Published on *The National Law Review* https://natlawreview.com

So What Does a Bankruptcy Carve-Out Clause Really Mean? Delaware Bankruptcy Court Concludes It is Not a Cap on Fees After All

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In chapter 11 bankruptcy cases, it is not uncommon for secured parties/lenders to provide a “carve-out” for various professional fees. Frequently there may be a “carve-out” for “all chapter 11 professionals” or the “carve-out” may be broken out in different amounts for the debtor’s professionals as opposed to, for example, Creditors’ Committee professionals. These “carve-outs” can often be in a Cash Collateral Order (assuming the debtor is using the secured party’s collateral) or in a DIP Order (debtor-in-possession financing). So what does a carve-out mean?

In a recent Delaware bankruptcy case, In re Molycorp, Inc., 2017 WL 56703 (Bankr. Del. Jan. 5, 2017), the DIP Lender agreed to a $250,000 “carve-out” for the fees and expenses of the professionals retained by the Creditors’ Committee. The Committee professionals filed a fee application far in excess of the “carve-out” amount, and as a result the DIP Lender objected to the fee application.

In overruling the objection, the Bankruptcy Judge concluded that the language in the DIP Order was not a “cap” on allowed fees. Moreover, the Judge distinguished the current case, which was a successful reorganization, from a failed reorganization. Had the case been a failed chapter 11, then the Judge agreed that the “carve-out” presented a limitation on how much money the Committee professionals would be entitled to out of the Lender’s collateral or money, but not so, at least not as written, in a successful reorganization.

National Law Review, Volume VII, Number 34