

Bankruptcy Circuit Update
Featuring cases from April 2018

We will be convening our next section-wide conference call on **Friday, June 1st, at 3:30 E.S.T./12:30 P.S.T.** to present and discuss notable cases from the past few months of the summaries. We are seeking volunteers to summarize significant or interesting cases. Please send an email to csullivan@diamondmccarthy.com if you are interested in presenting. The call-in information is: **dial in 866-690-2070 – code 787-594-2077.**

We hope you will join us for this call.

Second Circuit

Stillwater Liquidating LLC v. SFN Dekalb Holdings
(In re Stillwater Asset Backed Offshore Fund Ltd.),
2018 U.S. App. LEXIS 9927, 17-463 (2nd Cir., April 18, 2018)

The Second Circuit affirmed the judgment of the district court affirming a bankruptcy court order holding that a certain transfer of real property did not violate the automatic stay.

The bankruptcy court had previously held that a Georgia state foreclosure action (the “Foreclosure Order”) and subsequent transfers of real property (the “Hillandale Property”) did not violate the automatic stay in the Chapter 11 bankruptcy proceeding of Stillwater Asset Backed Offshore Fund Ltd. (the “Debtor”) and its related investment funds (collectively, the “Funds”). Stillwater Liquidating LLC (“Stillwater”), an entity charged by the bankruptcy court with pursuing recoveries on behalf of the Debtor and the Funds, appealed the district court’s judgment affirming the order, arguing that the bankruptcy court erred because the Foreclosure Order and subsequent transfers of property: (1) constituted an act to obtain the property of the estate; (2) involved the enforcement of a claim against the Debtor; and (3) were legally certain to impact the Debtor’s property.

First, the Second Circuit analyzed whether the Foreclosure Order was an “act to obtain... property of the estate,” within the meaning of 11 U.S.C. § 362(a)(3). The Second Circuit agreed with the bankruptcy court and district court that the Debtor’s property interests, including any of the Debtor’s legal and equitable interests in the Hillandale Property, had been conveyed prior to the 2012 bankruptcy filing (and the imposition of the automatic stay) pursuant to an asset purchase agreement that the Debtor had entered into in 2010. The Second Circuit was not persuaded by Stillwater’s various attempts to argue that it had a general right to the real property or its title, and also noted that Stillwater had conceded that all of the Debtor’s legal and equitable interests in real property, including the Hillandale Property, were conveyed pre-petition before

the 2012 bankruptcy stay.

Next, the Second Circuit addressed whether the Foreclosure Order and subsequent transfers of the Hillandale Property involved an action to enforce “a claim against the debtor” within the meaning of 11 U.S.C. § 362(a)(1). The Second Circuit noted that the Hillandale Property foreclosure was premised on outstanding real property taxes owed by a non-Debtor, Top Flight Investment LLC (“Top Flight”), to a non-creditor, the Tax Commissioner of DeKalb County, and the Foreclosure Order involved SFN DeKalb Holdings, a Top Flight creditor with a first priority lien interest in the property. At the time of the foreclosure, not only had the Debtor sold its “participation interests” in a certain loan for which the Hillandale Property served as collateral, but the Debtor also did not have a recorded interest in the real property nor was it a party to the foreclosure proceedings. Accordingly, the Second Circuit held that the Foreclosure Order and the subsequent sales of the property occurred independently of any interest in the Debtor, and thus did not involve the enforcement of a claim against the Debtor.

Finally, the Second Circuit analyzed whether the Foreclosure Order and subsequent transfers of the property were “legally certain” to impact estate property. The Second Circuit disagreed with Stillwater’s argument that the Second Circuit’s opinion in In re 48th Street Steakhouse, Inc., 835 F.2d 427 (2d Cir. 1987), was legally indistinguishable from the facts at hand. In that case, the Second Circuit held that a debtor’s interest in property could cause a bankruptcy stay to affect a relationship with a non-debtor where an action was legally certain to impact estate property. However, unlike here, the debtor in that case had a legal interest in the property that was subject to termination, which was a prime lease that would automatically terminate the debtor’s sublease. Here, the Debtor did not hold a recorded interest in the actual Hillandale Property. Accordingly, the Second Circuit affirmed the judgment of the district court.

ICP Strategic Credit Income Fund, Ltd. v. DLA Piper L.L.P.
(In re ICP Strategic Income Fund, Ltd.)
2018 WL 1902400, 17-1669 (2nd Cir., April 23, 2018)

The Second Circuit affirmed the judgment of district court affirming the bankruptcy court’s order dismissing the complaints filed by ICP Strategic Credit Income Fund, Ltd. (the “Feeder Fund”), ICP Strategic Credit Income Master Fund, Ltd. (the “Master Fund,” and, together with the Feeder Fund, the “Funds”), and Hugh Dickson and Michael Saville in their capacity as the Joint Official Liquidators of the Funds (together with the Funds, the “Liquidators”) against DLA Piper L.L.P. (US) (“DLA Piper”).

The Liquidators alleged that DLA Piper aided and abetted fraud and breaches of fiduciary duty committed by the Funds’ investment manager, ICP Asset Management LLC (“ICP”) and Thomas Priore (“Priore”), one of the Funds’ directors and the majority owner of ICP. According to the Liquidators, DLA Piper wrongfully helped Priore and ICP transfer over \$36 million of the

Funds' assets to Barclays Bank PLC ("Barclays") in order to satisfy obligations owed not by the Funds but by Triaxx Funding High Grade I, Ltd. ("Triaxx"), an investment vehicle in which the Funds had invested approximately 50% of their net asset value. The Liquidators alleged that although the payment was characterized at the time as a loan from the Funds, there was no agreement from Barclays or Triaxx to repay the Funds.

On appeal in the Second Circuit, the Liquidators raised the following issues: (1) whether the district court properly dismissed the Liquidators' claim under New York law against DLA Piper for aiding and abetting breach of fiduciary duty on the basis of the *in pari delicto* doctrine; (2) whether the Liquidators' claim for aiding and abetting breach of fiduciary duty was properly dismissed because the Liquidators failed to allege sufficient facts to establish a plausible claim that DLA Piper had actual knowledge of, or substantially assisted in, the alleged breach; and (3) whether the Liquidators' Cayman Islands fraudulent-trading claim was properly dismissed because the Liquidators failed to plausibly plead that the Funds were carried on with fraudulent purpose, that DLA Piper had actual knowledge of any fraud, and that DLA Piper was involved in carrying on the business of the Funds.

Turning first to the Liquidators' claim for aiding and abetting a breach of fiduciary duty, the Second Circuit noted that a threshold issue was whether DLA Piper established its affirmative defense under New York's *in pari delicto* doctrine. The *in pari delicto* doctrine prevents a party from seeking to recover against others for a wrong in which the party participated or is deemed through imputation to have participated. DLA Piper contended that, under the "most significant relationship" test, the Second Circuit should apply New York law to the question of whether ICP and Priore's conduct is imputed to the Funds. The Liquidators, on the other hand, argued that, based on the internal affairs doctrine, Cayman law should apply.

The Second Circuit noted that, under New York law, courts apply a flexible approach to choice-of-law disputes in order to give controlling effect to the law of the jurisdiction which has the greatest concern with the specific issue raised in the litigation. Accordingly, the Second Circuit then analyzed which state had the most significant relationship with the issue of imputation. Upon a review of the record, the Second Circuit held that the district court properly found that New York law applied to DLA Piper's *in pari delicto* defense under a "most significant relationship" analysis. As the district court noted, the Liquidators brought their case in New York state court, based on facts alleged to have occurred solely in New York, against a New York law firm.

The Liquidators contended that even under a "most significant relationship" analysis, Cayman law should govern DLA Piper's *in pari delicto* defense because where the case was filed and the location of the defendant are "irrelevant" to the conflict-of-laws-determination. In the Liquidators' view, New York had less interest in determining whether ICP and Priore actually breached any duty to the Funds, a Cayman corporation. The Second Circuit noted, however, that the actions of Priore and ICP were not relevant here. Instead, the Liquidators

asserted a claim of aiding and abetting breach of fiduciary duty under New York law against DLA Piper, a New York-based law firm, which conducted all its work related to this issue from New York.

Applying New York law to DLA Piper's *in pari delicto* defense, the Second Circuit concluded that the district court did not err in dismissing the Liquidators' claim. Under New York law, traditional agency principles play an important role in an *in pari delicto* analysis, and the acts of agents are presumptively imputed to their principals. According to the *Wagoner* rule, followed in New York, the *in pari delicto* doctrine applies to successors in interest of wrongdoers, including bankruptcy trustees and foreign liquidators. There is an exception to the *Wagoner* rule where a corporation is actually the victim of a scheme undertaken by the agent to the benefit of himself or a third party personally and the agent has totally abandoned his principal's interests. In such a case, the acts of the agent will not be imputed to its principal. This adverse-interest exception, however, is very narrow and does not apply where there is a benefit to the principal corporation, even if the agent's action was actually motivated by the agent's desire for personal gain.

Here, the Liquidators did not dispute that ICP and Priore acted as the Funds' agents. Instead, the operative question was whether ICP and Priore "totally abandoned" the Funds' interests at the time of the misconduct. DLA Piper argued that the Funds received a benefit from the actions of ICP and Priore through the preservation of the Funds' investment in Triaxx. The Liquidators contended that the Funds did not benefit from those actions, and that the Second Circuit should therefore apply the adverse-interest exception. The Second Circuit, however, agreed with the district court that the exception should not apply here because DLA Piper's assistance to the plan of ICP and Priore helped to sustain Triaxx and therefore preserved the Funds' large investment in it, which constituted a benefit at the time. Accordingly, since the Second Circuit held that the exception did not apply, the Liquidators' claims were barred by the *in pari delicto* doctrine.

After also affirming the district court's dismissal of the aiding and abetting claim on *in pari delicto* grounds, the Second Circuit addressed whether the district court properly concluded that the Liquidators did not adequately plead that DLA Piper knew of, or was a party to, an intent to defraud or to a fraudulent purpose. Section 147 of the Cayman Companies Law requires a showing that DLA Piper was "knowingly part[y] to the carrying on of" the Funds "with intent to defraud . . . or for any fraudulent purpose." Because the Liquidators failed to allege sufficient facts to establish that DLA Piper knew of the purported fraud, the Second Circuit concluded that the district court also did not err in dismissing the Liquidators' fraudulent-trading claim under Cayman law. Accordingly, the Second Circuit affirmed the judgment of the district court in its entirety.

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Fifth Circuit

MARCH 2018

***In re DeBerry*,
884 F.3d 526 (5th Cir. 2018)**

The issue before the Fifth Circuit was whether the proceeds of a homestead sold after the filing of a petition for chapter 7 bankruptcy remain exempt from the debtor's estate if they are not reinvested within the timeframe required to invoke the proceeds rule of Texas homestead law.

Curtis DeBerry ("DeBerry") filed chapter 7 bankruptcy, listing his San Antonio home as exempt under Texas law. No objections were filed to his claimed exemption. Seven months later, the bankruptcy court granted DeBerry's motion for authorization to sell the home, and he sold it for \$364,592.21. He did not reinvest those proceeds in another home; instead, he transferred the money to his wife and a law firm for the benefit of two parties who represented him in a criminal matter.

Borrowing the reasoning from its recent holding in *Hawk v. Engelhart (In re Hawk)*, 871 F.3d 287 (5th Cir. 2017), the Fifth Circuit reinstated the bankruptcy court's order which held that the proceeds did not lose their exempt status, and therefore, the Trustee was not entitled to the funds on that basis. Here, DeBerry, a chapter 7 debtor, owned the homestead at the time of filing and sold the home after the commencement of the bankruptcy. Because chapter 7 debtors, unlike chapter 13 debtors, are not required to forfeit post-petition earnings and acquisitions from creditors, the proceeds of DeBerry's homestead remained exempt from his estate despite the fact that he did not reinvest the proceeds in another homestead.

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Matter of UTSA Apartments 8, LLC,
886 F.3d 473, 2018 WL 1477935 (5th Cir. 2018).

This consolidated appeal arose from the bankruptcy of 19 companies that were tenants-in-common (the “Debtor TICs”) of a housing development in San Antonio, Texas (the “Property”). The Debtor TICs owned the Property with certain other non-debtor tenants-in-common (together with the Debtor TICs, the “TICs”), including Appellant UTSA Apartments, LLC (“UTSA”). Appellant Woodlark UTSA Apartments, LLC (“Woodlark”), a related entity to UTSA, was the Property’s asset and property manager. Pursuant to the Property’s governing agreements, each TIC promised to pay its pro rata share of Property expenses, as determined by Woodlark, through a process known as “cash calls.” If a cash call went unpaid, the non-defaulting TICs and Woodlark were permitted to purchase the defaulting TIC’s interest.

In December 2014, when the Property was suffering from financial decline, Woodlark sent a series of cash calls to the TICs, to which only UTSA and one other TIC responded. Accordingly, Woodlark and UTSA informed the non-responding, or defaulting, TICs that they intended to purchase their interest in the Property. Woodlark claimed that, based on a recent \$28 million appraisal (the “Appraisal”) and certain outstanding loans due on the Property, no payment was due to the defaulting TICs for their interests (the “Transferred Interests”). Over the defaulting TIC’s objections, Woodlark subsequently used its power of attorney under the Property’s governing documents to issue the Transferred Interests to UTSA, bringing UTSA’s ownership interest to 21.17%.

Shortly thereafter, in November 2015, several defaulting TICs filed suit in Texas state court, asserting claims for breach of fiduciary duty against Woodlark. One month later, the Debtor TICs filed for bankruptcy. The state court claims against Woodlark were removed to the bankruptcy court and filed as an adversary proceeding (the “Breach of Fiduciary Duty Adversary”). Additionally, Woodlark filed proofs of claim for more than \$500,000 for amounts it claimed were owed by the Debtor TICs for, among other things, the cash calls and its management fees. The Debtor TICs objected.

During the consolidated bankruptcy proceedings, the bankruptcy court approved the sale of the Property to a third party, Arris Reserve San Antonio, LLC (“Arris”) for \$33.5 million. After the sale closed in November 2016, the parties filed competing motions for distribution of the sales proceeds. Specifically, Woodlark and UTSA filed an opposed motion to distribute funds attributable to UTSA (“UTSA Motion to Distribute”). The Debtor TICs, on the other hand, filed an opposed motion to surcharge Woodlark and UTSA for the fees and costs that benefitted those entities in connection with the sale of the Property (“Debtor TIC Surcharge Motion”).

In January 2017, the bankruptcy court held a consolidated bench trial on the two aforementioned motions, the Breach of Fiduciary Duty Adversary, and Woodlark’s proof of

claims. After trial, the bankruptcy court held: (1) Woodlark owed the TICs fiduciary duties pursuant to the Property's governing agreements; (2) the Appraisal Woodlark cited as justification for refusing to compensate the TICs for the Transferred Interests was flawed; (3) Woodlark violated its fiduciary duties by issuing unnecessary cash calls and using the flawed Appraisal to strong arm the TICs into selling their interests; (4) because of that violation, Woodlark should forfeit the management fees it sought in its proof of claim; and (5) Woodlark was entitled, however, to recover the cash advances it had made in satisfaction of Property expenses. The bankruptcy court also held the remaining net proceeds from the Property sale should be distributed to the Debtor TICs, and reduced UTSA's share of those proceeds to 3.14%. The reduction was appropriate, the court explained, because the Transferred Shares UTSA received were due to its affiliate, Woodlark's, breach of fiduciary duty. The bankruptcy court also denied the UTSA Motion to Distribute and the Debtor TIC Surcharge Motion.

On appeal to the Fifth Circuit, UTSA and Woodlark (together, "Appellants") challenged: (1) the reduction of UTSA's share of net sale proceeds from 21.17% to 3.14% and (2) the reduction of Woodlark's proof of claims to the amounts paid for cash advances. With respect to the former, Appellants argued the reduction of UTSA's share violated § 363(h) and (j) of the Bankruptcy Code. Specifically, Appellants claimed that because UTSA owned a 21.17% share of the Property at the commencement of the case, the statute required the court to distribute 21.17% of the net proceeds to UTSA.

The Fifth Circuit, however, noted that whether § 363(j) requires distribution of sale proceeds in accordance with a party's interest at the time of distribution or commencement of the case was an open question. Indeed, existing case law focused on determining the *nature* of the co-owners' interest shares rather than the percentage of ownership attributable to each co-owner. Accordingly, relying on case law recognizing that the nature and extent of property interests in bankruptcy are determined by state law as of the petition date, the Fifth Circuit held state law should determine the interest shares for purposes of a § 363(j) distribution following a § 363(h) sale. Thus, because (1) all owners of the Property were co-owners at the commencement of the case and (2) the parties did not dispute UTSA owned a 21.17% ownership share in the Property prior the sale to Arris, the Court held UTSA was entitled to receive a 21.17% interest of the net proceeds of the sale and the allocation of only 3.14% violated the Bankruptcy Code. Further, the Court concluded a reduction of UTSA's interest was not proper on equitable grounds because UTSA had not been named as a defendant in the Breach of Fiduciary Duty Adversary and had no notice of or opportunity to present a defense to an equitable reduction.

The Court, however, affirmed the reduction in Woodlark's proof of claim. Appellants argued the bankruptcy court erroneously shifted the burden of proof to Woodlark by applying a presumption of unfairness in its transaction with the Debtor TICs. Woodlark claimed the presumption, which is recognized by Texas law, should not apply because it did not consummate any transaction with the Debtor TICs. The Fifth Circuit, recognizing its prior precedent that required an actual transaction to apply the presumption, nevertheless explained that form should not be elevated above substance. Here, the evidence showed Woodlark had used the faulty Appraisal to force the TICs either to pay the cash calls or forfeit their interests. Thus, while not involving a traditional transaction between the Debtor TICs and Woodlark, the allegations of self-dealing and threats by Woodlark relating to its attempted acquisition of the Debtor TICs

interests supported the imposition of the presumption. Further, there was sufficient evidence to support a finding that Woodlark had breached its fiduciary duty. Finally, the Fifth Circuit rejected Appellants' claim that the bankruptcy court failed to find Woodlark's breach caused damage to the Debtor TICs. Because the court merely ordered Woodlark to forfeit certain fees, rather than awarding damages, a finding of causation was not required.

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***In re Houston Regional Sports Network, L.P.,
886 F.3d 523, 2018WL 1529171 (5th Cir. March 29, 2018).***

In this matter, following confirmation of a Chapter 11 plan over the objection of an undersecured creditor that had made statutory election to have its entire claim treated as secured, the Fifth Circuit remanded to the Bankruptcy Court to consider the value of the undersecured creditor's collateral "in light of the reality of the plan of reorganization[.]"

Debtor Houston Regional Sports Network, L.P. (the "Network" or "Debtor") a television network, entered into media-rights agreements with the Houston Astros baseball and Houston Rockets basketball teams (the "Teams"). Comcast loaned the Network \$100 million, secured by a lien on substantially all of Debtor's tangible and intangible assets, including an Affiliation Agreement. Under the Affiliation Agreement, Comcast would carry the Network on its cable systems through 2032, in exchange for a monthly fee based on the number of Comcast subscribers. In 2013, Debtor involuntarily entered bankruptcy, and eventually the Teams entered into a sale agreement whereby AT&T and DirecTV would acquire all of the equity in the Network. The sale agreement was included in the plan of reorganization (the "Plan"), under which the Teams agreed to waive their rights to obtain from the Network approximately \$107 million in media-rights fees incurred during the bankruptcy. Before the Plan was confirmed, Comcast elected to treat its entire claim as secured pursuant to 11 U.S.C. § 1111(b).

Because the Plan provided that the Network's tangible collateral would be sold, Comcast's § 1111(b) election applied only to intangible collateral. The court valued the intangible collateral by discounting to present value the Network's projected net income through 2032 and apportioning it among the networks intangible assets in proportion to the revenue that

each asset would generate. In valuing the intangible collateral – as of the petition date – the bankruptcy court apportioned income to agreements that did not exist as of the petition date based on the probability that such agreements would come to fruition. The bankruptcy court valued the Affiliation Agreement at \$54.3 million on the date the Plan would go into effect, but subtracted the waived media-right fees from the Network’s income in the period between the petition date and the effective date, yielding large losses in that period. Because the Affiliation Agreement was the only intangible asset during that period, the bankruptcy court concluded that the Agreement’s value as of the petition date was zero. Since § 1111(b) does not allow a creditor to make an election as to collateral of “inconsequential value,” Comcast was not able to elect to have its claim treated as fully secured.

The issue on appeal was what date the bankruptcy court should use to make its valuation. Reasoning that § 506 directs the court to consider “the purpose of the valuation” and “the proposed disposition or use of [the] property” – all “in conjunction with any hearing on such disposition or use or on a plan affecting such creditor’s interest” – the Circuit Court concluded that bankruptcy courts have the flexibility to select the valuation date. Of “prime significance” in guiding the court’s valuation, however, is the debtor’s actual use of the property, rather than a “foreclosure sale that will not take place.” Thus, as in this case, when a court values collateral for the purpose of confirming a Chapter 11 cram-down plan under § 1129(b)(2)(A)(i), the proposed use or disposition of the property under the plan is “critical, precisely because the debtor is choosing to retain the collateral, rather than sell it or return it to the creditor.” The Fifth Circuit concluded that no bright-line rule was necessary, and that *In re Stembridge*, 392 F.3d 383 (5th Cir. 2004) does not compel a court to make its valuation for Chapter 11 cram-downs as of the date of the petition.

The Fifth Circuit also held that while the bankruptcy court’s valuation of the Affiliation Agreement – discounted back to the date of the petition – was correct, the court’s subtraction of media fees was an “impermissible surcharge” because the court did not value the collateral in light of its actual proposed post-reorganization use by the debtor. Under the Plan, the Network would be able to use the Affiliation Agreement to generate revenue free and clear of the now-waived media-rights fees; thus, the value of the Agreement in the reorganized debtor’s hands is unaffected by those waived fees. Because the costs of the media-rights fees would not be borne by the Network, the Fifth Circuit concluded that such fees are not deductible from the collateral the Network retains under the Plan.

Moreover, subtracting media-rights fees from the value of the collateral constituted an “impermissible surcharge” because those fees were administrative expenses, which must be borne out of the unencumbered assets of the estate. Even the narrow exception to this rule under 11 U.S.C. § 506(c) – when the expenses are reasonable, necessary, and benefit the creditor – would not apply here because (1) the Network will never pay the fees under the Plan, and (2) the benefit to the secured creditor (Comcast) would be zero.

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Tenth Circuit

Viper Services, LLC v. FORA Financial Bus. Loans, LLC
(In re Viper Services, LLC),
Adv. No. 17-1010-j, 2018 WL 1801208 (Bankr. D. N.M. April 13, 2018)

In this case, the court granted the defendant's motion to dismiss the adversary proceeding filed against it to avoid preferential transfers and denied the debtor's motion seeking to exclude the adversary from the effects of dismissal under Code Section 349. The debtor's confirmed chapter 11 plan contained typical retention of jurisdiction provisions and revested property of the estate in the reorganized debtor including preference actions as of the plan's effective date. The court dismissed the debtor's chapter 11 case after it failed to file post-confirmation quarterly reports and pay quarterly United States trustee (UST) fees per an order entered with the agreement of the debtor and the UST. The court explained that Section 349 governs the effect of dismissal of a bankruptcy case, that its premise "is to undo the bankruptcy case, as far as practicable, and to restore all property rights to the position in which they were found at the commencement of the case," and that the statute "permits the bankruptcy court, 'for cause,' to alter a Chapter 11 dismissal's ordinary restorative consequences." The court noted that the Code does not define the word "cause" for Section 349 purposes, but cited a Seventh Circuit case defining the term to mean "an acceptable reason," *In re Sadler*, 935 F.2d 918, 921 (7th Cir. 1991), and then proceeded to reject the varied arguments raised by the debtor to be able to continue to prosecute the preference case. In part, the court explained that the debtor could not pursue the preference action outside of bankruptcy, and while the plan contemplated that the debtor could continue prosecuting that action it also contemplated that the debtor would file post-confirmation reports and quarterly UST fees, but if failed to do either, and allowed its chapter 11 case to be dismissed. And the court noted that it had already determined that the vesting of the preference action in the debtor through the order confirming its chapter 11 plan did not constitute "cause" as contemplated by Section 349(b).

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Eleventh Circuit

First National Bank of Oneida, N.A. v. Brandt,
887 F.3d 1255, 2018 WL 1918247 (11th Cir. April 24, 2018)

The Court remanded to consider whether the dismissal of an individual's confirmed chapter 11 plan affects the Bank's ability to pursue prepetition deficiency claims when the Bank failed to comply with the terms of the confirmed plan for asserting a deficiency claim.

The Debtor filed his chapter 11 plan treating the Bank's various loans as a single class. The plan provided that the Debtor would issue a promissory note to the Bank secured by \$150,000 worth of real estate. Thereafter, the Bank would treat the real-estate loans as current and the Debtor would resume payments. The plan further provided that "[a]ny secured creditor who has filed a secured claim and claims an entitlement to an unsecured claim must file an amended claim seeking entitlement to an unsecured claim by 30 days after the confirmation hearing (including any continued dates)." The plan was confirmed, and the Bank did not amend its proofs of claim within 30 days after confirmation to claim an entitlement to an unsecured claim. A year after the plan was confirmed, the Debtor defaulted on loan payments to the Bank.

After the Debtor defaulted, the Bank brought an action against the Debtor for both prepetition and post-petition amounts due under the promissory notes. The Debtor moved to dismiss the claims on the basis that the Bank was not entitled to a deficiency claim since it failed to comply with the terms of the confirmed plan. The district court dismissed the Bank's prepetition claims but allowed the Bank to go forward on the deficiency claims related to post-petition promissory notes executed by the Debtor. After the case was fully briefed to the Eleventh Circuit, the Debtor was allowed to dismiss his case and did not receive a discharge. The Court took judicial notice of the dismissal of the Debtor's bankruptcy case.

The Court noted that § 349(b) is silent on the issue of whether the dismissal of an individual bankruptcy case, without a discharge, vacates a previously confirmed chapter 11 plan or otherwise renders that plan unenforceable by the debtor. Because the matter was already briefed prior to the dismissal, the parties did not meaningfully brief this issue. Given the change in circumstance and with the understanding that dismissal is aimed to return the parties to their respective pre-bankruptcy positions, the Court remanded the matter to consider to what extent the dismissal of the chapter 11 case affects the ultimate disposition of this issue.

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