BANKRUPTCY COURT DECISIONS

WEEKLY NEWS & COMMENT

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NO BAR FOR POST-PETITION ATTORNEY FEES GUARANTEED UNDER PRE-PETITION CONTRACT

A 4th Circuit U.S. Court of Appeals panel has found that the Bankruptcy Code does not preclude a creditor from asserting an unsecured claim for attorneys' fees, if those fees are incurred after the filing of a bankruptcy petition but guaranteed by a pre-petition contract, reversing the contrary determination of the U.S. District Court for the Eastern District of North Carolina's decision, which had affirmed the U.S. Bankruptcy Court for the Eastern District of North Carolina, and remanding for further proceeding. (*Summit-Bridge National Investments III, LLC v. Faison,* 2019 WL 490573 (4th Cir. 2019).)

Circuit Judge Pamela Harris, writing for the unanimous appellate panel, noted "as the bankruptcy and district courts recognized, we

continued on page 2

HIGHLIGHTS

JOHNSON & JOHNSON SUPPLIER SEEKS BANKRUPTCY OVER TALC LAWSUITS

A key supplier of talc used in Johnson & Johnson's baby powder filed for Chapter 11 bankruptcy on February 13 in the wake of multibillion-dollar lawsuits alleging its products caused ovarian cancer and asbestos-related mesothelioma..... 3

CAMP FIRE VICTIMS SEEK CLASS-ACTION STATUS WITHIN PG&E BANKRUPTCY

A family that lost its home and three businesses in California's most destructive and deadliest wildfire is seeking class-action status to sue PG&E Corp. within its bankruptcy, alleging the power producer's negligence was at the root of the blaze..... 5

UST SLAMS RETAILER GYMBOREE'S EXECUTIVE BONUS PLAN

The U.S. government's bankruptcy watchdog is calling for an order rejecting an executive bonus plan proposed by children's apparel retailer Gymboree Group Inc., saying it is the kind of pay-to-stay plan that spurred changes to the Bankruptcy Code. 6

ATTORNEY FEES

The 4th U.S. Circuit Court of Appeals, reversing the district court's decision, found that the Bankruptcy Code does not bar a creditor from asserting an unsecured claim for attorney fees, if those fees are incurred after the bankruptcy petition filing but guaranteed by a pre-petition contract. 1

FORECLOSURE

A new Florida law creates a rebuttable presumption in mortgage foreclosure actions that debtors who state an intent to surrender their property in their bankruptcy cases have waived any defense to foreclosure..... 7

HOT CASE

The 10th U.S. Circuit Bankruptcy Appellate Panel reversed the bankruptcy court's rulings that the debtors in two Chapter 7 cases could not amend their schedules in their re-opened cases. It joins a number of courts in holding "the debtor, under Rule 1009, may amend schedules without limitation of whether the case is open or reopened after closing."..... 13

CASES REPORTED

Supreme Court Docket..... 8

New Judicial Decisions 10

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are not the first courts to confront this issue." She added that "bankruptcy and district courts long have wrestled with this question, disagreeing as to whether creditors may assert unsecured claims for post-petition attorneys' fees based on pre-petition contracts," referencing *In re Augé,* 559 B.R. 223, 229 (Bankr. D.N.M. 2016).

"From 2003 through 2012, Branch Banking and Trust Company (BB&T) loaned $2.1 million to Ollie William Faison. To effectuate the loans, Faison signed three promissory notes secured by deeds of trust for farmland that Faison owned in North Carolina. Faison agreed that if the notes were placed with an attorney for collection, he would pay 'all costs of collection, including but not limited to reasonable attorneys' fees,'" the panel's opinion said.

Faison filed a petition for relief under Chapter 11 of the Bankruptcy Code in January 2014. During the ensuing bankruptcy proceedings, BB&T filed three proofs of claims for the outstanding principal and interest due on its promissory notes as of the date of Faison's petition. "Those three claims were entitled to preferential treatment under the Code because the promissory notes underlying them were secured by collateral – namely, Faison's farmland in North Carolina," the opinion said, referencing *Welzel v. Advocate Realty Investments, LLC (In re Welzel),* 275 F.3d 1308 (11th Cir. 2001). The panel noted, "that preferential treatment meant that BB&T's claims would be satisfied from the value of the farmland before any distributions were made to lower-priority unsecured claims," referencing *Stubbs & Perdue v. Angell (In re Anderson),* 811 F.3d 166 (4th Cir. 2016).

"BB&T assigned its interest in the promissory notes – and in turn, the three bankruptcy claims based on those notes – to SummitBridge National Investments III, LLC (SummitBridge) in January 2015. As holder of the notes, SummitBridge began to defend the three claims in Faison's bankruptcy proceedings, incurring attorneys' fees in the process."

"Almost two years after BB&T assigned its claims to SummitBridge, Faison proposed a plan for repaying his creditors, ultimately approved by the bankruptcy court. The plan treated SummitBridge's three claims as one aggregate secured claim for $1,715,000, the value of the farmland securing the three notes. That amount was enough to cover the outstanding principal and pre-petition interest on the three notes, as well as a portion of SummitBridge's post-petition interest and attorneys' fees. To the extent that SummitBridge had incurred excess attorneys' fees not covered by the farmland's value, the plan made clear, SummitBridge could file an unsecured claim to recover those fees," the panel explained.

SummitBridge filed the claim at issue here, an unsecured claim against Faison's estate for the remainder of the post-petition attorney fees it had incurred. Faison objected to SummitBridge's claim on two alternative grounds. "First, Faison argued that SummitBridge's underlying contractual claim for attorneys' fees was unenforceable under North Carolina law because SummitBridge had failed to comply with state-law notice requirements. And second, Faison raised the federal-law issue we address today, arguing that 'the Bankruptcy Code does not provide for allowance of an unsecured claim for post-petition attorneys' fees or costs,'" the panel added.

"The bankruptcy court addressed only Faison's federal-law argument, agreeing with him that the Code does not allow creditors like SummitBridge to assert unsecured claims for post-petition attorneys' fees. SummitBridge appealed the bankruptcy court's order to the district court, and the district court affirmed."

No basis for barring unsecured claims for post-petition attorneys' fees arising out of pre-petition contracts

The panel noted "the Supreme Court provided important guidance in *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co.,* 549 U.S. 443 (2007)." There, the Court reasoned, "[W]e generally presume that claims enforceable under applicable state law will be allowed in bankruptcy unless they are expressly disallowed," citing *Travelers*.

"In the years since *Travelers* was decided, both the Second and Ninth Circuits have concluded that there is no basis in the Code for barring unsecured claims for post-petition attorneys' fees arising out of pre-petition contracts, the panel explained, citing *Ogle v. Fidelity & Deposit Co. of Md.,* 586 F.3d 143 (2d Cir. 2009).

BANKRUPTCY COURT DECISIONS

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Faison argued, and the bankruptcy and district courts agreed, that creditors are barred from asserting such claims by § 502(b) and § 506(b) of the Code. The panel disagreed, concluding that "neither expressly disallows a creditor like SummitBridge from asserting an unsecured claim for post-petition attorneys' fees based on a valid pre-petition contract."

Travelers "proceeds along lines that, reasonably extended, would suggest ... that section 502(b)'s requirement – that the court 'shall determine the amount of such claim ... as of the date of the filing of the petition' – does not bar recovery of post-petition attorneys' fees," the panel concluded, citing *Ogle*.

The court noted "§ 506(b) expressly allows creditors with over-secured claims to add attorneys' fees to their claims, Faison argues, implies that creditors who are unsecured or, as here, under-secured may *not* assert such claims."

"The *Travelers* Court made clear that claims enforceable under state law are presumed allowable, and that this presumption may be overcome only by an *express* disallowance. *See* 549 U.S. at 452, 127 S.Ct. 1199 ('[W]e generally presume that claims enforceable under applicable state law will be allowed in bankruptcy unless they are expressly disallowed.'). And § 506(b) never mentions, let alone expressly disallows, unsecured claims for post-petition attorneys' fees," the panel explained. It concluded, that "under *Travelers,* the question before us is whether there is anything in § 506(b) that could be deemed an express disallowance of unsecured claims for post-petition attorneys' fees. Like the Second and Ninth Circuits, we think there is not."

Faison also made an appeal to policy considerations. He asserted SummitBridge's status as a secured creditor, guaranteed recovery on its principal. He argued that it would be unfair "to allow SummitBridge also to assert unsecured claims for attorneys' fees, because those claims would reduce the pool of assets available to wholly unsecured creditors who have yet to recover any principal, let alone fees. And that result would be inconsistent with a central purpose of the Code, which is to secure equality among similarly situated creditors," Faison asserted.

The panel found no basis in the text of the relevant Code provisions for Faison's particular fairness argument.

"What matters under § 502 and § 506(b) is the status of a given claim, not the status of the creditor asserting it: Under § 502, it is a 'claim' that is allowed or disallowed, see 11 U.S.C. § 502(b) (directing that a 'claim' shall be allowed unless subject to an enumerated exception), and under § 506(b), an 'allowed secured claim' will include reasonable attorneys' fees under specified circumstances, see id. § 506(b)," the panel concluded.

The panel noted that a "basic tenet of bankruptcy law is that secured creditors are privileged over unsecured creditors."

A second basic principle of federal bankruptcy law is "that state law governs the substance of claims," the panel said, adding "allowing creditors, like SummitBridge, who have bargained specifically for attorneys' fees under state law to enforce those rights in bankruptcy is fully consistent with that principle, even if it reduces the pool of assets otherwise available."

The panel found that allowing those creditors "to assert unsecured claims for those fees, far from 'providing an undeserved bonus for one creditor at the expense of others,' simply 'effectuates the bargained-for terms of the loan contract,'" citing *Ogle*.

The full text of *SummitBridge National Investments III, LLC v. Faison* will appear in the next issue of BCD.

FILINGS

JOHNSON & JOHNSON SUPPLIER SEEKS BANKRUPTCY OVER TALC LAWSUITS

Reuters (February 13) – A key supplier of talc used in Johnson & Johnson's baby powder filed for Chapter 11 bankruptcy on February 13 in the wake of multibillion-dollar lawsuits alleging its products caused ovarian cancer and asbestos-related mesothelioma.

Imerys Talc America, the U.S. unit of French group Imerys SA, said it filed for bankruptcy because it lacks the financial clout to defend against nearly 15,000 lawsuits over its talc mineral product, which is also used in cosmetics.

Imerys said that while it continued to believe the lawsuits are without merit, the prospect of rising settlement and defense costs over the next few years prompted the decision to file for bankruptcy.

They also cite a multibillion-dollar verdict against Johnson & Johnson and the ensuing media attention as factors that led to the Chapter 11 filing.

In July, a Missouri jury ordered J&J to pay a record $4.69 billion to 22 women who said asbestos in talc caused ovarian cancer. J&J has said it is appealing that verdict.

Imerys said it had settled for an undisclosed amount prior to the trial.

Imerys also attributed its filing to a dispute over an indemnity agreement. Imerys said some of its supply agreements required J&J to indemnify Imerys, but it said the U.S. healthcare conglomerate had refused to do.

Imerys and J&J have repeatedly denied the allegations about talc, saying numerous studies and tests by regulators worldwide have shown their talc to be safe.

J&J declined to comment on Imerys Talc America's Chapter 11 filing and on the allegations against it over the indemnification agreements.

Reuters on December 14 published a report detailing that J&J knew that the talc in its raw and finished

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powders sometimes tested positive for small amounts of asbestos from the 1970s into the early 2000s – test results it did not disclose to regulators or consumers.

J&J has said that its talc products do not contain asbestos.

Imerys said bankruptcy provided the best avenue for addressing its talc liability.

Bankruptcy provides Imerys a single forum to settle the widespread litigation. A similar strategy has been used by numerous companies facing litigation over faulty breast implants, products containing asbestos and recalled automotive airbags.

Two North American subsidiaries of Imerys, Imerys Talc Vermont and Imerys Talc Canada, also filed for Chapter 11 on February 13.

Total revenue in 2018 for Imerys Talc America was $174 million, according to records filed with the Delaware Bankruptcy Court.

Company to establish a trust

Imerys said in court documents it plans to use bankruptcy to establish a trust to pay personal injury claims, a strategy typically used by companies facing asbestos claims.

When the company leaves bankruptcy, current and future litigation claims will be channeled to the trust rather than Imerys, which would be freed from future lawsuits over talc.

Imerys could finance the trust with the disputed indemnity agreement with J&J and its right to insurance proceeds, which the company estimated could be worth around $700 million. It said it also has a right to an undetermined portion of up to $2 billion of Johnson & Johnson's insurance.

However, the company said some of the policies exclude asbestos claims and none of them cover claims in which the first exposure occurred after 1986. In addition, punitive damages are often not covered.

Imerys said it could exhaust some of those insurance proceeds within the first half of this year defending cases.

Court records show that the defense of a single case can cost $4 million.

As a co-defendant with J&J, Imerys has faced at least a dozen U.S. jury trials over allegations that its talc causes ovarian cancer or mesothelioma.

While some juries awarded damages as high as $2.75 million against Imerys Talc America, many verdicts were later thrown out on appeal.

Imerys and J&J have also won several trials or had cases result in mistrials due to hung juries.

The verdicts against the company are all still on appeal and Imerys has not yet paid any of those verdicts. However, the company settled at least four cases before they went to trial for undisclosed amounts.

Mark Lanier, a Texas-based lawyer representing many of the talc plaintiffs, on Wednesday said Imerys Talc America's bankruptcy would not change the litigation.

"We have always targeted our cases against J&J and Colgate Palmolive, the companies that put the asbestos laced talc into the products," Lanier said.

Colgate-Palmolive is another defendant in the U.S. talc litigation. The New York-based company sold Cashmere Bouquet, a cosmetic talcum powder, from 1871 to 1995.

Colgate did not respond to a request for comment. It has denied allegations that its talc products cause cancer.

(Reporting by Tom Hals and Tina Bellon. Additional reporting by Tamara Mathias in Bengaluru. Editing Bill Berkrot.)

DITECH BACK IN BANKRUPTCY, WILL PURSUE RESTRUCTURING WITH SALE OPTION

Reuters (February 12) – Mortgage originator Ditech Holding Corp. sought bankruptcy protection on February 11 a year after emerging from a previous bankruptcy, saying it has a deal with senior creditors to slash more than $800 million of its $961 million in term loan debt after suffering a cash crunch and failing to find a buyer.

Ditech in a filing in U.S. Bankruptcy Court for the Southern District of New York said its term loan lenders will take ownership of a reorganized company under provisions of their restructuring support agreement.

The agreement also provides a "toggle" feature, a company spokesman noted, providing Ditech with funding for continuing its effort to find a buyer during its Chapter 11.

Ditech President and Chief Executive Thomas Marano in a statement said the marketing effort will run in parallel with a court-supervised restructuring, which has commitments for loans worth up to $1.9 billion.

"We will continue to evaluate a broad range of options with the goals of maximizing value and creating the best path forward for our business," Marano said.

Ditech, which traces its roots to 1958 when it was established as a financing unit of coal producer Walter Energy Inc., previously sought bankruptcy protection as Walter Investment Management Corp in November 2017, also with a prepackaged restructuring plan to reduce its debt by about $800 million.

The Fort Washington, Pennsylvania-based company, which also services mortgages, emerged from that Chapter 11 last February and soon ran into financial

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difficulty and uncertainty about future demand, including for mortgage originations and reverse mortgages.

Rising interest rates also hurt refinancings, Ditech Chief Financial Officer Gerald Lombardo said in court papers.

"As interest rates have risen, less borrowers are refinancing loans in a higher interest rate environment, resulting in lower origination volume," Lombardo said.

Last June, Ditech began evaluating its options and within a few months was considering filing for bankruptcy protection again after trying to find a buyer and receiving bids that fell short of its needs.

Lenders signed on to the restructuring support agreement that Ditech began negotiating last December hold nearly $737 million in term loans. They are represented by Kirkland & Ellis and have retained FTI Consulting Inc. as their financial advisor.

Ditech's legal counsel is Weil Gotshal & Manges. The company also has hired Houlihan Lokey as its investment banking debt restructuring advisor and AlixPartners LLP as financial advisor.

(Reporting by Jim Christie.)

NEWS

CAMP FIRE VICTIMS SEEK CLASS-ACTION STATUS WITHIN PG&E BANKRUPTCY

Reuters (February 15) – A family that lost its home and three businesses in California's most destructive and deadliest wildfire is seeking class-action status to sue PG&E Corp. within its bankruptcy, alleging the power producer's negligence was at the root of the blaze.

November's Camp Fire leveled the town of Paradise in a fast-moving inferno, destroying the home of Julia and David Herndon, their son, daughter and her partner, the named plaintiffs in the class-action complaint filed on February 13 as an adversary action against PG&E in its Chapter 11 bankruptcy.

According to the complaint, the first of its kind in PG&E's bankruptcy, the company should face a jury trial for damages stemming from the Camp Fire because it did not adequately maintain power lines or cut back trees to limit the potential for sparking wildfires.

San Francisco-based PG&E also failed to take measures such as shutting off power lines during windy weather to reduce wildfire risk from its "unsafe" equipment, the complaint said.

The family said the cause of the Camp Fire "fits a familiar narrative: PG&E disregarded public safety by improperly operating and maintaining its electrical infrastructure and equipment, as it had numerous times before."

"Despite notice of its past failures and even public reprimand, PG&E has continued to cut corners and elevate profits over public safety, and it has continued to operate dangerous equipment without adequate risk management practices in place," the complaint alleged.

Investigators with the California Department of Forestry and Fire Protection, or CalFire, concluded PG&E's equipment did not cause the Tubbs Fire of October 2017 that killed 22 people. It was part of a conflagration of more than 170 fires that burned 245,000 acres.

But CalFire investigations are ongoing into whether PG&E's equipment sparked other blazes, including last year's Camp Fire. It killed 86 people and helped lift PG&E's estimated wildfire liabilities to more than $30 billion, pushing the company to seek Chapter 11 bankruptcy protection last month.

An adversary proceeding could actually prove to be a benefit for PG&E and Camp Fire victims alike as it could avert litigation potentially getting transferred to state court and may speed up a negotiated settlement, said Tom Warren, a lawyer for the plaintiffs.

"Ultimately, the way the bankruptcy is going to be resolved is by the debtor working with creditors," Warren said. "In this particular situation, it seems like the most efficient way to get the case resolved."

PG&E, which mentioned establishing a trust for wildfire victims, was not available for comment.

(Reporting by Jim Christie.)

COURT FAULTS PUERTO RICO BOARD APPOINTMENTS, KEEPS BANKRUPTCY ALIVE

Reuters (February 15) – A U.S. Appeals Court ruled on Friday that members of Puerto Rico's federally created oversight board were unconstitutionally appointed but declined to dismiss the bankruptcy cases the board filed for the U.S. commonwealth.

The ruling allows the island's 2017 federal court cases seeking to restructure about $120 billion of debt and pension obligations to continue and leaves court-approved restructuring deals in place.

The U.S. Court of Appeals for the First Circuit set a 90-day period to allow President Donald Trump and the U.S. Senate to constitutionally validate the appointments or reconstitute the board.

U.S. District Court Judge Laura Taylor Swain, who is hearing the island's bankruptcy, ruled in July that the creation by the U.S. Congress of the oversight board under a law known as PROMESA and the appointment of the board's members did not violate the U.S. Constitution.

The appeals court disagreed, ruling the board members are principal U.S. officers and should have been appointed by the president "with the advice and consent of the Senate."

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Creditors of the bankrupt island, including Aurelius Investment LLC and bond insurer Assured Guaranty Corp, had sued, claiming a violation of the U.S. Constitution's Appointments Clause and seeking a dismissal of the commonwealth's Title III bankruptcy cases.

Under the 2016 federal PROMESA law, then-President Barack Obama appointed six board members from lists of candidates recommended by Congress, as well as a seventh member. The appointments were not subject to Senate confirmation.

PROMESA gave the board authority to push fiscally struggling Puerto Rico into a court-supervised restructuring akin to bankruptcy.

The appeals court was wary about voiding the oversight board's actions, pointing to "innocent third parties" who have relied on them.

"In addition, a summary invalidation of everything the board has done since 2016 will likely introduce further delay into a historic debt restructuring process that was already turned upside down once before by the ravage of the hurricanes that affected Puerto Rico in September 2017," the ruling said.

Jose Cedeno, a spokesman for the oversight board, said the appeals court ruling was being evaluated and that the board was considering legal options.

Last week, Judge Swain approved a plan of adjustment restructuring about $17 billion of Puerto Rico's sales tax-backed debt. In November, a consensual deal with creditors over about $4 billion of debt related to the island's Government Development Bank won court approval.

(Reporting by Luis Valentin Ortiz in San Juan and Karen Pierog in Chicago. Editing by Matthew Lewis.)

EDDIE LAMPERT STEPS DOWN AS CHAIRMAN OF SEARS' BOARD

Reuters (February 14) – Eddie Lampert will step down as chairman of Sears Holdings Corp.'s board, effective immediately, a company filing showed on February 14.

Lampert's resignation relates to the completion of the "going concern" transaction and is "not the result of any disagreement with the company on any matter relating to the company's operations, policies or practices," according to the filing.

ESL Investments, Lampert's hedge fund, won a bankruptcy auction last month to buy the once iconic U.S. retailer after presenting an improved offer of $5.2 billion.

Lampert, who stepped down as chief executive officer of the company when it filed for bankruptcy last year, had earlier said he would hire a new chief to lead the company.

Kunal Kamlani – president of ESL Investments – also stepped down from the board, the company said.

(Reporting by Nivedita Balu in Bengaluru. Editing by Anil D'Silva.)

UST SLAMS RETAILER GYMBOREE'S EXECUTIVE BONUS PLAN

Reuters (February 13) – The U.S. government's bankruptcy watchdog is calling for an order rejecting an executive bonus plan proposed by children's apparel retailer Gymboree Group Inc., saying it is the kind of pay-to-stay plan that spurred changes to the Bankruptcy Code.

The U.S. Trustee in a filing on February 12 in U.S. Bankruptcy Court in Richmond, Virginia, blasted Gymboree's $2.2 million key employee incentive plan, taking issue with it for offering up to $400,000 for one executive of the retailer's Janie and Jack brand.

"The fact pattern before the court is precisely why Congress was driven in 2005 to make sweeping changes to the Bankruptcy Code in order to provide for the restriction of bonus and severance payments to a Chapter 11 debtors' senior executives, officers, and managers," the trustee said.

It argued San Francisco-based Gymboree has failed to show bonuses for its Janie and Jack executive are "primarily incentive based."

Bonuses for executives have long been a source of controversy in Chapter 11, with critics arguing they serve as retention plans for insiders who can slash payrolls during bankruptcy.

In 2005, Congress revised the Bankruptcy Code to do away with retention payments. KEIPs emerged as a way to reward insiders, but debtors must prove the plans pay for performance rather than simply provide retention payments.

According to the trustee, Gymboree is trying to reward a single insider to stay as it runs going-out-of-business sales at its Gymboree and Crazy 8 stores while keeping its Janie and Jack stores open to look for a buyer for the brand.

The insider is not required under the KEIP to do anything for the sale of Janie and Jack other than stay on until the deal goes through, the trustee said.

The trustee and Gymboree, which sought Chapter 11 bankruptcy protection in January for the second time in almost two years, were not available for comment.

The retailer in a February 5 motion seeking approval of its KEIP said its Janie and Jack brand is its "crown jewel" and has already attracted significant interest from potential bidders.

Gymboree has blamed its bankruptcy on an "unanticipated degree of decline of the brick-and-mortar retail industry" making it difficult to sustain its roughly $212 million in debt.

The brand has a stalking-horse bidder in Special Situations Investing Group, an affiliate of Goldman

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Sachs, which will put a floor on offers in anticipation of an auction and keeping officers and managers eligible for the KEIP focused on its sale is essential, Gymboree said.

Gymboree received a commitment for $30 million debtor-in-possession financing from Goldman Sachs Specialty Lending Holdings Inc. and SSIG.

Gymboree argued it especially needs incentives for the brand's senior vice president and general manager, adding the executive will not get a bonus if the brand is sold to Special Situations.

If another buyer emerges, the executive will get a $200,000 bonus, and if the purchase price tops $100 million the payout climbs to $400,000.

(Reporting by Jim Christie.)

GAS PRODUCER ARSENAL AND UST BATTLE OVER PLAN

Reuters (February 12) – Bankrupt natural gas producer Arsenal Energy Holdings LLC on February 11 argued for an order approving its prepackaged reorganization plan over objections by the U.S. Trustee, which questions whether the proposal is feasible.

Arsenal in a filing in U.S. Bankruptcy Court in Delaware said the objection by the government's bankruptcy watchdog is "wholly without merit," adding the plan has overwhelming support from the company's stakeholders.

Arsenal sought Chapter 11 protection last week with a pre-packaged reorganization plan after some of its stakeholders did not support an effort to refinance its debt.

The plan, backed by over 93 percent of noteholders and 100 percent of common equity holders, will give noteholders 100 percent of the reorganized company's Class A common units. Existing common equity holders will get 100 percent of the reorganized company's Class B common units.

The U.S. Trustee has focused on a part of the plan involving nearly $117 million of debt that will not be restructured while "seemingly ignoring the fact that approximately $861 million in subordinated note claims will be converted to equity," Arsenal said.

The Pittsburgh-based company, which operates 77 natural gas wells in the Appalachian Basin, also argued its plan provides a path for emerging from bankruptcy quickly and staying business.

"The feasibility risk is also contradicted by the market," Arsenal said, noting lenders have extended an additional $110 million in loans and have agreed to refinance the debt of its subsidiaries.

"Evidently, those sophisticated parties believe in the feasibility of the plan," Arsenal, which aims for its reorganization plan to be effective no later than March 21, said.

The U.S. Trustee's office in court papers last week criticized Arsenal's "warp speed" timeline for having its Chapter 11 plan confirmed on February 13 and said it doubted the plan will work.

The bankruptcy watchdog said it was particularly concerned about the $117 million in debt that will be left on the company's books and that matures in October 2020.

"Based on its projections, and despite envisioning a significant expansion of its business, the debtor may be unable to satisfy the secured debt at maturity," the U.S. Trustee said, adding that Arsenal assumes it will be able to refinance or extend payment on the debt.

The U.S. Trustee also said it doubts Arsenal can meet revenue projections while making $684 million in capital expenditures.

The U.S. Trustee's office and Arsenal were not available for further comment on their dispute.

(Reporting by Jim Christie.)

FORECLOSURE

FLORIDA LAW PRESUMES DEBTORS WHO INTEND TO SURRENDER WAIVE FORECLOSURE DEFENSE

A new Florida law creates a rebuttable presumption in mortgage foreclosure actions that debtors who state an intent to surrender their property in their bankruptcy cases have waived any defense to foreclosure. This presumption is contingent on the debtor receiving a discharge without withdrawing the stated intention.

Fla. Stat. § 702.12, which applies to any foreclosure action filed on or after Oct. 1, 2018, also allows a lienholder in a mortgage foreclosure action to submit any document the debtor filed under penalty of perjury in the bankruptcy case for use as an admission by the debtor/defendant.

"Bankruptcy courts have consistently held that borrowers who have received bankruptcy protection by announcing their intention to surrender their mortgage property have forfeited their right to contest the foreclosure," observed William L. Anderson, a litigator with Jimerson & Birr in Jacksonville, Fla.

"Bankruptcy courts are willing to sanction borrowers who attempt to 'have their cake and it too' when they contest the state court foreclosure proceedings. *See In re Elowitz*, 550 B.R. 603 (Bankr. S.D. Fla. 2016)."

While lenders could seek relief in the bankruptcy court, doing so added more time to the foreclosure process.

Lenders could also seek relief directly from the state court by asking the court to apply judicial estoppel to preclude the assertion of affirmative defenses or counterclaims.

"Several District Courts of Appeal have held that when a borrower declares their intention to surrender their interest in mortgaged real property, the borrower is precluded from taking overt action to defend against the foreclosure," Anderson said. For examples, he referenced *Clay County Land Trust v. HSBC Bank USA, N.A. for FBT Securitization Trust 2005-3*, 219 So. 3d 1015 (Fla. 1st DCA 2017); and, *Rivera v. Bank of America, N.A. ex rel. BAC Home Loans Servicing, L.P.*, 190 So. 3d 267 (Mem.) (Fla. 5th DCA 2016).

However, this approach does not present consistent results because courts have a great deal of discretion when it comes to applying judicial estoppel.

Now, Section 702.12 presents a clear roadmap for courts to follow when debtors file bankruptcy, state an intention to surrender their homes, and receive a discharge without changing their stated intention.

"Once the lender moves the trial court to judicially notice the bankruptcy proceedings, the trial court must take note of the same. Then, the ball is the borrower's court and the borrower must present some argument or proof as to why they should be able to defend against the foreclosure," Anderson said.

"This removal of discretion and clear mandate on how the trial court is to proceed should expedite foreclosure proceedings and provide a predictable set results for lenders."

Anderson cautions that while Section 702.12 enables the foreclosure process to move more quickly, the lender must still go through the necessary steps to obtain a foreclosure judgment. Lenders should know which bankruptcy documents they need to introduce, and outline for the trial court how the bankruptcy documents clearly demonstrate that the debtor is prevented from raising a defense.

"A borrower could still object to a lender's evidence at trial or make legal arguments that the lender failed to prove the requisite elements of foreclosure, without running afoul of judicial estoppel. Even if the trial court utilizes Section 702.12, a lender should be prepared for objections to evidence at trial," Anderson said.

ANNOUNCEMENT

JONATHAN I. LEVINE JOINS ARNOLD & PORTER IN NEW YORK

Jonathan I. Levine has joined Arnold & Porter as a partner in the firm's Bankruptcy and Restructuring practice. He will be resident in the firm's New York office.

Levine represents financial investors, debtors, and official and ad hoc creditors and equity committees in complex Chapter 11 reorganizations and out-of-court restructurings.

He was named a New York Rising Star in Bankruptcy & Creditor/Debtor Rights by Metro Magazine from 2011-2015.

Levine earned his JD from the University of California, Los Angeles and his BA from Stanford University.

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U.S. SUPREME COURT DOCKET

15-1509*	U.S. Bank National Association, Trustee, et al. v. The Village at Lakeridge, LLC, et al., 814 F.3d 993, 62 BCD 44 (9th Cir.) ISSUE: Standard of review of determination concerning non-statutory insider status.	Cert. filed 06/13/16 Review granted 03/27/17 Argued 10/31/17 Decided 03/05/18
16-317	Deutsche Bank Trust Co. Americas, et al. v. Robert R. McCormick Foundation, et al., 818 F.3d 98 (2d Cir.) ISSUE: Does presumption against federal preemption of state law apply in bankruptcy – Section 546(e).	Cert. filed 09/09/16
16-784*	Merit Management Group LP v. FTI Consulting Inc., 830 F.3d 690, 62 BCD 250 (7th Cir.) ISSUE: Whether Section 546(e) prohibits avoidance of transfer by or to financial institution without regard to whether institution has interest in property.	Cert. filed 12/16/16 Review granted 05/01/17 Argued 11/06/17 Decided 02/27/18
16-1215*	Lamar, Archer & Cofrin, LLP v. R. Scott Appling, 848 F.3d 953, 63 BCD 200 (11th Cir.) ISSUE: Whether and, if so, when statement concerning specific asset can be statement respecting financial condition.	Cert. filed 04/11/17 Review granted 01/12/18 Argued 04/17/18 Decided 06/04/18

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17-1653	Town Center Flats, LLC v. ECP Commercial II LLC, unpublished (6th Cir.) ISSUE: Nonparty to foreclosure proceeding buys property after redemption period expired – Deemed redemption.	Cert. filed 06/05/18 Review denied 10/1/18
17-1657*	Mission Product Holdings, Inc. v. Tempnology, LLC, 879 F.3d 389, 65 BCD 23 (1st Cir.) ISSUE: Whether debtor-licensor's rejection of license agreement terminates licensee's rights.	Cert. filed 06/11/18 Review granted 10/26/18
17-1696	Michael Thomas Lewis v. Pennsylvania Higher Education Assistance Agency, et al., unpublished (6th Cir.) ISSUE: Section 523(a)(8) – Constitutionality of decision of court of appeals.	Cert. filed 06/21/18 Review denied 10/1/18
18-10	Stephen J. Anderson and Melanie Anderson v. Gary L. Rainsdon, unpublished (9th Cir.) ISSUE: Whether Chapter 7 trustee a "United States officer or employee sued in official capacity" – Fed. R. App. 4(a)(1)(B).	Cert. filed 05/25/18 Review denied 10/1/18
18-25	Edward Mandel v. Steven Thrasher and Jason Coleman, unpublished (5th Cir.) ISSUE: Model of damages in trade-secret misappropriation case.	Cert. filed 06/29/18 Review denied 10/1/18
18-27	Estate of Juanita Jackson, et al. v. Rubin Schron, 873 F.3d 1325 (11th Cir.) ISSUE: Can bankruptcy courts use All Writs Act to expand their jurisdiction beyond Bankruptcy Code?	Cert. filed 06/29/18 Review denied 10/1/18
18-92	David V. Perry v. Bruce Kriegman, unpublished (9th Cir.) ISSUE: Constitutionality of Ponzi scheme presumption.	Cert. filed 07/16/18 Review denied 10/1/18
18-135	New Products Corp. v. Thomas R. Tibble, unpublished (6th Cir.) ISSUE: Is trustee insulated from liability for loss of estate property caused by trustee's negligence?	Cert. filed 07/23/18 Review denied 10/1/18
18-141	Allana Baroni v. CIT Bank N.A., unpublished (9th Cir.) ISSUE: Can party prove it is a "creditor" by possessing original note indorsed in blank?	Cert. filed 07/17/18 Review denied 10/1/18
18-142	Allana Baroni v. The Bank of New York Mellon, unpublished (9th Cir.) ISSUE: Can party prove it is a "creditor" by possessing original note indorsed in blank?	Cert. filed 07/17/18 Review denied 10/9/18
18-244	Charles E. Woide and Susannah C. Woide v. Federal National Mortgage Assoc., unpublished (11th Cir) ISSUE: Whether rescission effectuated upon mailing of notice where no challenge raised within 20 days of receipt.	Cert filed 08/20/18 Review denied 11/13/18
18-271	Zachary N. Trost and Kimberly A. Trost v. Sherry Trost, unpublished (6th Cir.) ISSUE: Under Kawaauhau what is sufficient evidence wrongdoer intended consequences of act?	Cert. filed 08/28/18 Review denied 11/05/18
18-299	Ross Harry Briggs v. The Honorable Charles E. Rendlen, 888 F.3d 930, 65 BCD 144 (8th Cir.) ISSUE: Must Article III judge resolve federal claim intertwined with bankruptcy?	Cert. filed 08/29/18 Review denied 11/05/18
18-331	Rafael Pabon Ortega v. Isabel Llompart-Zeno, et al., unpublished (1st Cir.) ISSUE: Whether automatic stay incorporated into PROMESA unconstitutional as applied to suspend civil rights action.	Cert. filed 09/11/18

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18-489*	Bradley Weston Taggart v. Shelley A. Lorenzen, et al., 888 F.3d 438, 65 BCD 145 (9th Cir.) ISSUE: Whether creditor's good-faith belief that discharge injunction does not apply precludes finding of civil contempt.	Cert. filed 10/15/18 Review granted 01/04/19
18-532	Sixty-01 Association of Apartment Owners v. Penny D. Goudelock, 895 F.3d 633, 65 BCD 248 (9th Cir.) ISSUE: Discharge of condo fees accruing after Chapter 13 case filed where debtor retains ownership.	Cert filed 10/09/18 Review denied 11/19/18
18-560	Peaje Investments LLC v. Financial Oversight and Management Board for Puerto Rico, 899 F.3d 1, 66 BCD 2 (1st Cir.) ISSUE: Whether lien on highway toll revenues a "statutory lien."	Cert. filed 10/26/18
18-668	Peggy A. Berg v. Social Security Administration, 900 F.3d 864, 66 BCD 35 (7th Cir.) ISSUE: Section 553(b) – Creditor "offsets a mutual debt owing" – "date of such setoff."	Cert. filed 11/15/18
18-747	Sonja Ritter v. Lois I. Brady, 730 Fed.Appx. 529 (9th Cir) ISSUE: Whether Dewsnup v. Timm should be overruled.	Cert. filed 12/02/18
18-905	Mastrogiovanni Schorsch & Mersky, P.C. and Rosa R. Orenstein v. Edward Mandel, unpublished (5th Cir.) ISSUE: Is a federal court authorized to invade a state court's exclusive province to appoint, instruct and control its own appointed receivers, by reinterpreting non-appealable state court receivership orders in contravention of Palmer v. Texas, 212 U.S. 118 (1909)?	Cert. filed 01/08/19
18-909	Valarie Davis v. Fiat Chrysler Automobiles U.S., LLC, unpublished (6th Cir.) ISSUE: Whether a plaintiff who fails to disclose her civil claim in bankruptcy is barred, under the doctrine e of judicial estoppel, from pursuing her claim – even where there is no evidence that the plaintiff made the omission in bad faith.	Cert. filed 01/09/19
18-941	Davis v. Tyson Prepared Foods, Inc., ISSUE: Should the Court grant certiorari to resolve an entrenched and acknowledged conflict among the courts of appeals over whether section 362(a) applies to a creditor's passively holding or obtaining an interest in property of the debtor or the estate?	Cert. filed 01/14/19

NEW JUDICIAL DECISIONS

COURT OF APPEALS

COURT APPOINTED TRUSTEE, AS AN ARM OF THE COURT, ENTITLED TO ABSOLUTE OR QUALIFIED IMMUNITY

Case name: *In re Ondova Limited Co.,* 2019 WL 419380, 66 BCD 207 (5th Cir. 2019).

Ruling: The 5th Circuit U.S. Court of Appeals affirmed the district court's dismissal under Rule 12(b)(6) and the denial of leave to file an amended complaint.

What it means: Trustees are entitled to absolute immunity for all actions taken pursuant to a court order and qualified immunity for personal harms caused by actions take within the scope of their official duties.

Summary: Jeffrey Baron appealed the district court's dismissal of his bankruptcy "adversary proceeding" against Daniel J. Sherman, the trusteed responsible for administering the bankruptcy estate of Ondova Limited Co. Baron also appealed the denial of his motion for leave to amend. The district court adopted the bankruptcy judge's report and recommendation. According to the panel's opinion, Baron had not plausibly alleged any actions not covered by absolute or qualified immunity, either in his original complaint or in his proposed amended complaint. Baron's factual allegations on appeal were "limited to Sherman's decision to seek a receivership over him, alleged falsehoods or misrepresentations during the receivership process, and subsequent use of the receivership to liquidate assets." The panel found that, as had been acknowledged by the bankruptcy judge, all property seizures that Baron complained of were done under a receivership

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order and were actions taken by the receiver rather than the trustee. The panel noted that "between the date Sherman was appointed trustee and the date Baron filed his adversary proceeding, the bankruptcy court entered approximately 147 orders in the Ondova Bankruptcy Case." The panel concluded that "Trustee Sherman was acting 'under the supervision and subject to the order of the bankruptcy judge' – and thus entitled to absolute immunity – for virtually all of his tenure as trustee," referencing *Boullion v. McClanahan,* 639 F.2d 213, 214 (5th Cir. 1981). The panel further found that "even when Trustee Sherman was not acting pursuant to a court order, he was still entitled to qualified immunity for actions taken within the scope of his official duties." The panel also agreed with the district court that this immunity extended to the trustee's attorneys "under both a derivative theory of judicial immunity and under the separate doctrine of attorney immunity," referencing *In re DeLorean Motor Co.,* 991 F.2d 1236 (6th Cir. 1993) and *Troice v. Proskauer Rose, L.L.P.,* 816 F.3d 341 (5th Cir. 2016). In agreeing with the district court's analysis of Baron's claims for breach of fiduciary duty, the panel concluded Baron failed to plausibly allege facts sufficient to support a finding of gross negligence, either in his original complaint or in his proposed amended complaint. Finally, in reviewing *de novo* the denial of a motion to amend, the panel determined that Baron failed "to raise the new causes of action contained within his proposed amended complaint in his briefs or argue that the district court erred in finding these claims unsuccessful." Thus, Baron waived the issue, and the panel ruled it would not disturb the district court's finding of futility. Accordingly, the panel affirmed both the district court's dismissal under Rule 12(b)(6) and the denial of leave to file an amended complaint.

The panel agreed with the district court's analysis of the trustee's immunity. "Trustees are entitled to absolute immunity for all actions taken pursuant to a court order," the panel noted, citing *Boullion*. The panel explained that "while this circuit does not have controlling precedent on the issue, numerous sister circuits have held that trustees have qualified immunity for personal harms caused by actions taken within the scope of their official duties," referencing *Grant, Konvalinka & Harrison, PC v. Banks (In re McKenzie),* 716 F.3d 404 (6th Cir.). The panel added, "only *ultra vires* actions – actions that fall outside the scope of their duties as trustees – are not entitled to immunity."

The panel concluded that "there is no compelling reason to depart from our sister circuits' sensible approach. We thus hold that bankruptcy trustees in the Fifth Circuit are entitled to qualified immunity for personal harms caused by actions that, while not pursuant to a court order, fall within the scope of their official duties."

The panel noted that "seeking a receivership is sometimes a necessary step in administering the estate." Baron disagreed "with Trustee Sherman's decision to pursue a receivership and alleged that Sherman made misleading statements during the receivership process," but the panel found that "these allegations – even when assumed to be true – cannot transform them into *ultra vires* actions that remove Trustee Sherman's qualified immunity."

U.S. DISTRICT COURTS

BANKRUPTCY COURT DID NOT ABUSE ITS DISCRETION IN DENYING A SANCTIONS MOTION

Case name: *Rent A Wreck, Inc. et al v. Rent-A-Wreck of America, Inc. et al (In re Rent-A-Wreck of America, Inc.),* 2019 WL 447323, 66 BCD 208 (D. Del. 2019).

Ruling: The U.S. District Court, District of Delaware affirmed the bankruptcy court's order finding that the debtors' Chapter 11 filing was "not patently unmeritorious or frivolous or made for improper purposes of delay, harassment, or to increase costs."

What it means: The court found "it was not patently clear that Debtors had 'absolutely no chance of success' in meeting the good faith filing requirement. Although Debtors did not prevail, failure to carry the burden of establishing good faith is neither the equivalent of 'bad faith' nor is it 'clear and convincing evidence' of an improper purpose under Bankruptcy Rule 9011."

Summary: The matter concerns the appeal of Appellants Rent a Wreck, Inc. and David S. Schwartz (together "Schwartz") from a bankruptcy court order dated May 17, 2018, which denied Schwartz's motion for sanctions against Rent-A-Wreck of America, Inc. ("RAWA") and Bundy American, LLC ("Bundy," and, together with RAWA, "Debtors") and their counsel, Quarles & Brady, LLP ("Q & B"). Following discovery and a two-day evidentiary hearing, the bankruptcy court dismissed the Debtors' Chapter 11 cases for failure to satisfy the good faith filing doctrine, *In re Rent-A-Wreck of America, Inc.,* 580 B.R. 364 (Bankr. D. Del. 2018). Based on the dismissal, Schwartz filed the sanctions motion seeking an order imposing sanctions against the debtors and Q & B pursuant to Federal Rule of Bankruptcy Procedure 9011. "Following another evidentiary hearing, the bankruptcy court issued a bench ruling exercising its discretion to deny the sanctions motion, finding that the debtors' Chapter 11 filing was not patently unmeritorious or frivolous or made for improper purposes of delay, harassment, or to increase costs," the opinion said. The district court found no basis to find that the bankruptcy court abused its discretion in denying the sanctions motion. The district court noted that "the determination of what might satisfy the 'somewhat nebulous good faith filing doctrine' is 'a fact-intensive, case-by-case inquiry,'" citing *In re PPI Enterprises (U.S.), Inc.,* 228 B.R. 339 (Bankr. D. Del. 1998). "Financial distress is not a term defined by statute or case law but rather determined by the facts and

circumstances of each individual case," the district court explained. "Here, it was not patently clear that Debtors had 'absolutely no chance of success' in meeting the good faith filing requirement. Although Debtors did not prevail, failure to carry the burden of establishing good faith is neither the equivalent of 'bad faith' nor is it 'clear and convincing evidence' of an improper purpose under Bankruptcy Rule 9011."

"Motions for sanctions are objectively tested by the reasonableness of the filing in question under the circumstances," the district court explained, citing *In re Aphton Corp.,* 423 B.R. 76 (Bankr. D. Del. 2010). It added, "the court must consider the reasonableness of the party's belief at the time the pleading was filed and not in hindsight, citing *Aphton*.

"It is not a *per se* violation of Bankruptcy Rule 9011 to file a Chapter 11 petition lacking good faith," the district court noted, citing *In re 15375 Memorial Corp.,* 430 B.R. 142 (Bankr. D. Del. 2010). The bankruptcy court stated that the burden for relief under Bankruptcy Rule 9011 is proof by the movant by clear and convincing evidence that no reasonable attorney or client could conclude that the petitions were filed in good faith and the parties do not dispute the applicable burden. "The question before the bankruptcy court was whether Schwartz proved by clear and convincing evidence that the bankruptcy filing was patently unmeritorious or frivolous given the requirements of the bankruptcy code or filed for improper purpose of harassment and delay," the district court said. The bankruptcy court concluded that "the filings were neither patently unmeritorious or frivolous." Schwartz's main argument on appeal was that the bankruptcy court must have abused its discretion in denying sanctions because the findings in the dismissal opinion supported a finding that Rule 11 has been violated. The district court disagreed and found no abuse of discretion.

The debtors argued that the record contains evidence supporting their ongoing financial difficulties. The district court agreed that this was not a frivolous case where the debtors made no attempt to establish some degree of financial distress, but ultimately, the financial evidence offered did not carry the debtors' burden. The sanctions motion ruling was based on the same record as the dismissal motion with respect to the debtors' financial distress. "While those findings would support dismissal based on Debtors' failure to carry their burden of establishing good faith, the bankruptcy court correctly concluded that those findings 'do not support an award of sanctions under a wholly different standard.'" The district court found, based on its review of the case law construing the good faith filing doctrine, that the debtors' failure to carry the burden of establishing financial distress did not support the imposition of sanctions.

RENTAL PROCEEDS NOT ABANDONED, CAN FORM BASIS FOR DENIAL OF DISCHARGE

Case name: *Pham et al. v. United States Trustee* (*In re Pham, et al.),* 2019 WL 77505, 66 BCD 209 (C.D. Cal. 2019).

Ruling: The U.S. District Court, Central District of California affirmed the bankruptcy court's order denying the debtors' Chapter 7 discharge pursuant to § 727(a)(2).

What it means: The bankruptcy court was correct in finding that the Chapter 7 trustee's intent to abandon certain property, and not the rental property, via a notice to abandon was clear and unequivocal, such that the rental proceeds were not abandoned and could form the basis for denial of discharge.

Summary: Debtors Lindsie and Tony Pham filed a voluntary Chapter 7 petition for bankruptcy relief July 23, 2012. The bankruptcy schedules disclosed ownership interests in five parcels of real property, including two adjacent rental properties located in Los Angeles. The LA property generated monthly rental income in excess of $15,000. The Phams used a property manager to operate the LA property. Ms. Pham testified at a mandatory meeting of creditors that the LA property was operating at a net loss, and that the management company collected the rents and paid for the mortgage and expenses. Subsequently, the trustee had conversations with the lender and learned that the mortgages on the LA property was not being paid. Upon investigation, the trustee learned that Ms. Pham had received checks from the property management group during the bankruptcy period totaling $25,996.60, the rental proceeds. The trustee sent a letter to the Phams Nov. 21, 2012, demanding the immediate turnover to the estate of the rental proceeds. That same day, the trustee filed a notice to abandon the LA property and other scheduled real properties. The letter did not indicate that the trustee was also abandoning any rental proceeds already collected from the properties. The Phams and the trustee entered into a settlement Feb. 14, 2014, in which the Phams agreed to return the diverted funds. The settlement agreement provided that the rental proceeds were an asset of the estate subject to the trustee's administration. The agreement also provided that the Phams had diverted and utilized the rental proceeds without authorization from the court or statutory authority under the bankruptcy code. The trustee commenced adversary proceedings against the debtors July 30, 2015, alleging that they were not entitled to a discharge under § 727(a)(2)(B) because they improperly transferred the property of the estate post-petition. The debtors primary defense at trial was that the Chapter 7 trustee abandoned the rental proceeds when he abandoned the LA property. They

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asserted that "because the rental proceeds were abandoned, the proceeds were not part of the estate and therefore could not provide a basis for denying their discharge." The trustee testified that when he filed the notice to abandon, the notice referred to the properties, not the rents. The bankruptcy court entered an order denying the debtors' discharge, rejecting the debtors' argument. The bankruptcy court determined that the rental proceeds were not abandoned because "abandonment of property of the estate is based on the Chapter 7 trustee's intent." The specific language in the notice to abandon and the trustee's demand on the debtors to return the rental proceed indicated intent by the trustee not to abandon the rental proceeds. The debtors appealed, contending the rental proceeds were not part of the estate. The district court rejected the debtors' argument, concluding that "the bankruptcy court was correct in finding that the Chapter 7 trustee's intent to abandon the LA property, and not the rental proceeds, via the notice to abandon was clear and unequivocal, and therefore the rental proceeds were not abandoned and could in fact form the basis for denial of discharge.

"Abandonment is not a process to be taken lightly because once an asset is abandoned, it is removed from the bankruptcy estate, and this removal is irrevocable except in very limited circumstances," the district court noted, citing *Catalano v. Commissioner,* 279 F.3d 682 (9th Cir. 2002). It added, "a 'trustee's intent to abandon an asset must be clear and unequivocal,'" citing *Chartschlaa v. Nationwide Mutual Insurance Co.,* 538 F.3d 116 (2d Cir. 2008). The district court in agreeing with the bankruptcy court, found that it was not the trustee's intent to abandon the rental proceeds from the LA property, and it also agreed this determination was amply supported by the record.

"Moreover, numerous courts have held that the abandonment of real property does not also abandon personal property that is related to, but separable from the real property, such as rental proceeds or insurance policies," the court noted, referencing *Pierson v. Paris (In re Humeston),* 83 F.2d 187 (2d Cir. 1936) (discussing rental proceeds). Thus, the district court found that "the rental proceeds derived from the LA property are separate interests, and that the Chapter 7 trustee only intended to abandon one of those interests – the equity interest in the underlying LA property."

BANKRUPTCY APPELLATE PANELS

BANKRUPTCY COURTS ERRED IN REQUIRING DEBTORS TO SHOW EXCUSABLE NEGLECT EXISTED TO AMEND THEIR SCHEDULES

Case name: *Mendoza et al., v. Montoya (In re Pedro Mendoza and Sandy M. Armijo),* 2019 WL 442380, 66 BCD 210 (Bankr. 10th Cir. 2019).

Ruling: The 10th U.S. Circuit Bankruptcy Appellate Panel reversed the bankruptcy court's rulings that the debtors in two Chapter 7 cases could not amend their schedules in their re-opened cases.

What it means: "Rule 1009(a)'s plain language does not create an ascertainable and specific period during which a debtor may amend his or her schedules. With this conclusion, we join a number of courts in holding 'the debtor, under Rule 1009, may amend schedules without limitation of whether the case is open or reopened after closing.'"

Summary: In two separate Chapter 7 cases the debtors failed to disclose personal injury claims before they received their discharges and their cases were closed. Both cases were reopened, and the debtors amended their schedules. In both cases, the trustee objected to the amendments asserting that the debtors' schedules could not be amended after the cases were closed. In both cases, the bankruptcy court sustained the objections because the debtors failed to show that their failure to amend their schedules before their cases were closed was the result of excusable neglect. The 10th U.S. Circuit Bankruptcy Appellate Panel reversed and remanded. Rule 1009 states: "A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed." In both cases, the bankruptcy court read Rule 1009 in conjunction with Rule 9006(b)(1), which states, "when an act is required or allowed to be done at or within a specified period by these rules ... the court for cause shown may at any time in its discretion ... [and] on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect." The BAP found that the bankruptcy courts erred by applying Rule 9006(b)(1) to Rule 1009 because Rule 1009's "any time before the case is closed" is not a specified period during which an amendment may be made. "Applying a plain meaning analysis, the phrase 'any time before the case is closed' does not create a 'specified period.' Until the case is closed, it is impossible to determine the date of the case closing, suggesting Rule 1009 references an indeterminate timeframe," the panel said. Section 350 complicates application of Rule 1009 by allowing cases to be reopened. The BAP noted that other courts have suggested that the reopening of a case is an administrative act and has no substantive effect. "Since the reopening of a case is purely administrative, we cannot read Rule 1009(a)'s language to impose a substantive limitation on the debtors' ability to amend their schedules as a matter of course. A reopening renders a case open. Rule 1009(a) contains no distinction between an original case and a case closed and then reopened. Nor does the Rule limit amending schedules to any time prior to the first closing of the case. As previously stated, Rule 1009(a)'s plain language does not create an ascertainable and specific period during which a debtor may amend his or her schedules. With this conclusion, we join a number

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of courts in holding 'the debtor, under Rule 1009, may amend schedules without limitation of whether the case is open or reopened after closing.'"

The BAP addressed "the appeals of Pedro Mendoza and Sandy Armijo and Steven and Darla Sue Dollman together as both appeals raise an identical legal issue: whether the New Mexico bankruptcy courts properly sustained a Chapter 7 trustee's objections to the amendment of the debtors' bankruptcy schedules."

"The bankruptcy courts' determinations the debtors in these two cases failed to justify the amendments to their schedules rested on the adoption of the excusable neglect standard pursuant to Rule 9006(b) and application of Pioneer to weigh factors on excusable neglect", the opinion said, citing *Pioneer Investment Services Co. v. Brunswick Associated Limited Partnership et al.,* 507 U.S. 380 (1993).

The BAP concluded "both bankruptcy courts erred in applying Rule 9006(b) and requiring the debtors to show excusable neglect existed to amend their schedules. Our decision does not preclude an objection to claimed exemptions on the merits or prevent the bankruptcy courts from denying the exemptions should the objector meet his or her burden of showing the exemptions are not properly claimed. We only conclude Rule 9006(b) should not be applied to prevent the debtors from amending their schedules in the reopened cases."

BANKRUPTCY COURTS

BANKRUPTCY COURT DECLINES TO ADOPT JUDICIALLY CREATED BAR-TO-JOINDER DOCTRINE

Case name: *In re On-Site Fuel Service, Inc.,* 2019 WL 409422, 66 BCD 211 (Bankr. S.D. Miss. 2019).

Ruling: The U.S. Bankruptcy Court, Southern District of Mississippi granted an amended motion to approve joinder in involuntary petition and denied the amended motion to dismiss involuntary petition.

What it means: The bankruptcy court found that § 303(c) unambiguously provides for joinder, "after the filing of a petition ... but before the case is dismissed or relief is ordered," if the joining creditor holds "an unsecured claim that is not contingent" and is not an initial petitioning creditor. It also found that it lacks the authority to "arbitrarily impose non-statutory conditions to joinder" and declined to adopt the judicially created bar-to-joinder doctrine.

Summary: Mansfield Oil Company of Gainesville, Inc. filed an involuntary petition Oct. 30, 2018, against alleged debtor, On-Site Fuel Service, Inc. under Chapter 7, asserting that it was eligible to file the petition under 11 U.S.C. § 303(b)3. Mansfield asserted that the alleged debtor may be the subject of an involuntary case under § 303(a), and that the alleged debtor was generally not paying its debts as they became due. Mansfield further alleged that its claim was $6,386,390.63. On-Site filed a motion to dismiss the involuntary petition Nov. 26, 2018, which was amended Nov. 30. A motion to approve joinder in the involuntary petition was filed Dec. 12 and amended Dec. 20, in which nine creditors sought to join the petition. The parties filed an agreed order Dec. 21 providing that the court would determine at a hearing whether to recognize the bar-to-joinder doctrine and whether the amended motion to dismiss should be treated as one filed under Rule 12(b)(1) or Rule 12(b)(6) of the Federal Rules of Civil Procedure as converted to a motion for summary judgment under Rule 12(d) and Rule 56. "Section 303(b) requires at least three (3) petitioning creditors to commence an involuntary proceeding when there are at least twelve (12) creditors eligible to petition, the court explained. In response to the petition, the alleged debtor claimed, "Mansfield's lack of good faith in impliedly asserting that there are fewer than twelve creditors eligible to petition and asserting that the petition is deficient because 'any claim Mansfield holds against the alleged debtor is subject to a bona fide dispute.'" At the hearing, the alleged debtor argued that the court should dismiss the involuntary proceeding because Mansfield filed the petition in bad faith. The alleged debtor also urged the court to adopt the bar-to-joinder doctrine so that if the court were to find that Mansfield filed the petition in bad faith, the creditors seeking to join the petition would be unable to cure the defective petition. Mansfield argued that § 303 provides for joinder as "a matter of right." The court noted that "Mansfield further asserted that even if the court found that it filed the petition in bad faith, which it maintains that it did not do so, such a finding would not prevent other creditors from joining the petition." The court added that the Fifth Circuit Court of Appeals has not ruled on the bar-to-joinder doctrine. The court found that "§ 303(c) unambiguously provides for joinder, 'after the filing of a petition ... but before the case is dismissed or relief is ordered,' if the joining creditor holds 'an unsecured claim that is not contingent' and is not an initial petitioning creditor." 11 U.S.C. § 303(c). The court concluded, "the plain language of section 303(c) simply does not condition joinder on the good faith of the original petitioning creditors," citing *In re FKF Madison Park Group Owner, LLC,* 435 B.R. 906 (Bankr. D. Del. 2010). Thus, the court found that it lacked the authority to "arbitrarily impose non-statutory conditions to joinder" and declined to adopt the judicially created bar-to-joinder doctrine," citing *In re FKF Madison Park Group Owner, LLC*. The alleged debtor maintained that the court should treat the amended motion to dismiss as a jurisdictional challenge to Mansfield's failure to satisfy the threshold statutory requirements of § 303(b)(1). The Fifth Circuit Court of Appeals has not determined whether § 303(b)'s requirements are jurisdictional. The court determined that "it would apply the bright line test set forth in *Arbaugh v. Y & H Corp,* 546 U.S. 500 (2006), and follow the reasoning of

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the circuit courts that have held that § 303(b)'s requirements are nonjurisdictional," referencing COLLIER ON BANKRUPTCY ¶ 303.08[2] ("The circuits are in agreement that the requirements of section 303(b) – that is, the type of claims that petitioning creditors must have, and the proper number of petitioning creditors – are not jurisdictional."). Accordingly, the court found that the amended motion to dismiss should be denied.

"Section 303 provides that "after the filing of a petition ... but before the case is dismissed or relief is ordered, a creditor holding an unsecured claim that is not contingent ... may join in the petition with the same effect as if such joining creditor were a petitioning creditor," the court explained, adding "Rule 1003 of the Federal Rules of Bankruptcy Procedure provides that 'the court shall afford a reasonable opportunity for other creditors to join in the petition before a hearing is held thereon.'"

Some courts apply a judicially created bad-faith exception to § 303(c) despite its plain language suggesting that "Congress anticipated that defective involuntary petitions would be filed and section 303(c) was intended to permit these defects to be corrected with retroactive effect," the court said, citing *In re Mylotte, David & Fitzpatrick,* No. 07-11861, 2007 WL 2033812 (Bankr. E.D. Pa. July 12, 2007). "The bar-to-joinder doctrine prevents creditors from joining a petition filed in bad faith," the court pointed out, referencing *Basin Electric Power Cooperative v. Midwest Processing Co.*, 769 F.2d 483 (8th Cir. 1985).

COURT FINDS § 1930 AMENDMENT UNCONSTITUTIONAL AS APPLIED IN BUFFETS, LLC's BANKRUPTCY CASE

Case name: *In re Buffets, LLC, et al.* 2019 WL 518318, 66 BCD 212 (Bankr. W.D. Tex.).

Ruling: The U.S. Bankruptcy Court, Western District of Texas in granting the reorganized debtors' motion, held that an amendment to Title 28, Section 1930 is unconstitutional as applied to this case due to its lack of uniformity for the first three quarters of 2018.

What it means: The court holds § 1930(a)(6)(B) unconstitutional as applied to this case due to its lack of uniformity for the first three quarters of 2018. The amendment also cannot be retroactively applied to the reorganized debtors for any relevant year.

Summary: Buffets, LLC, and its affiliates ("debtors" or, post-confirmation, "reorganized debtors") filed voluntary Chapter 11 petitions in March 2016. The debtors confirmed a plan in April 2017 and were substantively consolidated. The plan and confirmation order provide for payment of quarterly fees to the United States trustee (UST). "In October 2017, Congress amended Title 28, section 1930, to provide for an 833 percent increase in the maximum post-confirmation quarterly fees payable by certain Chapter 11 debtors with disbursements that equal or exceed $1 million when the UST System Fund balance is less than $ 200 million." 28 U.S.C. § 1930(a)(6)(B) (2018). The UST System Fund balance currently is less than $ 200 million, and the reorganized debtors' 2018 disbursements exceed $1 million in every quarter," the court's opinion said. The principals of the reorganized debtors were shocked by the quarterly fee increase. The reorganized debtors filed a motion requesting an order establishing a lower quarterly-fee liability and determining the word "disbursements" in § 1930(a)(6) is limited to funds disbursed as priority and administrative expense claims, claims of creditors, and interests of equity security holders pursuant to the plan. The UST filed an objection to the motion. The court made findings of fact and conclusions of law, and rendered an order denying the reorganized debtors' motion. The court held that the quarterly fees should be calculated based upon all disbursements made during the quarter. The reorganized debtors filed a motion to reconsider the order in light of constitutional violations and a recent opinion from the Western District of Wisconsin, *In re Cranberry Growers Cooperative,* 592 B.R. 325 (Bankr. W.D. Wis. 2018). Judge Catherine J. Furay in *In re Cranberry Growers Cooperative* excluded repayments on a revolving line of credit from disbursements because the debtor was contractually obligated to use it to make ordinary course operating payments. "The reorganized debtors asked the court to follow Judge Furay's opinion and narrowly interpret disbursements to only include payments made to creditors of the bankruptcy estate. This interpretation would result in the reorganized debtors owing $4,875.00 in fees payable to the UST's office for each quarter of 2018," the opinion said. The issue before the court now is whether 28 U.S.C. § 1930(a)(6)(B) requires the reorganized debtors to pay $250,000 in quarterly fees to the United States trustee for each quarter of 2018. The court concluded, "the new UST fees are excessive and certain situations may require a limitation on what constitutes a disbursement, but a narrow interpretation of disbursements that applies in the case of a revolving line of credit does not apply in this case. This Court reaffirms its original ruling that the term 'disbursements' includes all payments made by the reorganized debtors. A broad interpretation of disbursements, however, does not subject the reorganized debtors' 2018 disbursements to the increased quarterly fee requirement of § 1930(a)(6)(B). As applied to the reorganized debtors, the amendment is invalid." The court concluded the amendment to § 1930(a)(6) created non-uniform bankruptcy law and should not be applied retroactively.

"With the knowledge of the increased fees, future debtors may select pre-packaged plans or choose to restructure debts outside of bankruptcy to avoid the quarterly fees. The reorganized debtors in this case had no such opportunity. The debtors' post-confirmation reports indicate a total of $ 65,274,569.74 in disbursements for the first quarter of 2018; $ 67,303,248.20 for

the second quarter; and, $ 62,019,084.00 for the third quarter. Under the old statute, this would require quarterly-fee payments of $ 30,000 per quarter. The reorganized debtors are required to make quarterly-fee payments of $ 30,000 per quarter for the first three quarters of calendar year 2018, in adherence with the old statute in order to avoid constitutional violations and retroactive application of the statute," the court concluded.

CLAIM THAT PERSONAL INJURY ALLEGATION WAS FALSE PROCEEDING TO TRIAL

Case name: *Suburban Mobility Authority for Regional Transportation v. Lattman (In re Lattman)*, 2019 WL 464598, 66 BCD 213 (Bankr. E.D. Mich. 2019).

Ruling: The bankruptcy court denied the debtor's motion for summary judgment.

What it means: The court found that the debtor obtained money, property, or services in the form of payment for medical treatment after filing a complaint alleging that she was injured in a motor vehicle accident. The plaintiff alleged that the debtor's allegations of injury were false, and that it held a nondischargeable claim against her based on those false allegations.

Summary: Prior to filing bankruptcy, the debtor sued Suburban Mobility Authority for Regional Transportation alleging that she suffered neck, back, and shoulder injuries while aboard a SMART bus that was allegedly involved in an accident. SMART responded that the debtor did not – and could not – have suffered those injuries. Pursuant to state law, the debtor's complaint was reviewed by a panel of three evaluators who determined a dollar figure that it believed would settle the case. "If a party does not agree to accept the evaluation, he or she faces the possibility of having to pay the other party's costs after trial," the bankruptcy court said. The panel presented a six-figure case-evaluation award, which the debtor rejected. The case went to trial and the jury returned a verdict of "No Cause of Action." SMART then requested and received a $150,000 judgment against the debtor for its actual costs. It collected $30,109.80 prior to the debtor's Chapter 7 filing. SMART initiated an adversary proceeding asserting that its claim was excepted from discharge because it arose from fraud. The debtor moved for summary judgment. According to the debtor, SMART could not prove that she obtained any money, property, services, or an extension, renewal, or refinancing of credit as the result of fraud, and the debt SMART sought to except from discharge resulted from the operation of law (the imposition of case evaluation sanctions based on a Michigan Court Rule) rather than her alleged fraud. The court rejected the debtor's first argument because SMART paid $16,396.59 for the debtor's medical expenses. "SMART's payment log shows that at least some of these expenses were paid after Debtor's allegedly fraudulent state-court lawsuit was filed," the court said. "In addition, to prevail at trial, SMART must prove Debtor had a subjective, fraudulent intent in bringing the state-court lawsuit," the court noted, referencing *Rembert v. AT & T Universal Card Services, Inc. (In re Rembert),* 141 F.3d 277 (6th Cir. 1998) ("[w]hether a debtor possessed an intent to defraud a creditor within the scope of 523(a)(2)(A) is measured by a subjective standard [that] must be ascertained by the totality of the circumstances"). The debtor's motion was denied.

The debtor argued that because SMART did not litigate the fraud issues in the state court through a counterclaim, it is precluded from doing so here, but the court disagreed. "Jurisdiction to determine the dischargeability of debts described by 11 U.S.C. § 523(a)(2) is exclusively within the bankruptcy courts, and no state court has jurisdiction to decide whether a fraud claim will be dischargeable in bankruptcy," the court explained, citing *Sill v. Sweeney (In re Sweeney),* 276 B.R. 186 (B.A.P. 6th Cir. 2002).

"According to the United States Supreme Court: '[T]o the extent obtained by' modifies 'money, property, services, or ... credit'-not 'any debt'-so that the exception encompasses 'any debt ... for money, property, services, or ... credit, to the extent [that the money, property, services, or ... credit is] obtained by' fraud. The phrase thereby makes clear that the share of money, property, etc., that is obtained by fraud gives rise to a nondischargeable debt. Once it is established that specific money or property has been obtained by fraud, however, 'any debt' arising therefrom is excepted from discharge," the court noted, citing *Cohen v. De La Cruz,* 523 U.S. 213 (1998). The court added, "this language suggests that section 523(a)(2)(A) actions first require the Court to determine that a debtor received money or property through fraud. However, circuits are split on this issue. Compare e.g., *Nunnery v. Rountree (In re Rountree),* 478 F.3d 215, (4th Cir. 2007) (finding the plain language of the statute and the Supreme Court's interpretation of that language requires debtors to 'obtain something through fraud for the exception to apply') with *Muegler v. Bening,* 413 F.3d 980 (9th Cir. 2005) ('[i]t is only the fact of an adverse fraud judgment, and nothing more, that is required for a debt to be nondischargeable')." The Sixth Circuit has not decided the issue, the court said.

ATTORNEY DENIED COMPENSATION FOR DEFENDING SANCTIONS MOTION, FEES NOT NECESSARY TO ADMINISTER BANKURPTCY CASE AND PROVIDED NO BENEFIT TO ESTATE OR DEBTOR

Case name: *In re Schaller,* 2019 WL 468750, 66 BCD 214 (Bankr. E.D. Mich. 2019).

Ruling: The bankruptcy court denied an application for attorney fees made by the Chapter 13 debtor's cur-

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rent attorney for fees incurred defending a motion brought by the debtor's prior attorneys to impose sanctions on him.

What it means: The sanctions motion was brought against the debtor's attorney alone. Consequently, the court found that the fees incurred "were not necessary to administer this bankruptcy case, and they did not provide any benefit either to the bankruptcy estate or to the debtor. Therefore, they are not allowable under the text of Section 330(a)(1)."

Summary: The debtor filed for Chapter 13 relief on Oct. 9, 2017. He was represented by attorney Nicholas Reyna. On Nov. 11, 2017, attorney Kenneth W. Demers filed a notice of special appearance to represent the debtor at the Section 341 meeting only. On Jan. 6, 2018, Reyna and Demers filed a notice of substitution terminating Reyna as the debtor's attorney and substituting Demers as the debtor's attorney. The debtor's case was very active, with Demers defending the debtor's proposed plan against several objections and representing the debtor regarding a claim he asserted against the law firm that represented the holder of the mortgage on his home. After the debtor's plan was confirmed, Reyna and Demers filed fee applications. The debtor, represented by a new attorney, Nicholas Chambers from the law office of Charles J. Schneider, P.C., attended the hearing on the fee applications. Although the debtor did not file a written objection, Chambers voiced objection to Demers' application and asked for time to file a written objection. Chambers asserted that the debtor believed Reyna and Demers misled him regarding the handling of his case and charged far more than he expected. At the adjourned hearing, the court found some merit to the debtor's objections, and reduced the fees of both Reyna and Demers. The court did not find that the debtor was misled by Reyna and Demers. The attorneys then filed a joint motion asking the court to sanction Chambers and Schneider for raising false allegations in the objection. After the court ruled that Chambers and Schneider did not violate Rule 9011, they filed their fee application for representing the debtor. The trustee objected that Chambers and Schneider sought compensation for the time spent defending the sanctions motion. The trustee argued that those fees did not benefit the bankruptcy estate, the bankruptcy case, or the debtor because the motion did not seek sanctions from the debtor or the estate. The court awarded all the requested fees, except $3,868 incurred by Chambers and Schneider in defending the motion. The court rejected the argument that an attack on the debtor's attorney was an attack on the debtor, noting that Rule 9011 expressly authorizes bankruptcy courts to sanction attorneys independent of their clients. "No attorney wants to have to defend a sanctions motion brought against them. It takes time, costs money, and is not without risk. The fees incurred in successfully defending such a motion can be substantial, but necessary and reasonable to defend the motion. However, the issue in this case is not whether such fees are either necessary or reasonable. The issue is whether fees that were incurred to defend a request for sanctions that was made solely against Chambers and Schneider, must be paid by the debtor or his bankruptcy estate. These fees were not necessary to administer this bankruptcy case, and they did not provide any benefit either to the bankruptcy estate or to the debtor. Therefore, they are not allowable under the text of Section 330(a)(1)."

Chambers and Schneider conceded that the motion did not seek sanctions from the debtor or his estate but argued that this fact was not relevant because "there is no distinction between the debtor and his [counsel]" and that "the defense of one is the defense of the other."

"To be sure, the rule does impose a form of joint liability in some limited circumstances. Rule 9011(c)(1)(A) provides authority to hold a law firm 'jointly responsible for violations committed by its partners, associates and employees,' but the rule says nothing about making a client liable for violations by the client's attorney, or making an attorney liable for violations by the attorney's client," the court said.

While the disposition of the joint motion mattered to Chambers and Schneider, "it simply did not matter either to the bankruptcy estate or to the debtor, the court noted, explaining, "the joint motion did not ask for any relief against the bankruptcy estate or the debtor. If the Court had granted the joint motion it would have been Chambers and Schneider who would have had to pay – not the bankruptcy estate or the debtor."

The court concluded, "there is nothing in either Rule 9011 or 28 U.S.C. § 1927, that would have allowed Chambers and Schneider to transfer that liability to their client if they were the persons who were found to have violated either the rule or the statute."

NEW MEXICO MAKES IT EASY FOR LIENHOLDERS TO GIVE NOTICE OF PENDING FORECLOSURE ACTIONS

Case name: *Brakhahn v. Nash, et al. (In re Dedee D. Brakhahn),* 2019 WL 354699, 66 BCD 215 (Bankr. D.N.M. 2019).

Ruling: The bankruptcy court denied the defendants' motion for summary judgment and gave notice of its intention to grant summary judgment in favor of the plaintiff.

What it means: Under § 544(a)(3), the case trustee could have avoided the defendants' unrecorded deed to the property. Given the lack of a notice of lis pendens, the defendants' constructive notice defense failed. As the trustee declined to seek such avoidance, the plaintiff has the right to do so under § 522(h).

Summary: In July 2004, Marvin and Linda Nash gave the debtor and her husband three lots in Continental

Divide, N.M., along with a mobile home located on the property. This property became the debtor's homestead. The Nashes subsequently sold their business to the debtor and her husband, who were to make payments over time. After they defaulted, the Nashes obtained a judgment against them, foreclosed on the judgment lien, and purchased the property at a special master's sale. The debtor's husband died prior to the sale. The debtor filed bankruptcy six minutes before the Nashes recorded the deed they received from the special master. The debtor initiated an adversary proceeding to avoid the transfer of her home to the Nashes. "In New Mexico, title to a property in foreclosure passes when the special master's sale is approved by a court and the purchaser receives an interest in the property," the bankruptcy court said. "Thus, title to the Rockcrest Property passed to Defendants on November 30, 2017." However, the transfer was subject to avoidance until the deed was recorded. Because the debtor filed for bankruptcy relief prior to the recording of the deed, she was able to avoid the transfer pursuant to Section 544(a)(3). The court found that the Nashes' recording of the transcript of judgment they obtained against the debtor and her husband did not put a bona fide purchaser on notice of the foreclosure action. "Mortgages, liens, and similar foreclosable encumbrances should not be viewed as sufficient, by themselves, to give notice of a pending foreclosure action. Such a rule would place too much of a burden on buyers. County real estate records are filled with such liens and encumbrances. If every one of them functioned as notice of a possible foreclosure action that would have to be investigated, buyers would be substantially burdened. The Court did not find any case law, in New Mexico or elsewhere, holding that a recorded transcript of judgment or similar lien constituted such notice," the court said. "Rather than placing the burden of proving a negative on buyers, New Mexico has made it easy for lienholders to give notice of pending foreclosure actions: the notice of lis pendens." Given that the Nashes did not file a notice of lis pendens, their constructive notice defense failed and the trustee in the debtor's case could have avoided the Nashes' unrecorded deed pursuant to Section 544(a)(3). Because the trustee declined to seek such avoidance, the debtor had the right to do so under Section 522(h). The court denied the Nashes' motion for summary judgment and gave notice of its intention to grant summary judgment in the debtor's favor.

The court explained, "if a buyer takes property after a notice of lis pendens has been filed, she takes subject to the outcome of the litigation," referencing *Title Guaranty & Insurance Co. v. Campbell,* 106 N.M. 272 (N.M. Ct. App. 1987) (the party who filed a notice of lis pendens gets a judgment, the rights of that party relate back to the filing date of the notice). If the defendants had filed a notice of lis pendens, the plaintiff would not have been able to avoid the conveyance of the Rockcrest Property under § 522(h).

The court found that the defendants' "lack of equity" argument failed. The defendants argued that, "Debtor scheduled ownership of the Rockcrest Property with a value of $ 45,000. If the sale is avoided, the Debtor will have an ownership interest in the Rockcrest Property. But, the interest will be subject to the four-year-old Nash Creditors' Judgment of more than $ 216,000. The Debtor has no equity to exempt and therefore, cannot avoid the transfer under § 522(h)," the opinion said. The court concluded, "it would be persuasive if the defendants' interest were a mortgage, because § 522(f) does not allow the debtor to avoid a mortgage that impairs a homestead exemption. Defendants' interest is a judgment lien, however, not a mortgage. Under § 522(f), judgment liens can be avoided to the extent they impair homestead exemptions," referencing, *In re Osborne,* 520 B.R. 861 (Bankr. D.N.M. 2014) (judgment liens are the very definition of judicial liens and are subject to § 522(f) avoidance).

RULE 9011's SERVICE REQUIREMENTS CAN'T BE AVOIDED BY ASKING THE COURT TO INITIATE SANCTIONS

Case name: *Barnett v. Aldridge Pite, LLP et al. (In re Robert C. Barnett),* 2019 WL 325915, 66 BCD 216 (Bankr. M.D. Ga. 2019).

Ruling: The bankruptcy court denied a request to impose sanctions pursuant to Rule 9011.

What it means: A debtor's attorney asked the court to sanction the creditor's attorney on its own motion. The court denied the request, stating "it would be improper to allow Debtor's counsel to avoid the requirements of Rule 9011(c)(1)(A) by seeking relief under Rule 9011(c)(1)(B). It is Debtor's counsel, and not the Court, that has initiated the sanctions procedure."

Summary: Wilmington Savings Fund Society FSB moved for relief from the automatic stay to foreclose on the debtor's home. WSFS appeared at the hearing through local counsel, who requested a continuance. The debtor's attorney objected and argued that the motion was frivolous. The debtor's attorney asked the bankruptcy court to hold a hearing to consider imposing sanctions under Bankruptcy Rule 9011 against WSFS's law firm. The court denied the request, noting that the debtor's attorney had not complied with Rule 9011(c)(1)(A), which required the debtor's counsel to give the bank's counsel at least 21 days to withdraw the offending pleading before seeking sanctions. The debtor's attorney argued that this rule did not apply if the court held a hearing on its own motion pursuant to Rule 9011(c)(1)(B). The attorney added that he advised the creditor's attorney by phone the day before the hearing that he would seek sanctions. The court declined to hold a sanctions hearing based upon informal notice. Instead, the court invited the debtor's counsel to file a motion explaining why the court should issue a show cause order pursuant to Rule 9011(c)(1)(B). WSFS subsequently withdrew its motion for stay relief. The

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debtor's counsel filed a motion seeking a "show cause" hearing and seeking damages pursuant to Section 362(k)(1). The court denied the request for a show cause hearing and scheduled a hearing to consider damages based on a willful violation of the automatic stay. The court noted that Rule 9011 sanctions may be sought by motion pursuant to Rule 9011(c)(1)(A) or on the court's own motion pursuant to Rule 9011(c)(1)(B). "Informal service is not sufficient to satisfy the service requirements of Bankruptcy Rule 9011," the court said. "Further, the Court concludes that it would be improper to allow Debtor's counsel to avoid the requirements of Rule 9011(c)(1)(A) by seeking relief under Rule 9011(c)(1)(B). It is Debtor's counsel, and not the Court, that has initiated the sanctions procedure."

The court, in noting that informal service is not sufficient to satisfy the service requirements of Bankruptcy Rule 9011, said that the Fifth Circuit has held: "the plain language of Rule 9011 mandates that the movant serve the respondent with a copy of the motion before filing it with the court. There is no indication in Rule 9011 (or Rule 11) or in the advisory notes to support [movant's] contention that a motion for sanctions may be filed with the court without serving the respondent with a copy at least twenty-one days in advance. Moreover, we have continually held that strict compliance with Rule 11 is mandatory. We may not disregard the plain language of the statute and our prior precedent without evidence of congressional intent to allow 'substantial compliance' through informal service," citing *The Cadle Co. v. Pratt (In re Pratt),* 524 F.3d 580 (5th Cir. 2008).

"It would render Rule 11(c)(1)(A)'s 'safe harbor' provision meaningless to permit a party's noncompliant motion to be converted automatically into a court-initiated motion, thereby escaping the service requirement," the court added, citing *Radcliffe v. Rainbow Construction Co.,* 254 F.3d 772 (9th Cir. 2001).

CASES REPORTED

3D CIRCUIT

Rent A Wreck, Inc. et al v. Rent-A-Wreck of America, Inc. et al (In re Rent-A-Wreck of America, Inc.) (D. Del. 2019) ..... 66 BCD 208

5TH CIRCUIT

In re Ondova Limited Co. (5th Cir. 2019) ..... 66 BCD 207

In re On-Site Fuel Service, Inc. (Bankr. S.D. Miss. 2019) ..... 66 BCD 211

In re Buffets, LLC, et al. (Bankr. W.D. Tex.) ..... 66 BCD 212

6TH CIRCUIT

Suburban Mobility Authority for Regional Transportation v. Lattman (In re Lattman) (Bankr. E.D. Mich. 2019) ..... 66 BCD 213

In re Schaller (Bankr. E.D. Mich. 2019) ..... 66 BCD 214

9TH CIRCUIT

Pham et al. v. United States Trustee (*In re Pham, et al.)* (C.D. Cal. 2019) ..... 66 BCD 209

10TH CIRCUIT

Mendoza et al. v. Montoya (In re Pedro Mendoza and Sandy M. Armijo) (Bankr. 10th Cir. 2019) ..... 66 BCD 210

Brakhahn v. Nash et al. (In re Dedee D. Brakhahn) (Bankr. D.N.M. 2019) ..... 66 BCD 215

11TH CIRCUIT

Barnett v. Aldridge Pite, LLP et al. (In re Robert C. Barnett) (Bankr. M.D. Ga. 2019) ..... 66 BCD 216

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