asst Living, downward

7. Notably, while Glowacki averred that the total Crawford County yearly property appreciation rate was roughly .5% and that use of 1% yearly upward adjustments was an over-estimation, Glowacki adjusted the price of the sale occurring four years after the effective date (identified in TCLP's Appraisal as Sale 7 (the "Low–Rise Asst Living")) downward 4%—representing nearly double his averred actual increase in value. While this error appears to be immaterial to Glowacki's overall calculation of fair market value, it does bear on the credibility of TCLP's Appraisal itself.

by thirty percent to account for their "Superior/Corner" locations, see TCLP's Appraisal 38–39, thereby suggesting that their non-lakefront locations were more desirable. In his testimony, Glowacki conceded that he did not take into consideration the value of the lakefront location or view. He further opined, albeit unconvincingly, that the Beach Club, despite being physically located on Conneaut Lake's beach, did not actually have lake frontage due to the public's right to access the area of the beach between the former Beach Club structure and the water's edge. Of course, the documentary evidence proves otherwise. That is, the Beach Club property does have a water view and was near the water's edge. The Court is perplexed by Glowacki's logic as well as his failure to assign any value to the Property's proximity to and/or view of Conneaut Lake. Glowacki himself acknowledged in his appraisal that the area in which the Property is located is a "Resort Commercial District" and that, as of Crawford County's lakes generally, Conneaut Lake is a "revenue source for the growing summer tourism industry." See TCLP's Appraisal 5, 8. Further, that "[t]he Conneaut Lake area should continue to be an attraction for recreational purposes though the operation of Conneaut Lake Park on a long-term basis is questionable." See TCLP's Appraisal 6. As Conneaut Lake is a significant, if not the most significant, recreational attraction in the recreational area, it defies logic that the Property's close proximity to Conneaut Lake would not positively affect the value of the Property.

Even disregarding the non-lakefront location of all of Glowacki's comparable properties, Glowacki's selection of comparables is further called into question by his inclusion of properties which otherwise appear to share little to no commonalities with the Property. For example, despite the Property being located in Crawford County, Pennsylvania, two comparables, identified in TCLP's Appraisal as Sale 5 ("Dollar General I") and Sale 6 ("Dollar General II"), are located in Erie County, Pennsylvania; an entirely different market, which itself warrants exclusion of those sales as comparable. See TCLP's Appraisal 38–39. Regardless, no reconciliation was made for the different locations. A third property, identified in TCLP's Appraisal as Sale 4 ("Lumber Store II"), lacks any road frontage at all. Although Glowacki attempted to off-set the lack of road access to Lumber Store II by an increase in sales price of 100 percent, the properties are too different for Lumber Store II to be considered a usable comparable.

Due to these issues, the Court finds that TCLP's Appraisal is unpersuasive and unreliable. As stated above, TCLP bears the burden of proof in this breach of contract matter to establish damages by a preponderance of the evidence, to a reasonable degree of certainty. As this Court does not find convincing the only evidence TCLP presented to establish the post-fire fair market value of the Property, the Court could only speculate as to the existence of damages. Stated another way, TCLP has presented the Court with no credible evidence on which it could conclude without speculation that the post-fire fair market value of the Property is less than $622,000. Accordingly, TCLP has failed to sustain its burden.

Although this result may appear harsh under the circumstances—in that, it is apparent that TCLP was injured (but not necessarily damaged) by the loss of the Beach Club—such denial of relief in the absence of credible evidence of fair market value is not unprecedented.

In Arch Insurance Co. v. Carol & Dave's Roadhouse, Inc., an insurance company, as

subrogee, sought damages from a caterer for the total destruction of real property (a fire hall) by fire on the theory that caterer's employees caused the fire. On pre-trial motion, the court determined that damages for injury to real property would be measured by the diminution in fair market value, but the insurance company thereafter failed to introduce any credible evidence as to the fair market value of the real property. Despite the destruction of the real property, the court granted partial summary judgment to the caterer. After trial, the jury found the caterer to be 55% negligent and awarded the insurance company damages only in the amounts of personal property and extra expenses (but not for damages to the building). On appeal, the Third Circuit affirmed the rulings of the lower courts, noting that:

> The FMV was the appropriate measure of damages for the building destroyed in the fire. Due to its litigation decisions, Arch failed to produce any admissible or competent evidence to establish a market value for the building. Without the necessary evidence, the District Court acted appropriately in granting partial summary judgment in favor of Carol & Dave's. For these reasons, we will affirm.

Arch Ins. Co. v. Carol & Dave's Roadhouse, Inc., 567 Fed.Appx. at 135.

It is significant that TCLP was afforded not one, but two opportunities to put forth credible evidence as to the fair market value of the Property. First, at the May 17, 2017 hearing, where TCLP was unprepared to present any evidence as to fair market value, and again at the July 24, 2017 hearing, where it presented evidence that this Court now finds lacks credibility.

Further, the Court takes note that according to TCLP's prior filings with the Court, TCLP projects an increase in revenue associated with the Property, despite the destruction of the Beach Club structure itself. According to Gillette's pre-fire income capitalization calculation, the stabilized income to TCLP under the Beach Club Management Agreement was $43,425 per year prior to real estate taxes. See Park's Appraisal 33. TCLP agrees with this figure. See May 17th Transcript 51. However, pursuant to the cash flow projections attached to TCLP's Disclosure Statement, TCLP projects income of $5,000 per month from the "Land Lease"—"Beach Club Pad Lease," for a total income associated with the Property of $50,000 in 2018, and $60,000 in each 2019 and 2020. See *Disclosure Statement to Accompany Joint Plan Dated July 28, 2016* ("Disclosure Statement") Ex. I, pp. 11–13, 14–11277–JAD, ECF No. 426. Thus suggesting that the Property is, in fact, more valuable to TCLP post-fire as a vacant lot. TCLP's averments that the Property is worth only $35,000, despite projections of yearly income greater than that amount, beg the question of which is errant: TCLP's Appraisal or its cash flow projections.

Finally, the Court notes that its finding that TCLP failed to sustain its burden as to Count I does not foreclose TCLP from obtaining redress—TCLP has two remaining counts that it may pursue.

C.

Lifting of the Charitable Use Restriction

Even if TCLP's Appraisal was found to be a credible valuation of the Property when limited to commercial development, a significant issue remains as to whether the Property could be utilized for residential development.

The heart of TCLP's contention that the Property could only be used for commercial purposes is the Charitable Use Restriction imposed on the Property. Park

Restoration refutes this assertion and presented the testimony of Gillette who stated that a residential use would be permitted. At the July 24th trial, Gillette opined that residential development of the Property would be allowed under the Charitable Use Restriction, reasoning that even if a private residence was constructed, it can be developed in a way that the public would still have access to the beach and lake. Gillette further opined that the Charitable Use Restriction could be lifted in the future and testified that her determination that the Property could be used for residential purposes was informed by this Court's prior approval of sales of the neighboring Flynn Lots, free and clear of the Charitable Use Restriction.

TCLP disagrees averring that the sale of the Flynn Lots free and clear of the Charitable Use Restriction is not instructive here as the Flynn Lots were permitted to be sold free and clear of the Charitable Use Restriction due, in large part, to the non-objection from the Office of the Attorney General for the Commonwealth of Pennsylvania ("PA Attorney General").

At trial, Counsel for TCLP represented, without presenting any testimony or evidence in support thereof,[8] that the PA Attorney General had not indicated a willingness to permit the sale of the Property free and clear of the Charitable Use Restriction. However, even assuming that an objection from the PA Attorney General would be made, TCLP failed to articulate any legal basis for its contention that such objection would preclude the lifting of the Charitable Use Restriction. Instead, TCLP requested judicial notice of the motions seeking sale of the Flynn Lots wherein TCLP avers that the lifting of the Charitable Use Restriction would be permissible. And in such motions, the non-objection of the PA Attorney General was indicated as a factor in favor of approval. See e.g. *Debtor's Mot. for Entry of an Order Approv'g the Sale of Real Prop. Designated as Lot No. 5 in Lakefront Subdivision No. 1 Free and Clear of All Liens, Claims, Encumbrances, and Interests, Including All Charitable Use Restrictions*, 14–11277–JAD, ECF No. 318.

For its part, the Court clarified at the July 24th trial that the sales of the Flynn Lots were approved free and clear of the Charitable Use Restriction not because this Court had adjudged such lifting of the

8. Further demonstrating the disclosure issues plaguing both Parties in this matter, at the July 24th trial, TCLP's Counsel asked the Court as to whether it would like to hear from Mark Turner, who TCLP had indicated possessed information regarding the likelihood of the PA Attorney General's willingness to permit the sale of the Property free and clear of the Charitable Use Restriction. Park Restoration objected on the basis that Mr. Turner had not been identified as a witness prior to trial:

MS. LOFGREN: No further questions for Mr. Glowacki. I just ask whether or not the Court would like to hear from Mr. Turner as to any factual statements that underlie the reasonableness of determining whether the charitable use restriction may be lifted.

MR. MIZNER: Your Honor, he was not listed on the witness list and—

THE COURT: It's—I'm not trying the case. It's your case.

MS. LOFGREN: We didn't update the witness list with the continued hearing and this was not a part of the initial factual dispute.

MR. MIZNER: I have a right to know who the witnesses are and what they're going to testify about.

THE COURT: You do. We do. All right. Thank you. Any other witnesses?

July 24th Transcript 89–90. Following this exchange, TCLP did not formally call Mr. Turner or any other witness. The Court would also note that to the extent Mr. Turner's testimony would have relayed to the Court details of discussions between Mr. Turner and the PA Attorney General, such testimony would constitute hearsay.

Charitable Use Restriction to be warranted under the circumstances, but because no objection to the sale motions, which requested "free and clear" transfers, had been filed. Consequently, the Court had not previously ruled upon the merits of whether the Charitable Use Restriction should be lifted. Thus, the Court's granting of the prior sale motions should not be interpreted as favoring or disfavoring the lifting of the Charitable Use Restriction herein.

As the Court is without information as to whether there would be any objection to the sale of the Property, and as there has been no prior adjudication on the merits as to whether the Charitable Use Restriction should be lifted, the Court could only speculate as to whether the Property could be sold free and clear of the Charitable Use Restriction over the objection of the PA Attorney General.

However, the Court does note that TCLP's averment that the necessity of the Property for carrying-out the purpose of the Charitable Use Restriction would inhibit the sale of the Property free and clear is at odds with TCLP's prior submissions to this Court.

During the May 17th hearing, Counsel for TCLP stated on the record that the Property was designated as a "core" area of TCLP's property, subject to the Charitable Use Restriction, and as such, the Property would be unfit for residential use. In elucidating this argument, Counsel, on cross-examination, presented Gillette with an enlarged copy of the Conneaut Lake Land Use Map ("Land Use Map"), which had been attached to TCLP's *Joint Plan of Reorganization Dated July 28, 2016* ("Plan"),[9] and directed Gillette's attention to the area of the map colored "pink."[10] When the relevance of the evidence was called into question, Counsel stated:

> Counsel: The relevance is to show that [the Property is] in what we've designated as a pink core area of the park operations, and it's subject to a charitable use restriction that we likely cannot lift and that would make it not feasible for residential use. And so the comparison with the lakefront lots that we were able to sell free and clear of the charitable use restriction so that you could build residential unit on it, that's not a good comparison.

May 17th Transcript at 53. Further, after describing the Charitable Use Restriction generally, Counsel for TCLP stated:

> Counsel: . . . The point being that the Trustees of Conneaut Lake Park are specifically required to provide public access to the lakeshore, that the property where the Beach Club used to sit occupies that pink area which is primarily designated for lakeshore access. And so the possibility of us being able to lift the charitable use restriction in order to sell this for residential use is highly unlikely.

May 17th Transcript at 57. However, this classification of the Property as being "core" and necessary to carry out the purpose of the Charitable Use Restriction is directly contradicted by the language of TCLP's Plan, which was confirmed by order of court on September 6, 2016. See *Order Approving Disclosure Statement and Confirming Joint Am. Plan of Reor-*

9. 14–11277–JAD, ECF No. 427.

10. This portion of the Land Use Map appears in a pinkish-purple hue. During cross-examination, Counsel for TCLP referred to this portion as being highlighted in pink, whereas the Plan describes this same area as being colored purple. This area will be referred to interchangeability as pink or purple in direct citations to the May 17, 2017 hearing transcript and the Plan.

ganization Dated July 28, 2016, 14–11277–JAD, ECF No. 442.

Under the terms of the Plan, the Property, which is referred to as the "Beach Club Site" is designated as a "Noncore Parcel" not necessary for TCLP's "core business operations or to realize the overall charitable purpose for which the Real Property was put into charitable trust." Specifically, the Plan defined the term "Beach Club Site" as:

> "**Beach Club Site**" means the land on which the former Beach Club lay situate and designated within the purple area on the Conneaut Lake Park Land Use Plan.

See Plan 4, ¶ 2.15. The Plan also defined the term "Noncore Parcel" as:

> "**Noncore Parcel**" means, singularly and collectively, each parcel of Real Property that, in the Debtor's view, is **not necessary for the Reorganized Debtor's core business operations or to realize the overall charitable purpose** for which the Real Property was put into charitable trust. The Debtor has identified the Noncore Parcels in light green, bearing Numbers 1 through 4 in the Conneaut Lake Park Land Use Plan attached hereto as Schedule 2.25, as well as the **Beach Club Site** and Hotel Conneaut designated in purple[[11]] in the Conneaut Lake Park Land Use Plan.

See Plan 8, ¶ 2.56 (emphasis added).

In the Plan, TCLP includes the Beach Club Site as being one of six Noncore Parcels which could be potentially sold to satisfy the Plan obligations. See Plan 20, § 7.01. The Plan does note however, that as of the time of the Plan's filing, the PA Attorney General had not indicated that it would not object to the sale of the Property free and clear of the Charitable Use Restriction, as it had for the Flynn Lots.[12] See Plan 21. However, it also does not state that the PA Attorney General would object and TCLP failed to introduce at trial any persuasive evidence demonstrating that such objection would be made. In fact, the record to date is that the PA Attorney General has simply not objected to sales of Noncore Parcels.[13] These facts render Park Restoration's expert appraisal by Gillette more persuasive than the Glowacki appraisal obtained by TCLP. As such, the preponderance of the evidence is that the post-fire fair market value of the Property exceeds its pre-fire fair market value of $622,000. Consequently, TCLP has not sustained its burden of proof.

IV.

For the reasons above, this Court finds that the preponderance of the evidence is that TCLP has not proven that it incurred damages and relief is denied as to Count I of the *Complaint* only. An appropriate order shall be issued in accordance herewith.

ORDER

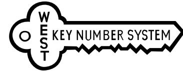
For the reasons set forth in the *Memorandum Opinion* issued contemporaneous-

11. The language of the Plan indicates that both the Beach Club Site (i.e. the Property) and Hotel Conneaut are designated in the purple portion of the Land Use Map. However, based on the evidence presented at trial, it appears that while the Beach Club Site is located in the pinkish-purple section, Hotel Conneaut is situate in the much darker blue-purple portion. Nonetheless, both the Beach Club Site and Hotel Conneaut are each identified by name as being a "Noncore Parcel."

12. In the event of an objection, the Plan provides that TCLP would seek a free and clear sale of the Property (as a Noncore Parcel) under the doctrine of *cy pres*. See Plan 21.

13. By the conclusion of the trial of this matter, the Court had approved the sales of lakefront Lot Nos. 2, 3, 4, and 5 without objection of the PA Attorney General. See 14–11277–JAD, ECF Nos. 356, 358, 444, 478, 521, and 525.

ly herewith, the Court hereby **ORDERS, ADJUDGES, and DECREES** that, as to Count I of the *Complaint* only, judgment is entered in favor of the Defendant and Count I is dismissed for Plaintiff's failure to prove damages.



IN RE: Sharon Boyd RILEY

CASE NO. 17–80108

United States Bankruptcy Court,
W.D. Louisiana,
Alexandria Division.

Signed September 29, 2017

Background: Debtor sought confirmation of Chapter 13 plan which proposed to pay her attorney, as an administrative expense of her estate, the "no-look" attorney fee allowed by a new standing order in the district, as well as reimbursement of advances totaling $367 made by attorney to pay filing fee and other prepetition costs on behalf of debtor as part of his "no-money-down" practice. Following a hearing, the court confirmed the plan, but reserved issue concerning reimbursement of advances.

Holdings: The Bankruptcy Court, John W. Kolwe, J., held that:

(1) the advances were not reimbursable as administrative expenses for the actual, necessary costs of preserving the estate;

(2) the advances were not reimbursable as administrative expenses for compensation and expenses awarded under the section of the Bankruptcy Code governing compensation for attorneys and other professionals providing services to the estate; and

(3) filing fees are obligations of debtors, and it is only in those cases in which courts allow debtors to pay the fees in installments that the fees may be shifted to debtor's bankruptcy estate.

Ordered accordingly.

1. Bankruptcy ⚷3192

"No-money-down" bankruptcy case is one in which debtor's attorney agrees to advance funds to pay filing fee, credit counseling course fee, and credit report fee on behalf debtor, with the understanding by debtor that the advances will be reimbursed through the confirmed plan, along with payment of no-look attorney fee.

See publication Words and Phrases for other judicial constructions and definitions.

2. Bankruptcy ⚷2871

If a debt is characterized as an administrative expense, the creditor on such debt enjoys an entitlement to distribution second only to domestic support obligations. 11 U.S.C.A. §§ 503(b), 507(a).

3. Bankruptcy ⚷2871

Administrative expenses are generally narrowly construed to maximize the value of the estate for all creditors. 11 U.S.C.A. § 503(b).

4. Bankruptcy ⚷2871

Two-part test is used in determining whether a debt is an administrative expense of the estate: first, the debt must arise from a transaction with the bankruptcy estate, and second, the goods or services evidenced by the debt must directly and substantially benefit the estate. 11 U.S.C.A. § 503(b)(1)(A).

5. Bankruptcy ⚷2873

Because the earliest a bankruptcy estate exists is on the petition date, in order to satisfy the first prong of the test for determining whether a debt is an adminis-

Public Auditorium Auth. of Pittsburgh & Allegheny County v. HBRM, LLC (In re Pittsburgh Sports Assocs. Holding Co.)

United States Bankruptcy Court for the Western District of Pennsylvania

March 25, 1999, Decided

Bankruptcy No. 98-28174-BM, Bankruptcy No. 98-28175-BM, Bankruptcy No. 98-28176-BM, Jointly Administered At Bankruptcy No. 98-28174-BM, Chapter 11, Adversary No. 98-2475-BM

Reporter
1999 Bankr. LEXIS 1870 *

IN RE: PITTSBURGH SPORTS ASSOCIATES HOLDING COMPANY, ***PITTSBURGH HOCKEY ASSOCIATES***, and HBRM LLC, Debtors; PUBLIC AUDITORIUM AUTHORITY OF PITTSBURGH AND ALLEGHENY COUNTY, a body corporate and politic, and SMG PITTSBURGH, INC., d/b/a PITTSBURGH ARENA, INC., a Delaware corporation, General Partner, trading as SMG PITTSBURGH, L.P., d/b/a PITTSBURGH ARENA, L.P., a Delaware limited partnership, Plaintiffs v. HBRM, LLC, a Pennsylvania limited liability company, General Partner of ***PITTSBURGH HOCKEY ASSOCIATES***, a Pennsylvania limited partnership, and ROGER M. MARINO, an individual, Defendants

Disposition: [*1] Motion for a permanent ***injunction*** filed by Public Auditorium Authority of Pittsburgh and by SMG Pittsburgh, Inc. GRANTED. ***Pittsburgh Hockey Associates*** and HBRM, LLC to dissolve the preliminary ***injunction*** issued on November 23, 1998, and again on November 25, 1998 DENIED.

Core Terms

covenants, relocate, non-relocation, Arena, ***injunction***, permanent ***injunction***, lease, franchise, equitable relief, restated, injunctive relief, breached, venue, permanent, purposes, damages, holders, hockey, team, right to injunctive relief, liquidated damages, monetary damages, qualifies, played, temporary ***injunction***, third amendment, hockey team, third party, enjoined, remedies

Case Summary

Procedural Posture

The matter was before the court upon a motion by plaintiffs, a public corporation (PAA) and a management company (SMG) for a permanent ***injunction*** and a motion to dissolve the preliminary ***injunction*** by defendants, a limited partnership (PHA) and a limited partnership company (HBRM).

Overview

Following evidence that a principal and his representatives had breached non-relocation covenants, the court enjoined further actions in breach of the covenants. Seeking to require the parties to abide by their promise to keep the Pittsburgh Penguins hockey team playing at the Pittsburgh Civic Arena, PAA and SMG sought to make the ***injunction*** permanent. PAA and SMG claimed that the value of the franchise could be accurately determined only if the court permitted them to solicit offers from potential purchasers who might relocate the team elsewhere. The court denied the motion to dissolve the temporary ***injunction***, but granted the motion of PAA and SMG for a permanent ***injunction***. The court held that a party seeking a permanent ***injunction*** had to: (1) demonstrate that exercise of the court's equity jurisdiction was warranted; (2) actually succeed on the merits of its claim; and (3) establish that the balance of the equities tips in favor of injunctive relief. The court found that PAA and SMG would have had no adequate remedy at law if PHA, HBRM, and the principal continued violating the non-relocation covenants and took steps that resulted in moving the Penguins to another city.

Outcome

The court denied the motion to dissolve the temporary ***injunction*** and granted the motion for a permanent ***injunction***.

LexisNexis® Headnotes

Civil Procedure > Remedies > ***Injunctions*** > Permanent ***Injunctions***

HN1[] **Injunctions, Permanent Injunctions**

A party seeking a permanent ***injunction*** must: (1) demonstrate that exercise of the court's equity jurisdiction is warranted; (2) actually succeed on the merits of its claim; and (3) establish that the balance of the equities tips in favor of injunctive relief. The first of these requirements itself consists of three subparts. The moving party must establish that: (1) it has no adequate remedy at law; (2) the threatened injury is real, not imagined; and (3) no equitable defense exists. One has no "adequate remedy at law" if the injury in question is of a repeated or continuing nature or if monetary damages are difficult to ascertain or inadequate.

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Judges: BERNARD MARKOVITZ, Chief Judge, U.S. Bankruptcy Court.

Opinion by: BERNARD MARKOVITZ

Opinion

PREFACE

Two matters are before us at this time.

After receiving evidence in court that Roger Marino and his representatives had egregiously breached non-relocation covenants contained in agreements ***Pittsburgh Hockey Associates*** ("PHA") had with Public Auditorium Authority of Pittsburgh ("PAA") and SMG Pittsburgh, Inc. (SMG"), we issued **[*4]** orders in November of 1998 preliminarily enjoining PHA, HBRM, and Marino from taking further actions in breach of the covenants. Marino is a principal of PHA and HBRM. The breaches occurred so soon after execution of the agreements that one is left to wonder whether Marino intended to abide by the covenants when the agreements containing them were executed.

Seeking to require debtors and Marino to abide by their promise to keep the Pittsburgh Penguins hockey team playing at the Pittsburgh Civic Arena, PAA and SMG have brought a motion to make permanent the ***injunction*** we issued in November of 1998.

Claiming that the value of the Penguins franchise can be accurately determined only if we permit them to solicit offers from potential purchasers who might relocate the team elsewhere, PHA and HBRM have brought a motion to dissolve the preliminary ***injunction***.

We will deny the motion of PHA and HBRM to dissolve the temporary ***injunction*** and instead will grant the motion of PAA and SMG for a permanent ***injunction***.

MEMORANDUM OPINION

- FACTS -

PAA is a corporation created under the Public Auditorium Authorities Law (53 P.S. § 2384 *et seq.*). Among other things in April of 1958, **[*5]** it leased from Urban Redevelopment Authority tracts of land on which the Civic Arena was constructed.

SMG is in the business of managing and operating various sports, entertainment, and convention complexes throughout the nation. It presently manages and operates the Civic Arena.

Debtor PHA is a limited partnership which owns and operates the Penguins franchise. It plays its home games at the Civic Arena.

Debtor HBRM is a limited liability company and is the sole general partner of PHA.

Defendant Roger Marino is co-chair of HBRM and co-managing director of PHA. He holds himself out as co-owner of the Penguins and has assumed and asserted *de facto* control and ultimate authority over the team.

Pursuant to a sublease dated July 1, 1981, PAA subleased the Civic Arena to Civic Arena Corporation ("CAC"), which managed and operated the facility.

On October 31, 1991, CAC assigned its sublease to SMG. In addition to managing and operating the Civic Arena, SMG coordinates and promotes all events held at the facility.

In accordance with an amended and restated lease agreement with PHA, SMG subleased the Civic Arena to PHA on October 31, 1991. The term of the lease will not expire until **[*6]** September 1, 2012.

Paragraph 304 of the amended and restated lease between SMG and PHA dated July 14, 1993, contained a "non-relocation covenant", whereby PHA covenanted and agreed:

> (1) to play and cause to be played in the Arena, all Penguins Regular Scheduled Games, all Penguins Playoff Series Games in which the Penguins are designated to play in their home rink, and at least two Exhibition Games per Season;
> (2) not to cause or permit the Penguins' status as a Member Club of the National Hockey League for the City of Pittsburgh, Commonwealth of Pennsylvania, to be transferred outside the City of Pittsburgh, Commonwealth of Pennsylvania, unless mutually agreed upon by Tenant and Landlord; and
> (3) not to assign, transfer, let or sublet, mortgage or pledge this Lease without the prior written consent of Landlord.

Among other things, PHA agreed in paragraph 305 of the amended and restated lease agreement dated July 14, 1993, not to "assign, transfer, pledge, or otherwise dispose of the Penguins" and not to "sell, assign, sublet, or otherwise transfer" its rights under the lease without the prior, written consent of SMG.

Paragraph 704 of the amended and restated **[*7]** lease between SMG and PHA further provides as follows:

> Tenant acknowledges that its obligation hereunder not to relocate during the term of this Lease is necessary to protect the business and goodwill of Landlord and that a breach of such covenant will irreparably and continually damage Landlord, for which money damages may not be adequate or

> determinable, and that Landlord shall, in addition to any other remedies available at law or in equity, have the right to injunctive relief to enforce the aforesaid covenant and to protect and preserve the rights of Landlord. Tenant agrees that in the event it breaches any of the non-relocation covenant, Landlord shall be entitled to a temporary, preliminary or permanent ***injunction*** in order to prevent the continuation of such harm... .

Paragraph 705 of the lease provided that, in addition to the rights and remedies given to it in the agreement, SMG would have all rights and remedies available to it at law or in equity. All such available rights and remedies are "cumulative and concurrent".

Paragraphs 304 and 704 of the amended and restated lease dated July 14, 1993, were amended in June of 1997, in a *third amendment* to the amended **[*8]** and restated lease.

Paragraph 304(2) was amended to provide that PHA could not cause the Penguins to be transferred out of Pittsburgh unless mutually agreed upon by SMG **and PAA.**

Paragraph 704 was amended to add paragraphs (B)(1) through (5).

PHA made various "acknowledgments" in paragraph (B)(1). For instance, PHA "acknowledged" that PAA, the City of Pittsburgh, and the County of Allegheny would suffer irreparable harm if PHA relocated the Penguins or entered into an agreement to sell the Penguins that contemplated relocating the team. Such action, PHA acknowledged, would constitute a material breach for which PAA would have no adequate remedy at law. PHA further acknowledged that PAA would be entitled to injunctive relief to prevent continuation of such harm. Lastly, PHA agreed that PAA had the right to recover specified liquidated damages, "if the Authority is unable to obtain an ***injunction***".

Paragraphs 704(B)(2) through (4) provide that, in the event PHA receives a bona fide offer to relocate the Penguins to another venue or to purchase and then relocate the team to another venue, which offer PHA intends to accept, PHA shall promptly notify PAA, the City, and the County **[*9]** and shall wait sixty days before accepting the offer. PAA has the option during this sixty-day period to match the offer.

Paragraph 704(B)(5) specifies the liquidated damages to which PAA is entitled. It provides in relevant part that:

> If the Authority is unable to (x) obtain an ***injunction*** in accordance with subsection 704(B)(1) above or (y) to find a buyer who exercises the option granted under subsection 704(B)(4) above, or if the Authority, in its sole discretion, chooses not to seek such a buyer, then the Authority shall have the right to recover liquidated damages from PHA in a cumulative amount....

The specified damages identified in paragraph 704(B)(5) include: the outstanding amount borrowed by PAA to renovate the Civic Arena in 1997; the outstanding amount of a bond PAA issued in 1994 to make earlier renovations to the Civic Arena; tax revenues lost in connection with Penguins games played at the Civic Arena; and $ 5,000,000 for additional damages and/or to offset costs incurred to attract another NHL franchise to Pittsburgh.

Beginning late in 1996, PHA approached PAA and SMG and requested certain improvements to the Civic Arena. Its request was in addition **[*10]** to improvements PAA had made to the Civic Arena in 1994 and 1995 with public funds. Among other things, PHA requested installation of luxury boxes and reconfiguration of the seating bowl.

PAA and SMG ultimately agreed to undertake the requested improvements. PAA financed the improvements by borrowing the sum of $ 10,500,000, which was to be repaid from public funds through allocations of tax revenue from Allegheny Regional Asset District ("RAD") and from a RAD grant in the approximate amount of $ 2,300,000.

Marino purchased an ownership interest in the Penguins through PHA in May of 1997, thereby becoming an equal partner and co-managing director of the Penguins.

On June 23, 1997, approximately one month after Marino acquired an interest in the Penguins, PHA, SMG, and PAA executed a document entitled "Development and Repayment Agreement". Paragraph (f) of the Recital portion of this agreement made reference to another agreement executed that same day. It states as follows:

> (f) Pursuant to the PHA Agreement, and as consideration in part for the improvement, PHA has agreed that the Pittsburgh Penguins will not be relocated from the Arena during the term of this Agreement. **[*11]** ...

The term of this agreement expires on June 30, 2007.

That same day -- i.e., June 23, 1997 --, PAA and PHA executed a document entitled "PHA Agreement", the term of which also expires on June 30, 2007.

PAA agreed in paragraph 1 to provide up to $ 10,500,000 to PHA to make improvements to the Civic Arena in accordance with the Development Agreement.

Paragraph 2.A of this agreement provides in part as follows:

> A. Covenant. Effective immediately, PHA affirmatively covenants to (I) occupy the Civic Arena in accordance with the Penguins Lease; (ii) have its NHL franchise continue to play the home portion of its regular and playoff schedule at the Civic Arena in accordance with the Penguins lease; (iii) not to relocate or attempt to relocate its NHL franchise; and (iv) not to initiate discussions for the sale and relocation of PHA's NHL franchise with any third party.

Paragraph 2.C of the PHA Agreement is identical to paragraph 704(B)(1) of the *third amendment* to the amended and restated lease agreement between PHA and SMG. It provides as follows:

> C. Injunctive Relief. PHA acknowledges that the Authority, the City, and the County would suffer irreparable **[*12]** harm if PHA's NHL franchise would, during the term of this Agreement, relocate or enter into any agreement for the sale or assignment of its rights and privileges under its NHL franchise that would constitute a material breach of this Agreement, that damages incurred as a result of such material breach would not be readily ascertainable, and that money damages would not adequately compensate the Authority, the City, or the County for resulting injuries. PHA acknowledges that its obligations as set forth in this Agreement are unique and that the Authority would not have an adequate remedy at law if PHA's NHL franchise were to relocate. Therefore, PHA agrees that this Agreement may be specifically or mandatorily enforced by the Authority. PHA agrees that, if it breaches this covenant not to relocate, then in addition to any other remedies available at law or in equity (including specific performance), the Authority shall be entitled to a temporary, preliminary, or permanent ***injunction*** in order to prevent the continuation of such breach or harm?.If the Authority is unable to obtain an ***injunction***, the Authority shall have the right to recover liquidated damages as set forth below.

[*13] Paragraph 2.G of the PHA Agreement is virtually identical to paragraph 704(B)(5) of the *third amendment* to the amended and restated lease agreement. It sets forth the same liquidated damages which PAA would be entitled to recover in the event PAA was unable to obtain an ***injunction*** in accordance with paragraph 1.C.

Starting in May of 1998, less than a full year after PHA had persuaded PAA to make further improvements to the Civic Arena and PHA had executed the so-called "PHA Agreement", Roger Marino, principal of debtors PHA and HBRM, undertook discussions with representatives of various cities concerning relocation of the Penguins. If he ever intended to abide by the non-relocation covenants set forth in the *third amendment* to the amended and restated lease agreement and the PHA Agreement, we are left to wonder whether the ink on the agreements had fully dried before Marino decided to investigate the possibility of relocating the Penguins to another city. Conduct in violation of the covenants almost certainly occurred well before one year had elapsed. Marino and his representatives did not wake up one morning and decide on the spur of the moment to make overtures to other cities **[*14]** and to travel there that same day to meet with appropriate individuals and to tour their arenas. Arranging such visits requires considerable time and planning before they take place.

Marino secretly traveled to Houston, Texas, in May of 1998 to meet with its representatives to discuss possible relocation of the Penguins to Houston and to tour the Summit to see whether it was a suitable venue for playing hockey.

He secretly traveled to Kansas City, Missouri, in August of 1998 and met with its representatives, including its Mayor, to discuss moving the Penguins to Kansas City. Marino also toured the Kemper Arena to evaluate it as a potential venue for hockey games.

At some unspecified time after August of 1998, Marino or his representatives also secretly traveled to Las Vegas, Nevada, and met with representatives of these cities to discuss the possibility of relocating the Penguins there.

Neither PAA, SMG, nor the other co-principal and co-owner of the Penguins was aware of any of these visits and discussions concerning possible relocation of the Penguins until after they had taken place.

On October 7, 1998, after learning about these visits and discussions, PAA and SMG brought **[*15]** a

complaint in equity in the Court of Common Pleas of Allegheny County, Pennsylvania, against PHA, HBRM, and Roger Marino seeking to enforce the non-relocation covenants contained in the *third amendment* to the amended and restated lease with SMG and the PHA Agreement with PAA. Along with their complaint, PAA and SMG filed a motion requesting a preliminary ***injunction*** prohibiting PHA, HBRM, and Marino from violating the aforementioned non-relocation covenants.

Debtors PHA and HBRM responded to the complaint by filing voluntary chapter 11 petitions on October 13, 1998, thereby staying the state court action against them brought only six days before. Roger Marino himself did not file a bankruptcy petition. Three days later, on October 16, 1998, debtors PHA and HBRM had the state court action removed to this court, where it was docketed at Adversary No. 98-2475-BM.

PHA and HBRM brought motions to dismiss or to stay the adversary action against them. PAA and SMG responded by bringing a motion for remand or for relief from the automatic stay. Marino brought his own motion to dismiss shortly thereafter.

A hearing on these motions was conducted on November 13, 1998, at which time we invited **[*16]** all interested parties to provide whatever support for their motions they deemed appropriate. We issued an oral order at the conclusion of the hearing which, among other things, prohibited PHA, HBRM, and Marino from engaging in discussions with third parties pertaining to relocation of the Penguins and effectively requiring them to comply with the above non-relocation covenants. The order was entered after the parties had an opportunity to offer evidence on the matter. This order was primarily intended to maintain the status quo until the dust generated by debtors' bankruptcy filings had settled and we could decide upon a permanent course of action.

On November 17, 1998, PHA, HBRM, and Marino brought motions for reconsideration of our oral order of November 16, 1998. PHA and SMG stated their opposition to the motions.

We issued a written order on November 25, 1998, which was intended to codify our previous oral order. Among other things, the order enjoined debtors, their managing directors, partners, affiliates, agents, officers, servants, employees, experts, and attorneys from: (1) initiating or engaging in discussions with third parties concerning the sale or relocation of the **[*17]** Penguins hockey team; (2) relocating or attempting to relocate the Penguins hockey team to a venue other than the Civic Arena; and (3) causing or permitting the Penguins hockey team to play any portion of its regular season and playoff season scheduled for the Civic Arena to be played at any other venue.

On January 9, 1999, PHA, HBRM, and Marino withdrew their earlier motions for reconsideration and did not appeal the written order of November 25, 1998. As a consequence, said order remains in force to this date.

After experiencing an apparent change of heart concerning the above ***injunction***, PHA brought a motion on February 12, 1999, to dissolve the temporary ***injunction*** arising from our orders of November 13, 1998, and November 25, 1998, respectively.

PHA and SMG responded by bringing a motion of their own on February 23, 1999, to make permanent the ***injunction*** we had issued.

A hearing on the motion to dissolve the temporary ***injunction*** and the motion to make it permanent was held on March 19, 1999, at which time all interested parties were given an opportunity to offer evidence on the issues raised by the motions.

- DISCUSSION -

Debtors PHA and HBRM and non-debtor Marino **[*18]** previously had requested reconsideration of the orders of November 13, 1998, and November 25, 1998, which enjoined them from taking action in violation of the above non-relocation covenants. We issued these orders because we were convinced at the time that they were necessary to preserve the status quo until the furor created by debtors' petitions subsided.

For reasons that are known only to debtors and Marino, they subsequently withdrew their motions for reconsideration and agreed to let the order stand. The orders became binding when they took no appeal of them.

PAA and SMG have responded to debtors' motion by bringing a motion of their own to make the above ***injunction*** permanent.

We first will address the motion of PAA and SMG for a permanent ***injunction***. A determination that a permanent ***injunction*** is warranted would largely obviate the need to address debtors' motion to dissolve the temporary ***injunction***.

A.) Motion For Permanent *Injunction*.

HN1[] A party seeking a permanent ***injunction*** must:

> (1) demonstrate that exercise of the court's equity jurisdiction is warranted;
>
> (2) actually succeed on the merits of its claim; and
>
> (3) establish that the balance of **[*19]** the equities tips in favor of injunctive relief.

Roe v. Operation Rescue, 919 F.2d 857, 868 n.8 (3d Cir. 1990).

The first of these requirements itself consists of three subparts. The moving party must establish that:

> (1) it has no adequate remedy at law;
>
> (2) the threatened injury is real, not imagined; and
>
> (3) no equitable defense exists.

Roe, 919 F.2d at 868 n.8.

One has no "adequate remedy at law" if the injury in question is of a repeated or continuing nature or if monetary damages are difficult to ascertain or inadequate. *Glasco v. Hills, 558 F.2d 179, 181 (3d Cir. 1977)*.

We are convinced that PAA and SMG would have no adequate remedy at law if debtors PHA, HBRM, and Marino were to continue violating the non-relocation covenants and took steps that resulted in moving the Penguins to another city. PAA is an instrumentality of the City of Pittsburgh and Allegheny County and was created to further the public interest of this community.

Were debtors to violate the non-relocation covenants and the Penguins ultimately moved as a consequence, the resultant injury to this community would be continual **[*20]** in that the community and surrounding areas would be without a professional NHL franchise. The injury most likely would be permanent in that it would be exceedingly difficult, if not impossible, to attract another NHL franchise to relocate here.

Moreover, any award of monetary damages would be difficult, if not impossible, to determine and would not be adequate. The Penguins are as much a part of the warp and woof of this community as are its other professional sports teams, museums, parks, theaters, and ethnic neighborhoods. Because the team is known as the **Pittsburgh** Penguins, it brings invaluable recognition to this region and greatly enhances its cachet in ways that confer economic benefit in the form of increased business, employment, and tax revenues. All of these would suffer if the Penguins relocated. Having an NHL franchise, we are convinced, can help to entice other individuals and businesses considering moving into this region to do so. Major League franchises contribute greatly to the making of major league cities.

We do not believe that the resultant injury to the self-image, pride, and prestige of this community, could be adequately compensated for solely by an **[*21]** award of money damages. To the extent that money damages would be adequate, they would be virtually impossible to calculate in a meaningful way.

The second and third subparts of the first of the above requirements for a permanent ***injunction*** also are satisfied in this case.

Evidence that the threat is real, not imagined, is found in the actions of Roger Marino and his minions occurring shortly after execution of the PHA Agreement. He made overtures to officials in Houston, Kansas City and Las Vegas, concerning relocation of the Penguins to these cities and even toured some of their arenas to find out whether they would provide a suitable venue for playing hockey. We have little or no doubt that Marino, as debtors' controlling principal, would once again violate the non-relocation covenants in the absence of an ***injunction*** prohibiting him and his subordinates from so doing.

Finally, debtors PHA and HBRM have not raised any equitable defenses to the request for a permanent ***injunction***. Although they seek to have the temporary ***injunction*** dissolved because the required elements for a temporary ***injunction*** purportedly are not satisfied, debtors have not asserted any credible equity-based **[*22]** arguments in opposition to the ***injunction***.

Based on the foregoing, we conclude that the first of the above requirements for a permanent ***injunction*** is satisfied in this instance.

PHA and SMG also have satisfied the second requirement for a permanent ***injunction***. In other words, they have prevailed on the merits of their claim that debtors and Marino breached the non-relocation covenants.

We previously determined that debtors and Marino, their dominant principal, breached these covenants by making secret overtures to various other cities about relocating the Penguins there and by traveling to those cities to discuss the matter in person with various

officials and to tour their facilities to see if they would provide an acceptable venue for hockey. [1]

Finally, PAA and SMG have shown **[*23]** that the balance of the equities in this case favors issuance of a permanent ***injunction***.

We already have determined that PAA, SMG, and the community at large, whose interest PAA is charged with furthering, would suffer substantial, noncompensable injury if PHA, HBRM, and Roger Marino were not enjoined from taking actions in violation of the non-relocation covenants and the Penguins ultimately moved elsewhere.

It is not clear what injury, if any, debtors PHA and HBRM themselves would suffer as debtors-in-possession if we permanently enjoined them from taking action which violates the non-relocation covenants and which resulted in the Penguins moving to another city. Any confirmed plan or reorganization apparently will be funded by a sale of the Penguins to a third party. We anticipate that the net sale proceeds will be applied as far as they go toward paying creditors' claims and will in no way inure to the benefit of PHA and HBRM. In addition, it is questionable at present whether such a sale would result in any funds that make their way to Roger Marino and other interest holders as equity owners.

It is conceivable, however, that claim holders may be harmed by a permanent ***injunction***. **[*24]** A sale of the hockey franchise to a purchaser who would relocate the Penguins to another city might fetch more than would a sale to a purchaser who is not able to relocate the team. We have no way of knowing at the present time whether any distribution would be made to general unsecured creditors even in the event the team is sold and moved elsewhere. Even if we assume, however, that claim holders and equity interest holders would fare less well if a permanent ***injunction*** is issued, the irreparable harm suffered by PAA, SMG, and the community at large in the absence of a permanent ***injunction*** outweighs that experienced by claim holders and interest holders in the presence of one.

We reach this conclusion without intending to derogate the importance of the interests of claim holders in a bankruptcy case. As important as their interests are, they may have to give way when the interest of the community at large so dictates. In this case it so dictates.

Based on the foregoing, we conclude that we should grant the motion by PAA and SMG for a permanent ***injunction***.

B.) Motion To Dissolve Temporary Inunction.

It is not necessary in light of the determination that PAA and SMG are **[*25]** entitled to a permanent ***injunction*** to address in detail the arguments offered by PHA and HBRM in support of their motion to dissolve the temporary ***injunction***. We nonetheless shall address two arguments offered in support of their motion because of their importance not only to the decision to issue a permanent ***injunction*** but also to the eventual fate of the non-relocation covenants if and when debtors receive a discharge.

We have concluded that PAA and SMG were successful on the merits of their claim that PHA, HBRM, and Marino had breached the above non-relocation covenants. PHA and HBRM apparently concede that PAA and SMG may be entitled to permanent injunctive relief in another forum, but strenuously deny that such injunctive relief is appropriate in the context of a bankruptcy case. They offer two arguments in support of this proposition.

According to PHA and HBRM, any obligation owed to PAA and SMG as a result of the non-relocation covenants qualifies as a "claim" for purposes of *§ 101(5)(B) of the Bankruptcy Code* and therefore is dischargeable. They also assert that, as a hypothetical judicial lien creditor, PHA may invoke the "strong-arm" power accorded by *§ 544(a)(1) of the **[*26]** Bankruptcy Code* to avoid under state law the obligations owed to PAA and SMG under the non-relocation covenants. As a result, they argue, they could not be prohibited from selling the Penguins to a party who may wish to relocate the team to another city. Neither of these arguments has merit in this case.

"Claim" is defined in the Bankruptcy Code in relevant part as a:

> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment.

The term "claim" is to be construed broadly to permit a

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[1] We will undertake later on in this memorandum opinion a more complete discussion of the contention of debtors PHA and HBRM that SMG and PHA **cannot** prevail on the merits in light of the fact that PHA and HBRM are in bankruptcy.

debtor to meet all of its legal obligations in bankruptcy and to enable holders of allowed claims to participate in the bankruptcy proceedings. Ohio v. Kovacs, 469 U.S. 274, 279, 105 S. Ct. 705, 708, 83 L. Ed. 2d 649 (1985).

The purpose of this provision is to cause the liquidation or estimation of contingent claims for which there may be an alternative equitable remedy with the result that the equitable remedy will be discharged in bankruptcy. For instance, if a judgment for specific performance may be satisfied by an alternative right to payment, the creditor entitled to specific performance has a "claim" in the bankruptcy case. **[*27]** Kovacs, 469 U.S. at 280, 105 S. Ct. at 708.

The United States Court of Appeals for the Third Circuit, whose decisions bind us, recently has spoken to the proper application of *§ 101(5)(B)* in light of Kovacs. *See* Torwico Electronics, Inc. v. State of New Jersey, Department of Environmental Protection (In re Torwico Electronics, Inc.), 8 F.3d 146 (3d Cir. 1993), *cert. denied, 511 U.S. 1046, 114 S. Ct. 1576, 128 L. Ed. 2d 219 (1994); also* Air Line Pilots Ass'n v. Continental Airlines (In re Continental Airlines), 125 F.3d 120 (3d Cir. 1997), *cert denied, 522 U.S. 1114, 118 S. Ct. 1049, 140 L. Ed. 2d 113 (1998).* [2]

[*28] When determining whether equitable relief such as an ***injunction*** qualifies as a "claim" for purposes of *§ 101(5)(B)*, we must examine the nature of the remedy sought and determine whether it can give rise to a right to payment. Continental Airlines, 125 F.3d at 134. Even if it does not facially require payment of money, it still may constitute a "claim". Torwico, 8 F.3d at 150.

In particular, we must determine whether monetary payment is an **alternative** for the requested equitable relief. If it is such an alternative, the equitable relief constitutes a "claim". Continental Airlines, 125 F.3d at 133 (*citing* Matter of Udell, 18 F.3d 403, 407 (7th Cir. 1998)).

The Third Circuit has analyzed requests for injunctive relief in either of two way to determine whether such relief qualifies as a "claim". These variant formulations, we are told, are "persuasive and consistent". Torwico, 8 F.3d at 150.

Under the one formulation, we must determine whether the requested equitable relief is but a "repackaged ....claim for damages". Torwico, 8 F.3d at 149 (*citing* In re CMC Heartland Partners, 966 F.2d 1143, 1147 (7th Cir. 1992)). **[*29]** If the requested equitable relief is so "repackaged", it qualifies as a "claim" for purposes of *§ 101(5)(B)*.

Under the other formulation, a request for equitable relief constitutes a "claim" if the party seeking the ***injunction*** has the option of taking action on its own and then suing to recover damages. If, however, the other party has no option to accept damages in lieu of equitable relief and instead seeks to end or ameliorate harm, it does not have a "claim". Torwico, 8 F.3d at 149 (*citing* In re Chateaugay, 944 F.2d 997, 1008 (2d Cir. 1991)).

The fact that compliance with an order granting equitable relief will require a debtor to expend money, without more, is not sufficient reason for concluding that the equitable remedy sought is a claim. What matters is whether a party seeks to force a debtor to pay money to it, in which case that party has a "claim". Torwico, 8 F.3d at 150.

Applying the above legal standard to the facts of this case, we conclude that the injunctive relief sought by PAA and SMG is **not** a "claim" for purposed of *§ 101(5)(B)* and therefore survives debtors' anticipated discharges.

We do not view **[*30]** the permanent ***injunction*** PAA and SMG seek as a "repackaged claim for damages" arising out of the breach of the non-relocation covenants by PHA, HBRM, and Marino. PAA and SMG instead seek to prevent PHA, HBRM, and Marino from continuing to engage in conduct that violates the covenants. In short, they want the Penguins to remain where they are and want to avoid having to recover for losses resulting from the breaching of the covenants. [3]

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[2] We are aware of a well-reasoned case which would have us follow a different approach for determining whether a right to equitable relief is a "claim" for purposes of *§ 101(B)(5)*. *See* Maids International, Inc. v. Ward (In re Ward), 194 B.R. 703 (Bankr. D. Mass. 1997). Were we to follow its approach, the outcome of this case might well be different. We are, however, precluded from so doing because the United States Court of Appeals for the Third Circuit, which interpretation of the law binds us, has spoken to the issue.

[3] Media accounts and statements in court proceedings made public the secret attempts at shopping the Penguins. Immediately thereafter, public support at the box office dipped, all of which inured to the economic detriment of PAA and SMG. In spite thereof, no claim is advanced for money damages.

We also do not view PAA and SMG as having the option **in the requisite sense** of seeking monetary damages as an "alternative" to an ***injunction*** prohibiting PHA, HBRM, and Marino from breaching the covenants.

Paragraph 704(B)(1) of the *third amendment* to the restated and amended lease **[*31]** between PHA and SMG is identical to paragraph 2.C of the agreement between PHA and PAA executed during that same month. They provide, among other things, that PAA is entitled to an ***injunction*** in the event PHA breaches the non-relocation covenants. Only if PAA is unable to obtain an ***injunction***, however, is it entitled to liquidated damages.

Also, paragraph 704(B)(5) of the *third amendment* to the restated and amended lease between PHA and SMG is identical to paragraph 2.G of the agreement between PHA and PAA. If PHA is unable to obtain an ***injunction*** **or** is unable to find a buyer for the Penguins, **or** chooses not to find such a buyer, it has the right to recover certain specified liquidated monetary damages.

As we read paragraphs 704(B)(1) and 2.C, PAA does not have the option in the requisite sense of seeking monetary damages for a breach of the non-relocation covenants as an alternative to injunctive relief. That is to say, PAA does not enjoy the luxury of deciding whether to seek injunctive or monetary relief. It may seek monetary relief **only in the event injunctive relief is not available**. Accordingly, these paragraphs do not justify the conclusion that PAA's right **[*32]** to injunctive relief is a "claim" for purposes of *§ 101(5)(B)*.

PHA, HBRM, and Marino do not seriously contest this conclusion but instead assert that paragraphs 704(B)(5) and 2.G provide that a breach of the non-relocation covenants triggers a right to injunctive relief as well as a right, under certain conditions, to payment of monetary damages. It is this disjunctive provision, they argue, which qualifies PHA's right to injunctive relief as a dischargeable "claim".

We disagree both with their construal of paragraphs 704(B)(5) and 2.G and with the conclusion they reach.

We have just concluded that the first of the disjuncts set forth in paragraphs 704(B)(5) and 2.G -- i.e., the right to liquidated damages if PHA is unable to obtain an ***injunction*** -- does not provide on its own that PHA has the option of pursuing monetary damages in lieu of injunctive relief. It may recover damages only in the event an ***injunction*** is not available.

The remaining disjuncts of paragraphs 704(B)(5) and 2.G, we conclude, do not constitute "alternatives" to equitable relief in the sense required for a right to injunctive relief to qualify as a "claim" for purposes of *§ 101(5)(B)*. Not just any alternative **[*33]** right to monetary damages will qualify under the rubric set forth in Torwico and Continental Airlines as an "alternative" remedy in the requisite sense.

A right to injunctive or other equitable relief qualifies as a "claim" for purposes of *§ 101(5)(B)* if the breach that gives rise to equitable relief also gives rise to a **corollary** right to payment of liquidated damages -- i.e., **to a right to payment with respect to the equitable remedy**. *Continental Airlines, 125 F.3d at 133* (*citing approvingly to Matter of Udell, 18 F.3d 403, 408 (7th Cir. 1994)*).

We understand this cryptic language to mean that the right to monetary relief must be "derivative of" or a "corollary to" the right to injunctive relief. It is not sufficient for purposes of *§ 101(5)(B)* that the equitable remedy and the right to money damages are related only to the extent that both happen to be disjunctively available in the event of a breach.

Applying this analysis to our case, we see that the disjunctive remedies available to PAA under paragraphs 704(B)(5) and 2.G in the event of a breach of the non-relocation covenants do not make PHA's right to injunctive **[*34]** relief a "claim" in the requisite manner. The other remedies set forth in these contractual provisions, while unquestionably alternatives in a generic way, are not "derivative of" PAA's right to injunctive relief.

One final matter remains for our consideration.

Section 544 of the Bankruptcy Code (*11 U.S.C. § 544*), the so-called "strong arm" clause, provides in relevant part as follows:

> (a) The trustee....may avoid....any obligation incurred by the debtor that is voidable by--
>
> > (1) a creditor that extends credit to the debtor at the time of commencement of the case, and that obtains at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such creditor exists.

PHA and HBRM argue, as an apparent afterthought and half-heartedly, that we should not enjoin them and Roger Marino from violating the non-relocation

covenants because, under *§ 544(a)(1)*, a hypothetical judicial lien holder would be able to sell the Penguins to a third party without regard to the non-relocation covenants.

This argument is unpersuasive and merits **[*35]** the same cursory treatment from us that PHA and HBRM gave it.

Although these strong arm powers arise under federal bankruptcy law, their scope vis-a-vis third parties is governed entirely by the substantive law of the state in which the property is located as of the bankruptcy filing date. *Midatlantic National Bank v. Bridge (In re Bridge), 18 F.3d 195, 200 (3d Cir. 1994)*. We conclude from this that Pennsylvania law controls the determination whether a judicial lien creditor could, as PHA and HBRM contend, avoid debtors' obligations arising under the non-relocation covenants. Their contention is not persuasive.

To begin with, we question whether *§ 544(a)* even applies here. The purpose of *§ 544(a)* is to enable the trustee (or debtor-in-possession) to set aside preferential or fraudulent transfers and to preserve estate assets against unrecorded or "secret" liens. *In re Teerlink Ranch, Ltd., 886 F.2d 1233, 1235 (9th Cir. 1989)*. There is no indication that fraud or a secret lien of any kind is at issue here. To the contrary, what is at issue is a non-relocation covenant contained in a lease which was duly filed with the appropriate authorities.

[*36] Also, PHA and HBRM have not offered any case law in support of what they consider to be the "obviously true" premise that, under Pennsylvania law, a judicial lien creditor could sell the Penguins without regard to the non-relocation covenants. The correctness of this proposition is far from obvious.

According to Pennsylvania law, the purchaser of property sold at a sheriff's sale assume all risk under the rule of *caveat emptor* and receives only what right, title, and interest the judgment debtor had. *CSS Corporation v. Sheriff of Chester County, 352 Pa. Super. 256, 259, 507 A.2d 870, 872 (1986)*, *appeal denied*, *514 Pa. 630, 522 A.2d 559 (1987)*. The same would appear to apply by parity of reasoning with respect to limitations on the debtors' interest, such as non-relocation covenants.

An appropriate order shall issue.

BERNARD MARKOVITZ

Chief Judge

U.S. Bankruptcy Court

ORDER OF COURT

AND NOW at Pittsburgh this 25th day of **March**, 1999, in accordance with the accompanying memorandum opinion, it hereby is **ORDERED, ADJUDGED**, and **DECREED** that:

(1) the motion for a permanent ***injunction*** filed by Public **[*37]** Auditorium Authority of Pittsburgh and by SMG Pittsburgh, Inc. is **GRANTED**. Debtors ***Pittsburgh Hockey Associates*** and HBRM, LLC, their managing directors, partners, affiliates, agents, officers, servants, employees, experts and attorneys are **PERMANENTLY ENJOINED** from:

(A) initiating or engaging in discussions with third parties concerning the sale or relocation of the Pittsburgh Penguins hockey team; and
(B) relocating or attempting to relocate the Penguins hockey team to a venue other than the Pittsburgh Civic Arena; and
(C) causing or permitting the Penguins hockey team to play any portion of its regular season and playoff season scheduled for the Civic Arena to be played at any other venue.

(2) the motion by ***Pittsburgh Hockey Associates*** and HBRM, LLC to dissolve the preliminary ***injunction*** issued on November 23, 1998, and again on November 25, 1998, is **DENIED**.

It is **SO ORDERED.**

BERNARD MARKOVITZ

Chief Judge

U.S. Bankruptcy Court

End of Document

In re PITTSBURGH SPORTS ASSOCIATES HOLDING COMPANY, Pittsburgh Hockey Associates, HBRM, LLC, Debtors.

Bankruptcy Nos. 98–28174BM to 98–28176BM.

United States Bankruptcy Court, W.D. Pennsylvania.

June 18, 1999.

Chapter 11 debtor moved to reject alleged lease and, in alternative, sought determination that lease was not true lease but disguised financing agreement. The Bankruptcy Court, Bernard Markovitz, Chief Judge, held that: (1) agreement which Chapter 11 debtor executed in connection with its acquisition of professional hockey franchise, after party who was barred by league rules from providing financing to debtor to acquire franchise allegedly purchased former owner's leasehold interest in building where franchise played its games and then leased premises back to debtor, was not true "lease" but disguised "financing agreement", and (2) debtor could reject agreement in any event, even if it was lease.

Motion granted.

1. Evidence ⚩207(1), 265(7)

"Judicial admission" is admission made by party in pleadings, stipulations, and the like, and does not have to be proven in litigation in which it is made.

See publication Words and Phrases for other judicial constructions and definitions.

2. Evidence ⚩265(7)

Judicial admission is binding upon party making the admission, for purposes of case in which it is made, provided that it is unequivocal.

3. Evidence ⚩207(1)

Judicial admissions are restricted in scope to matters of fact which otherwise would require evidentiary proof.

4. Bankruptcy ⚩3117

Statements that Chapter 11 debtor made in various motions and adversary proceedings in bankruptcy case, in which it characterized its agreement with creditor as "lease," were not in nature of "judicial admissions," such as would bind debtor in subsequent proceeding for determination as to whether agreement in question was true "lease" or disguised financing arrangement; true nature of debtor's agreement with creditor was in nature of legal conclusion, which was not within scope of doctrine of judicial admissions.

See publication Words and Phrases for other judicial constructions and definitions.

5. Evidence ⚩201

Conclusions of law do not lie within scope of doctrine of judicial admissions; rather, they must be proven in contested matter.

6. Bankruptcy ⚩3117

Statements that Chapter 11 debtor made on its tax returns, audited financial statements and the like, in which it characterized its agreement with creditor as "lease," were not made in judicial context and thus did not qualify as "judicial admissions," such as would bind debtor in subsequent proceeding for determination as to whether agreement in question was true "lease" or disguised financing arrangement.

7. Bankruptcy ⚩3117

Even statements which Chapter 11 debtor had made within judicial context in various motions and unrelated adversary proceedings in bankruptcy case, when debtor had characterized as "lease" the agreement that it now sought to reject, were not made "in the same litigation" as debtor's rejection request, and thus were

not binding on debtor as "judicial admissions."

See publication Words and Phrases for other judicial constructions and definitions.

8. Bankruptcy ⚷3101

Estoppel ⚷68(2)

Statements which Chapter 11 debtor made in various motions and unrelated adversary proceedings in bankruptcy case, when debtor characterized as "lease" the agreement that it now sought to reject, did not qualify as a "position" which litigant "urged upon" or "argued before" court, and could not be given judicial estoppel effect, where question as to true nature of agreement was not at issue in any of these various motions or unrelated adversary proceedings.

See publication Words and Phrases for other judicial constructions and definitions.

9. Estoppel ⚷68(2)

"Judicial estoppel" is judge-made doctrine which prevents litigant from asserting position that is inconsistent with position that litigant had asserted in the same or in previous proceeding.

See publication Words and Phrases for other judicial constructions and definitions.

10. Estoppel ⚷68(2)

Doctrine of judicial estoppel was created to prevent litigants from playing fast and loose with court.

11. Estoppel ⚷68(2)

Judicial estoppel involves the relationships between a given litigant and the judicial system as whole; its primary purpose is to protect integrity of judicial system, not to protect other parties to litigation.

12. Estoppel ⚷68(2)

There is no bright-line test for determining whether doctrine of judicial estoppel applies in particular instance; rather, its application requires consideration of facts and circumstances specific to that particular case.

13. Estoppel ⚷68(2)

Judicial estoppel is appropriate where: (1) litigant's present position is inconsistent with position that it previously had asserted; and (2) litigant asserted either or both of these inconsistent positions in "bad faith," i.e., with intention of playing fast and loose with court.

See publication Words and Phrases for other judicial constructions and definitions.

14. Estoppel ⚷68(2)

Person invoking doctrine of judicial estoppel need not be same adversary as the one against whom the previous inconsistent position was asserted.

15. Estoppel ⚷68(2)

To be judicially estopped by its prior inconsistent position, litigant need not have benefitted from this previous inconsistent position.

16. Estoppel ⚷68(2)

Doctrine of judicial estoppel is not intended to eliminate all inconsistencies, however slight or inadvertent; rather, it is concerned only with deterring inconsistencies which are of such magnitude as to lead one to conclude that litigant is playing fast and loose with the court.

17. Estoppel ⚷68(2)

For litigant's prior, inconsistent representations to have judicial estoppel effect, they must qualify as a "position" which litigant urged upon, or argued before, court.

18. Contracts ⚷152

Under Pennsylvania law, caption of document does not determine its legal effect.

19. Landlord and Tenant ⚷24(1)

Under Pennsylvania law, caption on agreement indicating that is meant to create landlord-tenant relationship is not necessarily dispositive.

20. **Landlord and Tenant ⚷24(1)**

Under Pennsylvania law, it is not necessary that agreement contain the word "lease" in order for agreement to qualify as lease, as long as the requisites for lease are present.

21. **Landlord and Tenant ⚷20**

Under Pennsylvania law, "lease" may be accurately defined as a conveyance or grant or demise of certain described land or tenement, usually in consideration of rent or other recompense, for a prescribed period but for a less time than the lessor hath in the premises.

See publication Words and Phrases for other judicial constructions and definitions.

22. **Landlord and Tenant ⚷24(1)**

Under Pennsylvania law, no particular words are required to constitute a lease; any writing will suffice if it establishes intention of one party to voluntarily dispossess itself of premises in return for consideration and of the other party to assume possession for prescribed period.

23. **Landlord and Tenant ⚷20**

Under Pennsylvania law, in bona fide lease, interest of lessee is equivalent to that of a purchaser of premises for term of lease.

24. **Landlord and Tenant ⚷24(1)**
Secured Transactions ⚷10

Under Pennsylvania law, determination as to whether agreement is "true" lease or financing device requires examination of particular facts and circumstances of each case; what at first glance looks to be lease may, upon further scrutiny, reveal itself to be disguised financing device.

25. **Landlord and Tenant ⚷24(1)**
Secured Transactions ⚷10

Under Pennsylvania law, agreement which Chapter 11 debtor executed in connection with its acquisition of professional hockey franchise, after party who was barred by league rules from providing financing to debtor to acquire franchise allegedly purchased former owner's leasehold interest in building where franchise played its games and then leased premises back to debtor, was not true "lease" but was disguised "financing agreement," particularly in light of provisions designed to maintain same relationship between parties, and same stream of payments flowing from debtor to alleged lessor, even if franchise relocated, and in light of security agreement drafted by alleged lessor purporting to give it security interest in virtually all of debtor's assets.

See publication Words and Phrases for other judicial constructions and definitions.

26. **Bankruptcy ⚷3115.1**

Rejection of unexpired lease by debtor cuts off any right of lessor to require debtor to perform and limits lessor's claim to one for breach of contract. Bankr. Code, 11 U.S.C.A. § 365.

27. **Bankruptcy ⚷2834**

Any allowed claim arising from debtor's rejection of its unexpired lease is treated as prepetition claim for damages. Bankr.Code, 11 U.S.C.A. § 365(g)(1).

28. **Bankruptcy ⚷3112**

In deciding whether to approve debtor's proposed rejection of unexpired lease, bankruptcy court employs the so-called "business judgment" test. Bankr.Code, 11 U.S.C.A. § 365(a).

29. **Bankruptcy ⚷3112**

To prevail on motion to reject unexpired lease, debtor must establish that rejection is in best interest of estate and of unsecured creditors. Bankr.Code, 11 U.S.C.A. § 365(a).

30. **Bankruptcy ⚷3112**

In deciding whether to approve debtor's proposed rejection of unexpired lease, bankruptcy court should not substitute its judgment for that of debtors, but should instead allow rejection to take place if motion is not manifestly unreasonable and not in bad faith and would seem to en-

hance debtors' estate. Bankr.Code, 11 U.S.C.A. § 365(a).

31. Bankruptcy ⚷3112

Even assuming that agreement which Chapter 11 debtor executed in connection with its acquisition of professional hockey franchise was in nature of true "lease" and not disguised "financing agreement," agreement in question, which debtor signed after party who was barred by league rules from providing financing to debtor to acquire franchise allegedly purchased former owner's leasehold interest in building where franchise played its games and then leased premises back to debtor, could be rejected on theory that rejection was in best interest of estate; while rejection would deprive debtor of arena in which hockey franchise could play its games, it also relieved debtor of unusually burdensome agreement and maximized probability that debtor would succeed in negotiating agreement that contained more favorable terms. Bankr.Code, 11 U.S.C.A. § 365(a).

MEMORANDUM OPINION

BERNARD MARKOVITZ, Bankruptcy Judge.

FINDINGS OF FACT

Debtor Pittsburgh Hockey Associates ("PHA") owns and operates a National Hockey League ("NHL") franchise known as the Pittsburgh Penguins, which since its inception has played all of its home games in the Civic Arena in Pittsburgh, Pennsylvania.

Respondent Public Auditorium Authority ("PAA") constructed the Civic Arena and is the ultimate Lessor of the land on which it is located and of adjacent land.

Respondent SMG Pittsburgh presently leases the Civic Arena and adjacent land from PAA and has entered into an agreement with PHA whereby the Penguins play all home games at the Civic Arena.

All the assets of the Penguins, including the lease for the Civic Arena and adjacent land, were owned and controlled prior to 1991 by Edward J. DeBartolo Corporation ("DeBartolo") or by corporations it owned or controlled. Civic Arena Corporation ("CAC") had entered into a sublease with PAA whereby CAC subleased the Civic Arena and land on which it was situated. DeBartolo Century Corporation ("DCC") had entered into a sublease with PAA whereby DCC subleased the land adjacent to the Civic Arena.

Under these leases, CAC and DCC paid annual rents to PAA in the amount of $350,000 plus another $250,000 for use of the ice rink for practices. The total rent they paid to PAA on an annual basis was $600,000.

DeBartolo decided in 1991 to divest itself of some of its assets and put the Penguins up for sale. Its asking price for the assets of the franchise was $65,000,000.

DeBartolo engaged one Howard Baldwin to act as its agent and to find prospective buyers of the franchise and its assets. Although Baldwin had located several prospective purchasers, none was able to consummate a sale. At that point Baldwin informed DeBartolo that a group of investors he led wanted to purchase the Penguins and related assets.

Baldwin, however, was not able to meet the $65,000,000 asking price established by DeBartolo. He still needed to come up with approximately $29,000,000 in additional funds.

In an attempt to obtain additional capital, Baldwin approached one Edward Snider, who already was a principal owner of another NHL franchise. He also approached Spectacor Management, in which Snider had a substantial interest.

NHL rules prohibited Snider from purchasing more than a five percent interest in the Penguins because of his substantial ownership interest in another NHL franchise. Its rules also prevented Snider from lending enough money to Baldwin to

enable Baldwin to consummate a purchase of the Penguins.

As a way of masking Snider's participation in the transaction and making it palatable to the NHL, Snider and others created respondent SMG Pittsburgh, which in turn provided Baldwin with $24,000,000 so that Baldwin could purchase the Penguins. The remaining $5,000,000 needed to purchase the Penguins was taken care of when DeBartolo agreed to accept deferred payments in this amount from future advertising and playoff revenues and expansion fees.

Baldwin and his group of investors purchased the Penguins from DeBartolo on October 31, 1991 through a complex series of transactions. The assets of the franchise were contributed by the DeBartolo corporations to a partnership known as PBT Business Trust ("PBT"), another DeBartolo entity. PBT then transferred its interest in the NHL franchise known as the Penguins to the group of investors led by Baldwin who were known as PHA.

Among the documents executed in connection with the sale of the Penguins was an agreement between CAC and SMG, whereby SMG acquired CAC's rights to the Civic Arena under CAC's sublease with PAA. SMG then purported to sublease the Civic Arena to PBT, which in turn transferred its interest in the Penguins and in this purported sublease to PHA.

Among other things, the agreement between PBT and SMG specified that the agreement would expire on September 1, 2012, "unless terminated earlier".

The agreement between SMG and PBT also provided that, under certain conditions, SMG had the right to relocate the Penguins to a venue other than the Civic Arena. If SMG elected not to renew the CAC lease with PAA and did not itself select a new venue for the Penguins, the Penguins had the option of relocating to another venue, **but only if the Penguins maintained SMG's position vis-a-vis the Penguins until the year 2012.** Should this occur, the Penguins had an obligation to require the landlord of the alternative venue to enter into an agreement with SMG, who then would enter into an agreement with PHA on terms substantially similar to those providing for PHA's occupancy of the Civic Arena.

Yet another document prepared in connection with Baldwin's acquisition of the Penguins was a security agreement between PBT, the predecessor of PHA, and SMG, whereby the obligations of PBT/PHA to SMG were protected by a security interest in basically all the assets of the Penguins. Despite repeated demands by SMG that it do so, PBT/PHA never executed the agreement.

The agreement between SMG and PHA, as amended and restated, provides for payment of a base rent in accordance with a specified formula. It also obligates PHA to pay SMG all event costs for staging hockey games at the Civic Arena and to pay an adjusted base rent for regularly-scheduled home games that are televised within a fifty-mile radius of the Civic Arena.

The amended and restated agreement also entitles SMG to a specified dollar amount of gross revenues derived from suites in existence prior to the 1993–94 hockey season and to specified percentages of gross revenues derived from various seats and suites constructed in 1993–94. SMG also retains 92.5% of revenues derived from sales of programs and novelties and retains 100% of parking revenues through October 31, 2001, after which it will retain only 60%. It also receives a specified percentage of advertising revenues.

With the exception of those NHL franchises which play their home games in a arena under an agreement with an entity affiliated with the franchise, the cost to PHA of playing its home games is the highest in the NHL and exceeds its nearest competitor by more than twenty-five

percent. If player salaries are excluded, PHA's costs are the highest in the NHL as a percentage of costs other than player salaries.

PHA derives no income from non-hockey events staged at the Civic Arena. Moreover, it is required to compensate SMG for revenues SMG loses at non-hockey events due to reduced seating capacity as a result of improvements to the Civic Arena made in 1997.

PHA presently pays SMG between six million and seven million dollar annually for playing its home games at the Civic Arena, an increase of one thousand percent over the annual rents previously paid by CAC and DCC to PHA. It also is obligated to pay for recent improvements made to the Civic Arena. SMG, which purports to lease the facility to PHA, is not required to pay anything for the improvements. The total annual amount PHA pays for using the Civic Arena and for recent improvements made thereto exceeds ten million dollars.

PHA has suffered losses exceeding $50,000,000 over the past three hockey seasons. During this same period, payments made by PHA to SMG and for improvements to the Civic Arena exceed $30,000,000. Payments to SMG alone during this period approximate $20,000,000.

PHA filed a voluntary chapter 11 petition on October 13, 1998. It indicated in its schedules that it had an unexpired lease with SMG for use of the Civic Arena.

Three different plans of reorganization, none of which has yet been confirmed, were filed in this bankruptcy case. After PHA indicated that it would not file a plan of its own, a group led by former Penguins player Mario Lemieux submitted a plan in March of 1999. The NHL submitted a plan in April of 1999. SMG and Fox Sports Net Pittsburgh, which has local television rights to Penguins games, submitted yet a third plan. Hearing on possible confirmation of one of these plans is scheduled for Thursday, June 24, 1999.

On May 26, 1999, PHA brought the present motion to reject in accordance with 11 U.S.C. § 365(a) the above agreement for use of the Civic Arena or, in the alternative, to determine that the agreement is not a "true" lease.

An evidentiary hearing on PHA's motion to reject the agreement was conducted on June 4, 1999. We issued an oral order at the conclusion of said hearing granting its motion to reject the agreement. A written codification of that oral order was subsequently transmitted to the parties in interest bound by the oral order.

An evidentiary hearing on PHA's motion to determine that its agreement with SMG for use of the Civic Arena is not a "true" lease but a disguised financing agreement instead was conducted on June 7, 1999.

The purpose of this memorandum opinion is to more fully explain the basis for our oral order issued on June 4, 1999, and to determine whether the amended and restated agreement between PHA and SMG constitutes a "true" lease.

PREAMBLE

Initially it must be said that we do not wish to encourage a litigant to characterize a transaction in one manner one day and thereafter revise diametrically the legal description. If such conduct merits a judicial response, it can be provided at an appropriate time. That being said, we find that PHA has not made a judicial admission that its agreement with SMG qualifies as a "true" lease, nor do we find that debtor's actions merit invoking the doctrine of judicial estoppel. Court documents, exhibits, and testimony evidence an intent to camouflage a financing agreement into a lease structure. To the extent that the agreement is a "true" lease, we alternatively conclude that PHA may reject it.

DISCUSSION

I. Is PHA Estopped From Seeking A Determination That Its Agreement With SMG Is Not A True Lease?

PHA identified its agreement with SMG as an unexpired lease of real property in

its bankruptcy schedules. It did the same in various motions brought previously in this bankruptcy case and in Adversary No. 98–2053–BM, wherein we enforced certain non-relocation covenants contained in agreements between PHA and SMG and between PHA and PAA.

According to SMG, these representations by PHA estop PHA from now asserting that its agreement with SMG is not a "true" lease. Such representations, SMG contends, qualify as binding judicial admissions and are conclusive with regard to the "true" nature of the agreement. SMG further maintains that PHA's earlier assertions concerning its lease with SMG are inconsistent with PHA's present position and that PHA therefore is judicially estopped from denying that its agreement with SMG is a "true" lease.

A. ***Judicial Admissions.***

[1, 2] A judicial admission is an admission made by a party in pleadings, stipulations, and the like, and do not have to be proven in the litigation in which they are made. *Giannone v. United States Steel Corp.,* 238 F.2d 544, 547 (3rd Cir.1956). It is binding upon the party making the admission for purposes of the case in which made, provided that said admission is unequivocal. *Glick v. White Motor Co.,* 458 F.2d 1287, 1291 (3d Cir.1972).

[3] Judicial admissions are restricted in scope to matters of fact which otherwise would require evidentiary proof. *Id.* A legal conclusion—e.g., that a party was negligent or caused an injury—does not qualify's a judicial admission. *Giannone,* 238 F.2d at 547; *MacDonald v. General Motors Corp.,* 110 F.3d 337, 341 (6th Cir. 1997) (*citations omitted*).

PHA's numerous previous representations during this bankruptcy case that its agreement with SMG is a lease is not a binding judicial admission for at least two reasons.

[4, 5] For purposes of the present motion, the proposition that the agreement between PHA and SMG is (or is not) a "true" lease is a conclusion of law no less than the proposition that, say, an individual was negligent or committed perjury. In the present context it does not constitute a statement of fact. Conclusions of law, we have seen, do not lie within the scope of the doctrine of judicial admission. They must be proven in a contested matter.

The contention that PHA's previous assertions constitute binding judicial admissions fails also because they were **not** made "in the same litigation" as is now before us. *Giannone,* 238 F.2d at 547.

[6] Many of the representations by PHA that it had a lease with SMG were made to banks, on its tax returns, in audited financial statements, and to members of the press and electronic media. They were not made in a **judicial** context and therefore do not qualify as admissions.

[7] As for those statements PHA made in various other motions brought in this bankruptcy case or in adversary actions brought under it, they were not made in the requisite sense "in the same litigation".

Giannone was a personal injury tort action brought under state law in federal court. It did not involve a bankruptcy case, which is vastly different from a garden-variety personal injury case. What qualifies as the "same litigation" for purposes of a garden-variety personal injury action is not the same as what constitutes such in a bankruptcy case. A motion for relief from the automatic stay, for instance, is not the "same litigation" as a motion for approval of counsel fees or an adversary action objecting to discharge even though all are brought within the confines of a single bankruptcy case.

B. ***Judicial Estoppel.***

[8] SMG alternatively argues that PHA is judicially estopped from now maintaining that the above agreement with SMG is not a "true" lease because of previous statements by PHA in the above bank-

ruptcy case that it was a "lease". This argument fares no better than does SMG's previous argument concerning judicial admissions. Debtor is not judicially estopped from asserting in its present motion that its agreement with SMG really is not a lease and from seeking a determination to that effect.

[9, 10] Judicial estoppel is a judge-made doctrine which prevents a litigant from asserting a position that is inconsistent with a position that litigant had asserted in the same or in a previous proceeding. *Ryan Operations v. Santiam–Midwest Lumber Co.,* 81 F.3d 355, 358 (3d Cir.1996). It was created to prevent a litigant from playing "fast and loose" with the court. *McCarron v. F.D.I.C.,* 111 F.3d 1089, 1097 (3d Cir.1997).

[11] It involves the relationships between a given litigant and the judicial system as a whole. *Delgrosso v. Spang & Co.,* 903 F.2d 234, 241 (3d Cir.1990). Its primary purpose is to protect the integrity of the judicial system, not to protect other parties to the litigation. *Fleck v. KDI Sylvan Pools, Inc.,* 981 F.2d 107, 121–22 (3d Cir.1992).

[12] There is no bright-line test for determining whether the doctrine applies in a particular instance. Its application requires consideration of facts and circumstances specific to that particular case. *Scarano v. Central Railroad Co. of New Jersey,* 203 F.2d 510, 513 (3d Cir.1953).

[13] Judicial estoppel is an appropriate remedy when: (1) the litigants' present position is inconsistent with a position it previously had asserted; and (2) the litigant asserted either (or both) of the inconsistent positions in bad faith—i.e., with intention to play "fast and loose" with the court. *Ryan Operations,* 81 F.3d at 361.

[14, 15] The person invoking the doctrine of judicial estoppel need not be the same adversary as the one against whom the previous inconsistent position was asserted. *Ryan Operations,* 81 F.3d at 359. Furthermore, the litigant whom they seek to estop need not have benefitted from its previous inconsistent position. *Id.*

[16] Judicial estoppel is not intended to eliminate all inconsistencies, however slight or inadvertent; it is concerned only with deterring inconsistencies which are of such a magnitude as to lead one to conclude that a litigant is playing "fast and loose" with the court. *Ryan Operations,* 81 F.3d at 358.

Although PHA unquestionably represented on numerous occasions in previous proceedings occurring within the perimeters of this bankruptcy case that its agreement with SMG was a lease, we are not willing to conclude that these representations are "inconsistent", for purposes of judicial estoppel, with its present position that said agreement really is not a lease after all.

When PHA made these previous representations, the question whether the agreement "truly" was a lease or a lease in name only was not at issue. That questions was not "on the table", as it now is. PHA, in other words, did not previously assert the position that the agreement with SMG "truly" was a lease, as opposed to a lease in name only, when it previously so characterized the agreement with SMG.

[17] To the extent that these previous representations are inconsistent with PHA's present assertion, they would have to qualify as a "position" which PHA "urged upon" or "argued before" the court for judicial estoppel to apply. *Cheripka v. Republic Insurance Co. (In re Cheripka),* 1991 WL 276289 (3rd Cir.1991). When it previously represented in this bankruptcy case that it had a lease with SMG, PHA was not asserting a "position" which it was "urging upon" or "arguing before" the court.

The matter does not end there. Judicial estoppel also does not apply because we see nothing that would justify the inference that PHA's present position that its

agreement with SMG is not truly a lease is asserted in bad faith—i.e., for the purpose of playing "fast and loose" with the court.

PHA brought the motion presently under consideration on May 26, 1999, shortly after SMG and Fox Sports had submitted their own plan of reorganization. It was approximately one month before a hearing on which of the competing plans of reorganization were scheduled to be heard. SMG's argument, as we understand it, maintains that PHA now seeks a determination that its agreement with SMG is really not a lease for the purpose of preventing confirmation of SMG's proposed plan. Such an outcome, SMG continues, will increase the likelihood that the Lemieux plan will be accepted by voting creditors and then confirmed. This result, it insists, would inure to the benefit of PHA's present principals. We reject SMG's argument for at least two reasons.

We are not persuaded that PHA brought the present motion when it did because it intended to scuttle the plan proposed by SMG and Fox Sports. It is just as likely, based on the evidence presented, that PHA brought the present motion when it did—i.e., shortly after the Penguins were eliminated from contention for the Stanley Cup—because it wanted to avoid an anticipated reduction in the sale of playoff tickets. Filing the motion while the playoffs were still in contention, PHA reasoned, would erode fan support for the Penguins.

Even if SMG is correct in asserting that PHA brought the present motion when it did for the purpose of having the Lemieux plan confirmed over the plan submitted by SMG and Fox Sports, this does not constitute the sort of bad faith required for judicial estoppel to apply. Judicial estoppel, we previously noted, was created to protect the integrity of the judicial system and was not meant to protect the litigants. Any harm to SMG that may (or may not) occur to SMG as a result of PHA's present motion does not trigger application in this instance of the doctrine of judicial estoppel.

Having determined that PHA is not estopped from seeking a determination that its agreement with SMG is not a "true" lease, we next shall address the merits of PHA's position.

C. *Is The Agreement Between PHA And SMG A "True" Lease?*

To make this determination we must consult Pennsylvania law.

[18–20] The caption of a document does not determine its legal effect. *Kowatch v. Atlantic Richfield Co.,* 480 Pa. 388, 391, 390 A.2d 747, 749 (1978). For instance, a caption indicating creation of a landlord-tenant relationship is not necessarily dispositive in that regard. *Nath v. National Equipment Leasing Corp.,* 282 Pa.Super. 142, 153–54, 422 A.2d 868, 873–75 (1980), *aff'd,* 497 Pa. 126, 439 A.2d 633 (1981). On the other hand, it is not necessary that the agreement contain the word "lease" for it to be one, provided that the requisites for a lease are present. *Morrisville Shopping Center v. Sun Ray Drug Co.,* 381 Pa. 576, 582–83, 112 A.2d 183, 186–87 (1955).

[21] It is difficult, if not impossible, to formulate an all-encompassing definition of "lease". It may, however, be accurately defined as:

> . . . a conveyance or grant or demise of certain described land or tenement (usually in consideration of rent or other recompense) for a prescribed period . . . . but for a less time than the lessor hath in the premises.

Morrisville Shopping Center, 381 Pa. at 582, 112 A.2d at 186.

[22] No particular words are required to constitute a lease. Any writing will suffice if it establishes the intention of one party to voluntarily dispossess itself of the premises in return for consideration and of the other party to assume possession thereof for a prescribed period. *Schweit-*

zer v. Evans, 360 Pa. 552, 555, 63 A.2d 39, 40 (1949).

[23] In a bona fide lease, the interest of the lessee is equivalent to that of a purchaser of the premises for the term of the lease. *Commonwealth v. Monumental Properties, Inc.,* 459 Pa. 450, 470–72, 329 A.2d 812, 822–23 (1974). As one court stated long ago:

> A lease is a sale and conveyance of the property leased, which only differs from what is called a deed, in being limited to a term certain, and leaving a reversionary interest in the grantor.... From the moment of letting, the land becomes the tenant's and remains such until the lease terminates; the house, if there be one, is his castle.

Wien v. Simpson, 2 Phila. 158, 158 (Pa. Dist.Ct.1856).

[24] Determining whether an agreement is a "true" lease or a financing device requires examination of the particular facts and circumstances of each case. What at first glance looks to be a lease may upon further scrutiny reveal itself to be a disguised financing device. *Nath,* 282 Pa.Super. at 148, 422 A.2d at 871.

[25] Our review of the circumstances surrounding the agreement between PHA and SMG which is at issue here leads us to conclude that it was **not** a "true" (or bona fide) lease whereby SMG conveyed to PHA the right to use the Civic Arena so the Penguins could play their home games there. Rather, it was a financing device masquerading as a lease, so as to allow Howard Baldwin to purchase the team while providing a stream of money to SMG to reimburse it for the cash infusion and for its efforts in running the facility.

A complex series of agreements and transactions occurred on October 31, 1991, which culminated in PHA becoming the owner of the NHL franchise known as the Pittsburgh Penguins.

Among other things, CAC and SMG executed, with PHA's consent, an agreement whereby CAC assigned to SMG all of CAC's rights to the Civic Arena arising out of its sublease with PAA. Contemporaneously therewith, SMG purportedly subleased the Civic Arena to PBT, which in turn transferred to PHA its interest in the Penguins along with the purported sublease it had just entered into with SMG. The term of the purported sublease was to expire on September 1, 2012, "unless terminated earlier hereunder".

According to Article III, § 315(2) of their agreement, SMG has the right under certain conditions to relocate the Penguins to an "alternative facility" of SMG's choosing. No geographical limitations were set upon the locus of the alternative facility. Nothing would seem to prohibit SMG from relocating the Penguins to an alternative facility located, say, two thousand miles from the Civic Arena. If PHA did not timely reject the alternative facility chosen by SMG, PHA and SMG were required to execute an amendment to their agreement reflecting the fact of relocation to the alternative facility. Such amendment could not, however, affect any of the terms of their agreement unless a particular term was "inapposite" relative to the alternative facility.

According to Article III, § 315(3) of their agreement, PHA has the right under certain conditions to relocate to an "alternative facility" acceptable to SMG. Should it relocate the Penguins, however, PHA must require the owner of the alternative facility to enter into a lease agreement with SMG, which then shall amend its agreement with PHA to reflect the relocation and which shall not affect any terms of the previous agreement unless a particular term was "inapposite" relative to the alternative facility. Among other things, the agreement requires PHA to guarantee SMG the stream of income it would have enjoyed at the Civic Arena had relocation not taken place.

These provisions lead us to conclude that the agreement between PHA and SMG whereby the Penguins were to play

all of their home games at the Civic Arena is not a "true"—i.e., bona fide—lease, as the concept was defined previously.

The agreement did **not** convey, grant, or demise the Civic Arena to PHA during the term of the lease. We have just seen how the above provisions of their agreement gave SMG the right (under certain conditions) to relocate the Penguins to another facility, which could be virtually anywhere. If it did so, the terms of their agreement had to be amended only to reflect the fact of relocation and to change any terms that were "inapposite" relative to the alternative facility. All other terms of the agreement, including those which provided the basis on which PHA paid SMG for permitting the Penguins to pay at the Civic Arena remained in effect.

Also, the agreement provided that PHA itself could under certain conditions relocate the Penguins to another facility. It could do so, however, only if the owner of the alternative facility first entered into a lease with SMG, which in turn would sublease the alternative facility to PHA under terms which would guarantee the stream of income SMG would have enjoyed had the Penguins remained at the Civic Arena.

In our estimation, these requirements negate the proposition that PHA in effect had purchased the Civic Arena for a specified term, one of the requirements for a lease, so that the Penguins could play there.

The matter does not end there. The requirement that a lease be for a prescribed period of time also is lacking in this instance. The term of their agreement was to expire on September 1, 2012, "unless terminated earlier". Such an indefinite term is inconsistent with the requirement that a lease be for a "prescribed period".

The agreement between SMG and PHA for use of the Civic Arena was in reality a financing device masquerading as a lease.

When Howard Baldwin came up short in his quest to purchase the Penguins from DeBartolo, he approached an individual about providing the necessary funds to enable the sale to go through. Due to this individual's ownership of a substantial portion of another NHL franchise, NHL rules prohibited this individual from contributing the needed funds in exchange for an equity interest in the Penguins or from lending the money to Baldwin. To make his participation palatable to the NHL, this individual (and others) created SMG, which then contributed $24,000,000 ostensibly in return for acquiring CAC's rights to the Civic Arena under its sublease with PAA. Its contribution in reality was a **loan** to Baldwin's group to enable them to complete their purchase of the Penguins.

The above-cited provisions of the above agreement between SMG and PHA (as successor to PBT), were inserted to provide a steady stream of payments to SMG. Even if the Penguins ceased playing in the Civic Arena and moved to another facility it ensured that PHA would fully repay SMG the funds it had loaned to Baldwin and his co-investors. We would expect to find such provisions in a financing transaction, not in a bona fide lease.

A compelling piece of extrinsic evidence in support of this conclusion is the security agreement SMG drafted which granted SMG a security interest in basically all of the Penguins assets. Despite repeated demands by SMG that it do so, neither PBT nor PHA executed the agreement. SMG would not have so acted unless it had loaned $24,000,000 to PHA and intended the so-called lease to be a financing device rather than a bona fide lease.

Both PHA and SMG urge us to take the following factors into consideration in determining whether or not the above agreement between them is a bona fide lease:

(1) whether the amount of the rent was calculated to compensate for use of the property or was based on some other purpose, such as ensuring a particular return on an investment;

(2) whether the property was purchased by the lessor specifically for the lessee's use;

(3) whether the transaction was denominated a lease to gain certain tax advantages;

(4) whether the lessee assumed obligations normally assumed by the lessor; and

(5) whether the agreement permits the lessee to purchase the property for a nominal sum at the end of the lease.

City of Olathe, Kansas v. KAR Development Associates (In re KAR Development Associates), 180 B.R. 629, 639 (D.Kan. 1995) (*citing to In re Hotel Syracuse, Inc.,* 155 B.R. 824, 838–39 (Bankr.N.D.N.Y. 1993)).

We are not convinced that these factors are relevant to determining in this instance whether or not the agreement between SMG and PHA is a bona fide lease. These factors were articulated for determining whether an agreement between SMG and PHA is a bona fide lease for purposes of 11 U.S.C. §§ 365(d)(4) and 502(b)(6). We are not here concerned with these provisions of the Bankruptcy Code but instead with whether the agreement is a bona fide lease at all under state law. In addition, these cases were concerned with rejection of equipment leases. The purported lease at issue here does not concern equipment.

To the extent these cases are relevant, they indicate on balance that the above agreement is **not** a lease for purposes of 11 U.S.C. §§ 365(d)(4) and 502(b)(6).

We already have determined that the agreement between SMG and PHA was structured as a covert financing device to ensure that SMG would receive a return on the loan it had made to enable the Baldwin-led group of investors to purchase the Penguins from DeBartolo.

SMG acquired CAC's rights under its sublease with PAA for the purpose of providing a vehicle whereby the loan it made to the Baldwin group could be disguised as a lease. It acquired the ostensible sublease so the Penguins could play in the Civic Arena and generate revenues to repay the loan.

Although calling the transaction a lease apparently did not provide any tax advantages, it was so denominated to make it palatable to the NHL. The record does not indicate whether the NHL was aware of this subterfuge.

Finally, as the purported lessee, PHA assumed the obligation of paying for certain improvements to the Civic Arena. SMG, whose purported interest in the Civic Arena was greatly enhanced by such improvements, paid nothing for them.

Based on all the foregoing, we conclude that the agreement between SMG and PHA concerning use of the Civic Arena for staging Penguins hockey games was not a "true" lease but was instead a financing device to ensure that PHA repaid a loan SMG had made to enable the group led by Howard Baldwin to purchase the Penguins.

II. Rejection Of The Lease

It is not necessary in light of the determination that the agreement between SMG and PHA is not a bona fide lease to determine whether PHA can reject it. To the extent that said agreement is a true lease, we shall consider out of an abundance of caution whether PHA may reject it in accordance with the Bankruptcy Code.

With the bankruptcy court's approval, a chapter 11 debtor-in-possession may reject an unexpired lease to which it is a party. 11 U.S.C. §§ 365(a) and 1107(a).

[26] Rejection cuts off any right of the other party to the lease to require debtor to perform and limits their claim to one for breach of contract. *University Medical Center v. Sullivan (In re University Medical Center),* 973 F.2d 1065, 1075 (3rd Cir. 1992).

[27] If the unexpired lease was not previously assumed during the bankruptcy case, the resultant breach is deemed to have occurred immediately **before** the filing of the bankruptcy petition. 11 U.S.C. § 365(g)(1). Any allowed claim arising therefrom is treated as a prepetition claim for damages. *In re Klein Sleep Products, Inc., Nostas Associates v. Costich (In re Klein Sleep Products, Inc.),* 78 F.3d 18, 26 (2d Cir.1996). The measure of the resultant damages is set at 11 U.S.C. § 502(b)(6).

[28] The appropriate standard we must apply in determining whether or not to approve rejection under § 365(a) of the Bankruptcy Code is the so-called "business judgment" test. *N.L.R.B. v. Bildisco and Bildisco (In re Bildisco),* 682 F.2d 72, 79 (3d Cir.1982), *aff'd,* 465 U.S. 513, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984).

[29] To prevail on its motion to reject, debtor must establish that rejection is in the best interest of the estate and of unsecured creditors. *In re Klein Sleep Products,* 78 F.3d at 25.

[30] We should not substitute our own judgment for that of debtors but should instead allow rejection to take place if the motion is not manifestly unreasonable and not in bad faith and would seem to enhance debtors' estate. *Four B Corp. v. Food Barn Stores, Inc. (In re Food Barn Stores, Inc.),* 107 F.3d 558, 567 n. 16 (8th Cir.1997).

[31] SMG has objected to debtors' motion to reject its sublease with SMG. According to SMG, rejection of the agreement does not pass muster under the business judgment rule. Rejection of the sublease, it insists, is not a reasonable business judgment in that it will leave the Penguins without a place to play its home hockey games next season and will result in "immediate and total devastation of fan support". We disagree.

To begin with, SMG's unarticulated premiss that the Penguins will not have a venue in which to play its home games if PHA rejects its present sublease with SMG is not necessarily true. The possibility remains that the plan proposed by SMG and Fox Sports Pittsburgh will carry the day and be confirmed over competing plans. If this occurs, we would expect that SMG will quickly negotiate a new agreement with the reorganized debtor which will have the Penguins playing in the Civic Arena next hockey season. Even if their plan is not confirmed and the Lemieux-led plan is confirmed instead, there still will remain time for the reorganized debtor and SMG to arrive at a mutually acceptable new agreement. Both sides would have powerful economic incentives to do so. The Penguins will need a facility in which to play home games. SMG will need to come to terms with the reorganized debtor or else be in material default of its lease with PAA and risk having PAA terminate the lease and deal directly with the reorganized debtor.

The matter does not end there. We also are persuaded that PHA's rejection of the present sublease is in the best interest of its bankruptcy estate and comports with the requirements of the business judgment rule. If the present agreement is not the most onerous in the NHL, it is near the top of the list.

PHA presently pays SMG between $6,000,000 and $7,000,000 per year, a tenfold increase over the rent paid to PAA by CAC and DCC, and also pays several million dollars more per year for improvements made to the Civic Arena which are included in SMG's leasehold interest. SMG pays nothing for these improvements. In addition to receiving a substantial base rent, SMG presently retains 92.5% of revenues derived from sales of programs and novelties, 100% of parking revenues, and 80% of revenues from sales of food and beverages. It also receives a substantial percentage of ticket sales for various seats and suites at the Civic Arena, of income derived from the Igloo Club, and of advertising revenues.

Not only does PHA not derive any revenue from non-hockey events staged at the Civic Arena, it also is required to compensate SMG for revenues lost by SMG as a result of decreased seating capacity due to construction of Igloo Club seats in 1997.

PHA has lost approximately $50,000,000 during the past three hockey seasons. The cost to PHA of operating under the provisions of the agreement with SMG during that same period is approximately $30,000,000, which equals some 60% of its operating losses. Rejection of the current agreement with SMG and negotiation of a new one will go a long way towards rectifying this problem.

Neither PHA nor any reorganized debtor could continue to operate for very long under the provisions of the present agreement with SMG. No feasible plan of reorganization is likely as long as the agreement remains in effect.

Even the plan of reorganization proposed by SMG and Fox Sports Pittsburgh supports this conclusion. While their plan does not propose altering any of the terms of the sublease with SMG, they do propose that PAA assume the cost of paying for improvements made to the Civic Arena and propose that the City of Pittsburgh and County of Allegheny effectively subsidize payment of amusement taxes for events held at the Civic Arena. Their proposed plan would merely shift to other creditors the burden of defraying other costs of doing business at the Civic Arena while leaving the onerous provisions of the agreement unchanged.

While SMG's contention that rejection of the sublease is not in the best interest of PHA's bankruptcy estate at first blush may appear plausible, further reflection convinces us that rejection of the sublease is the only remaining reasonable course of action available and is in the best interest of PHA's bankruptcy estate.

Rejection of the sublease will leave PHA (at least for the time being) in the admittedly perilous position of not having a place to play its home games. So doing, however, also will **maximize** the probability that a reorganized debtor will succeed in negotiating an agreement containing more favorable terms which will enable it to continue operating at the Civic Arena and to remain viable. When viewed from this perspective, it becomes apparent that PHA's request to reject the present sublease is in the best interest of its bankruptcy estate.

We are optimistic that the reorganized debtor and SMG will successfully arrive at a new agreement that is mutually acceptable to both parties while relieving the reorganized debtor of some of the intolerable provisions of the present agreement and enabling it to survive as a viable entity. While it unquestionably could happen that SMG and a reorganized debtor might not succeed in negotiating a new agreement on terms which would enable the latter to survive, SMG in that event would be in default of its agreement with PAA and would risk having its agreement with PAA terminated. It is precisely this "Sword of Damocles" hanging over the heads of both parties that makes reasonable PHA's request to reject its sublease with SMG.

PHA's rejection of its sublease with SMG may or may not result in SMG receiving rejection damages as a result of the breach that will occur. While agreeing that SMG in principle is entitled to rejection damages, the parties disagree concerning whether or not such damages are appropriate in this instance. We need not address this issue now and will not do so unless SMG submits a claim for rejection damages and an interested party objects.

An appropriate order shall issue.

Neutral
As of: April 23, 2018 3:48 PM Z

In re Pittsburgh Sports Assocs. Holding Co.

United States Bankruptcy Court for the Western District of Pennsylvania

November 23, 1999, Decided ; November 23, 1999, Filed

Jointly Administered at Bankr. No. 98-28174 BM, Chapter 11, Motion No. 99-4729M, Related To: Motion No. 99-2413M

Reporter
1999 Bankr. LEXIS 1872 *

IN RE: PITTSBURGH SPORTS ASSOCIATES HOLDING COMPANY; PITTSBURGH HOCKEY ASSOCIATES; and HBRM LLC, Debtors. PITTSBURGH SPORTS ASSOCIATES HOLDING COMPANY; PITTSBURGH HOCKEY ASSOCIATES, and HBRM LLC, Movants

Counsel: **[*1]** For PITTSBURGH SPORTS ASSOC. HOLDING CO., Debtor: James R. Walsh, Spence Custer Saylor Wolfe & Rose, Johnstown, PA.

For PITTSBURGH SPORTS ASSOC. HOLDING CO., Debtor: Robert Gerald Sable, Sable, Pusateri, Rosen, Gordon & Adams, Pittsburgh, PA.

U S TRUSTEE: Kathleen Robb, Office of the U.S. Trustee, Pittsburgh, PA.

For JOHN R. KOSKO, Creditor Committee Chairperson: Doepken, Keevican & Weiss, Pittsburgh, PA.

Judges: Bernard Markovitz, United States Bankruptcy Judge.

Opinion by: Bernard Markovitz

Opinion

ORDER OF COURT

And now this *11-23-99*, upon Joint Motion and stipulation of the Debtors and SMG Pittsburgh, L. P., the Debtors' "Motion to Reject Agreements with SMG Pittsburgh, L.P., or in the Alternative, to Determine that Agreements with SMG Pittsburgh, L.P. are Not a Lease" and SMG's Response to that Motion are withdrawn, and this Court vacates the Opinion and Order of June 18, 1999 file in this case at the above Motion number.

Bernard Markovitz

United States Bankruptcy Judge

End of Document

In re COUNTRYWIDE HOME LOANS, INC., f/k/a Countrywide Funding Corp.

No. 07–00204 TPA.

United States Bankruptcy Court, W.D. Pennsylvania.

April 1, 2008.

Background: United States Trustee (UST) filed Notice of Examination to obtain information from residential mortgage lender regarding computation of its bankruptcy claim in debtors' Chapter 13 cases, and lender objected on ground, inter alia, that Notice of Examination allegedly exceeded statutory scope of the UST's powers and duties.

Holdings: The Bankruptcy Court, Thomas P. Agresti, J., held that:

(1) the UST had authority, pursuant to statutory grant of power to appear and be heard on any issue in any bankruptcy case or proceeding, to seek and obtain a Rule 2004 examination in proper circumstances;

(2) while power granted to the UST to appear and be heard was, by its terms, specifically limited to appearing in case or proceeding, and did not include power to proceed on matters unrelated to any case or proceeding, this "case or proceeding" requirement was satisfied where notices to appear for Rule 2004 examination that the UST had issued to residential mortgage lender were issued in context of previously-filed Chapter 13 cases;

(3) UST made sufficient showing of "good cause" to obtain production from home mortgage lender, pursuant to Bankruptcy Rule 2004, of documents relating to specific accounts of individual debtor-borrowers;

(4) proposed scope of the UST's Rule 2004 examination was consistent with broad scope of Rule 2004 examinations and with level of "good cause" demonstrated by the UST ; and

(5) UST was not barred by res judicata from pursuing discovery under Rule 2004.

So ordered.

1. Statutes ⇐181(1)

Role of court when interpreting statute is to give effect to intent of Congress.

2. Statutes ⇐188, 212.6

It is presumed that Congress expresses its intent through ordinary meaning of its language, and every exercise of statutory interpretation begins with examination of plain language of statute.

3. Statutes ⇐181(2), 190

If meaning of statute is clear, and if implementation of it does not lead to absurd result, then judicial inquiry is at an end.

4. Statutes ⇐190

Just because a statutory provision may be, by itself, susceptible to differing constructions does not mean that the provision is therefore "ambiguous."

See publication Words and Phrases for other judicial constructions and definitions.

5. Statutes ⇐190, 205, 208

Plainness or ambiguity of statutory language is determined by reference to language itself, the specific context in which that language is used, and broader context of statute as whole.

6. Statutes ⇐208

Statutory context can suggest the natural reading of provision that, in isolation, might yield contestable interpretations.