The FBA Newsletter

Federal Bar Association, Dallas Chapter
2807 Allen Street, Suite 344, Dallas, Texas 75204
www.fedbar.org/dallas.html

Fall 2014

Amendments to Local Civil and Criminal Rules for the Northern District of Texas

The Amendments to the Local Civil and Criminal Rules for the Northern District of Texas became effective September 2, 2014.

Winding Up the First Decade Under BAPCPA – November 14, 2014 Bankruptcy Seminar

The Dallas Chapter of the FBA will sponsor a luncheon presentation on November 14, 2014 at the Belo, with a lively panel discussion regarding BAPCPA, as we enter the 10th year since its enactment. The panel will consist of Julianne Parker, Corky Sherman, Marc Taubenfeld, and Judge Hale, who have all agreed to express opinions on what has worked, what has not worked, and what has surprised them the most about practice after the reform legislation.

CLE credit will be given. There is no charge for the program and lunch will be available for purchase at the Belo.

Inside This Issue

ECF Training – October 22, 2014

The District Court is offering hands-on ECF training on October 22, 2014 from 9:00 a.m. to 1:15 p.m. at the Earle Cabell Federal Building and Courthouse, 1100 Commerce Street, Dallas, Texas 75242. The course qualifies for 4 hours of CLE, including 1 hour of ethics. Register online at www.txnd.uscourts.gov.

Amendments to Federal Rules

Proposed Amendments to Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure are posted for public comment on the court's website. Written comments must be received by February 17, 2015.

Brown-Bag Luncheon – November 4, 2014

Each year, the FBA coordinates several Brown-Bag Luncheons with our federal judges. The events give young lawyers the opportunity to interact with the judiciary while learning important practice tips. One hour of CLE credit is provided. While lunch is not provided at the Brown-Bag Luncheons, young lawyers are encouraged to bring their own lunch. Please direct any questions to Cort Thomas, Young Lawyers Chair, at (214) 220-7815 or cthomas@velaw.com.

On November 4, 2014, the FBA will host a Brown-Bag Luncheon for young lawyers in Judge Boyle's Courtroom.

Upcoming FBA — Dallas Events

November 14, 2014, Bankruptcy Seminar

January 26, 2015, Civil Practice Seminar

April 29, 2015, Criminal Practice Seminar

June 19, 2015, Judicial Appreciation Luncheon

Upcoming FBA — National Events

2014

September 17-19
The Annual National Seminar on the Federal Sentencing Guidelines

September 24
WEBINAR: Proposed Amendments to the Federal Rules of Civil Procedure

October 1
WEBINAR: The Impact of Technological Innovations on the Workplace

October 6
Government Contracts & Bankruptcy Law Sections: Government Contracts and Bankruptcy: What Happens When Things Go South?

October 8
WEBINAR: Disability Claims under ERISA

October 10
Federal Litigation Section: Unveiling of the Portrait of the Hon. Joel F. Dubina, Senior Judge, U.S. Court of Appeals for the 11th Circuit and Reception

November 14
16th Annual DC Indian Law Conference

Nothing to Cough at
Bankrupting Asbestos Claims in the Fifth Circuit

Nicholas A. Antaki
J.D./D.C.L. Candidate - May 2015
Paul M. Hebert Law Center - Louisiana State University
NickAntaki@gmail.com

Issue

"The underlying legal issue in this case is whether a bankruptcy court may, consistent with the Constitution's guarantee of due process, hold that a state-law wrongful-death claim based on the death of a housewife, who fatally contracted mesothelioma from asbestos fibers on her husband's work clothes, was discharged in a bankruptcy filed by her husband's former employer fifteen years before she developed or was aware of any symptom of the disease." *Jimmy Williams, Sr. et. al. v. Placid Oil Co.* (*In re Placid Oil Co.*), No. 12-11120 (5th Cir. May 27, 2014) (Dennis, J., *dissenting*).

Facts

In 2004 Appellants Jimmy Williams Sr. (Mr. Williams) and his children (collectively, the Williams/ Williamses) brought suit in state court under Louisiana's wrongful death and survival statutes on behalf of their deceased wife/mother, Mrs. Myra Williams (Mrs. Williams). Appellee, Placid Oil Company (Placid) was a named co-defendant in the Louisiana state case due to Mr. Williams's employment at its refinery from 1966 until 1988, when Placid's bankruptcy plan was confirmed. In response to the state suit, Placid filed a Motion to Reopen Chapter 11 Proceedings in 2008 to determine whether Mrs. Williams's claims were discharged in 1988.

The Issues Raised in Bankruptcy Court

Two distinct issues were raised in the bankruptcy proceeding; whether the Williamses had pre-existing claims at the time of confirmation; and to what degree the Williams' claims, if existing at the time of confirmation, were subject to due process notice requirements. The bankruptcy court ruled that the Williams' claims existed pre-confirmation and were discharged due to Placid's timely constructive notice in the *Wall Street Journal*. Because the claims were found to exist pre-confirmation, the Williamses are classified as "unknown" creditors in relation to Placid at the time constructive notice of the bar date was published. The bankruptcy court also found that the constructive notice was sufficient so as to notify the Appellants.

On Appeal

On appeal, Appellants only contested the sufficiency of notice issue, not appealing the issue of the claims existence before confirmation. The Fifth Circuit affirmed the bankruptcy court's decision 2-1 (Dennis, J., *dissenting*). Both the majority and the dissent agreed that the level of notice required was premised on a determination of whether the Appellants were "known" or "unknown" creditors in 1988- in other words, whether the asbestos-caused death of Mrs. Williams was "reasonably ascertainable" (and therefore "known") by Placid at the time of confirmation.

Majority Opinion

The crux of the dispute, according to the majority's affirmation, lies the interpretation of *In re Crystal Oil*, 158 F.3d 291 (5th Cir. 1998) in which the Fifth Circuit held; "In order for a claim to be reasonably ascertainable, the debtor must have in his possession, at the very least, some specific information that reasonably suggests both the claim for which the debtor may be liable and the entity to whom he would be liable. By contrast, the debtor need only provide "unknown creditors" with constructive notice by publication." *Id.* at 297. In clarifying *Crystal Oil*, the majority held that "At one extreme, the law does not require that a creditor serve upon the debtor a formal complaint in order to make himself 'reasonably ascertainable' or 'known'. However, at a minimum, the debtor must possess 'specific information' about a manifested injury, to make the claim more than merely foreseeable." *In re Placid Oil Co.*, No. 12-11120 (5th Cir. May 27, 2014). Through this interpretation, the majority determined Placid lacked specific information in 1988 about Mrs. Williams's future injury so as to qualify her as a "known" creditor. Because her claims were "unknown" to Placid in 1988, constructive notice satisfied the Due Process requirements.

The Dissent

The essence of the dissent is a different interpretation of an "unknown future claim."

"Unknown, future claim" refers to the future claim of an asbestos-exposed individual whose disease has not manifested itself by the time of the bankruptcy filing. In other words, it is a claim that is unknown to either the debtor or the potential creditor at that time." *In re Placid Oil Co.*, No. 12-11120 (5th Cir. May 27, 2014) (Dennis, J., *dissenting*).

Whereas the majority defined an "unknown future claim" through the eyes of a debtor, the dissent considered the term in the eyes of both parties. At the time of notice, the harm from the asbestos exposure is conjectural to both the debtor and the creditor. Therefore, an unknown creditor, whose claim is unknown to him at the time of bankruptcy, cannot be reasonably expected to be put on notice via constructive notice. Constructive notice of bankruptcy, therefore, cannot satisfy due process in relation to asbestos-related claims, as it impossible for immature asbestos-related claims to be known at the time of bankruptcy.

The dissent recognizes the conundrum which asbestos claims cause in the context of bankruptcy and calls for, as a remedy, the appointment of a future claims representative (FCR). The dissent finds precedent in FCR appointment through equating "unknown" asbestos-claimants with "incompetent" individuals- for which a FCR may be appointed. The dissent states that the appointment of an FCR will satisfy both due process notice requirements and the interests of bankruptcy. With an FCR appointment the asbestos-claimant who is unknown to himself is given the opportunity for recovery in the future, while the debtor is assured that his bankruptcy protection will not be overturned on due process grounds.

The Ninth Circuit applied the same reasoning to Section 3. Federal registration requirements create a "comprehensive scheme for immigrant registration." Those federal provisions include no mention of state participation in the registration scheme. The Ninth Circuit followed the Supreme Court's precedent in *Hines v. Davidowicz*[1] that states cannot "conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations" when the federal government has enacted a "complete scheme of regulation and has therein provided a standard for the registration of aliens…."

In addressing Section 5(C), the Ninth Circuit focused on the federal Immigration Reform and Control Act of 1986 ("IRCA"). Although it includes penalties for employers who employ illegal aliens, the IRCA does not subject illegal aliens workers to criminal punishment. Other IRCA provisions even provide affirmative protections to unauthorized workers. The IRCA's legislative history demonstrates that Congress considered but ultimately decided against adopting criminal sanctions against illegal alien employees. By conflicting with Congress's decision not to criminalize unauthorized work, Section 5(C) "stands as an obstacle" to Congress's objectives and purposes as reflected in the IRCA.

Analyzing Section 6 required the Ninth Circuit to decide whether states have the inherent authority to enforce federal immigration law's civil provisions. The Ninth Circuit held that they do not. Rather, Arizona must be federally authorized to conduct such enforcement. The INA includes extensive regulations for adjudicating and enforcing civil removability. Section 6 exceeds the scope of federal authorization for Arizona's state and local officers to enforce the INA's civil provisions. In doing so, Section 6 "stands as an obstacle" to the federal government's authority to make removability decisions.

The Ninth Circuit also found that (1) SB 1070's negative effect on the United States' foreign relations; and (2) the threat of other states creating their own differing immigration enforcement rules further supported preemption.

The Supreme Court's decision will be particularly important in light of the immigration laws that states besides Arizona have recently passed. Litigation is already underway regarding the immigration laws of Alabama, Georgia, and Indiana. The Court will likely hear oral arguments in April 2012 and could issue a ruling by late June 2012.

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[1] 312 U.S. 52, 66-67 (1941).

Show Me the Money: Fifth Circuit Rethinking *Pro-Snax* Rule in *Barron & Newburger, P.C. v. Texas Skyline, Limited, et al.*

Tyson Attaway
J.D. Candidate-May 2015
University of Mississippi School of Law
tattaway@go.olemiss.edu

In July 2014, the Fifth Circuit rendered its opinion in Barron & Newburger, P.C., v. Texas Skyline, Limited, et al., No. 13-50075 (5th Cir. 7/15/14), which dealt with a bankruptcy court's order reducing the fees a debtor's counsel received under 11 U.S.C. § 330. Barron and Newburger ("B & N") represented the debtor which initially filed a voluntary petition under Chapter 11 of the Bankruptcy Code. When the case was later converted to Chapter 7, B & N's services ended. B & N subsequently filed an application for fees in excess of $130,000, but the bankruptcy court only allowed approximately $20,000 and disallowed the remainder. Citing In re Pro-Snax Distributors, Inc., 157 F.3d 414 (5th Cir. 1998), the bankruptcy court explained that, for a service to be compensable under § 330, fee applicants must prove that the service resulted in an "identifiable, tangible, and material benefit to the estate." The court denied most of the fees because of B & N's lack of success and lack of identifiable benefit. The district court affirmed. On appeal, B & N argued that the bankruptcy court misapplied Fifth Circuit precedent and 11 U.S.C. § 330 in reducing its fees. The Fifth Circuit affirmed the decision of the bankruptcy court, but was somewhat begrudged that it was forced to rely on the controversial Pro-Snax standard. Accordingly, Judge Edward C. Prado wrote a special concurrence, joined by the other judges on the panel, denouncing the Pro-Snax standard and urging reconsideration by the Fifth Circuit sitting en banc.

Judge Prado's concurrence finds Pro-Snax to be misguided for three reasons: it conflicts with the language and legislative history of § 330, it diverges form the decisions of other circuits, and it has sown confusion in the circuit. First, Section 330 constrains a bankruptcy court's discretion to determine the amount of fees by requiring the court to "take into account" a set of listed factors, including "whether the services were necessary to the administration of, or beneficial at the time at which the service rendered." 11 U.S.C. § 330(a)(3)(C). Further, a court must disallow any compensation when "the services were not reasonably likely to benefit the estate…." 11 U.S.C. § 330(a)(4)(A)(ii)(I). So contrary to the Pro-Snax standard, a court under the statute may compensate an attorney for services that are "are reasonably likely to benefit the estate" and adjudge that reasonableness "at the time at which the services was rendered." Second, the Second, Third, and Ninth Circuits have rejected the actual benefit test required by Pro-Snax. See In re Ames Department Stores, Inc., 76 F.3d 66 (2d Cir. 1996) abrogated on other grounds by Lamie v. U.S. Tr., 540 U.S. 526 (opted to use reasonably likely to benefit the estate standard rather than actual benefit); In re Top Grade Sausage, Inc. 227 F.3d 123 (3d Cir. 2000) abrogated on other grounds by Lamie v. U.S. Tr., 540 U.S. 526 (rejected Pro-Snax approach but departed from the statute by imposing a heightened standard and hindsight evaluation); In re Smith, 317 F.3d 918 (9th Cir. 2002) (held that § 330(a)(4)(A) superseded its past precedent that required the services provided be of actual benefit to the estate). Finally, Judge Prado discussed multiple cases in which the Fifth Circuit's district and bankruptcy courts interpreted Pro-Snax differently, leading him to conclude that the differing approaches evidences the necessity of "squaring [Pro-Snax] with the statute."

Given the rarity of an appellate panel unanimously joining in a special concurrence, the case of Barron & Newburger, P.C. v. Texas Skyline Limited is certainly one to keep an eye on. Hopefully, the court of appeals will accept Judge Prado's plea for an en banc review so that compensation for bankruptcy professionals in the Fifth Circuit will comport with statutory law and other circuits.

Seventh Circuit

Wellness International Network, Ltd. v. Sharif (In re Sharif), 727 F.3d 751, 775 (7th Cir. 2013), cert granted, 13-935, 2014 WL 497634 (U.S. July 1, 2014).

Tyson Attaway
J.D. Candidate-May 2015
University of Mississippi School of Law
tattaway@go.olemiss.edu

In the upcoming term, the Supreme Court may answer vital issues left undetermined by the unanimous opinion in *In re Bellingham Insurance Agency, Inc.* The Court will consider the case of *Wellness International Network, Ltd. v. Sharif (In re Sharif)*, reviewing the Seventh Circuit's dual holdings that (1) a litigant may not waive an Article III objection to a bankruptcy court's constitutional authority to enter final judgment in a core proceeding and (2) that the bankruptcy court lacked constitutional authority under Article III to enter final judgment on Wellness International Network's state-law alter-ego claim. 727 F.3d 751, 775 (7th Cir. 2013), *cert granted*, 13-935, 2014 WL 497634 (U.S. July 1, 2014).

In *In re Sharif*, the bankruptcy court entered default judgment against the debtor on four claims brought under 11 U.S.C. § 727 and a fifth state-law alter-ego claim because of multiple failures to comply with discovery. The debtor appealed to the district court alleging that the bankruptcy court lacked jurisdiction to enter final judgment under *Stern v. Marshall,* 564 U.S. ––––, 131 S. Ct. 2594 (2011). The district court concluded that the debtor had standing as to the *Stern* issue, but that objections based on the bankruptcy court's authority to enter a final judgment are waivable because they do not implicate subject matter-jurisdiction and the debtor failed to raise the issue sooner. The district court then applied a deferential standard of appellate review on the merits in considering whether the bankruptcy court's entry of sanctions constituted an abuse of discretion and whether its factual findings were clearly erroneous. Upon review, the district court affirmed, and the debtor appealed the decision to the Seventh Circuit. On appeal, the Seventh Circuit concluded that a litigant cannot waive an Article III, § 1, objection to a bankruptcy court's entry of final judgment in a core proceeding where at issue is a traditional action at common law (*I.e.*, the debtor's state-law alter-ego claim). The court of appeals additionally held that the bankruptcy court lacked constitutional authority to enter default judgment on the state-law alter-ego claim, because it was between private parties, was wholly independent of federal bankruptcy law, and was not resolvable in the claims-allowance process.